# Lower Burma Rulings

BEING THE

## Printed Judgments of the Chief Court of Lower Burma

VOLUME VII

1913-14

PUBLISHED UNDER THE AUTHORITY OF
THE CHIEF COURT OF LOWER BURMA

RANGOON
SUPERINTENDENT, GOVERNMENT PRINTING, BURMA
1915

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# JUDGES OF THE CHIEF COURT OF LOWER BURMA

DURING

## 1913-14.

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THE HON'BLE SIR CHARLES EDMUND FOX, KT., *Barrister-at-Law* (on leave from 25th March 1913 to 16th June 1914).

### PUISNE JUDGES.

THE HON'BLE SIR HENRY SULIVAN HARTNOLL, KT., I.C.S., *Barrister-at-Law* (officiating Chief Judge from 25th March 1913 to 15th June 1914 and on leave from 4th November 1914 to 4th December 1914).

THE HON'BLE MR. E. W. ORMOND, B.A., *Barrister-at-Law* (on leave from 3rd August 1914 to 4th November 1914).

THE HON'BLE MR. D. H. R. TWOMEY, I.C.S., *Barrister-at-Law* (on leave from 3rd August 1914).

THE HON'BLE MR. S. M. ROBINSON, *Barrister-at-Law* (on leave up to 17th September 1913).

THE HON'BLE MR. L. M. PARLETT, I.C.S. (Temporary Additional Judge from 25th March 1913 to 16th September 1913, again from 19th November 1913 to 30th September 1914 and also again from 2nd November 1914).

THE HON'BLE MR. C. P. R. YOUNG, B.A., *Barrister-at-Law* (officiating Judge from 25th March 1913 to 15th June 1914, again from 3rd August 1914 to 2nd September 1914 and also again from 17th November 1914).

# CORRIGENDA.

2 L.B.R., p. 165, line 1 (head-note) *for* "non-compoundable" *read* "compoundable."

7 L.B.R., p. 106, line 4 (head-note) *for* "1886" *read* "1866."

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# LOWER BURMA RULINGS

*Before Mr. Justice Twomey.*

*Criminal Appeal No. 780 of 1912.*

*November 28th, 1912.*

TO GALE *alias* TO LE *alias* KYAW HLA
*v.* KING-EMPEROR.

*Eggar*—Assistant Government Advocate for King-Emperor.

*Tender of pardon—forfeiture of pardon—procedure prior to trial for offence in respect of which pardon was tendered—necessity of a definite finding as to breach of condition—ss. 337, 339, Code of Criminal Procedure, 1898.*

The Code of Criminal Procedure, 1898, contains no provision for the *withdrawal* of pardons. If a Magistrate or Judge considers that an approver has *forfeited* his pardon, he should draw up an order specifically setting forth the alleged breach of the condition of pardon and call upon him to show cause why he should not be tried for the offence in respect of which the pardon was tendered as provided in section 339, Code of Criminal Procedure. Unless the approver admits the alleged breach of condition the Magistrate or Judge should hear the evidence relied on as establishing the breach and any rebutting evidence which the approver may offer and should then record a definite finding as to whether there has been a breach or not. A definite finding arrived at in this manner is essential before the approver can be placed on trial.

The appellant Nga To Le was arrested on a charge of being concerned in two dacoities committed on the night of 23rd January 1912 at Ywathit and Ywadanshe in the Thatôn District. After his arrest he made a confession and thereupon a pardon was tendered to him on the condition mentioned in section 337, Code of Criminal Procedure. He was examined as an approver against four of his alleged accomplices and made what appeared to the committing Magistrate to be a full and true disclosure. When the case came for trial to the Sessions Court, To Le repeated the evidence given by him to the committing Magistrate. There are slight discrepancies between the two depositions but in material particulars there was no serious variation. The four accused persons were

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however not convicted. Permission was given to withdraw the charge against them on the following grounds stated in the Sessions Judge's order of 21st June 1912 :—

"(1) There are serious discrepancies between the evidence of the approver and the other prosecution witnesses, firstly, as to the number of the dacoits, as to their identity and as to whether they were disguised or not; secondly, as to what occurred in Shan Gyi's house when the witness Po Tha visited it; thirdly, as to whether, on the occasion of the search for the gun in Shan Gyi's compound, To Galê did or did not display, by his words and conduct, uncertainty as to whether the gun had been buried inside or outside the stone wall.

(2) Apart from the evidence of the approver which thus appears to me discredited, the only evidence against any of the accused is the fact of the discovery of part of the dacoited property in situations, which do not in my opinion warrant the inference that they were in the possession of the accused in question."

In acquitting the four accused the Sessions Judge recorded his opinion that "To Galê has forfeited his pardon by giving false evidence, more particularly as to his pointing out to the search party the exact place where the gun was buried and as to his presence at the time when the gun was buried since it appears to me clear that he was uncertain whether the gun was buried inside or outside the stone wall and it seems to me incredible that he could have been uncertain on this point if he had actually been present when the gun was buried."

In consequence of this opinion, the Subdivisional Magistrate, Thatôn, recorded an order withdrawing the pardon and To Le was accordingly charged with taking part in the Ywathit dacoity. He adhered to the statements already made by him, admitting his part in the dacoity. But before both the committing Magistrate and the Additional Sessions Judge he urged that he had been pardoned and that he had complied with the conditions of his pardon. The learned Judge disregarded this plea, treated the pardon as having been withdrawn and convicting the accused sentenced him to suffer transportation for seven years.

The Judge does not seem to have referred to the provisions

of law applicable to the matter. If he had done so he would have seen that the present Code (1898) contains no provision for the withdrawal of pardons. Section 339 provides that if a person who has accepted a tender of pardon has either by wilfully concealing anything essential or by giving false evidence, not complied with the conditions on which the tender was made, he may be tried for the offence in respect of which the pardon was tendered and the statement made by him may be given in evidence against him when the pardon has been *forfeited* under this section. The question whether the pardon has been forfeited is in each case a question of fact and elementary principles of justice and good faith require that this question of fact should be properly tried and determined before the approver is charged with the offence for which he was pardoned. The mere expression of opinion by the Sessions Judge is not enough. The approver should be given an opportunity of meeting the allegation that he has failed to make the full and true disclosure required under section 337. The proper course was to draw up an order setting forth specifically the alleged breach of the condition of pardon and to call upon the approver to show cause on a future date why he should not be tried for the dacoity as provided in section 339. On the date fixed for the hearing unless the approver admits the alleged breach of condition the Magistrate or Judge should hear the evidence relied upon as establishing the breach and any rebutting evidence which the approver may offer, and should then record a definite finding as to whether there has been a breach or not. A definite finding arrived at in this manner is essential before the approver can be placed on his trial for the original offence.

The Assistant Government Advocate who appears for the Crown in this Court does not support the conviction as it stands. It is clearly impossible to sustain it. But I am asked in setting aside the conviction to order a new trial which should be preceded by an enquiry as indicated above concerning the alleged breach of the condition of pardon.

The course suggested to me would no doubt be appropriate if the records disclosed *primâ facie* grounds for the opinion expressed in the Sessions Judge's order of 21st June 1912.

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But the grounds appear to be of the flimsiest description. The only part of the approver's evidence which the Sessions Judge refers to specifically as false is that relating to the discovery of the gun, Exhibit 13, near the accused Shan Gyi's house. The approver told the police that he was present when Shan Gyi buried the gun and that he could show the place. The gun was actually found buried within a few yards of the spot pointed out by To Le. It appears that To Le showed some uncertainty as to the exact spot and the Sessions Judge inferred from this uncertainty that To Le could not have been actually present when the gun was buried and that To Le gave false evidence in saying he was present at the time and in saying that he pointed out the exact spot. The allegation is that the gun was buried at night and To Le might easily make a mistake of a few yards as to the exact spot. Also, seeing that the gun was found a few yards from the spot first pointed out by To Le, I think it is unreasonable to argue that he gave false evidence in saying that he pointed out the exact place. There are discrepancies between To Le's statements and those of Ma Lôn Ma and Ma Pu Si as to the number of the dacoits, as to whether they were disguised with soot and lime or not, and as to who they were. Ma Lôn Ma and Ma Pu Si said they recognised two men who are not among those denounced by the approver. But the identification of these two men by Ma Lôn Ma and Ma Pu Si was discredited by the police and the men were not tried for the offence. The evidence of Ma Lôn Ma and Ma Pu Si must therefore be accepted with reserve and their statements as to the number and appearance of the dacoits are of doubtful value. As regards the assemblage at Shan Gyi's house before the dacoity there is no adequate reason for regarding the particulars given by the approver as false even where his account conflicts with the evidence of the witness Po Tha.

In my opinion therefore there are no sufficient grounds for holding that Nga To Le gave false evidence at the trial. He appears to have complied substantially with the condition of his pardon and so long as the pardon was in force he could not be convicted of the offence in respect of which he was pardoned.

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The conviction and sentence are set aside and the appellant is acquitted and will be released unless he is liable to be detained on some other charge.

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*Before Sir Charles Fox, Chief Judge, Mr. Justice Hartnoll and Mr. Justice Twomey.*

*Civil Reference No. 1 of 1912.*

*December 4th, 1912.*

## MRS. ROSE D'CASTRO *v.* EDMUND D'CASTRO.

*Divorce—jurisdiction of Divisional Court—residence of husband and wife—ss. 3 (2), (3), 12, 13, 14, 17, Indian Divorce Act, 1869.*

A Divisional Court has jurisdiction under the Indian Divorce Act only if the husband and wife reside or last resided together within the local limits of the ordinary jurisdiction of such Court.

An initial question in this case is whether the Judge of the Toungoo Divisional Court had jurisdiction to deal with the petition. Under section 3 *(3)* of the Indian Divorce Act "District Court" means in the case of a petition under the Act the Court of the District Judge within the local limits of whose ordinary jurisdiction or of whose jurisdiction under this Act the *husband and wife reside* or last resided together. The Divisional Court is the District Court under the Act for the Toungoo Division.

It does not distinctly appear from the petition that the petitioning wife was residing anywhere in the Toungoo Division at the time the petition was presented. The petition states that the parties last resided together at Mergui in the Tenasserim Division and that from there the wife came to Rangoon to her father's house. The correspondence filed in the case would appear to indicate that she continued to live in Rangoon. It may be however that before the petition was presented she went to reside at some place in the Toungoo Division. The case must go back to the Toungoo Divisional Court to take evidence as to where the wife was residing at the time the petition was presented. If it is not proved that she was then residing at some place in the Toungoo Division, the case should be sent back forthwith under section 17 of the Act.

If on the other hand it is proved that she was then residing in the Toungoo Division, the Judge should take evidence with

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a view to satisfying himself on such evidence that none of the matters enumerated in sections 12, 13 and 14 of the Act as matters which may disentitle a petitioner from a decree for dissolution, exist.

The cause of the delay in presenting the petition should be especially inquired into.

*Hartnoll, J.*—I concur.

*Twomey, J.*—I concur.

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*Civil Reference No. 6 of 1912.*

*December 4th, 1912.*

*Before Sir Charles Fox, Chief Judge, and Mr. Justice Hartnoll.*

THOMAS GAME *v.* (1) U KYE, (2) PE YA.

*M. Israel Khan*—for plaintiff.

*S. S. Halkar*—for defendants.

*Legal Practitioners—remuneration—class of business—business in a Court—business outside a Court—District Court only place in which agreement may be filed—s. 28, Legal Practitioners' Act, 1879.*

Section 28 of the Legal Practitioners' Act, 1879, applies to all agreements between a pleader and his client respecting the amount and the manner of payment for the whole or any part of the former's services, fees, or disbursements in respect of any sort of business done or to be done by the pleader for the client.

The following reference was made by the Judge of the Small Cause Court, Rangoon, under section 113, Civil Procedure Code:—

*August 13th, 1912.*

The plaintiff in this suit is a pleader and he sues to recover an alleged balance of his fees. The plaint sets out that the first defendant was compulsorily retired from the Government service and that plaintiff was retained to memorialise the Lieutenant-Governor for Rs. 550, the second defendant agreeing to pay this sum. Plaintiff suggests that he fulfilled his contract and incidentally it is mentioned that the memorial was successful, the first defendant being reinstated. He now claims the unpaid balance of Rs. 500. As the agreement on which plaintiff relies was verbal I pointed out that section 28 of the Legal Practitioners' Act was fatal to his claim. Under that section a pleader's agreement with his client respecting his fees must be "filed in the District Court or in some Court in which some portion of the business in respect of which it

has been executed" within 15 days or it is invalid. But it has been argued on behalf of Mr. Game that the agreement touched a memorial and not a Court case. I am of opinion that the contention is unsound for two reasons. Firstly, a pleader's professional business may embrace conveyancing, drafting, consulting and indeed much that never comes into Court at all. And I cannot suppose that the Legislature intended to differentiate between different kinds of legal business. What it wanted apparently to do was to protect a client in his transactions (professional) with his legal adviser for the relationship is one that offers considerable opportunities of abuse. Secondly, the section says that the agreement must be filed either in the District Court or in some Court in which some part of the work was to be done. To me this looks as if the District Court were expressly mentioned as the Legislature had chamber work in view. If the clause touched only work that came into Court then surely it was enough to say that the agreement must be filed in the Court or Courts in which that work was done.

As there is some doubt as to the true interpretation to be put upon the section and as it is a matter of great importance to all pleaders I think it is a fit case to refer to the Honourable Judges.

The question I refer is—

"Does section 28 of the Legal Practitioners' Act touch all agreements for fees made by pleader and client with respect to the former's professional employment whether the business upon which he is engaged does or does not come into some Court?"

I would answer the question in the affirmative.

*The opinion of the Bench was as follows:—*

We are of opinion that section 28 of the Legal Practitioners' Act, 1879, applies to all agreements between a pleader and his client respecting the amount and the manner of payment for the whole or any part of the former's services, fees, or disbursements in respect of any sort of business done or to be done by the pleader for the client.

The contention that the section applies only to remuneration, etc., in respect of business to be done in a Court cannot

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prevail, since the section applies also to agreements of the nature specified between mukhtars and their employers, and between Revenue-agents and their employers. Mukhtars may appear, plead and act in some Criminal Courts, but Revenue-agents cannot as such do any business in any Court either Civil or Criminal: consequently the words in the section after "District Court" cannot be availed of by them, and the District Court is the only Court open to them to file agreements in.

We express no opinion as to whether there is a Court in the Town of Rangoon in which a pleader may file an agreement covered by the section.

The question referred is answered in the affirmative.

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## FULL BENCH—(CIVIL REFERENCE).

*Civil Reference No. 7 of 1912.*

*September 4th, 1912.*

*Before Sir Charles Fox, Chief Judge, Mr. Justice Hartnoll, Mr. Justice Ormond and Mr. Justice Twomey.*

WILLIAM EDMUND HARDINGE *v.* 1. HENRIETTA ELIZA HARDINGE, 2. HAROLD HOOGWERF.

*Villa*—for appellant.
*deGlanville*—for 1st respondent.
*Hancock*—for 2nd respondent.

*Divorce Law—order of a Divisional Judge in Upper Burma under Indian Divorce Act (IV of 1869)—no appeal against such order to Chief Court, Lower Burma—ss. 3, 10, 55, Indian Divorce Act, 1869—s. 28 (1)(d), Lower Burma Courts Act, 1900—s. 10 (d), Upper Burma Civil Courts Regulation, 1896.*

On a reference to a Full Bench under section 11, Lower Burma Courts Act, 1900, of the following question:—

"In the event of a Judge of a Divisional Court in Upper Burma acting in his capacity as District Judge under the Indian Divorce Act dismissing a petition presented under section 10 of that Act, does an appeal from such order of dismissal lie to this Court?"

It was held that since section 55 of the Indian Divorce Act provides for an appeal only to the Court to which an appeal lies from a decree or order passed in the exercise of original civil jurisdiction, and no appeal lies from a decree or order of a Divisional Court in Upper Burma passed in the exercise of such jurisdiction, the result is that there is no Court to which an appeal lies from a decree or order of such Court under the Indian Divorce Act, and the answer to the question referred must be in the negative.

*Percy* v. *Percy*, (1896) I. L. R. 18 All., 375, referred to.

The following reference was made to a Full Bench by

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WILLIAM EDMUND HARDINGE *v.* I. HENRIETTA ELIZA HARDINGE.

Mr. Justice Hartnoll and Mr. Justice Young under section 11 of the Lower Burma Courts Act, 1900:—

The appellant presented a petition to the Judge of the Divisional Court, Mandalay, in his capacity as District Judge under the Indian Divorce Act (IV of 1869) praying that his marriage with the first respondent be dissolved and making the second respondent co-respondent and claiming damages from him by reason of his having committed adultery with the first respondent. The petition was dismissed. This appeal has accordingly been filed in this Court. No objection has been taken by the respondents that this Court has no jurisdiction to hear the appeal; but it seems to us that there are grave doubts as to whether we have jurisdiction looking at the wording of section 55 of the Act. We can only find one case in which the meaning of section 55 has been discussed—that of *Percy* v. *Percy* (1). Having in view the importance of the question raised we have been asked to refer it to a Full Bench and we consider that we should do so.

We therefore refer to a Full Bench the following question:—

"In the event of a Judge of a Divisional Court in Upper Burma acting in his capacity as District Judge under the Indian Divorce Act dismissing a petition presented under section 10 of that Act, does an appeal from such order of dismissal lie to this Court?"

*The opinion of the Full Bench was as follows:—*

*December 2nd, 1912.*

*Fox, C. J.*—If an appeal lies, it must be by virtue of section 55 of the Indian Divorce Act.

That section says:—

"All decrees and orders made by the Court in any suit or proceeding under this Act shall be enforced and may be appealed from, in the like manner as the decrees and orders of the Court made in the exercise of its original civil jurisdiction are enforced and may be appealed from under the laws, rules and orders for the time being in force:

Provided that there shall be no appeal from a decree of a District Judge for dissolution of marriage or nullity of marriage: nor from the order of the High Court confirming or

(1) (1896) I. L. R. 18 All., 375.

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refusing to confirm such decree. Provided also that there shall be no appeal on the subject of costs only."

By section 3 of the Act the Judges of Divisional Courts throughout Burma are District Judges under the Act.

In Lower Burma an appeal lies to this Court from a decree or order of a Divisional Court exercising original jurisdiction by virtue of section 28 (*1*) (*d*) of the Lower Burma Courts Act.

In Upper Burma Divisional Courts have jurisdiction to hear and determine suits and original proceedings by virtue of section 10 (*d*) of the Upper Burma Civil Courts Regulation, 1896, but the Regulation does not provide for any appeal from a decree or order of a Divisional Court in any original case heard and determined by it.

Since section 55 of the Indian Divorce Act provides for an appeal only to the Court to which an appeal lies from a decree or order passed in the exercise of original civil jurisdiction, and no appeal lies from a decree or order of a Divisional Court in Upper Burma passed in the exercise of such jurisdiction, the result is that there is no Court to which an appeal lies from a decree or order of such Court under the Indian Divorce Act and the answer to the question referred must be in the negative.

*Hartnoll, J.*—I concur.

*Ormond, J.*—I concur.

*Twomey, J.*—I concur.

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## PRIVY COUNCIL.

ON APPEAL FROM THE CHIEF COURT OF LOWER BURMA.

*Privy Council Appeal No. 51 of 1912.*

*Before the Lord Chancellor, Lord Macnaghten, Lord Atkinson, Lord Moulton, Sir John Edge and Mr. Ameer Ali.*

### THE SECRETARY OF STATE FOR INDIA IN COUNCIL *v.* J. MOMENT.

*Powers of Legislation—suits against the Secretary of State—rights over land—right to sue in a Civil Court—s. 41 (b) of the (Burma) Town and Village Lands Act (IV of 1898) ultra vires—ss. 65, 66, 67, Government of India Act, 1858—s. 22, Indian Councils Act, 1861.*

Under the provisions of section 65 of the Government of India Act, 1858, the Government of India is precluded from such legislation as takes away the right of any person to proceed against it in a Civil Court in a case involving a right over land.

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*December 10th, 1912.*

Section 41 (*b*) of the Burma Town and Village Lands Act (IV of 1898) was held to be *ultra vires*.

*The Peninsular and Oriental Company* v. *The Secretary of State for India*, 5 Bom. H. C. R., Appendix I; *Vasudev Sadashiv Modak* v. *The Collector of Ratnagiri*, 4 I. A., 119; referred to.

This was an appeal from a judgment of the Chief Court of Lower Burma on its Appellate Side.

The judgment of their Lordships of the Privy Council was delivered on the 10th December 1912 by :—

*Lord Chancellor.*—This Appeal raises the question whether the Government of India could make a law the effect of which was to debar a Civil Court from entertaining a claim against the Government to any right over land. The question is obviously one of great importance. The proceedings out of which the appeal arises related to an ordinary dispute about the title to land, in the course of which there emerged a claim to damages for wrongful interference with the Plaintiff's property. The only point which their Lordships have to decide is whether section 41 (*b*) of the Act, IV of 1898 (Burma), was validly enacted. A majority of the Judges of the Chief Court of Lower Burma have held that it was not, and the Secretary of State appeals against the Judgment.

The section enacts that no Civil Court is to have jurisdiction to determine a claim to any right over land as against the Government. In the Court below it was held that this enactment was *ultra vires* as contravening a provision in section 65 of the Government of India Act, 1858, that there is to be the same remedy for the subject against the Government as there would have been against the East India Company.

Their Lordships are satisfied that a suit of this character would have lain against the Company. The reasons for so holding are fully explained in the Judgment of Sir Barnes Peacock, C. J., in *The Peninsular and Oriental Company* v. *The Secretary of State for India* reported in the *Appendix to Volume 5 of the Bombay High Court Reports* (1), and the only question is whether it was competent for the Government of India to take away the existing right to sue in a Civil Court. This turns on the construction of the Act of 1858, and of the Indian Councils Act of 1861. Their Lordships have examined the provisions of

(1) 5 Bom. H. C. R., Appendix I.

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the Acts of 13 Geo. III., c. 63, and 3 and 4 Wm. IV, c. 85, to which reference was made in the course of the argument, but these statutes do not appear to materially affect the argument.

The Act of 1858 declared that India was to be governed directly and in the name of the Crown, acting through a Secretary of State aided by a Council, and to him were transferred the powers formerly exercised by the Court of Directors and the Board of Control. The property of the old East India Company was vested in the Crown. The Secretary of State was given a quasi-corporate character to enable him to assert the rights and discharge the liabilities devolving on him as successor to the East India Company. The material words of section 65 enact that "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." Section 66 is a transitory provision making the Secretary of State in Council come in place of the Company in all proceedings pending at the commencement of the Act, without the necessity of a change of name. Section 67 is also a transitory provision making engagements of the Company entered into before the commencement of the Act binding on the Crown and enforceable against the Secretary of State in Council in the same manner and in the same Courts as they would have been in the case of the Company had the Act not passed.

By section 22 of the Indian Councils Act of 1861 the Governor-General in Council is given power to make laws in the manner provided, including power to repeal or amend existing laws, and including the making of laws for all Courts of Justice. But a proviso to this Section enacts that there is to be no power to repeal or in any way affect, among other matters, any provision of the Government of India Act, 1858.

Their Lordships are of opinion that the effect of section 65 of the Act of 1858 was to debar the Government of India from passing any Act which could prevent a subject from suing the Secretary of State in Council in a Civil Court in any case in

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which he could have similarly sued the East India Company. They think that the words cannot be construed in any different sense without reading into them a qualification which is not there, and which may well have been deliberately omitted. The Section is not, like the two which follow it, a merely transitory Section. It appears, judging from the language employed, to have been inserted for the purpose of making it clear that the subject was to have the right of so suing and was to retain that right in the future, or at least until the British Parliament should take it away. It may well be that the Indian Government can legislate validly about the formalities of procedure so long as they preserve the substantial right of the subject to sue the Government in the Civil Courts like any other defendant, and do not violate the fundamental principle that the Secretary of State, even as representing the Crown, is to be in no position different from that of the old East India Company. But the question before their Lordships is not one of procedure. It is whether the Government of India can by legislation take away the right to proceed against it in a Civil Court in a case involving a right over land. Their Lordships have come to the clear conclusion that the language of section 65 of the Act of 1858 renders such legislation *ultra vires*.

It was suggested in the course of the argument for the Appellant that a different view must have been taken by this Board in the case of *Vasudev Sadashiv Modak v. The Collector of Ratnagiri* (1). The answer is that no such point was raised for decision.

Their Lordships will humbly advise that the Appeal should be dismissed with costs.

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*Before Mr. Justice Twomey.*

*Criminal Appeal No. 1048 of 1912.*

## MAUNG GYI *v.* KING-EMPEROR.

*December 19th, 1912.*

*Wiltshire*—for appellant.

*Drunkenness—unsoundness of mind—temporary dementia—loss of self-control—burden of proof—ss. 84, 324, 326, Indian Penal Code.*

A after partaking of intoxicating liquor walked two miles in the sun to a village where he was hit on the head by **B**. He pursued **B** to a certain house, but not finding **B** there he attacked and wounded with a *da* five women who were on the house.

(1) 4 I.A., 119.

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The Civil Surgeon thought that the accused was not fully responsible for his actions owing to the mental state caused by the wound on his head, the alcohol he had taken and the walk in the sun.

It was held that the facts were not sufficient to bring the case within the provisions of section 84 of the Indian Penal Code. The term "Unsoundness of mind" as used in that section cannot be construed so widely as to cover the loss of self-control following a hostile blow on the head. The assault on the women was the outcome of disappointed rage.

The appellant Nga Maung Gyi has been convicted under sections 326 and 324, Indian Penal Code, and sentenced to suffer transportation for seven years. One day about 3 P.M. he went on to Maung Shwe Gun's house at Chinya, Bassein District, armed with a long *da* and cut five women who were buying and selling cloth there. Three of the women received wounds which are classed as grievous hurt; the wounds suffered by the other two were less severe.

The defence was that Nga Maung Gyi was not responsible for his actions. He had been drinking at another village, he then had a walk of two miles in the sun, and on reaching Chinya a man named Po Thet hit him on the head with a stick just before the attack on the women. The Civil Surgeon who was examined as a witness gave it as his opinion (after being told some of but not all the facts) that the accused was not fully responsible for his actions "owing to the mental state caused by the wound on his head and the alcohol he had taken and the walk that he had taken in the sun." He considered in these circumstances that Nga Maung Gyi was suffering from "mental disease of a purely temporary nature" and said that he would call this disease "temporary dementia."

The Senior Magistrate held however that the case was not covered by section 84, Indian Penal Code, because one of the factors which resulted in the "temporary dementia" was intoxication.

There is only the statement of one witness that the appellant drank liquor on his way to Chinya.

Assuming that he was partly intoxicated the irritation caused by Po Thet's blow would probably be greater than if he was perfectly sober. It is clear from his own statement to the village headman that he went on to Shwe Gun's house because he thought Po Thet had gone there. He went in a state of anger desiring to be revenged on Po Thet and not finding Po Thet he

vented his fury on the unoffending women whom he saw on the house. No theory of mental disease, "temporary dementia" or disease of any other kind, is required to explain his acts. The burden of proving that he was incapable, through unsoundness of mind, of knowing the nature of his acts or that he was doing what was wrong or contrary to law, was upon the accused. I think he failed to discharge the burden of proof. The term "unsoundness of mind" as used in section 84 is in my opinion inapplicable to the mental condition of the accused at the time, nor is there any sufficient reason to suppose that accused when he cut down the women was incapable of knowing that he was doing what was wrong and contrary to law. The term "unsoundness of mind" cannot be construed so widely as to cover the loss of self-control following a hostile blow on the head. When the head is already inflamed with alcohol and has been exposed to the sun afterwards, the loss of self-control may be all the more complete. But these circumstances do not serve to bring the case under section 84, Indian Penal Code.

Attention is arrested by the use of the expressions "mental disease" and "temporary dementia" by the Civil Surgeon. A blow on the head may produce mental disease but this is not a necessary or even a common result. Every day men sustain more severe knocks on the head than the appellant suffered without mental disease supervening. The Civil Surgeon's opinion that in the present case the blow caused mental disease, and this within a quarter of an hour, is apparently based only on the circumstance that Nga Maung Gyi attacked the women wantonly. The Civil Surgeon was ignorant of the fact that Nga Maung Gyi had gone on to the house in pursuit of the man who struck him and that he attacked the women only on finding that the man was not there. If the Civil Surgeon had been fully informed of the facts he would probably have found it unnecessary to import mental disease and dementia to account for what was really the outcome of disappointed rage. In the circumstances of the case no weight can be attached to the Civil Surgeon's opinion.

The sentence is in my opinion no more than the appellant deserved.

The appeal is dismissed.

## FULL BENCH.

*Criminal Revisions Nos. 220B and 221B of 1912.*

*January 8th, 1913.*

*Before Sir Charles Fox, Chief Judge, Mr. Justice Hartnoll, Mr. Justice Ormond and Mr. Justice Twomey.*

1. HOCK CHONG & Co. *v.* THA KA DO.
2. THE COLONIAL TRADING COMPANY *v.* MYA THEE.

*McDonnell*—for applicants.

*Halker*—for 1st respondent.

*Criminal Breach of Trust—agreement between parties—constitution of a trust—legal and popular use of the term—s. 405, Indian Penal Code—provisoes 2 and 5, s. 92, Indian Evidence Act.*

An undertaking by accused to use an advance of money solely for the purpose of buying paddy and to sell the paddy to the complainant, does not make him a trustee of the money.

*Held* (Hartnoll, J., dissenting),—that upon a complaint of Criminal Breach of Trust under section 405 of the Indian Penal Code he was rightly discharged.

*Po Seik* v. *King-Emperor*, 6 L. B. R., 62; *Wong Yone Main* v. *King Emperor*, 6 L. B. R., 46: followed.

*J. Reid* v. *So Hlaing*, 5 L. B. R., 241, referred to.

*Hartnoll, J.*—The two references Nos. 220B and 221B have been heard together. They only differ in that in one case a receipt was taken for the money and in the other there was no receipt. It is allowed that they only differ from the case of *In re Po Seik* v. *King-Emperor* (1) in that whereas in that case promissory notes were executed in these cases there were no promissory notes. It was further contended that the District Magistrate erred in going beyond the terms of the agreement in considering whether or not there was a trust. As regards the absence of promissory notes my judgment in *Po Seik's* case covers these references and as regards the further contention my views are expressed in the case of *J. Reid* v. *So Hlaing* (2).

I would set aside the orders dismissing the complaints and direct further enquiry into them.

*Ormond, J.*—These are two applications in revision from the District Magistrate who discharged the accused in each case. The offence alleged in each case is that of criminal breach of trust.

The facts are similar in both cases. Money was advanced to the accused by the complainant for the purpose of buying

(1) 6 L.B.R., 62. (2) 5 L.B.R., 241.

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1. HOCK CHONG & Co. v. THA KA DO.
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paddy and the accused signed an agreement undertaking that the sum advanced will be used for no other purpose than the purchase of the said paddy. In one case a receipt was given for the money but not in the other. In neither case did the accused execute a promissory note. The District Magistrate has found that there was no trust; the transaction being a loan.

Counsel for the petitioners contends that the fact of the absence of a promissory note in these cases differentiates them from the case of *Wong Yone Main* v. *King-Emperor* (1), and also from the case of *Po Seik* v. *King-Emperor* (2). In those cases it was held that the transaction was a loan and therefore there was no trust. In my opinion the District Magistrate has rightly applied those decisions to the present case. Petitioner's counsel contends also that the District Magistrate should not have gone beyond the terms of the written agreement in considering whether or not there was a trust. In my opinion the agreement in writing does not disclose a trust and therefore counsel's contention that the Magistrate relied upon extraneous evidence or matter, in holding that the transaction was not a trust, does not apply to the case. And even if the document did amount to an admission of a trust, it would not be a "contract grant or other disposition of property" within the meaning of section 92 of the Evidence Act.

I would therefore dismiss both these applications.

*Twomey, J.*—In each of these two cases, a firm of millers advanced a sum of money (Rs. 2,000 in one case and Rs. 3,000 in the other) to the accused on his undertaking to buy paddy and sell it to the firm within a specified time (15 days in one case and 3 days in the other) and to use the money for no other purpose. The amount of paddy to be bought was mentioned as "about 2,000 baskets" and "about 3,000 baskets." The exact quantity was left indefinite and the price also was left indefinite, as it was part of the bargain that the accused should buy at what rate he could and should sell to the firm at the market price on the day of delivery.

In each case, the accused failed to supply paddy according to his undertaking or to account for the money and the millers prosecuted him for criminal breach of trust. The District

(1) 6 L.B.R., 46. (2) 6 L.B.R., 62.

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Magistrate held that the cases were governed by the Full Bench ruling in *Po Seik* v. *King-Emperor* (1), that the money was not entrusted to the accused in the sense contemplated in section 405, Indian Penal Code, and consequently that no offence had been committed under that section. In *Po Seik* v. *King-Emperor* (1), it was held that the relation between the accused Po Seik and the miller who advanced money to him was that of borrower and lender, and that the money was not "entrusted" to him. If the money was lost while in the accused Po Seik's possession it was he who had to bear the loss and not the miller. Po Seik was to make any profit he could on buying the paddy and re-selling it to the miller. If the price fell after Po Seik had bought the paddy the loss on re-sale to the miller fell upon Po Seik, for his contract, as in the present cases, was to sell the paddy to the miller at the market rate ruling on the day of delivery. I concur in the view of the majority of the Full Bench in Po Seik's case that there was no trust in the above circumstances. The property in the money passed to the accused and his contract to *use* it only in a certain way did not in my opinion operate to create a constructive trust in the money for the benefit of the miller. As pointed out by Robinson, J., loans are often made with conditions of this sort attached to them. A not uncommon example in this country is where a Chetty landlord advances money to his Burmese tenants to enable them to buy paddy seedlings to plant up the Chetty's land. It is never contended that the Chetty retains a beneficial interest on the money lent merely because there is a stipulation that the money will be used only in bringing the Chetty's land under crop. The same may be said of an advance to a contractor for the specific purpose of building a house, a boat, or a carriage for the lender. There is no essential difference between such cases and that of the accused in *Po Seik* v. *King-Emperor* (1). There is no authority for holding that in any of these cases the mere contract restricting the use of the money suffices to create a trust. In *Po Seik's* case the money was really payment in advance of the price of paddy sold to the miller for forward delivery.

It is argued that the money was advanced by the miller

(1) 6 L.B.R., 62.

only because of the confidence reposed by him in the accused on the strength of his undertaking, and that as this confidence was abused there was a breach of trust. According to this view the words "entrusted" and "trust" in section 405 would have to be construed in their loose popular sense as distinguished from their strictly legal sense, and such latitude is not permissible in interpreting a penal enactment. The illustrations to section 405 are sufficient to show that it is only in the strictly legal sense that the words are employed. The existence of an express or constructive trust must be proved as an essential ingredient of the offence. Looking to the accused Po Seik's liability to make good the loss of the money in any circumstances, and to the condition that he was to bear any loss on a fall in the market price and to profit by any rise, I think the property in the money passed to him and there was no trust.

The circumstances of the two present cases admittedly resemble those of *Po Seik* v. *King-Emperor* (1) in all respects except that Po Seik gave promissory notes for the monies advanced to him while the present accused did not. In my opinion the absence of promissory notes does not alter the character of the transactions. By taking a promissory note the miller may be in a better position to recover the money in case of default. But whether a promissory note is taken or not the transaction is in point of law a loan, the property in the money passes and no beneficial interest in it remains with the lender.

The only other ground urged in the application for revision is that the District Magistrate erred in going beyond the terms of the printed agreement in considering whether there was a trust. Even on the agreement as it stands I do not think the existence of a trust can be inferred. In any case the District Magistrate's action in considering extrinsic oral evidence as to the conditions of the advance appears to be fully covered by provisoes 2 and 5 to section 92 of the Evidence Act.

I would therefore dismiss the application.

*Fox, C.J.*—Money was advanced by the complainants in these cases on agreements identical in terms with the agreement in

(1) 6 L.B R., 62.

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the case of *Po Seik* v. *King-Emperor* (1), but in these later cases no promissory notes were taken from the respondents.

The question is whether the money so advanced was held in trust by the respondents for the complainants.

In my judgment nothing in the agreement constitutes the person who signs it a trustee of the money advanced to him.

The agreement does not appear to me to constitute more than contractual relationship between the parties to it.

Upon the judgments of the majority of the Judges of the Bench both applications will be dismissed.

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*Special Civil First Appeal No. 139 of 1911.*

*January 3rd, 1913.*

*Before Mr. Justice Parlett.*

M. DORABJEE *v.* 1. HAVABEE, 2. HAFEZBEE, 3. MARIAMBEE, 4. KHATIZA BIBI, 5. RAHIMABEE, 6. BIBI (plaintiffs-respondents, 2 to 6, minors by their guardian *ad litem* HAVABEE)—Legal Representatives of DAWOODJEE ISMAILJEE MAYETH (deceased).

*Eggar*—for defendant-appellant.

*K. B. Banerji*—for plaintiffs-respondents.

*Jurisdiction—Court of Small Causes—nature of suit—nature of defence.*

As the question for decision was whether the plaintiff, who had applied for a refund of security given, had duly performed his work as manager, the defendant was entitled to try to prove that he had not done so. The Court of Small Causes which heard the case was not debarred from going into this question even if it was not competent to go into accounts. Such a Court in determining whether it has jurisdiction or not must look to the nature of the suit as brought by the plaintiff and not to the nature of the defence. A defendant has not power to oust the Court of a jurisdiction which it otherwise has by the mere raising of a defence.

This was a suit for the return of Rs. 2,000 deposited by the plaintiff as security for the due performance of his work as manager of the defendant. The defence in effect was that the money was not payable as the plaintiff had not duly performed his duties: in particular that he had misappropriated certain sums and by negligence suffered defendant's goods to sustain damage estimated at a total amount in excess of the amount of security, and had failed to account for his dealings as manager. There was a written agreement between the parties, and

admittedly also a subsequent further oral agreement, though the exact terms of the latter are in dispute. The Court of first instance considered that the deposit was merely security for that part of the written agreement (clause *5*) which related to the return of the stock, goods, account books, press-copy books, papers, letters, documents, cash, etc., belonging to the defendant company, and holding that the existence of any such not returned by him was not proved, decreed plaintiff's suit. I would remark, however, that the written agreement imposed other obligations upon the plaintiff, *e.g.*, by clauses *3*, *4* and *6*, so that mere return of the stock, account books, etc., would not necessarily entitle him to a refund of his security, even if it were merely security for due performance of the written agreement. But plaintiff admits that it was security for the due performance of his work as manager of the defendant's company, and even if the exact terms of clause *9*, which is said to have been struck out of the agreement when signed, were not embodied in the subsequent oral agreement, it is clear that the due performance of his work as manager would entail such conduct on his part as would protect his employers from loss or damage arising from misconduct, neglect or default on his part, such as clause *9* refers to.

The question for decision, therefore, was not merely whether plaintiff had complied with clause *5* of the agreement, but whether he had duly performed his work as manager: and defendant was entitled to try and prove that he had not done so. It appears that defendant has filed two suits in Mandalay, one for compensation for misappropriation and for damage to his goods caused by plaintiff's negligence; and the other for an account; and execution in this case was postponed to enable them to be concluded. For the plaintiff it is contended that the Small Cause Court could do nothing else, having no jurisdiction over the subject-matter of those two suits and not being competent to go into accounts. For the defendant on the other hand it has been urged that the question of accounts was inseparable from that of the refund of the security, and that the plaint in this suit should have been returned for presentation to a Court having jurisdiction to go into accounts. In my opinion neither contention is wholly sound. Incidentally also

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I may mention that I consider the defendant's written statement was a defence only, and not a set-off: it is sufficient to say that the filing of the suits in Mandalay would probably have precluded him from pleading a set-off in this suit.

The contention that a Small Cause Court cannot take cognizance of a case in which an account is to be taken has been held to be untenable. The Court must look to the nature of the suit as brought by the plaintiff, and not to the nature of the defence, to determine whether or not the Court of Small Causes has jurisdiction. It is not in the power of a defendant to oust the Court of a jurisdiction that it otherwise has, by the mere raising of a defence. Where such a defence is raised the Court of Small Causes has power to inquire into it and determine it for the purpose of the suit which it has jurisdiction to try. I am of opinion that the defence raised did not affect the jurisdiction of the Court, and that that defence should have been gone into and adjudicated upon.

I reverse the decree of the Small Cause Court and remand the case for further hearing and decision in accordance with the views indicated above. Costs of this appeal will be costs in the suit.

*Civil Revision No. 124 of 1911.*

*January 13th, 1913.*

*Before Mr. Justice Twomey.*

## OWEN PHILLIPS *v.* LIM CHIN TSONG.

*Alexander*—for applicant (plaintiff).

*Clifton*—for respondent (defendant).

*Wrongful dismissal—seamen—officers—rights of action for wages—restriction imposed by section 35, Indian Merchant Shipping Act, 1859—ss. 35, 55, 56, Indian Merchant Shipping Act, 1859—ss. 1, 73 of the Contract Act, 1872.*

The provisions of section 35 of the Indian Merchant Shipping Act, 1859, prevent a seaman [a term which includes an officer] from being awarded more than one month's wages as compensation for wrongful dismissal if effected before the first month's wages have been earned.

According to the finding of the lower Court the applicant, Owen Phillips, who had signed for six months as an officer on the respondent, Lim Chin Tsong's steamer, the *Seang Bee*, was discharged without fault before one month's wages had been earned. He was paid wages up to the day of his discharge.

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He sued the respondent for wrongful dismissal claiming as compensation Rs. 780 or four months' wages at Rs. 195 per mensem. The learned Judge held that the provisions of section 35 of the Indian Merchant Shipping Act, 1859, prevented him from awarding more than one month's wages as compensation, and accordingly gave the plaintiff a decree for Rs. 195 and costs on that amount. He further ordered the plaintiff to pay the defendant's costs on the amount disallowed.

The plaintiff applies to this Court in revision. It is contended that section 35 was merely intended to provide an additional summary remedy and not to deprive seamen of their ordinary rights of action for wages, that seamen are not prevented by section 35 from suing for damages for breach of contract under section 73, Contract Act, and that section 35 should be read subject to sections 55 and 56 of the Indian Merchant Shipping Act, 1859.

The view that section 35 merely provided an additional summary remedy appears to be untenable. If it had been intended that the restriction to one month's wages should apply only to cases in which the wages are to be recovered summarily by distress warrant under section 56, the insertion of the words "the Court or" in section 35 would be meaningless. The mention of "the Court" in section 35 shows, I think, that one month's wages is the maximum amount which could be granted by way of compensation even by a Court of civil judicature under section 57. There can be no doubt, I think, that the restriction was intended to be general in its application. The result is curious, for the restriction relates only to wrongful dismissals before the first month's wages have been earned, and consequently if a seaman is dismissed after the first month of his articles he can sue for damages without this restriction. In the case of an ordinary able-bodied seaman who can probably get employment within a week or two in another ship, the restriction is not likely to cause hardship. But in cases like the present where the seaman is an officer it is no doubt more difficult to get another ship and the restriction may cause hardship. It seems possible that in framing section 35 (and the corresponding section in the English Statute) the fact that an officer is included in the definition of "seaman" for the

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purposes of the Act was overlooked. However that may be, the wording of the restriction is clear and effect must be given to it.

The restriction in question is not removed by the Contract Act. Section 1 of that Act provides *inter alia* that "nothing herein contained shall affect the provisions of any Statute, Act or Regulation not hereby expressly repealed," and the Contract Act does not repeal section 35 of the Indian Merchant Shipping Act, 1859.

The terms of the restriction being express I think that it must take effect notwithstanding any wider rights of action which seamen may have had before the Act was passed.

I therefore concur in the decision of the Small Cause Court.

As regards costs, I do not agree that the plaintiff should be required to pay the defendant's costs on the amount disallowed. The plaintiff had an honest claim in which he succeeded to a substantial degree. The defendant on the other hand set up a defence that the plaintiff was rightly discharged, and he failed to prove this plea. In this state of affairs I do not think that costs should be apportioned in the manner ordered by the Judge.

The application is dismissed except that the lower Court's order for the payment of Rs. 30 by the plaintiff to the defendant is set aside. The costs in this Court will be borne by the applicant.

*Civil Miscellaneous Appeal No. 19 of 1912.*

*January 20th, 1913.*

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

## NGWE HMON *v.* MA PO.

*Agabeg*—for appellant.

*Dawson*—for respondent.

*Letters-of-administration—withdrawal of application—erroneous dismissal—cancellation of order—procedure in contentious cases—Order IX, Rule 9, Order XVII, Rules 2 and 3, and Order XLIII, Code of Civil Procedure, 1908—ss. 83, 86, Probate and Administration Act, 1881.*

A applied for letters-of-administration to an estate. The application was returned for amendment. A then applied to be allowed to withdraw the application. No orders were passed on this application and when the case was called at the expiry of the six months allowed for amendment the

original application was dismissed. Later, on an application to reopen the case, the Judge allowed the petition for letters to be withdrawn.

When returned for amendment the case came under Order XVII, Civil Procedure Code, 1908. The application was dismissed under Rule 2 of that Order and the Judge had authority under Rule 9 of Order IX to set aside the dismissal. Under Order XLIII no appeal lies against his order in spite of section 86 of the Probate and Administration Act, 1881, which refers only to orders made by virtue of the powers conferred on a Judge by that Act. The section applicable is section 83 whereby the procedure in contentious cases is governed by the Code of Civil Procedure.

The respondent applied for letters-of-administration to the estate of Maung Po O. Her application was on the 21st June 1911 returned for amendment within six months. In November she applied to be allowed to withdraw her application on the ground that she wished to apply for letters to another Court. No orders were passed on this application to withdraw. On the 20th December the case was called; the respondent was absent, and the original application was dismissed with costs. The application for withdrawal was apparently overlooked. On the 20th January 1912 the respondent applied to have the order dismissing her original application set aside, and again asked that she might be allowed to withdraw that application. The District Judge allowed the case to be reopened, thereby in effect setting aside his previous order dismissing the application, and he allowed the petition for letters to be withdrawn.

The appellant who opposed all the respondent's applications appeals on the ground that the Court acted without jurisdiction in giving leave to the respondent to withdraw her application after it had been dismissed with costs. This involves the questions whether the District Judge was authorized to set aside the dismissal of the original application, and whether an appeal lies against his order setting it aside. From the 21st June the case came under Order XVII relating to adjournments. Rule 2 of that Order would appear to be more applicable to the order of dismissal on the 20th December than Rule 3 is. If so the District Judge had authority under Order IX, Rule 9, to set aside the dismissal. That being so Order XLIII gives no appeal from an order allowing an application to set aside a dismissal. For the appellant, however, it was argued that section 86 of the Probate and Administration Act

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gives her an appeal to this Court. That section applies to orders made by a District Judge by virtue of the powers conferred on him by the Act. The order setting aside the dismissal cannot properly be said to be an order made by virtue of any power given by the Act. It was made in the course of procedure, and procedure in contentious cases is under section 83 of the Act governed by the Code of Civil Procedure. Since that Code gives no appeal from an order allowing an application to set aside a dismissal for default of appearance no appeal lies against the order appealed against.

The appeal is dismissed with costs—2 gold mohurs allowed as advocate's fee.

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*Criminal Appeals Nos. 93, 94 and 95 of 1913.*

*March 14th, 1913.*

*Before Mr. Justice Hartnoll.*

1. PO WIN, 2. TUN BAW, 3. SHWE DON, *v.* KING-EMPEROR.

*Maung Kin*, Assistant Government Advocate.

*Penal Code, s. 397—robbery—use of deadly weapon by one of a gang of robbers—s. 392, Indian Penal Code.*

The use of a deadly weapon by one of a gang of robbers does not bring his associates within the terms of section 397, Indian Penal Code.

*Nga I* v. *King-Emperor*, 6 L.B.R., 41, referred to.

*Nga Sein* v. *King-Emperor*, 3 L.B.R., 121; *Queen-Empress* v. *Senta*, I.L.R. 28 All., 404; *Queen-Empress* v. *Bhavjya*, Ratanlal's Unreported Cases, 397; followed.

The case is a perfectly clear one against the appellants and the appeal was only admitted as Maung Tun Baw and Maung Shwe Dôn have been convicted under section 392 read with section 397 of the Indian Penal Code. In convicting Maung Tun Baw and Maung Shwe Dôn under section 392 read with section 397 the Magistrate says that he followed the ruling in the case of *Nga I* v. *King-Emperor* (1). That ruling applies to the case of Po Win who had the clasp knife but not to the cases of the other two men. I would refer the Magistrate to the case of *Nga Sein* v. *King-Emperor* (2). The case of *Queen-Empress* v. *Mahabir Tiwari* mentioned in this latter case was over-ruled

(1) 6 L.B.R., 41. (2) 3 L.B.R., 121.

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by the case of *Queen-Empress* v. *Senta* (1), which takes the same view as that taken in *Nga Sein* v. *King-Emperor* (2). In the Bombay High Court a similar view is taken in the case of *Queen-Empress* v. *Bhavjyá* (3). The convictions of Tun Baw and Shwe Dôn will be altered to convictions under section 392 of the Indian Penal Code. As regards the punishment, since it is not shown that Tun Baw and Shwe Dôn used any deadly weapon their sentences are reduced to sentences of five years' rigorous imprisonment. Po Win's appeal is dismissed.

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*Before Sir Charles Fox, Chief Judge, and Mr. Justice Hartnoll.*

*Civil 2nd Appeal No. 159 of 1911.*

PO ZAN *v.* MAUNG NYO BY HIS GUARDIAN LU HMAN.

*November 11th, 1912.*

*Ba Thein*—for defendant-appellant.

*D. N. Palit*—for plaintiff-respondent.

*Buddhist Law : Inheritance—grandchild of deceased (son of the eldest daughter) claiming as against a son of deceased—Kinwun Mingyi's Digest, s. 163.*

A Burman Buddhist couple died leaving two heirs, a son and a grandson (the son of their eldest child, a daughter). The son, at the time of his father's death, was competent to assume the position of an *orasa* heir.

The grandchild claimed an equal share with the son in the property of the couple, on the ground that he was the son of the "eldest daughter" (relying on the texts collected in section 163 of the Kinwun Mingyi's Digest).

*Held*,—that these texts were not intended to be applied where there is or has been an *orasa* son.

*Tun Myaing* v. *Ba Tun*, 2 L.B.R., 292; *Ma Mya Thu* v. *Po Thin*, P.J.L.B., 585; *San Dwa* v. *Ma Min Tha*, 2 (Chan Toon's) L.C., 207; *Ma Saw Ngwe* v. *Ma Thein Yin*, 2 (Chan Toon's) L.C., 210; *Ma Gun Bon* v. *Maung Po Kywe*, 1 (Chan Toon's) L. C., 406 (at 414); referred to.

*Po Sein* v. *Po Min*, 3 L.B.R., 45, followed.

*Hartnoll, J.*—Maung Nyo, a minor, by his next friend, Maung Lu Hman, who is also his father, has sued Maung Po Zan for a half share of the property of his deceased grandparents Ko Hpan and Ma Bok Hton. This he has been awarded and Maung Po Zan now appeals on the ground that he should only

(1) See the judgment at foot of page 404, I.L.R., 28 All.
(2) 3 L.B.R., 121.
(3) Ratanlal's Unreported Cases, 797.

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have been awarded an eighth share. The genealogical tree is as follows:—

KO HPAN (died in Natdaw 1268 B. E.) | MA BOK HTON (died in Wazo or Tawthalin 1271 B. E.)

- MA HNIN THET (died in Wagaung 1270 B. E.).
  - MAUNG NYO, plaintiff.
- MAUNG CHIT PON (died as a child).
- MAUNG PO ZAN, defendant.

It will be noticed that Ma Hnin Thet died after her father but before her mother. She married twice but left no issue by her first husband.

Maung Nyo has been awarded a half share on the authority of the texts quoted in section 163 of the Kinwin Mingyi's Digest of Burmese Buddhist Law, Volume I; but it is argued that they do not apply as, although Ma Hnin Thet was the eldest born daughter and child of Ko Hpan and Ma Bok Hton, yet she was not the *orasa* child, that Maung Po Zan was the *orasa* child and that there can be only one *orasa* in a family. Therefore it is urged that he is the favoured and privileged one and that Ma Hnin Thet can get no special treatment. The record shows that when Maung Po Zan gave his evidence on the 9th March 1911 he stated that his age was 28 years, and that he used to live with his mother. When his parents therefore were alive he was an adult and in the position to assume the duties of an *orasa* son. The term *orasa* was considered in the case of *Tun Myaing* v. *Ba Tun* (1). It was there held that if the eldest son died as in this case before he attained his majority his next younger brother succeeded to his position as *orasa* if he attained his majority and was competent. The cases of *Ma Mya Thu* v. *Po Thin* (2) and *San Dwa* v. *Ma Min Tha* (3) were quoted with approval. The ruling in the case of *Ma Saw Ngwe* v. *Ma Thein Yin* (4) that there can be only one *orasa* child in a family was also concurred in. After studying

(1) 2 L.B.R,, 292.
(2) P.J.L.B., 585.
(3) 2 Chan Toon's L.C., 207.
(4) 2 Chan Toon's L.C., 210.

the texts I can see no reason to differ from the views expressed in the above mentioned cases. Where there are both sons and daughters in a family the son is preferred to the daughter and I have never known the reverse. The texts in section 150 of the Digest clearly show that the son is perferred to the daughter even though he is born after many daughters. The *Dhammathatlinga, Cittara* and *Kyannet* make him the *orasa*; the first and last of these Dhammathats expressly state that the daughter shall have no claim to the *orasa* share on the ground that she is the eldest born. In the case of *Ma Mya Thu* v. *Po Thin* (1), the youngest son was held to be the *orasa* although he had two elder sisters. Applying the principles above quoted to the present case I would hold that Po Zan was the *orasa* child of Ko Hpan and Ma Bok Hton. He attained majority and was competent to assume the duties of an *orasa* and he must be preferred to his elder sister, Ma Hnin Thet, even though she happened to be the eldest born. It is shown that he lived with his mother.

The question therefore arises whether Maung Nyo can claim the benefit of special treatment as the son of the eldest daughter on the authority of the texts quoted in section 163 of the Digest and I would hold in the negative. The Dhammathats in several places give special treatment both to the eldest son and to the eldest daughter; but in construing them it has been the tendency of the Courts to prefer the son to the daughter where the son has in fact been the eldest born child or has been in a position to assume the position of the *orasa* son. Where there are no sons, or no sons competent to perform the duties of an *orasa* son then the eldest daugther has been given special treatment. The reason no doubt for giving special treatment to one of the children is because on the death of the parent or parents he or she takes the place of the deceased parent or parents in the family. Similarly the reason for giving special treatment to the children of an eldest son or daughter as laid down in the case of *Ma Gun Bon* v. *Maung Po Kywe* (2) where their parents die before their grandparents no doubt was on account of the superior claims of the "auratha" heir. The reason ceases to

(1) P.J.L.B., 585. (2) 1 Chan Toon's L.C., 406 at 414.

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exist where, as in the present case, the deceased parent never was the *orasa* and never could assume the position of such owing to the existence of another child who took the position of an *orasa* in preference to her. Looking at the texts in sections 162 and 163 of the Digest it does not seem to me that they exclusively deal with the eldest born child. Several of the texts in section 162 deal with the child or children of a deceased *orasa*, and as has been shown an *orasa* need not necessarily be the eldest born son. In section 163 the text of the *Kyannet* expressly makes the right of the eldest sister's son dependent on the eldest brother being childless. The case of *Po Sein* v. *Po Min* (1) is distinguishable from this one. There the plaintiffs were not the sons of the eldest female child as the plaintiff is in this case. To allow in every case special treatment to the child or children of the eldest daughter if that child is the eldest born would in certain cases mean that special treatment must be allowed to two branches in one family, and this is contrary to the rule of decision adopted in interpreting the Dhammathats nor have I known of such a practice. Looking at the principle underlying the doctrine of special treatment of a child I would hold that where there has been or is an *orasa* son the texts set out in sections 162 and 163 of the Digest giving the child or children of an eldest daughter special treatment do not apply.

I would therefore not allow Maung Nyo one half share of his grandparents' estate, but would only allow him one quarter of his mother's share which was one half. In other words I would allow him one-eighth of the estate. As regards costs I would give proportionate costs in the District Court. In the Divisional Court Maung Po Zan has appealed on a stamp of excessive value. I would give him his costs in that Court calculating them on a stamp of correct value. In this Court I would allow him his costs.

*Fox, C. J.*—I concur.

(1) 3 L.B.R., 45.

*Before Sir Charles Fox, Chief Judge, and Mr. Justice Hartnoll.*

*Special Civil 2nd Appeal No. 186 of 1912.*

*March 10th, 1913.*

(1) MA NYEIN, (2) SHWE MI, (3) MA BWIN, (4) PO WIN, (5) MAUNG HPAN, (6) MAUNG HNYET *v.* MA SEIN.

*Maung Thin*—for defendants-appellants.

*Lambert*—for plaintiff-respondent.

*Buddhist Law: Inheritance—dissolution of marriage—claim of children—absence of filial relationship.*

A Burmese Buddhist died leaving a widow and one child by a former (divorced) wife. The latter had not, since the divorce of her mother, resumed filial relations with her father.

*Held*,—that under the circumstances the whole of the property brought to or acquired under the second marriage devolved upon the widow.

Further *held*,—that on the death of the widow the child by the former wife was not entitled (under these circumstances) to any share in her estate as against the widow's nephews and nieces.

*Ma Yi* v. *Ma Galé*, 6 L.B.R., 167, followed.

*Mi Nyo* v. *Mi Nyein Tha*, 2 U.B.R. (1904—1906), Buddhist Law —Inheritance, 15, distinguished.

*Sein Hla* v. *Sein Hnan*, 2 L.B.R., 54, referred to.

*Hartnoll, J.*—The respondent, Ma Sein, is the daughter of U Pwe and Ma Gwet, both deceased. U Pwe and Ma Gwet divorced when Ma Sein was an infant. Ma Sein is now some fifty years old. After the divorce U Pwe married Ma Hnin Tha, and Ma Gwet married one Maung Shwe Thet. U Pwe died in 1272 B.E. and Ma Hnin Tha in 1273 B.E. The appellants are the nephews, nieces and grand-nephew of Ma Hnin Tha. After U Pwe's death Ma Hnin Tha made a deed of gift of the bulk of her and U Pwe's property to the appellants. Ma Sein brings the suit to obtain a declaration that she is the sole heir of Ma Hnin Tha and for an order that appellants hand over to her all the property left by Ma Hnin Tha. The appellants contest the claim by saying that Ma Sein never lived with U Pwe after the divorce from her mother and never resumed filial relations with him and so that she is not entitled to inherit. They also rely on the deed of gift.

The learned District Judge held that there had been a resumption of filial relationship between U Pwe and Ma Sein, and that the deed of gift was null and void. He therefore granted her prayer. The learned Divisional Judge held that there had not been a resumption of filial relationship between

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U Pwe and Ma Sein, that nevertheless Ma Sein was entitled to all U Pwe's separate estate and half the jointly acquired estate during his coverture with Ma Hnin Tha. Holding the deed of gift to be null and void, he gave a decree accordingly.

The first point for decision is whether filial relations were ever resumed between U Pwe and Ma Sein, for it is admitted that after the divorce Ma Sein lived with her mother. I can see no reason for differing from the conclusion arrived at by the learned Divisional Judge. The burden of proof lay on Ma Sein to show that filial relations were such between her and U Pwe and Ma Hnin Tha that there is no doubt that they received her as their heir and intended her to be so. U Pwe certainly did give her a house to live in some ten years before his death and she and her husband have no doubt worked some of his lands; but that seems to be all that is definitely proved, and that is not enough to prove that there was a resumption of filial relationship such as she claims. The witnesses do not know in what capacity she worked the lands. Some of them are her relatives and that lessens the value of their testimony. Ma Hnin Tha in executing the deed she did shows that she did not want her to inherit. I therefore agree with the Divisional Judge's conclusion.

The next point for determination is whether considering that filial relations between her, U Pwe and Ma Hnin Tha are not proved to have been resumed she is entitled to inherit. The latest decision in an analogous case is that of *Ma Yi* v. *Ma Gale* (1), (which is now being published): but it is urged that the circumstances in this case are different to those in that one and the other cases quoted in it. It is said that they more resemble those in the case of *Mi Nyo* v. *Mi Nyein Tha* (2). Here there is no widow of a second marriage as she is dead. There are also no children of the second marriage but only collaterals of the deceased second wife. The case of *Sein Hla* v. *Sein Hnan* (3) is relied on. Now the texts relied on in the case of *Mi Nyo* v. *Mi Nyein Tha* (2) do not seem to me to apply to the present case. They refer to a husband who has

(1) 6 L.B.R., 167.
(2) 2 U.B.R. (1904—06), Bud. Law—Inheritance, 15.
(3) 2 L.B.R., 54.

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divorced his wife and who remains alone—that is does not marry again, and does not start a second home. Here U Pwe married Ma Hnin Tha and started new home. As I have held that Ma Sein never resumed filial relations in that home she cannot be considered to form a member of it and consequently on U Pwe's death Ma Hnin Tha was his heir and inherited his property to the final exclusion of Ma Sein. On her death therefore her estate would devolve on her heirs, the appellants. The case of *Sein Hla* v. *Sein Hnan* (1) is not applicable as in that case the illegitimate son lived with his father and his father's wife and formed one of the household. It is unnecessary to express an opinion as to what the position would have been if U Pwe had not married again or if Ma Hnin Tha had predeceased him. I would hold in the circumstances that Ma Sein has shown no right to inherit the property she claims. On this finding there is no need to discuss the validity of the deed executed by Ma Hnin Tha.

I would allow this appeal and dismiss the suit and give appellants their costs in all Courts.

*Fox, C. J.*—I concur.

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*Before Mr. Justice Hartnoll, Officiating Chief Judge.*

*Criminal Appeals Nos. 141, 142 and 143 of 1913.*

1. NGA TE, 2. SEIN PE, 3. BAIK GYI

*v.* KING-EMPEROR.

*March 28th, 1913.*

The Assistant Government Advocate for King-Emperor.

*Evidence Act, 1872, section 32, sub-sections (1) and (3)*

A was present amongst a band of dacoits engaged in committing dacoity. He was there in his capacity of assistant to the police to whom he had previously given information that a dacoity was going to take place. He was mortally wounded by the police. He made a "dying statement" incriminating certain persons as his companions.

*Held*,—that such statement could not be admitted as evidence in the trial of his companions for dacoity under sub-section (*1*) of section 32 of the Evidence Act, 1872, as the cause of his death came into question only indirectly and incidentally.

*Held*,—further, that under the circumstances his statement would not have exposed him to a criminal prosecution and so it could not be admitted under sub-section (*3*) of the section above quoted.

The appellants have been convicted of dacoity in that they were members of a gang that attacked Bun Yan's house at

(1) 2 L.B.R., 54.

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Inywa on the night of the 20th September last. That a dacoity took place is certain. Po Ok says that he saw 6 or 7 in the gang. Kalapi saw 5 or 6. The robbery had clearly begun when the robbers found that their presence was known for Kalapi was fired at and Po Ok says that he saw the torches being lit.

The question is whether the crime has been brought home to the appellants. One man amongst the dacoits was Po Thaw Gyi. He was shot by the police who were waiting for the dacoits and subsequently died of his injuries. He made certain statements and these have been admitted in evidence. The question is whether they are admissible. They have been admitted under section 32 (*3*) of the Evidence Act on the ground that they would have exposed him to a criminal prosecution. That provision of law seems to me clearly not to apply as after a perusal of the statements of Mr. McDonald and Maung Maung I am unable to hold that they would have done so. Po Thaw Gyi went and gave information that the dacoity was going to take place and it was in consequence of this information that the police went to the spot. It was part of the arrangement that Po Thaw Gyi was to wear white clothes when he accompanied the dacoits and Mr. McDonald says that he must have said that the man in white was not to be fired at. Po Thaw Gyi appears to have been present in his capacity of assistant to the police and it cannot be said that he was of the same mind as the rest of the dacoits and that he had the same intention as they had—that is, to rob. He cannot be held to have been one of the dacoits in this view and so section 32 (*3*) of the Evidence Act is not applicable. When he made the statements he could not have had the slightest idea that he was going to be prosecuted and so the conditions in his mind that are contemplated by the sub-section were non-existent. It was urged at the hearing of the appeal that section 32 (*1*) makes the statements admissible. That sub-section refers to statements made by a person as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death in cases in *which the cause of that person's death comes into question.* The present case is one concerned with who were the dacoits who attacked Bun Yan, and it can hardly be said that the cause of Po Thaw Gyi's death comes into question in it directly

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though it may come indirectly and incidentally; but the trial is clearly not one into the circumstances of his death as to who caused it and whether an offence was committed by some one in causing it. The provision rests on the doctrine of necessity, that is, that the injured person is dead and is generally the principal witness and so is likely to know more or as much about the circumstances of his death than or as any other person. In the present instance such doctrine of necessity does not apply as the object of the trial is to ascertain whether certain persons were the dacoits or not—a matter that has nothing to do with the circumstances of Po Thaw Gyi's death. Even if portions of the statements were admissible it would seem that the admissible portions would be confined to those relating to the actual cause and circumstances of the death and not to previous transactions; but for the grounds I have given I must hold that Po Thaw Gyi's statements are not admissible at all.

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*Before Mr. Justice Hartnoll, Officiating Chief Judge.*

*Criminal Revision No. 47B of 1913.*

*April 7th, 1913.*

## (1) KHRISHNA PERDAN, (2) NITYA NANDA *v.* PASAUD.

*R. N. Burjorjee*—for applicants.

*Workmen's Breach of Contract Act, 1859—effect of dismissal for default of application under—Code of Criminal Procedure, ss. 247, 403.*

An application under section 1 of the Workmen's Breach of Contract Act, 1859, was dismissed for default before any order had been passed by the Magistrate under section 2 of the Act. Three years later the application was renewed but dismissed by the Magistrate, who held that there were no sufficient grounds for going on with a case determined so long ago.

*Held*,—that (1) no "offence" against the Act having yet been committed there was no "acquittal" and section 403 of the Code of Criminal Procedure did not bar the re-opening of the proceedings.

(2) The delay being due to the applicant's inability to find the offender there was no ground for refusing to continue the enquiry.

*King-Emperor* v. *Takasi Nukayya*, (1901) I.L.R. 24 Mad., 660, followed.

*Gurudin Teli* v. *S. Mutu Servai*, 6 L.B.R., 89, referred to.

From the copy of the Magistrate's order attached to the application it appears that in the year 1909 respondent proceeded

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against one of the applicants under section 2 of the Workmen's Breach of Contract Act (XIII of 1859) and that process was issued, but the case was dismissed for non-appearance of the respondent. Respondent sought to re-open the case and alleged that the delay in applying to do so was that he did not know the whereabouts of the applicants. The Magistrate held that there were no sufficient grounds for going on with a case that had been heard and determined nearly three years ago and so he discharged the applicants.

The learned Sessions Judge on application being made by respondent to him found that the order dismissing the case for default could not be regarded as one passed under section 247 of the Code of Criminal Procedure and so that the Magistrate was not precluded by section 403 from taking up the case afresh, and that there was no limitation for applications in the Criminal Courts. He therefore ordered further enquiry on the merits.

Applicants now ask that this order be revised and the first two grounds are that the order passed in 1909 fell under section 247 of the Code of Criminal Procedure—that the case is a summons case and the order amounted to an acquittal. As was said in the case of *King-Emperor* v. *Takasi Nukayya* (1) the offence created by the Workmen's Breach of Contract Act is not the neglect or refusal of the workman to perform the contract but the failure by the workman to comply with an order made by the Magistrate that the workman repay the money advanced or perform the contract. In the present case the complainant did not appear and the complaint being dismissed the Magistrate never made any order. Consequently there was no offence under the Act and Chapter XX of the Code of Criminal Procedure and section 403 of the same Code does not apply.

The only other ground that need be considered is that further enquiry should not be ordered as no action had been taken for nearly three years. If it is a fact that respondent could not discover the whereabouts of the applicants that explains the delay. In the case of *Gurudin Teli* v. *S. Mutu Servai* (2), it was held that although one object of the Act may have been

(1) (1901) I.L.R., 24 Mad., 660. (2) 6 L.B.R., 89.

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to provide a speedy remedy for employers against workmen the main object was to provide for the punishment of workmen who have taken advances and have fraudulently broken their contracts to work.

I dismiss the application.

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*Civil Reference No. 5 of 1912.*

*February 24th, 1913.*

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

## MOMENT v. MOMENT.

*Divorce—two years' desertion not complete at the time of filing of the original plaint—cause of action—dismissal of suit for absence of —s. 10, Indian Divorce Act, 1869.*

The plaintiff petitioned for divorce from her husband on the ground of adultery coupled with desertion. The suit was filed and the decree of the Divisional Court was passed, before the desertion had extended to the statutory two years.

*Held*,—that as there had not been two years' desertion at the time of passing of the decree the latter could not be sustained: and, further, that as the cause of action was not complete at the time of filing the petition the decree could not be sustained even if it had been passed after the desertion had extended to two years.

*Obiter Dicta*.—That a decree for judicial separation might have been granted if asked for; and that further relief could be obtained by filing a fresh suit.

*Wood* v. *Wood*, (1887) L.R. 13 P.D., 22, dissented from.

*Lapington* v. *Lapington*, (1888) L.R. 14 P.D., 21, followed.

*Hartnoll, J.*—Petitioner prayed for a decree for divorce from respondent on the grounds that he had been guilty of adultery coupled with cruelty and desertion. The learned Divisional Judge found the adultery proved, the cruelty not proved and the desertion proved. He accordingly passed a decree for divorce subject to the confirmation of this Court.

The evidence as to the adultery is very meagre, but it is not necessary to come to a decision as to whether it is proved or not, as on another ground it will be seen that the decree cannot be confirmed.

The evidence as to cruelty is insufficient since it rests on the uncorroborated statement of petitioner as to the events of a single day.

As regards desertion the petitioner alleges that respondent drove her out of the house on the 23rd July 1910, that she

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went and stayed with her sister for a month, that she then returned to the house whereupon respondent left the house and never returned. She filed her petition on the 26th February 1912. From the evidence it appears that there was a quarrel between the parties on 23rd July 1910, in consequence of which petitioner left the house which belonged to her. In that on that date she left her husband there was no desertion by him then and so his desertion cannot be said to have commenced on that date. She returned some time subsequent to the 19th August 1910—the date of the letter she found in respondent's pocket. So the date on which the respondent left her and on which his desertion may be said to have commenced must have been a date subsequent to the 19th August 1910. It was probably a day or two after or a few days after that date. She filed her petition on the 26th February 1912. The Divisional Judge in passing his order on the facts on the 8th May 1912 said that it was clear that then there had not been desertion for two years and so adjourned the proceedings till 1st August for further orders. On this latter date he gave the decree for divorce. He evidently took the desertion to have commenced on the 23rd July 1910; but, as I have pointed out, I consider this view incorrect. I am of opinion that the decree should not be confirmed on two grounds.

Section 10 of the Indian Divorce Act says:—

> Any wife may present a petition to the District Court or to the High Court praying that her marriage may be dissolved on the ground that * * * her husband * * * has been guilty * * * of adultery coupled with desertion without reasonable excuse for two years and upwards.

Now when petitioner presented her petition the period of desertion was not two years and so she had no cause of action. She could therefore get no decree on her petition, as it was presented prematurely. This was the view taken in *Lapington* v. *Lapington* (1). It is true that in the case of *Wood* v. *Wood* (2) in a similar case the petitioner was allowed to file a supplemental petition on which, further evidence being given, a decree *nisi* was passed. But I incline to the view taken in *Lapington* v. *Lapington* (1). Further, in the present case a

(1) (1888) L.R. 14 P.D., 21.
(2) (1887) L.R. 13 P.D., 22.

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supplemental petition even was not filed, and so action has been taken solely on a plaint that does not disclose a cause of action. Secondly, the decree is dated the 1st August 1912—a date on which I hold that there had not been desertion for a period of two years, since I hold that the desertion began subsequently to the 19th August 1910.

I would therefore not confirm the decree for divorce.

The petitioner does not want a decree for judicial separation only and so I would dismiss the petition. This will not debar her from presenting a fresh petition, if the desertion has continued and she is able to also prove adultery.

*Fox, C.J.*—I concur.

*Parlett, J.*—I concur.

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*Before Sir Charles Fox, Chief Judge, and Mr. Justice Hartnoll.*

*Civil 2nd Appeal No. 40 of 1912.*

*March 10th, 1913.*

S. K. SUBRAMONIAN PILLAY *v.* 1. P. GOVINDASAWMI PILLAY, 2. P. SUBRAMONIAN PILLAY.

*J. M. Xavier*—for appellant (plaintiff).

*P. M. Chari*—for respondents (defendants).

*Civil Procedure—Appeals, Second—pleadings in—s. 100, Civil Procedure Code, 1908.*

*Trust, Divestment of—*

The pleadings in Second Appeal should refer only to the findings of the lower Appellate Court and not to those of the original Court.

The various means by which a trustee may divest himself of a trust explained.

*Fox, C.J.*—The only appeal open to the appellant is one on grounds mentioned in section 100 of the Code of Civil Procedure, that is to say, that the decision of the Appellate Court—

(*a*) is contrary to law or some usage having the force of law, or

(*b*) has failed to determine some material issue of law or usage having the force of law, or on the ground that—

(*c*) there has been some substantial error or defect in the procedure provided by the Code or by any other law for the time being in force which may possibly

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have produced error or defect in the decision of the case upon the merits.

The grounds of appeal in the case are as follows:—

1. That the lower Courts had erred in law in holding on the evidence that the plaintiff-appellant had divested himself of his rights as Trustee, and had estopped himself from asserting his rights as such Trustee.

2. That the lower Courts have erred in law in having omitted to discuss and consider the legal aspect of the Trusteeship, and how under the provisions of the Trustee Act and the principles of Hindu Law plaintiff-appellant was by his conduct estopped from asserting his rights as Trustee.

3. That the lower Courts have erred in law in not holding on the evidence that plaintiff-appellant was forcibly kept out of the Trusteeship by the defendants-respondents, and that there was at any time any formal renunciation by him of his rights as Trustee.

All the grounds refer to the decisions of both lower Courts. On a second appeal to this Court under section 100 of the Code the decision of the lower Appellate Court is the only one which has to be dealt with under clauses (*a*) and (*b*) of the section. Reference to the original Court's decision in the grounds of appeal is consequently erroneous.

The Divisional Court did not hold that the plaintiff had estopped himself from asserting his rights as Trustee. It held that he had divested himself of those rights and had none left to claim: in fact he was no longer a Trustee under the will.

The Divisional Judge's decision on the facts is final. He found that the plaintiff had acted as Trustee for a time, but that from not later than the beginning of 1901 Pakirisami and the defendants had been in possession and control of the trust property and that since then what work was done on the temple concerns by the plaintiff was done by him as their agent or servant. The learned Judge thought it probable that the plaintiff had voluntarily given up the Trusteeship as part of a family compromise, but was not prepared to hold that the evidence was sufficient to justify a definite finding to that effect.

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His finding, however, is in effect that the plaintiff handed over to Pakirisami the management of the trust property and had abandoned the Trusteeship. Whether he could divest himself of the Trusteeship is a matter of law. The Indian Acts dealing with trusts and trustees do not apply to the case, because the trust is either a public or a private religious or charitable endowment. The matter must be decided on general principles of law and equity and good conscience.

Mr. Lewin says in Chapter XXVI of his work on Trusts that the only modes in which a Trustee can divest himself of his office are the following :—

*First*—He may have the universal consent of all the parties interested ;
*Secondly*—He may retire by virtue of a special power in the instrument creating the trust or a statutory power applicable to the trust ; or
*Thirdly*—He may obtain his release by application to the Court.

The first of these modes is the only one that needs consideration in the present case. The trust is to apply the income of some land to the purposes of a temple and the worship of a Goddess. It is not clear whether the temple is a public or a private temple, but the ancestors of the defendants appear to have been the most prominent supporters of it, and the trust is one created by the will of the defendant's grand-father.

The Divisional Judge has found that the defendant's father and the defendants have been in possession and control of the temple and land for more than ten years prior to the institution of the suit. They could scarcely have been in possession for so long unless all persons interested had consented to the control and management being handed over to Pakirisami when this was done, and under the circumstances it appears justifiable to conclude that all persons interested in the temple and land did consent at the time to the plaintiff handing over the management and divesting himself of the Trusteeship.

The decree of the Divisional Judge appears to be correct. The appeal fails and is dismissed with costs—5 gold mohurs advocate's fee.

*Hartnoll, J.*—I concur.

*Civil Revision No. 137 of 1911.*

*March 13th, 1913.*

*Before Mr. Justice Parlett.*

## J. D. PAPPADEMETRIOU *v.* ROSE HALLIDAY.

*Ormiston*—for applicant (defendant).

*R. S. Dantra*—for respondent (plaintiff).

*Lessor and lessee—lease to two partners of a firm—liability of third partner thereon—use and occupation.*

Two of the partners in a firm rented a house from A; and thereupon the firm went into occupation of the premises. One of the conditions of the deed of partnership was that no agreement on the part of the firm should be made unless assented to and signed by each and every member of the firm. A sued the third partner, who had refused to agree to or sign the lease, for "use and occupation" of the premises.

*Held*,—that under the circumstances the defendant was not bound by the agreement and that in any case no suit for "use and occupation" for a period covered by the lease would lie.

*Ragoonathdas Gopaldas* v. *Morarji Jutha*, (1892) I.L.R. 16 Bom., 568, followed.

*Chinnaramanuja Ayyangar* v. *Padmanatha Pillaiyan*, (1896) I.L.R. 19 Mad., 471, distinguished.

Plaintiff claimed Rs. 900 as compensation for use and occupation of her premises from 16th October 1908 to 30th November 1908 from defendant as a partner in the firm known as the Amphitryon Hotel, which premises—the plaint set out—were rented to that firm at Rs. 600 per mensem. Defendant denied that the premises were rented to the firm, but to De Leo and Vereniki under an instrument in writing to which he was not a party, and he pleaded that as that tenancy was in existence, the suit for use and occupation did not lie. He admitted that the premises were used for the purposes of the partnership during October and November 1908. Plaintiff then admitted the lease filed, but claimed that it was abrogated after 5th June 1908.

The points for decision were whether the lease ceased to operate by agreement: if not, whether the suit for use and occupation lay. The lower Court held, and the decision is final, that the lease was not terminated, but that nevertheless the suit as brought lay, and gave plaintiff a decree as prayed. Defendant applies for revision on the ground that the suit did not lie.

It appears that on 30th January 1908 defendant entered into partnership with De Leo and Vereniki to carry on

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business under the name of the Amphitryon Hotel. Clause XII of the deed of partnership provides that, with certain exceptions which do not apply to the lease now in question, "no partner shall be at liberty to * * * enter into any * * * agreement in the name of the firm, but every such * * * agreement shall be signed by each and every one of the said partners in his individual name and not otherwise." The lease in question was made on 1st May 1908 between plaintiff on the one part and Vereniki and De Leo on the other, and was executed by those three persons alone. The name of the firm does not appear in it. Defendant admittedly refused to agree to the terms of the lease or to sign it. On 5th June 1908 Vereniki left the partnership, which continued between defendant and De Leo till 10th December 1908.

For defendant reliance is placed on *R. Gopaldas and others* v. *M. Jutha and others* (1), which in some respects closely resembles the present case. It was cited in the lower Court but the learned Judge considered it of doubtful authority in view of *C. Ayyangar and others* v. *P. Pillaiyan and others* (2) and further inapplicable as being a suit for rent on the covenant in a lease. It appears, however, from the report that the claim was in the alternative, for rent and for compensation for use and occupation, and it is the decision on the latter claim which is particularly pertinent to the present case. The learned Judge thereon says:—"The claim for use and occupation arises when immoveable property is occupied by the defendant by the permission of the plaintiff. The plaintiffs in this case have transferred, or demised, the land for three years to Wagji; and have, during the continuance of the lease, no power to suffer or permit any one to occupy the shop. They have parted with their interest during the continuance of the lease. The premises, if permissibly occupied during its currency, must be occupied by the permission of Wagji, and not of the plaintiffs." If for the term and the lessee's name were substituted fifteen years and De Leo and Vereniki, the passage cited might have been written about the present case. It was however upon the other part of the decision regarding the

(1) (1892) I.L.R, 16 Bom., 568.
(2) (1896) I.L.R. 19 Mad., 471.

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liability for rent of partners not executing a lease made on behalf of the partnership that the Madras High Court dissented from the Bombay case. On this point the Madras case has nothing in common with the present one, as the following passage from the judgment shows :—

> The question is whether the appellants are liable on the rental agreements executed by the defendants, but not executed by the deceased person whom they represent. It is not denied that the deceased was a partner, nor was it argued in the Court below that the executants had exceeded their powers in taking the leases. * * * By the agreement under which the partners worked any one partner was empowered to take a lease and execute any necessary document, such documents being taken to be binding upon all the partners as if executed by them. In result, therefore, it must be taken that, although the other members of the firm are not mentioned in the agreements, and did not execute them, it was intended that they should operate as if all the members were parties to them. * * * There is nothing to show an intention to make the executants only liable and to exclude the liability of the other partners.

I have referred to the other cases cited in this ruling, but do not find in them authority directly binding in the present case. Here, on the contrary, it is clear that De Leo and Vereniki had no power under the deed of partnership to execute a lease on behalf of the firm; that defendant resolutely refused to agree to the terms of the lease or to sign it, and it cannot be said that it was intended that it should operate as if he were a party to it, and I hold that he was not. But even if he had been, or if by the deed of 5th June 1908 he had succeeded to Vereniki's liability under the lease, the demise effected by that lease would have been a bar to a suit for use and occupation during the continuance of the lease.

I therefore reverse the decree of the Small Cause Court and dismiss the suit with costs in both Courts.

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*Civil Miscellaneous Appeal No.* 153 *of* 1912.

*April 2nd,* 1913.

*Before Mr. Justice Hartnoll, Offg. Chief Judge, and Mr. Justice Young.*

## ISMAIL MAMOON DAWOODJI *v.* THE OFFICIAL ASSIGNEE.

*P. P. Ginwala*—for appellant.

*N. M. Cowasjee*—for respondent.

*Presidency Towns Insolvency Act, 1909, s. 56—fraudulent preference—surety—"creditor."*

The word "creditor" in section 56 of the Presidency Towns Insolvency Act, 1909, (which avoids as fraudulent a payment made by an insolvent

debtor in favour of any creditor with a view to prefer such creditor), means any person who at the date of the payment is entitled, if insolvency supervenes, to claim a share of the insolvent's assets under section 46 of the Act. A surety is included in the latter section, and a payment made to such surety, before he has been called upon to pay as surety, may be deemed fraudulent and void as against the Official Assignee.

*In re Paine, Exparte Reid*, (1897) 1 Q.B.D., 122; *In re Blackpool Motor Car Company, Limited. Hamilton.* v. *Blackpool Motor Car Company, Limited*, (1901) 1 Ch. Dn., 77; followed.

*Hartnoll, Offg. C.J.*—The appellant petitioned for an order that he rank as a secured creditor in respect of a sum of Rs. 8,068 and that certain promissory notes of a face value of Rs. 7,880-5-6 were subject to a lien in his favour. The sum of Rs. 8,068 were made up as follows:—He had stood security for the insolvents to Messrs. Finlay, Fleming & Co. and on account of this had paid them Rs. 2,963-14-0. He had also guaranteed a debt of Rs. 4,500 to A. K. A. M. Sivaraman Chetty and had paid it. The insolvents also owed him Rs. 605 for goods supplied. The insolvents were adjudged insolvent on the 25th November 1910 on the petition of Messrs. Bume & Rief. He did not pay Messrs. Finlay, Fleming & Co. until the 30th December 1910 nor Sivaraman Chetty until the 31st January 1911. His case is that prior to the insolvency he was pressed by Messrs. Finlay, Fleming & Co. and Sivaraman Chetty and that he represented matters to the insolvents who sold goods from their Mandalay shop to certain persons, who in their turn executed promissory notes for the value of the goods in his favour. The notes bear date between the 9th and 18th November 1910.

The Official Assignee opposed the claim on the grounds that the promissory notes were given without consideration, and that there was a fraudulent preference within the meaning of section 56 of Presidency Towns Insolvency Act, and the learned Judge on the Original Side disallowed the claim on these grounds.

As regards the question of consideration for the notes I am of opinion that between the insolvent and the appellant there was consideration for them. The consideration was the contingent liability of the appellant on his guarantee—a liability which at the time the notes were executed in his name it was

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undoubtedly clear he would have to discharge in view of the state of affairs of the insolvents.

There remains the question of whether there was a fraudulent preference within the meaning of section 56 of the Act. The first point is whether appellant was a creditor of the insolvents within the meaning of that section when the notes were executed in his name, for he had not at that time paid Messrs. Finlay, Fleming & Co. and Sivaraman Chetty. The corresponding section of the English Bankruptcy Act is section 48, and they practically agree with each other. In the case of *In re Paine, Exparte Reid* (1), it was held that the word "creditor" in section 48 means any person who at the date of payment is entitled, if bankruptcy supervenes, to prove in the bankruptcy and share in the distribution of the bankrupt's estate, that a surety who has a right of proof under section 37 of the Act in respect of his contingent liability as surety is such a person and that a payment therefore to or for the benefit of a surety before he has been called on to pay as surety may be a fraudulent preference. This decision was followed in the case of *In re Blackpool Motor Car Company, Limited. Hamilton* v. *Blackpool Motor Car Company, Limited,* (2), where it was held that a charge given to the surety before he has been called on to pay as surety may be a fraudulent preference. Section 37 of the English Act and section 46 of the Presidency Towns Insolvency Act, which deal with debts provable in insolvency, are practically of the same import and so the English decisions which I have quoted are authority for holding that in Rangoon the word "creditor" in section 48 of the Indian Act includes a surety before he has been called on to pay as surety, and I would hold accordingly, as my views are the same as those expressed in the English cases quoted. It is now for consideration as to whether there has been a transfer of property from the insolvents to appellant with a view to giving the latter a preference over the other creditors. That there has been such a transfer is clear. The promissory notes should have been in insolvents' favour, as they were the sellers of the goods; but they arranged that they should be

(1) (1897) 1 Q.B.D., 122.
(2) (1901) 1 Ch. Dn., 77.

made out in the name of appellant—in other words they transferred to appellant the debts due to them from the purchasers on account of the goods. Looking at the facts and circumstances I am also of opinion that the transfer was made with a view to giving appellant a preference over the other creditors.

There is no trustworthy evidence to show that appellant ever put any pressure on the insolvents. Moreover, he was not in a position to do so, as at the time of the transfer he had not paid any money on behalf of the insolvents and so there was no liability on their part to him. The parties were uncle and nephew. The very way of making the transfer gives the transaction a clandestine appearance. Mandalay far from Rangoon is taken as the scene of the operations. Other goods of the insolvents are at the same time consigned to Rangoon in the name of another uncle. If the transactions as to the notes were to hold good and the money due on them was all recovered, appellant would recover more than all he has paid to Messrs. Finlay, Fleming & Co. and Sivaraman Chetty and so be no loser by his guarantee; whereas, if the purchasers had paid insolvents or given the notes in their favour, appellant after having paid the two creditors of insolvents would have only been entitled to share rateably with the other creditors. The notes were made out in appellant's name just before the insolvency, and looking at the relationship of insolvents and appellant it is reasonable to hold that they both knew that bankruptcy must come and was imminent.

There seems to me to be no doubt that the facts and inferences to be drawn from them show that the insolvents had the notes put into appellant's name so as to save him from loss on his guarantee and so to favour him over the other creditors, and that that was the substantial and dominant reason in the minds of the insolvents when they acted as they did. The reason for their action was not pressure.

I would therefore hold that the transfer as evidenced by the promissory notes executed by the purchasers in appellant's favour was a fraudulent preference of appellant by the insolvents within the meaning of section 56 of the Act and is therefore void as against the Official Assignee.

The mere undertaking of appellant to be surety for

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insolvents' debts could not put him in a better position in respect to the estate of the insolvents than other unsecured creditors. To make himself in a better position than others he should have taken effectual means—such as paying the sums due on his guarantee and then pressing the insolvents and so compelling them to pay him or give him a lien on their property.

There is absolutely no reason to declare that appellant is a secured creditor in respect of the Rs. 605 worth of goods supplied to the insolvents.

I would therefore dismiss this appeal with costs—3 gold mohurs.

*Young, J.*—I concur.

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*Special Civil 2nd Appeal No.* 233 *of* 1912.

*April* 3*rd*, 1913.

*Before Mr. Justice Parlett.*

MI NAFIZU NISSA *alias* NOR E DA *v.* BODI RAHMAN.

*A. B. Banurji*—for appellant (defendant).

*K. W. Bonnerjee*—for respondent (plaintiff).

*Muhammadan Law—ante-nuptial agreement—husband undertaking to live with wife's parents—divorce—delegation to wife of power to pronounce the "triple talak."*

A, a Muhammadan, married B, a Muhammadan girl under fifteen years of age; promising at the time (*inter alia*) to live with her parents for three years and not to ill-use her; and furthermore delegating to her the power to pronounce the "triple talak" (divorce) in the case of a breach of any of his stipulations.

A failed to carry out his promise as to residence and also ill-treated her and B took advantage of the power delegated to her and pronounced the "triple talak." Subsequently A sued for restitution of conjugal rights. The lower Appellate Court gave A a decree, holding that the promise was void according to Muhammadan Law and on grounds of public policy; and that in any case the delegation of the power to divorce was of no effect, since such a power can, under Muhammadan Law, only be exercised immediately on delegation.

*Held*,—that under the circumstances there was nothing in Muhammadan Law to render the promise as to residence invalid, nor was it void for any other reason: and that the Muhammadan Law allowed a delegation of power to divorce to be exercised, not only immediately, but on the happening of a certain event.

*Tekait Mon Mohini Jemadai* v. *Basanta Kumar Singh*, (1901) I.L.R. 28 Cal., 751, distinguished.

*Afazulla Chowdry* v. *Sakina Bi*, 1 L.B.R., 351; *Hamidoolla* v. *Faizunnissa*, (1882) I.L.R. 8 Cal., 327; *Meer Ashruf Ali* v. *Meer Ashad*

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*Ali*, 16 W.R., 260; *Ayatunnessa Beebee* v. *Karam Ali*, (1908) I.L.R. 36 Cal., 23; followed.

*Badarannissa Bibi* v. *Mafiattala*, 7 Ben. L.R., 442, referred to.

The parties are Muhammadans and respondent sued appellant for restitution of conjugal rights. His suit was dismissed by the Township Court but decreed by the District Court.

It appears that they were married on 22nd June 1909, a written contract being drawn up at that time providing, *inter alia*, that plaintiff should not use any indecent, reproachful or abusive language to appellant; should not assault or pain her in other ways; and should live with her at her father's house for three years and afterwards at a place of her choice, and continuing: " If I violate any one of the aforesaid terms, then she will have full power to leave me for ever, to give three *talaks* (irrevocable divorce) to herself and to take a second husband; I delegate my authority of divorce to her; at that time or afterwards whenever she will take another husband, I shall have no claim upon her." The plaint sets out that they lived in the appellant's parents' house till May 1910, when a separate house was built in which they lived until about the middle of October 1910, when appellant left and returned to her mother and declined to come back to plaintiff. It appears that appellant's father is dead, but that her mother built the second house in the same compound as her own house. The written statement sets out that in the middle of October 1910 plaintiff beat the appellant and left the house, and that she availed herself of the authority delegated to her in the marriage contract and pronounced three *talaks* to herself by reason of the conditions having been broken, among other ways, by plaintiff having abused and severely beaten and ill-treated her on several occasions and by his failure to live for three years in her parents' house. The Township Court held that ill-treatment was proved, and also breach of the condition as to residence, and that appellant was justified in exercising the power of divorcing herself delegated to her by the contract, and did so, and that the marriage was therefore dissolved; the suit was accordingly dismissed.

The main grounds of first appeal were that the condition as to residence was unreasonable and void; that the ill-treatment

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was not proved; and that the divorce, if any, was invalid. The District Court held that the condition as to residence was opposed to public policy and void; that the ill-treatment, if any, was trivial; and that as the power of divorce was not exercised immediately upon its being delegated, the delegation became of no effect, and there was no valid divorce. On the first point the District Court was influenced by the ruling in *Tekait Mon Mohini Jamadai* v. *Basanta Kumar Singh* (1) which refers solely to Hindu Law. In the judgment in that case the learned Judges emphasize the fundamental difference between marriage under Muhammadan and under Hindu Law; for whereas under the former it is entirely a contract, under the latter "though a contract it is also a sacrament; it is more religious than secular in character." Sir R. K. Wilson in his Digest of Anglo-Muhammadan Law (2) points this out and remarks that the above ruling is of little assistance in cases under Muhammadan Law. The rule which that learned author gives, in paragraph 56 of the above-mentioned work, is that "a condition that the wife shall, though adult, be at liberty to live in the house of the parents is void"; and therefore it certainly does not cover a case like the present where the wife at the time of the marriage was under 15 years of age. The case of *Afazulla Chowdry* v. *Sakina Bi* (3) is however directly in point, and though it was quoted to the District Judge and binding upon him, he does not appear to have considered it. That case expressly lays down that a written agreement such as that now in question is valid under Muhammadan Law: the condition was to remain in force for only three years, when the wife would still be under 18 years of age and a minor. It is however unnecessary to consider whether plaintiff broke this condition as the appellant's case is that a course of ill-treatment culminated in a severe assault upon her, after which she returned to her mother's house, and that it was this treatment which led her to exercise her power of pronouncing a divorce.

The District Judge considered the evidence of ill-treatment exaggerated, which I think it is, though not so much so as he

(1) (1901) I.L.R. 28 Cal., 751.
(2) 4th Edition, p. 140.
(3) 1 L.B.R., 351.

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believed, nor do I agree with him in doubting its occurrence altogether. Plaintiff himself has clearly lied, in that both in his plaint and in his evidence he stated that he had built the house they lived in, whereas he had subsequently to admit that his mother-in-law built it. But as regards the other witnesses I am unable to see that they are shown to have perjured themselves. His witnesses speak to having visited him and his wife from time to time up to a short period before they separated and finding them apparently on good terms: this may be so, but it does not disprove that on several occasions he assaulted her, as the defence evidence goes to show he did. Though some of that evidence may be exaggerated, that of Inmizudin Moulvi, a schoolmaster and relative of plaintiff, is not so and may be safely accepted. He says that the girl's mother three or four times told him that plaintiff had assaulted her: a month before the final scene he was sent for as he had assaulted her and found her weeping and plaintiff admitted having struck her. On the last occasion her mother came to call him again and on his way to the house plaintiff himself met him and told him that he had struck his wife, and his mother-in-law was in consequence calling a meeting of elders at the house. It appears that several people assembled there and, though plaintiff then denied the assault, appellant repeated that it had been committed and that he had often ill-treated her before and did not carry out the terms of the marriage contract, and she thereupon gave herself the triple *talak*, whereupon plaintiff used some filthy abuse. I have no doubt that he did repeatedly assault her, and though not so severely as she tries to make out, it must be remembered that at the time of the last assault she was barely 16, and he a man of 26. No doubt she at last could put up with it no longer, and on the next occasion determined to avail herself of the authority given her in the contract, and when it arose she sent her mother off at once to call the Moulvi and other persons to witness the formality. Plaintiff seems to have been alarmed and also gone for the Moulvi, perhaps hoping he would smooth matters over as he had done on previous occasions. I consider the condition not to assault her was a reasonable one, and its repeated breach entitled her

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to divorce herself as she did. [See *Hamidoolla* v. *Faizunnissa* (1).]

The District Judge, however, considered that the power must be exercised as soon as conferred, without waiting for any breach of conditions, and therefore the delegation of power became of no effect. He does not quote authority for this. The text books refer to an option being given to the wife which she must exercise if at all, at once, or within a specified time, but they also show that the option may be made exercisable only on the happening of a certain event. This is referred to in the case of *Badarannissa Bibi* v. *Mafiattala* (2), where the following quotation from Baillie, Chapter II, page 218, is given: "Repudiation is said to be suspended or attached to a condition when it is combined with a condition and made contingent on its occurrence." And again in *Meer Ashruf Ali and another* v. *Meer Ashad Ali* (3) it is said: "A discretion to repudiate when attached to a condition need not be limited to any particular period but may be absolute as regards time." For the appellant reliance is placed on *Ayatunnessa Beebee* v. *Karam Ali* (4), where it was held that "when a power is given to a wife by the marriage contract to divorce herself on her husband marrying again, then if her husband does marry again she is not bound to exercise her option at the very first moment she hears the news. The injury done to her is a continuing one and it is reasonable that she should have a continuing right to exercise the power." I cannot agree that the assaults were in the same sense a continuing injury, though they were a cumulative one. No doubt she put up with them for a time till she saw there was no hope of improvement, and on the next repetition of his ill-treatment she exercised her power at once. I am of opinion that the divorce she then pronounced was a valid one.

I reverse the decree of the District Court and restore that of the Township Court dismissing the suit, with costs in all Courts—advocate's fees in this Court 2 gold mohurs.

(1) (1882) I.L.R. 8 Cal., 327.
(2) 7 Ben. L.R., 442.
(3) 16 W.R., 260.
(4) (1908) I.L.R. 36 Cal., 23.

*Before Mr. Justice Parlett.*

*Criminal Appeal No. 163 of 1913.*

*April 10th, 1913.*

## BA THIN *v.* KING-EMPEROR (RANGOON ELECTRIC TRAMWAY AND SUPPLY CO., LTD).

*Agabeg*—for appellant.

*Dawson*—for R. E. T. & S. Co., Ltd.

*Indian Tramways Act, 1886—bye-laws framed under the—break of journey—necessity for purchase of fresh ticket.*

A passenger on a tramcar took and paid for a ticket entitling him to travel for a certain distance; he alighted at an intermediate stopping place, and boarded another tramcar, which was performing the same journey, in order to get to the point to which he might have travelled by the first car. He refused to pay the fare demanded of him on the second car, contending that he was entitled to complete his journey with his original ticket.

*Held*,—that the contract of carriage had been determined by the passenger's own act, and that he was rightly convicted for travelling on the second tramcar without paying his fare.

*Bastaple* v. *Metcalfe*, (1906) 2 K.B.D., 288, followed.

*Ashton* v. *Lancashire and Yorkshire Railway Co.*, (1904) 2 K.B.D., 313, referred to.

The facts in this case were not in dispute. They are as follows. The accused entered a tramcar No. 61 and purchased a ticket for two annas covering the stage from Sule Pagoda to Kemmendine. He alighted at China Street, which is but a small portion of the stage, and after obtaining refreshments boarded the next car (No. 15) going in the same direction. On being requested to purchase a ticket on car No. 15 he refused to do so, producing the ticket issued to him on car No. 61 and claiming to continue his journey to Kemmendine on it without further payment. Upon being told that he could not do so he became quarrelsome, left the car at Morton Street, refused to pay anything and eventually aimed a blow with a knife at the tramway Inspector. For this he has been convicted and sentenced under sections 324 and 511, Indian Penal Code, and no grounds are shown for interfering with that finding and sentence. But he was further convicted of an offence under section 31 of the Indian Tramways Act (XI of 1886) for having travelled from China Street and evaded payment of toll and has been fined Rs. 10. The appeal was admitted for hearing as regards that conviction and sentence alone.

It is urged that an offence has not been made out under the

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abovenamed section as the accused did not evade or attempt to evade payment of toll; that having paid the fare from Sule Pagoda to Kemmendine he was entitled to travel the entire distance whether on the same or on different cars. In other words it is urged that he was entitled to break his journey and continue it by another car. For the Company it is contended that he was not so entitled and reference has been made to Rules 7 and 8 made by the Company with the previous sanction of the Local Government under section 24, sub-section (*3*), and section 25 of the Act, which provide as follows:—

Rule 7. Each person shall as soon as possible after entering the car pay to the conductor the fare legally payable for his journey and obtain a ticket therefor.

Rule 8. Each passenger shall when required so to do show his ticket to the conductor or any duly authorized servant of the Company or pay the fare legally demandable for the distance travelled over by such passenger.

Rule 2. Any person infringing Rules 7 or 8 shall be liable to a fine not exceeding Rs. 10.

Section 24, sub-section (*3*), empowers the promoter or lessee of a tramway with the previous sanction of the Local Government to make rules consistent with the Act, and with the order or any rules made under the Act, for regulating the travelling in any carriage belonging to him, and section 25 empowers him to direct that a breach of any such rule shall be punishable with fine which may extend to Rs. 20. This clearly covers power to make such rules as Rules 7 and 8 quoted above and to fix a penalty for their breach such as is fixed in Rule 2. It was however argued that the Act does not empower the authority making a rule to create an offence but that the penalty for breach of the rules is to be recoverable by civil suit. I need merely say that the words "a breach of it shall be punishable with fine" cannot possibly bear any such meaning. No Indian cases were cited, but the English case of *Bastaple* v. *Metcalfe* (1) was relied on for the Company and it is almost identical with the present case. There a passenger on a tramcar took and paid for a ticket entitling him to travel for a certain distance, he alighted at an intermediate stopping place, walked a quarter of a mile in the direction of his destination, and got on to another tramcar, which was performing the same journey, in order to get to the point to which he might have travelled

(1) (1906) 2 K.B.D., 288.

by the first car. He refused to pay the fare demanded of him on the second car, contending that he was entitled to complete his journey with his original ticket :—

*Held*,—that the contract of carriage had been determined by the passenger's act, and that he was liable to be convicted for travelling on the second tramcar without paying his fare.

It appears in that case that the local authority had framed a bye-law in almost identical terms with those of Rule 7, providing *inter alia* that each passenger should upon demand pay to the conductor the fare legally demandable for the journey or for the stage thereof for which it should be demanded, and should forthwith take a ticket from the conductor for the fare so paid. Another bye-law provided a penalty. In holding that the passenger ought to have been convicted for travelling on the second tramcar without paying his fare the Lord Chief Justice said :—

What we have to consider is what is the true view to take when a passenger, without giving notice to the conductor, gets out of a tramcar under circumstances which would ordinarily amount to a termination of his transit and then claims to proceed without further payment, not by the same car, but by another. In my view the contract was a contract to carry the respondent on that route on a particular car, and not on a succession of cars ; it was not a contract which allowed him to get in and out of the cars on that route as often as he liked. The contract was determined by the respondent's own act.

Darling, J., said :—

I am of the same opinion. I think that when the respondent took his ticket there was a contract made between him and the tramway company by which they contracted to carry him to Holy Rood, but that the respondent might, if he chose, determine the contract by getting off the tramcar before the end of the journey. I cannot imagine that the respondent had the right to say, even with regard to the particular car by which he travelled, that he would get on and off whenever he pleased. I think that, when he became a passenger, he remained a passenger until he left the car and went away from it ; I do not say that if he left it for a mere temporary purpose, such as was suggested in argument, of buying something in a shop while the car was waiting, the contract would necessarily be determined, but I am most clearly of opinion that the contract was at an end when he got off the car and allowed it to continue its journey. If he got on to another car in order to go to the place to which he originally intended to travel it would necessitate the making of a fresh contract, and he could not demand that the corporation should renew without any consideration the contract which he had himself already determined.

It had been previously decided in *Ashton* v. *Lancashire and Yorkshire Railway Company* (1), that a contract by a railway

(1) (1904) 2 K.B.D., 313.

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company to carry a passenger from one station to another does not, in the absence of special terms, entitle the passenger to break the journey at any intermediate station, and the reasons of the learned Judges for so holding are applicable to the present case. I am of opinion, therefore, that the accused might have been convicted of a breach of either Rule 7 or Rule 8, and inasmuch as he did travel from China Street onwards and evaded payment of toll that his act also constituted an offence under section 31 of the Act.

The appeal is dismissed.

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*Special Civil 2nd Appeal No.* 246 *of* 1911.

*May 6th,* 1913.

*Before Mr. Justice Parlett.*

C. BURN *v.* D. T. KEYMER.

*F. S. Doctor*—for appellant (defendant).
*P. N. Chari*—for respondent (plaintiff).

*Res judicata—foreign judgment—judgment given "ex parte"—s. 13, Civil Procedure Code, 1908.*

A foreign judgment by a Court of competent jurisdiction, even if pronounced *ex parte*, is binding on a Court in British India if the defendant, though given an opportunity to appear and defend, declined to do so.

*Bikrama Singh (Rajah of Faridkot)* v. *Bir Singh*, (1888) P.R. No. 191 (p. 491); *The Bank of Australasia* v. *Nias*, 16 Q.B.R., 717 (Smith's Leading Cases, Vol. II, 663); *Reimers* v. *Druce*, 23 Beav., 150; *Sreehuree Bukshee* v. *Gopal Chunder Samunt*, 15 W.R., 500; followed.

*The Delta*, (1876) L.R. 1 P.D., 393, referred to

*Jones* v. *Zahru Mal*, (1889) P.R. No. 66 (p. 210), distinguished.

On the 1st March 1909 respondent took out a writ of summons in the King's Bench Division of the High Court of Justice in England on a statement of claim for £59-16-11 and costs against appellant who was residing in Burma. The writ was specially endorsed under Order III, Rule 6, of the Rules of the Supreme Court, appearance to be made within ninety days of the date of service. It was served on appellant on the 5th of April, and on the 29th of June his solicitors entered an appearance for him. On the 22nd August he swore an affidavit setting out his defence to the action to which on the 15th of September plaintiff filed an affidavit in reply, and on the 21st of September an order was passed granting appellant leave to defend the action upon paying into Court £59-16-11 within six weeks. On the 23rd September his solicitors communicated the order to

the appellant and asked him to remit the amount to them if he decided to defend the action. He may not have received their letter in time to send a remittance by post before the 2nd November, and he did not telegraph it, he says, on the score of expense. Instead of doing so, he, on the 18th of October, wrote a letter to his solicitors affecting to believe that the Court's order of the 21st September mentioned six weeks by mistake for six months. This letter did not reach his solicitors till after the 2nd November, on which date judgment had been entered for the plaintiff for the amount of the writ with costs £19-3-6, or £79-0-5 in all. Instead of taking steps to get this judgment in default set aside and to obtain leave to defend the action in accordance with the rules of the Supreme Court, appellant did nothing, again, he says, on the score of expense. The present suit was brought on the 30th March 1911 on the judgment to recover Rs. 1,185-5-0, the equivalent of £79-0-5. It has been decreed with costs and the decree affirmed with costs on first appeal. The main ground in this second appeal is that the judgment was not given on the merits of the case within the meaning of section 13 of the Civil Procedure Code, that it is therefore neither conclusive nor *res judicata*, and that a suit based solely upon it as this one is, must fail. For the respondent it is urged that the judgment sued on was not *in absentem*, defendant having entered appearance and having been granted leave to defend on terms, and that being passed after consideration of two affidavits of plaintiff's and one of defendant's, it was given on the merits.

For appellant, paragraph 224 of Hukm Chand's Res Judicata, First Edition, is relied upon, in which occurs the following passage:—

> In *The Delta* (1), Sir Robert Phillimore appears to have held that a judgment by default is on a matter of form and not on the merits; and therefore not entitled to recognition. It appears that in that case there had been an enquiry into the merits. Mr. Pigott says:—" This principle is also to be found in many foreign decisions," but that it " should certainly be strictly limited to judgments coming from countries in which a judgment by default is a matter of form only, the law there not requiring an examination into the merits (2). In British India an *ex parte* judgment is preceded by an enquiry into the merits and therefore can never be a matter of form only. In *Bikrama Singh* v. *Bir Singh* (3) the

(1) L.R. 1 P.D., 393. (2) Pig. For. Jud., 208.
(3) (1888) P.R. No. 191 (p. 491).

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judgment sued upon had been passed on an *ex parte* enquiry, and the Punjab Chief Court held that it could not be examined to determine whether it was erroneous on the merits. The decision of the Chief Court in *Jones* v. *Zaru Mal* (1) is not against that view, as it proceeded on the ground that the *ex parte* judgment discussed "none of the merits of the case as regards defendants 1 and 2, and more inquiry should have been made; notwithstanding the non-appearance of defendants 1 and 2." Mr. Frizelle, in delivering the judgment of the Court, said:—"Had defendants appeared and pleaded in the Nahan Court, plaintiff no doubt would have been prepared with further evidence, but their not having done so, does not make the judgment one on the merits, and the only remedy I can see is that plaintiff should now be allowed to prove his case on the merits, and that there should be a full inquiry and a decision on the merits as if the suit had been originally brought in the Umballa Courts." The learned Judge expressly admitted, however, that to bar an enquiry into the merits, "the judgment should be one on the full merits, and in an *ex parte* case as far as they can be ascertained *ex parte*."

It appears to me that the judgment sued on cannot be regarded as a matter of form only. The case of *Bikrama Singh* (2) referred to above is a strong authority in respondent's favour. There, as here, defendant had notice and did not avail himself of it, and the suit was decreed against him *ex parte*. Plaintiff sued on the judgment and succeeded. The following passage occurs in the judgment:—

The general tendency of the later decisions is in favour of the conclusiveness of a foreign judgment and against its being open to examination on the merits, provided that the Court which pronounced it was of competent jurisdiction, and that the person against whom it is sought to be enforced had an opportunity of defending himself before that Court.

The case of *Jones* v. *Zahru Mal* (1) decided that:—"It is a good defence to a suit brought on a foreign judgment that it has not been given on the merits: when therefore it appeared that the judgment sued upon was not on the merits at all, and only professed to be so sufficiently to justify the passing of an *ex parte* decree (the defendant not having appeared, and defended the suit in the Foreign Court), this was not enough, as even in an *ex parte* case the judgment should be on the merits as far as they can be ascertained *ex parte*," and in the course of the judgment it is remarked that:—"If they (defendants 1 and 2, received due notice from the Court, and the case had been decided on the merits, they would not be now entitled to plead in the same way as if they had appeared and pleaded in the Foreign Court."

(1) (1889) P.R. No. 66 (p. 210).
(2) (1888) P.R. No. 191 (p. 491).

In *The Bank of Australasia* v. *Nias* (1), it was said :—"It is open to the defendant to show that the Foreign Court had not jurisdiction in the subject-matter of the suit or that he was never summoned to answer and had no opportunity of making his defence," and in *Reimers* v. *Druce* (2), that :—"A foreign judgment sought to be enforced in this country was examinable for the following purposes, and for these only, namely—1st. For the purpose of shewing that the defendant abroad had no notice of the suit, and never knew of it until the judgment was given."

*Sreehuree Bukshee* v. *Gopal Chunder Samunt* (3) lays down that the rule in the case of foreign judgments sought to be executed in our Courts is that they must finally determine the points in dispute and must be adjudications upon the actual merits, and that they are open to impeachment on the ground that the defendant was not summoned or had no opportunity of defence. Here defendant was both summoned and entered an appearance and had an opportunity of defending the action, and though the time granted may have been insufficient he neither applied for an extension nor to reopen the case and defend the action as he might have done under the rules.

In view of the above authorities, I consider the judgment must be held to have been given on the merits of the case.

It is moreover conceded and indeed urged by the appellant that the doctrine of foreign judgments in the Civil Procedure Code is based on the principle of *res judicata*, and I feel no doubt that the judgment sued on is *res judicata* under section 11 of the Civil Procedure Code. A defendant cannot avoid the application of the principle of *res judicata* by saying that he did not appear at the trial of the suit, and the plaintiff who has got an *ex parte* decree on proof of his title, or on failure of the defendant to prove a defence, the onus of proving which was on him, cannot be deprived of the full benefit of the decree which he has obtained by the fact that the defendant did not appear in Court to protect his own interest.

On the main ground I hold that the appeal fails.

(1) 16 Q.B.R., N.S., 717 ; (Smith's Leading Cases, Vol. II, p. 663).
(2) 23 Beav., 150 [English Reports—Rolls, 53, p. 57].
(3) 15 W.R., 500.

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A minor ground was raised that the lower Appellate Court erred in granting an advocate's fee in its decree. The plaintiff in England sued by his duly constituted agent and attorney Mr. Villa, who happens to be a Barrister. Mr. Villa signed and verified the plaint and was represented in the Court of first instance by a pleader and was therefore correctly granted a pleader's fee in the decree of that Court. In the lower Appellate Court, however, Mr. Villa appeared in person and was granted Rs. 59-4-0 as advocate's fee. This I consider was wrong. Under Order III a party to a suit or his duly constituted agent and attorney may appear and act personally if he chooses. But the mere fact that he or his attorney happens to be a member of the legal profession entitled to practise in that Court does not, I consider, enable him to charge the other side an advocate's fee.

The decree of the Divisional Court is therefore modified by the omission of the order for appellant to pay respondent Rs. 59-4-0 costs in that Court. Appellant will pay respondent's costs in this appeal.

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*Civil Revision No.* 113 *of* 1912.

*May 6th,* 1913.

*Before Mr. Justice Hartnoll, Offg. Chief Judge, and Mr. Justice Young.*

KALI KUMAR SEN *v.* 1. N. N. BURJORJEE, 2. R. N. BURJORJEE, 3. B. N. BURJORJEE, 4. BOMANJEE N. BURJORJEE, 5. TEHMINA DORABJEE SAKLAT, 6. KHORSHADE CURSETJEE LIMJEE, 7. GOOL D. MEHTA, 8. BEEKHAIJI A. MEHTA, 9. HEERABI N. BURJORJEE, 10. MUNNEEJI MANECK SATHNA [Heirs and Legal Representatives of NOWROJEE BURJORJEE (deceased) and represented by their common Manager, the 1st Defendant, N. N. BURJORJEE].

*D. N. Palit*—for applicant (plaintiff).
*R. S. Dantra*—for respondents (defendants).

*Pauper suit—failure to comply with the provisions of Order 33, Rule 2, of the Civil Procedure Code, 1908—effect of Civil Procedure Code, s. 141, and Order 33, Rules 2 and 5.*

An application for permission to sue as a pauper not accompanied by the schedule of property prescribed by Order 33, Rule 2, of the Civil Procedure Code, 1908, is not "framed and presented in the manner prescribed

by Rule 2" and should be rejected under Order 33, Rule 5. The explicit provisions of Order 33, Rule 5, are not over-ridden by section 141 of the Code. Maxim "*Generalia specialibus non derogant*" applied.

On the 3rd January 1912 applicant applied to be allowed to sue as a pauper. He gave the names of four persons as defendants. No schedule of property belonging to him was annexed to his application, but he stated in it that he was not entitled to property worth Rs. 100 besides his clothing and bedding and the property the subject-matter of the suit, and that he was a pauper within the meaning of the explanation to Rule 1, Order 33, of the Civil Procedure Code. In an affidavit attached he also made a statement of the same nature. In verifying the application he declared that:—"What is stated in all the paragraphs of this plaint are true to my own knowledge." The District Court did not reject the application under Order 33, Rule 5, but proceeded under Order 33, Rule 6. It was then discovered that the names of the defendants were not correctly given and on the 28th February an amended application was put in, giving the names of ten defendants. There was the same statement as to property contained in it, and the verification declared that:—"What is contained in all the paragraphs of this plaint are true to my information and belief." The date is given as "this day of February 1912." Notice was then issued to the other defendants under Order 33, Rule 6. On the 15th July 1912 the District Judge rejected the application, as neither application was verified as required by Order 6, Rule 15, and so they were not framed and presented as prescribed by Rules 2 and 3 of Order 33. The order was clearly passed under Order 33, Rule 7, and should have been a refusal to allow to sue as a pauper. Against this order this application in revision is made. At the hearing counsel for respondents pointed out that there was no schedule of moveable and immoveable property annexed as required by Order 33, Rule 2.

The verification of the first application dated the 3rd January was clearly defective, as from the applicant's statement he could not have known personally of his own knowledge certain of the facts stated in the application, as he says that he was only born in the year 1892. The verification of the second application is not strictly in the form prescribed by Order 6,

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Rule 15; but perhaps it may be held to comply substantially with the rule; but the further question arises as to whether the second application could legally be received in view of the stringent provisions of Order 33, Rule 5, and the absence in Order 33 of any provision allowing amendments, and consequently whether orders should not have been passed on a consideration of the first application only. But it does not seem necessary to decide this point, as both applications fail to comply in another respect with the provisions of Order 33, Rule 2. There is no schedule of the moveable or immoveable property belonging to the applicant with the estimated value thereof annexed to either application, and the statements as to applicant's property which I have referred to cannot be said even to substantially comply with the rule. Hence, on the face of the application the applicant is subject to the prohibition specified in Order 33, Rule 5 (*a*). Section 141 of the Code cannot be held to apply in view of the express provisions of Order 33, Rule 5.

As for interference in revision there are absolutely no grounds for doing so.

I would accordingly reject the application with costs. A counsel's fee of one gold mohur is allowed.

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*Criminal Revision No. 115A of 1913.*

*June 4th, 1913.*

*Before Mr. Justice Twomey.*

## KING-EMPEROR *v.* PO THIN.

*Criminal Procedure—sentence of imprisonment—"jail," Meaning of the word, in the Code of Criminal Procedure—ss. 383, 541, Code of Criminal Procedure, 1898.*

It is illegal to sentence any person to confinement in a Police lock-up.

In this case the accused was convicted of an offence under section 309, Indian Penal Code, and was sentenced to suffer seven days' simple imprisonment in the Lemyethna police lock-up. The Magistrate's order was illegal. He had no power to sentence the accused to suffer imprisonment in a police lock-up. Section 383 of the Code of Criminal Procedure directs that an accused sentenced to imprisonment shall be forwarded to a jail with a warrant. A jail is a prison within the meaning of the Prisons Act, 1894, and the Prisoners Act, 1900, but the terms "prison" and "jail" do "not include any place for the con-

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finement of prisoners who are exclusively in the custody of the police" [*see* section 3 (*l*), Prisons Act, 1894]. The Local Government could of course direct under section 541, Code of Criminal Procedure, that persons liable to be imprisoned may be confined in such a place; but the Local Government has not issued any such direction. The Magistrate should not have mentioned the place of confinement in his order at all, and the warrant should have been addressed to the Superintendent of the District jail or other jail to which prisoners sentenced in Lemyethna are ordinarily committed.

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*Before Mr. Justice Twomey.*

*Criminal Revision No. 323A of 1913.*

KING-EMPEROR *v.* 1. PO HAN, 2. NYO E.

*July 11th,* 1913.

*Offence, Abetment of—s. 3, Whipping Act, 1909—s. 109, Penal Code.*

Persons (other than juvenile offenders) convicted of *abetment* of theft (or of any other offence specified in section 3 of the Whipping Act, 1909) cannot be punished with whipping under the provisions of that section.

The Cantonment Magistrate convicted the 2nd accused of abetment of theft under section 380 read with section 109 of the Indian Penal Code and sentenced him to undergo a whipping. The 2nd accused is not a juvenile offender as defined in the Whipping Act and it is necessary to consider whether the sentence of whipping passed upon him is authorized by section 3 which provides this punishment for the substantive offence of theft but makes no mention of abetment.

The words "punishment provided for the offence" in section 109 of the Indian Penal Code mean the punishment provided for the offence either in the Penal Code or in some special or local law (*see* sections 40 and 41). It might be argued that the Whipping Act is a "Special Law" within the meaning of section 41, as it is a law "applicable to a particular subject," namely, whipping, and accordingly that the abetment of theft is punishable with whipping because this form of punishment is provided for the substantive offence, theft, in section 3 of the Whipping Act. But it appears to me that the special laws contemplated in sections 40 and 41 of the Code are only laws, such as the Excise, Opium and Cattle Trespass Acts, creating

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fresh offences, that is, laws making punishable certain things which are not already punishable under the general Penal Code. The Whipping Act is not a special law in this sense; it creates no fresh offences, but merely provides a supplementary or alternative form of punishment for offences which are already punishable primarily under the Penal Code or (in the case of juvenile offenders) other enactments. I think this is the only view consistent with the language of the Whipping Act itself. For, section 4 expressly provides the punishment of whipping for abetment of rape and section 5 expressly provides it for abetments by juvenile offenders. If it was intended that abetments of the offences mentioned in section 3 should also be punishable in this way, the intention would no doubt have been clearly expressed, and as it is not so expressed the intention of the law must be that abetments of these offences should be punishable only under the Penal Code. This intention would be defeated if the Whipping Act were regarded as a special law under sections 40 and 41 of the Indian Penal Code.

As the Whipping Act is a highly penal enactment it must be construed in the sense most favourable to the subject.

It must be held, therefore, that persons convicted of abetment of theft or abetment of any of the other offences mentioned in section 3 of the Whipping Act, 1909, are not liable to the punishment of whipping.

As the whipping in this case has been carried out, nothing can be done beyond pointing out the illegality of the sentence.

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*Civil Second Appeal No.* 99 *of* 1911.

*July* 15*th*, 1912.

*Before Mr. Justice Parlett.*

LU GALE *v.* 1. PO THEIN, 2. BA YIN.

*R. N. Burjorjee*—for appellant (plaintiff).
*R. N. Banerjee*—for respondents (defendants).

*Libel—privilege—statements made in answer to enquiries by police officers—s. 161, Code of Criminal Procedure, 1898.*

Statements made in answer to questions asked by a police officer making general enquiries as to the names of bad characters (with a view to ultimate action under the preventive sections of the Code of Criminal Procedure) are "privileged" but not "*absolutely* privileged."

*Methuram Dass* v. *Jaggannath Dass*, (1901) I.L.R. 28 Cal., 794, distinguished.

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*Harrison* v. *Bush*, 25 L.J., Q.B., 25 (at p. 29) ; *Stuart* v. *Bell*, (1891) 2 Q.B.D., 341 (at p. 346) ; referred to.

In a suit for damages for slander where the slanderous statement is made on a privileged occasion the burden of showing actual malice is thrown upon the plaintiff. The defendant may then prove that the statement is true or that he honestly believed it to be so.

*Hebditch* v. *McIlwaine and others*, (1894) 2 Q.B.D., 54 (at p. 58), followed.

Appellant brought a suit against the two respondents and another man for damages for slander, alleging that they falsely and maliciously stated to a police officer that plaintiff was a man of bad character and an associate of criminals. The respondents pleaded that the statements were made in answer to the police officer's enquiries and were therefore privileged, and that they were not made maliciously. The Court fixed two preliminary issues—(1) Whether or not a suit for damages will lie ? and (2) If so, can the plaintiff jointly sue the defendants ? Having answered both these issues in the affirmative the Court framed two further issues—(3) Did the plaintiff lose his reputation by the act of the defendants? and (4) If so, to how much compensation is the plaintiff entitled ? In the result a decree was given for plaintiff for Rs. 500 and costs against the three defendants. On appeal the District Court dismissed the suit against all the defendants. Plaintiff now appeals, making only the 1st and 2nd defendants respondents. The grounds urged at the hearing were that the District Court should have resettled the issues and remanded the case to the lower Court, as there was no issue as to malice, or as to the truth of the statements made by defendants or as to their having reasonable or probable cause for making them. Briefly the case is as follows :—

A police officer was making enquiries with a view to taking proceedings under the preventive sections of the Criminal Procedure Code, and the respondents were examined by him as witnesses in the course of those enquiries. At their conclusion the officer asked them whether there were any other bad characters in their village, and in reply they made the statements now complained of. The defendants urged that on the authority of *Methuram Dass* v. *Jaggannath Dass* (1) their

(1) (1901) I.L.R. 28 Cal., 794.

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statements were absolutely privileged. In that case it was held that statements made in answer to a police officer conducting an investigation into the commission of a crime under the Code of Criminal Procedure, 1882, are privileged. In the present instance the investigation was not into an offence, and was not being held under Chapter XIV of the Code, section 161 of which has since been materially amended and therefore the grounds on which the above case was decided do not strictly apply. In my opinion the occasion was not absolutely privileged but was one of qualified privilege. The principle has been thus stated by Lord Campbell, C.J., in *Harrison* v. *Bush* (1) :—

> A communication made *bonâ fide* upon any subject-matter in which the party communicating has an *interest* or in reference to which he has a *duty*, is privileged, if made to a person having a corresponding *interest* or *duty*, although it contains criminatory matter, which, without this privilege, would be slanderous and actionable.

And again by Lindley, L.J., in *Stuart* v. *Bell* (2) :—

> The reason for holding any occasion privileged is common convenience and welfare of society.

There can be no doubt that it was the police officer's duty to ascertain the existence of any person whom it was necessary in the public interests to require to furnish security under the Criminal Procedure Code, and equally it was defendants' duty in the public interests to assist him by giving him information within their knowledge. I hold therefore that the occasion was one of qualified privilege.

> As soon as the Judge rules that the occasion is privileged, then, but not till then, it becomes material to inquire into the motives of the defendant and to ask whether he honestly believed in the truth of what he stated (3).

It was laid down by Lord Esher, M.R., in *Hebditch* v. *McIlwaine and others* (4) that :—

> It is for the defendant to prove that the occasion was privileged. If the defendant does so, the burden of showing actual malice is cast upon the plaintiff, but, unless the defendant does so, the plaintiff is not called upon to prove actual malice.

(1) 25 L.J., Q.B., 25 (at page 29).
(2) (1891) 2 Q.B.D., 341 (at page 346).
(3) Odgers on Libel and Slander (5th edition, 1911), page 251.
(4) (1894) 2 Q.B.D., 54 (at page 58).

The following extracts from the work of the learned author quoted above (1) are also pertinent to the present case:—

The mere fact that the words are now proved or admitted to be false is no evidence of malice, unless evidence be also given by the plaintiff to show that the defendant knew they were false at the time of publication.

As regards answers to inquiries he writes:—

Every answer given by the defendant to any one who has an interest in the matter, and, therefore, a right to ask for the information, is privileged. But, of course, the defendant must honestly believe in the truth of the charge he makes at the time he makes it. And this implies that he must have some ground for the assertion; it need not be a conclusive or convincing ground: but no charge should ever be made recklessly and wantonly, even in confidence.

As regards communications imputing crime or misconduct in others he writes:—

Such accusations must always be made in the honest desire to promote the ends of justice, and not with any spiteful or malicious feeling against the person accused, nor with the purpose of obtaining any indirect advantage to the accuser. Nor should serious accusations be made recklessly or wantonly; they must always be warranted by some circumstances reasonably arousing suspicion.

Applying these principles to the present case, it lay upon the defendants to prove that the occasion was privileged. This they have done, and it was then for the plaintiff to establish malice on their part, and if he succeeded it was still open to the defendants to shew that their statements were true, or that they believed them to be so. Certain evidence given for plaintiff does indeed indicate malice on the defendants' part, but as there was no issue upon the point it cannot be held that he had an opportunity of proving it: neither had defendants an opportunity of substantiating their statements, or their grounds for making them.

Under Rule 25 of Order XLI, I frame the following issues and refer them for trial to the Court of first instance, which shall proceed to try them and return the evidence with its findings thereon and the reasons therefor: —

(1) Did Maung Po Thein or Maung Ba Yin make the alleged slanderous statements to the police officer maliciously?

(2) Are those statements true?

(3) Had Maung Po Thein or Maung Ba Yin reasonable and probable grounds for making them?

(1) Odgers on Libel and Slander (5th edition, 1911), pages 361, 363, 365.

*Criminal Appeal No.* 1079 *of* 1912.

*Febry.* 25*th*, 1913.

*Before Mr. Justice Twomey.*

## AZIM-UD-DIN *v.* KING-EMPEROR.

*Criminal Procedure—joinder of charges—s. 239, Code of Criminal Procedure—meaning of "same offence" in—.*

Two persons accused of an offence cannot be tried together if the prosecution cases against them are mutually exclusive. The words "accused of the same offence" in section 239 of the Code of Criminal Procedure imply that the co-accused have acted in concert or association.

The appellant Azim-ud-din has been convicted of voluntarily causing grievous hurt to his wife Fulzanbi with a clasp knife and has been sentenced to rigorous imprisonment for six years. There are two entirely conflicting versions of how Fulzanbi was wounded. According to one version the culprit was Azim-ud-din, her husband; according to the other it was Fazl Rahman, who is the son of a former husband of Fulzanbi by a former wife. Fulzanbi had a daughter by her former husband (the father of Fazl Rahman) and this girl, Samnia Khatom, now about 8 years old, lived with her mother Fulzanbi and step-father Azim-ud-din. It is common ground that on the day in question the child Samnia Khatom went to the house where Fazl Rahman lived with his wife and mother-in-law Hamibi in another village. Fulzanbi disapproved of this and went there to get her daughter back. Fulzanbi states and has stated from the first that Fazl Rahman took her daughter away that morning, that she remonstrated with Fazl Rahman at Hamibi's house and that Fazl Rahman stabbed her on that house. She says that her husband Azim-ud-din did not come to the spot till after the stabbing. The version of Fazl Rahman is that he was not present at the stabbing, that the girl Samnia came to his house of her own accord; Fulzanbi came to call her back; Azim-ud-din came too and opposed Fulzanbi's wishes in this matter saying that he could not maintain Samnia, and that thereupon Fulzanbi quarrelled with Azim-ud-din and he stabbed her.

Fazl Rahman was first arrested and charged with the crime on Azim-un-din's information, but in view of the statements of Hamibi and Samnia Khatom, Azim-ud-din was afterwards arrested and the two men were put on their trial together. The Senior Magistrate discharged Fazl Rahman as there was

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no trustworthy corroboration of Fulzanbi's evidence against him. He convicted Azim-ud-din on the evidence of four eye-witnesses. It may be remarked that three of the four persons who support Fazl Rahman's version are near relatives of his, being his half-sister, mother-in-law and brother-in-law respectively.

I do not propose to deal with the merits of the case now, for I think it is necessary to order a new trial on the ground of misjoinder. The Senior Magistrate appears to have thought that Azim-ud-din and Fazl Rahman were "accused of the same offence" within the meaning of section 239 of the Code of Criminal Procedure. But the words "same offence" in my opinion imply that both the accused should have acted in concert or association. They do not apply to such a case as the present in which the allegations against the two accused are mutually exclusive. The prosecution case against Azim-ud-din is that Fulzanbi received her wounds in a particular manner. It is not permissible for the prosecution in the same case to allege as an alternative that Fulzanbi received her wounds in another and entirely different manner. The two men should have been tried separately as required by the provisions of section 233. I think it probable that the misjoinder has seriously prejudiced the appellant in his defence. But in any case the ruling in *Subramanya Ayyar's* case (1) renders it necessary to order a fresh trial.

The conviction and sentence are set aside and it is ordered that the accused Azim-ud-din shall be committed to Sessions for trial on the charge under section 326 of the Indian Penal Code.

(1) (1902) I.L.R. 25 Mad., 61.

*Civil Revisions Nos.* 147 *and* 148 *of* 1911.

*May 26th,* 1913.

*Before Mr. Justice Twomey.*

SANA EMAN SAIB *v.* 1. MOOMA ENA MAHOMED MEERA SAIB, 2. KHATYA BI, 3. HAWA BI, 4. MIRIAM BI, 5. MAHOMED GANI AMAL, 6. MAHOMED AISHA GANI AMAL, 7. KHATYA NATCHI AMAL.

*Brown*——for applicant (plaintiff).
*M. Auzam*—for respondents (defendants).

"*Promissory Note payable to bearer on demand*"—*s. 26, Indian Paper Currency Act, 1910.*

A promissory note payable to any person or order does not, by indorsement in blank, become "a promissory note payable to bearer on demand" within the meaning of section 26 of the Indian Paper Currency Act, 1910; and is not invalid therefor.

*Maung Po Tha* v. *L. D'Attaides*, 5 L.B.R., 191; *Jetha Parkha* v. *Ramchamdra Vithoba*, (1892) I.L.R. 16 Bom., 689; referred to.

In these cases Civil Revision Cases Nos. 147 and 148 of 1911 the only question for decision is whether it is an infringement of the Indian Paper Currency Act to indorse a promissory note in blank. The District Court of Amherst has held in Suit No. 164 of 1910 that a person who gets a promissory note payable on demand to himself or order and indorses it in blank makes out a promissory note payable to bearer on demand. A person who makes a promissory note payable to bearer on demand infringes the provisions of section 26, Indian Paper Currency Act, 1910, (corresponding to section 24 of the Indian Paper Currency Act, 1905). The learned Judge following the ruling in *Maung Po Tha* v. *L. D'Attaides* (1) held that the promissory notes sued upon in the present cases embodied contracts forbidden by law and consequently that the plaintiff could not recover on them. The judgment of the learned Judge was passed in a case in the District Court, in which the same question arose, but it was made applicable to the cases now under revision which are two Small Cause Court cases between the same parties as in the District Court case.

I can find no authority for the learned Judge's view that the plaintiff by indorsing the notes in blank "made" promissory notes payable to bearer on damand. It appears to me that when a promissory note is drawn up, signed and delivered to

(1) 5 L.B.R., 191.

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the payee it is "made" once and for all and a subsequent indorsement is no part of the "making." If the Legislature intended to prohibit indorsements in blank it may be presumed that the intention would have been clearly expressed in the section of the Paper Currency Act referred to above. The District Judge in support of his view quotes section 8 (*3*) of the English Bills of Exchange Act (1882) which defines a bill payable to bearer so as to include a bill on which the only or the last indorsement is in blank. Before that Act was passed a bill payable to bearer did not include a bill indorsed in blank. It required an express provision of law to bring about this change in England and I think that an express provision of law would be necessary for the same purpose in India. The Bombay case *Jetha Parkha* v. *Ramchamdra Vithoba* (1) is also relied upon. Mr. Justice Farran in that case gave it as his opinion that the section of the Indian Paper Currency Act embraces not only a promissory note which is expressed to be, but also one which in legal effect is payable to bearer on demand. I think the learned Judge was only contemplating cases in which the wording of the promissory note departs from common usage. In such cases the document as drawn or made has to be construed and its legal effect determined. There is nothing in the Bombay case to suggest that the prohibition in section 26 of the Indian Paper Currency Act extends to indorsements in blank.

I therefore decide that the construction which the District Court has put upon the section is incorrect.

* * * * *

*Before Mr. Justice Hartnoll, Offg. Chief Judge, and Mr. Justice Young.*

*Civil First Appeal No.* 53 *of* 1913.

*June* 16*th*, 1913.

MAHOMED IBRAHIM *v.* A. SUBBIAH PANDARAM.

*R. N. Burjorjee*—for appellant (defendant).
*Giles*—for respondent (plaintiff).

*Decree—payment of—by instalments—Order XX, Rule 11, Civil Procedure Code, 1908.*

An order refusing to direct payment of a decree by instalments is not part of the decree (even if simultaneous with it), and is not appealable.

The appellant was sued by the respondent for the recovery of Rs. 10,264 due on two promissory notes. He did not deny

(1) (1892) I.L.R. 16 Bom., 689, page 696.

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his liability but asked that payment by instalments be allowed. The District Judge refused to pass an order for payment by instalments, and that refusal is the subject-matter of this appeal. Respondent urges that the order refusing the application to be allowed to pay by instalments is not a part of the decree but is a separate order passed under Order XX, Rule 11, and that an order under that Order and Rule is not appealable. The contention appears to us to be correct. The decree is merely one for the payment of Rs. 10,264 and costs. The order on the application for permission to pay by instalments was dealt with under Order XX, Rule 11. The appeal is therefore dismissed with costs on the ground that it does not lie.

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*Criminal Revision No. 38B of 1913.*

*June 20th, 1913.*

*Before Mr. Justice Twomey.*

## BA LIN *v.* KING-EMPEROR.

*McDonnell*—for applicant.

*Railway servant—negligence of—endangering the safety of any person—s. 110, Indian Railways Act, 1890.*

A railway servant cannot be convicted under section 101 of the Indian Railways Act, 1890, unless he has, by his disregard of the rules, *actually* endangered the safety of some person. It is not sufficient that his act *might* have endangered the safety of some person.

*Queen* v. *Manphool*, (1873) 5 N.W.P., 240; *Emperor* v. *Ganesh Das*, 6 Chaudhri's Indian Cases, 483; followed.

*King-Emperor* v. *A. C. Dass*, 4 L.B.R., 139; *King-Emperor* v. *M. N. Atchataramayya*, 4 L.B.R., 350; *King-Emperor* v. *Po Gyi*, 4 L.B.R., 353; distinguished.

The accused Ba Lin, a Station Master at Gangaw on the Pegu-Martaban Railway line, has been convicted under section 101 of the Railways Act of endangering the safety of persons travelling in No. 235 up-train by disobeying Rule 92 of the Rules framed under the Act, and he has been sentenced to simple imprisonment for one month. The rule referred to provides that no train shall be allowed to leave station unless permission to approach has been received from the station ahead. It was found by the Magistrate that Ba Lin neglected to get a "Line Clear" message from Martaban, the station ahead, and that he nevertheless gave the driver of No. 235 up-train authority to proceed from Gangaw to Martaban. As a matter of fact no

accident of any kind occurred and apparently the passengers in train No. 235 were not actually endangered in any way. There was no other train on the section between Gangaw and Martaban. When No. 235 approached Martaban the engine-driver found the signals against him. He stopped his engine and whistled. The Martaban Station Master came out on a pilot engine and piloted No. 235 into the station yard. It was pleaded for the defence that Ba Lin did in fact receive the necessary "Line Clear" telegram from Martaban and that the Assistant Station Master at Martaban put a false "private number" in the telegram so that he might afterwards be able to deny sending the telegram. It was pointed out that the Assistant Station Master at Martaban was next on the list for promotion to Station Master and that he therefore had a motive for getting Ba Lin into trouble. The Magistrate disbelieved this defence and I do not think that the Magistrate's finding on the facts should be disturbed in revision. The only question to be decided is whether the conviction was justified on the facts as found by the Magistrate. On this question of law the learned Sessions Judge refers to the cases of *Queen* v. *Manphool* (1) and *Emperor* v. *Ganesh Das* (2). The following is the main part of the judgment in the former case :—

> The prisoner has been found guilty of endangering the safety of persons in a certain goods train by negligence ; but, although he is shown to have neglected his duty, there is no evidence whatever of the safety of any persons in any goods train having been endangered by his neglect of his duty. On the contrary it is plainly apparent that, by reason of the precautions taken by other persons, any possible danger which might have resulted from his neglect was avoided. Although, therefore, he may be punishable departmentally or otherwise for neglect of duty, it does not seem that he can be convicted and punished under section 29, Act XXV of 1871. It is not a good and sufficient answer to the plea here urged on his behalf to argue that, because a neglect of duty such as he was guilty of may sometimes lead to the endangering of the safety of persons in a goods train, or that because, had not precautionary measures been taken, and had the line not been clear, his neglect of duty would probably or certainly have endangered the safety of persons in a goods train, he should be held to have actually endangered the safety of persons in a goods train.

The later case of *Ganesh Das* (2) contains the following passage :—

> It is not sufficient to show that the act of the accused or any omission on

(1) (1873) 5 N.W.P., 240.
(2) 6 Chaudhri's Indian Cases, 483 (at page 484).

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his part was likely to endanger the safety of any person. It must be proved affirmatively that it did in point of fact so endanger any person's safety. In the present case any possibility of an accident was averted by reason of the fact that the special goods train arrived at the Dogra distance signal before the mixed passenger train arrived at that station and, therefore, it cannot be said that the safety of any person in either train was actually endangered on the occasion in question. We quite agree that if the facts had been different, if, for instance, the mixed passenger train had been started off from Dogra, prior to the arrival of the goods special on the same line of rails, the accused would rightly have been convicted of an offence under section 101 of the Act, and this, too, though no actual collision had occurred. In that event his act or omission would unquestionably have resulted in endangering the safety of persons in the two trains.

These rulings strongly support the view of the Sessions Judge that the conviction in the present case cannot be sustained. It is pointed out moreover that the rulings in the Lower Burma Chief Court cases *King-Emperor* v. *A. C. Dass* (1), *King-Emperor* v. *M. N. Atchataramayya* (2) and *King-Emperor* v. *Po Gyi* (3) on which the District Magistrate relied were all cases in which the personal safety of passengers was clearly endangered. In these cases there was not merely a risk of danger; the danger actually arose. In the first two cases the breach of rule resulted in actual collisions and in the third case a collision was narrowly averted. All that the Assistant Traffic Superintendent could say in this case was as follows :—

---The breach of the rules by the accused *did* entail a possibility of accident. For example, if a bridge had been reported insecure of any other obstruction occurred on the section between Martaban and Gangaw and the Station Master, Martaban, had got information just before the train reached Gangaw, the fact of the Station Master, Gangaw, letting the train through without a "Line Clear" might have caused a serious accident. Or a waggon might have blown out of the yard at Martaban on the single line.

The Martaban Station Master stated that no accident could have taken place in the circumstances. Section 101 does not provide for cases in which the disobedience of a rule is merely *likely* or *calculated* to endanger the safety of any person. The intention of the Legislature was apparently to leave it to the Railway authorities to deal departmentally with disobediences involving risk of danger without entailing actual danger.

On these grounds I set aside the conviction and sentence and direct that the bailbond of the accused shall be cancelled.

(1) 4 L.B.R., 139. (2) 4 L.B.R., 350. (3) 4 L.B.R., 353.

*Before Mr. Justice Twomey.*

*Criminal Revision No. 101B of 1913.*

*July 3rd, 1913.*

1. BA NYUN, 2. KHE BWE, 3. TUN LIN, 4. SHWE YON, 5. BA THIN, 6. PO SIN, 7. PO MIN, 8. PO TOKE, 9. SHWE KHAN, 10. PO CHON *v.* KING-EMPEROR.

*Maung Pu*—for applicants.

*Public servant—order of a—disobedience of—s. 188, Penal Code.*

Certain persons erected "*zayats*" on land which had been granted by the Collector for the purpose of a Karen burial ground. The Collector ordered them to remove these buildings, and, as they did not comply, they were convicted under section 188 of the Indian Penal Code for disobedience of the lawful order of a public servant.

*Held*,—that the Collector had no authority in law for issuing such an order.

The applicants lately built *zayats* on a piece of land surrounding a certain ancient pagoda in the Insein District. But a grant of the land had already been granted by the Deputy Commissioner in 1909 for the purpose of a Karen Christian burial ground.

The Township Officer by the Deputy Commissioner's orders directed the applicants to remove the *zayat* by a certain date and, as the applicants failed to comply, they were prosecuted under section 188, Indian Penal Code, and fined Rs. 5 each. They have now applied in revision to this Court, pleading *inter alia* that the Deputy Commissioner and the Township Officer were not lawfully empowered to promulgate the order in question.

It does not appear from the Revenue proceedings or from the convicting Magistrate's judgment under what provision of law the Deputy Commissioner conceived himself to be acting. I am unable to find that there was any lawful authority for the order. The Land and Revenue Act and the rules framed under it do not appear to confer on Revenue Officers any power to deal with third parties who trespass on grant land, or who otherwise interfere with the grantee's enjoyment thereof. So far as I can see, an order directing persons other than the grantee to take certain order with buildings on the land is not authorised by the Act or rules.

Furthermore, it is very doubtful whether the trial of the ten applicants jointly was lawful under Chapter XIX of the Code of

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Criminal Procedure. The case does not seem to me to fall under section 239.

Notice of the present application was sent to the District Magistrate but no one has appeared in support of the convictions.

On the above grounds I set aside the convictions and sentences and direct that the fines paid by the applicants shall be refunded to them.

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*Civil Revision No. 55 of 1913.*

*July 7th, 1913.*

*Before Mr. Justice Twomey.*

IN THE MATTER OF THE PETITION OF GAGGERI FRANCESCO.

*Harvey*—for petitioner.

*Gaunt*—Assistant Government Advocate.

*Revision—Powers of a High Court to revise order of a Civil Court sanctioning a prosecution—ss. 439, 476, Code of Criminal Procedure.*

A " High Court " within the meaning of the Code of Criminal Procedure cannot, under section 439 of the Code, revise the order of a Civil Court under section 476 of the Code sanctioning a prosecution.

*Ramzan Ali* v. *Oporno Charan Chowdry*, 4 L.B.R., 138; *In re Bhup Kunwar*, (1903) I.L.R. 26 All., 249; *In re Chennanagoud*, (1902) I.L.R. 26 Mad., 139; *Salig Ran* v. *Ramji Lal*, (1906) I.L.R. 28 All., 554; *Har Prasad Das* v. *King-Emperor*, (1912) 17 C.W.N., 647; followed.

The Judge of the Small Cause Court acting under section 476 of the Code of Criminal Procedure has sent the applicant Gaggeri Francesco to the District Magistrate to be tried under section 193 of the Indian Penal Code for intentionally giving false evidence in a suit in that Court. Francesco denied on oath that a certain receipt produced as an exhibit in the suit was the receipt which had been granted to him by the defendant, and the learned Judge, on grounds which are stated in the order, regarded the denial as false.

Francesco applies to the Chief Court to set aside the Judge's order and I am asked to deal with the application as a matter for revision under section 439 of the Code of Criminal Procedure. There was for some time a conflict of Indian rulings on the question whether a High Court acting under section 439 could deal with orders passed by Civil and Revenue

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Courts under section 476. But there is now an overwhelming preponderance of authority (1) in support of the view that section 439 is applicable only to the proceedings of subordinate *Criminal* Courts, a view which has already been expressly adopted by this Court [(*per* Irwin, J., in *Ramzan Ali* v. *C. C. Chowdry* (2)]. By no stretch of language can the Small Cause Court be treated as a subordinate Criminal Court even when it exercises powers under section 476 of the Code of Criminal Procedure.

It follows that the present application can be admitted only as an application under section 25, Provincial Small Cause Courts Act, 1887.

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*Civil Reference No. 5 of 1913.*

*July 29th, 1913.*

*Before Mr. Justice Hartnoll, Offg. Chief Judge, Mr. Justice Ormond, and Mr. Justice Twomey.*

*In re* THE APPLICATION OF CHET PO FOR THE REFUND OF STAMP DUTY AND PENALTY.

Reference made by the Officiating Financial Commissioner, Burma, under section 57 of the Stamp Act.

*Higinbotham*—Government Advocate.

*"Executed," Meaning of the expression—in the Indian Stamp Act, 1899—s. 2, Indian Stamp Act, 1899.*

An instrument not signed is not "executed" within the meaning of the Indian Stamp Act, 1899, and need not then be stamped.

The mere fact that such an instrument is not "executed" within the meaning of the Indian Stamp Act does not necessarily imply that the instrument is incomplete for the purposes for which it was drawn up.

The question on which the learned officiating Financial Commissioner desires a ruling under section 57 of the Stamp Act is not precisely formulated in the order of reference but may perhaps be stated as follows:—

"Can an unsigned instrument written on *parabaik* be held liable to duty under the Indian Stamp Act, 1899?"

The fact that an instrument is written on *parabaik* or palm leaf is of course immaterial. "Paper" is defined in the Stamp

(1) *See* I.L.R. 26 All., 249; 28 All., 554, and 26 Mad., 139; also 17 C.W.N., 647.

(2) 4 L.B.R., 138.

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Act as including vellum, parchment or any other material on which an instrument may be written.

Before the British annexation it was the universal custom in Upper Burma to make all documents without signature. Under the Burmese law and practice signatures were absolutely unknown. (*See* the Upper Burma Rulings, 1892-96, Vol. I, p. 303, and Vol. II, p. 462.) The English practice of affixing signatures has been adopted gradually since the annexation, but the old custom continued for many years and probably persists still in remote parts. The document out of which the present reference arose is dated 10th waning Nayôn, 1262 B.E. (21st June 1900).

A document though not yet executed may be an instrument. But as a general rule instruments become chargeable with stamp duty only when they are executed (section 3, Stamp Act). It was held by the Judicial Commissioner, Upper Burma, (Mr. Burgess), in 1893 (in the first case cited above) that signature was not necessary for the completion or execution of Burmese instruments. The custom of the country was to regard them as complete without signature and the Stamp law as it then stood (Indian Stamp Act, 1879) presented no obstacle to the recognition of this practice, for it contained no definition of "executed" and "execution." Moreover, under the English law signature was not essential for the execution of instruments under seal, though necessary in the case of instruments not under seal (section 122, Stamp Act, 1891).

But the present Indian law is different. The Indian Stamp Act, 1899, expressly defines the words "executed" and "execution" as meaning "signed" and "signature" [section 2 (*12*)]. Unsigned Burmese instruments made since that Act came into force, *i.e.* since 1st July 1899, cannot be treated as executed for the purposes of the Stamp law.

Our answer to the present reference is therefore as follows:—

"As 'execution' means 'signature' under section 2, Indian Stamp Act, 1899, an instrument which becomes chargeable with stamp duty only on being executed is not liable to duty until it is signed."

In accordance with the universal custom referred to above

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formal documents on palm leaf and *parabaik* have hitherto been treated by the Courts in Upper Burma as completed documents and admitted in evidence as such though they are not signed. Our decision that these unsigned documents are not liable to stamp duty does not necessarily imply that they must henceforward be regarded as incomplete. The effect of the present decision is only that the Courts cannot refuse to admit any such document in evidence merely on the ground that it is unstamped.

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*Civil 2nd Appeals Nos.* 18 *and* 19 *of* 1912.

*June 26th,* 1913.

*Before Mr. Justice Twomey.*

## PO HAN *v.* MA TALOK.

*Tha Din*—for appellant.

*Gaunt*—for respondent.

*Buddhist Law : Divorce—single act of cruelty—Kinwun Mingyi's Digest, Vol. II, para. 303.*

Under Burmese Buddhist Law a divorce (on the terms of a divorce by mutual agreement) may be allowed to a wife on proof of a *single* act of cruelty on the part of the husband.

*Ma Ein* v. *Te Naung*, 5 L.B.R., 87, in part disapproved.

*Ma Gyan* v. *Su Wa*, 2 U.B.R. (1897—1901), 28, approved.

*Mi Kin Lat* v. *Ba So*, 2 U.B.R. (1904—06), Buddhist Law : Divorce, 3; *Lôn Ma Galè* v. *Maung Pe*, 5 L.B.R., 114 ; referred to.

The respondent Ma Talôk sued her husband—the appellant Po Han—for a divorce on the grounds of desertion and cruelty. She stated that she resigned all claim to share in the *hnapazôn* property and merely asked for a decree for divorce without costs. The decree asked for was virtually what a Burman Buddhist spouse may now obtain in Upper Burma when the other party is without fault and does not consent. This was decided in the important Upper Burma case *Mi Kin Lat* v. *Ba So* (1) in 1904. The learned Judicial Commissioner's main ruling in that case does not yet appear to have been adopted fully in Lower Burma, though the case was cited with approval in *Lôn Ma Galè* v. *Maung Pe* (2)* in connection with another question. It is not necessary to consider whether the

(1) 2 U.B.R. (1904—06) Bud : Law—Divorce, 3.

(2) 5 L.B.R., 114.

* Overruled by *Maung Pe* v. *Lôn Ma Galè*, 6 L.B.R., 18.

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respondent Ma Talók would have been entitled to a divorce if her husband had been without fault, for it has been her case throughout that he was guilty of cruelty towards her. The learned District Judge has discussed the evidence as to cruelty and I agree with his finding that it is established. It is urged now that no issue as to ill-treatment was framed by the Township Court, which decided the suit only with reference to the charge of desertion, and that the District Judge having found against the plaintiff-respondent on the issue as to desertion ought to have dismissed the suit. But though no specific issue was framed as to ill-treatment it was certainly covered by the issue—"Is the plaintiff entitled to a divorce according to her plaint?"—for the plaint expressly pleads ill-treatment. The action of the District Court in dealing with this matter was authorized by the provisions of Order 41, Rule 24, and I see no reason to think that the defendant-appellant was prejudiced by the absence of a specific issue. Ma Talôk gave evidence of the ill-treatment she suffered at his hands and her evidence was corroborated by the village headman to whom she complained and showed the marks of the beating. No attempt was made to rebut this evidence. On the contrary the defendant admitted kicking and beating the plaintiff.

The argument derived from the case of *Ma Ein* v. *Te Naung* (3) has no force. It is true that the judgment in that case appears to countenance the view that a divorce should not be granted to a woman for a single act of cruelty. But in the first place I note that no actual ill-usage was proved in that case apart from the plaintiff's own statement. Moreover, it is clear from the texts cited in section 303 of the Kinwun Mingyi's Digest (Vol. II—Marriage) that even where the husband has been guilty of cruelty only once, it is open to the wife to insist on a divorce and she is entitled to get it, subject to a penalty, the penalty being that the divorce shall be effected as if both parties desired it and the assets and liabilities of the couple are to be divided equally between them. [See *Ma Gyan* v. *Su Wa* (4) where this rule was adopted for Upper Burma (1897).] In the present case the joint property of the married

(3) 5 L.B.R., 87.
(4) 2 U.B.R. (1897—1901), 28.

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couple appears to have been appropriated by the husband already.

I think the decree of divorce was rightly granted and I dismiss with costs Po Han's appeals both in the divorce case and in the connected case (No. 97 of 1911 of the District Court) in which he prayed for restoration of conjugal rights.

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*Special Civil 2nd Appeal No.* 147 *of* 1910.

*July 28th,* 1913.

*Before Mr. Justice Hartnoll, Officiating Chief Judge, and Mr. Justice Young.*

## LUN MAUNG *v.* MOMEIN BEE BEE.

*A. C. Dhar*—for K. E. Mahomed.
*D. N. Palit*—for Ngwe Shein.

*Decree—erroneous—amendment of—s. 152, Civil Procedure Code, 1908.*

A decree not in conformity with the judgment need not be altered if third parties who have *bonâ fide* acquired rights thereunder object and show good cause.

*Hatton* v. *Harris*, (1892), L.R., A.C., 547, referred to.

*Young, J.*—By an order passed on the 31st March 1913 the Divisional Judge of Hanthawaddy has brought it to the notice of this Court that in Special Civil Appeal No. 147 of 1910 it confirmed an appellate decree of the Divisional Court which inadvertently granted the plaintiff in Civil Regular No. 15 of 1908 of the District Court of Hanthawaddy a foreclosure decree in lieu of a decree for sale of certain mortgaged property as prayed with a view to the amendment of the decree in question. The said Divisional Court having passed a judgment for a mortgage decree as prayed, there can be no doubt that both its own decree and the decree of this Court should have been for a decree for sale, and if the decree is to be amended at all, that this Court is the only Court which has power to effect the alteration. The original decree-holder was one Momein Bibi, who has no interest in the matter, having assigned her rights under the decree and does not appear ; she has as a matter of fact assigned them twice over, nor again does the judgment-debtor take any interest in the proceedings, though served, from which it may be inferred that the mortgage debt is likely to equal if not exceed the purchase price of the property if sold, and that therefore it is immaterial to him whether the property is sold

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or foreclosed. The only parties who have taken any active interest in the matter are the two rival assignees. The one is a later purchaser for value of the decree for foreclosure, who seeks or can seek in other proceedings to avoid the purchase by the earlier assignee on various grounds which have been discussed before us. Neither of the assignees really pressed for an alteration of the decree; the later assignee in fact strenuously objected to it urging that he was a third party who had bought the final foreclosure decree *bonâ fide* and for value and that the earlier assignee had bought either a preliminary foreclosure decree or a decree for sale which at one period of the proceedings was passed by a Judge of the District Court of Hanthawaddy and which was subsequently cancelled or declared null and void by his successor on the ground that it could not amend a decree of a superior Court, and that whatever he had purchased he had allowed the decree-holder to remain in ostensible possession and transfer to him the Final Foreclosure Decree. In the absence of any application by the judgment-debtor to alter the decree, and rights under the decree as existent having been *bonâ fide* acquired by third parties it would be improper for us to exercise our powers in that respect—*Hatton* v. *Harris* (1). The contending assignees should determine their rights either in execution or, if that prove to be an unsuitable forum, be referred to a regular suit.

*Hartnoll, Offg. C.J.*—I concur.

*Criminal Revision No. 165B of 1913.*

*August 28th, 1913.*

*Before Mr. Justice Twomey.*

## SEIN YIN *v.* AH MOON SHOKE.

*Robertson*—for applicant.

*Workmen's Breach of Contract Act—liability of supervising artificers or workmen.*

An artificer, workman, or labourer is not exempted from liability for prosecution under the Workmen's Breach of Contract Act, 1859, merely on the ground that his duties in regard to the work in dispute have been confined to supervision and direction.

*Gilby* v. *Subbu Pillai*, (1883) I.L.R. 7 Mad., 100, distinguished.

This is a case under the Workmen's Breach of Contract Act, 1859. It appears from the agreements filed in the Magis-

(1) (1892) L.R., A.C., 547, at page 558.

trate's proceedings that the respondent Ah Moon Shoke received an advance from the petitioner Ma Sein Yin to build a house for her. It is alleged that when the house was only half finished the respondent refused to go on with the work. Ma Sein Yin admitted that Ah Moon Shoke "did not build himself" though she said he is a head-carpenter. The Additional Magistrate dismissed the complaint holding that the respondent is not an "artificer, workman or labourer" within the meaning of the Act, because he took no part in the work himself. No authority is given for this decision. It is apparently incorrect to say that the respondent took no part in the work. Though he may not have handled any tools himself he was presumably the supervisor and director of the manual labour engaged in building the house. It is not necessary for a prosecution under the Act that the artificer should work with his own hands. This is clear from section 1 which expressly provides for cases where a head-artificer or workman (such as Ah Moon Shoke appears to be) undertakes to get a certain work done by other artificers, workmen or labourers according to the terms of a contract. In the Madras ruling *Gilby* v. *Subbu Pillai* (1), the ordinary business of the accused was that of a contracting bricklayer and the contract which he was accused of breaking was a contract for earthwork. Subbu Pillai was not himself a workman at earthwork and it was held that he did not come under the Act. The case is clearly distinguishable from the present case in which the accused is a "carpenter-contractor" or "head-carpenter" under whose supervision and direction the house was to be built by journeymen carpenters. I think the case falls clearly within the scope of the Act.

The order of dismissal is set aside and it is ordered that the complaint shall be restored to the file of the Additional Magistrate, who should enquire into it and dispose of it under the Act.

(1) (1883) I.L.R. 7 Mad., 100.

*Criminal Sessions Trial No. 30 of 1909.*

*March 16th, 1910.*

*Before Mr. Justice Hartnoll.*

## THE KING-EMPEROR *v.* J. S. BIRCH, M. C. GUPTA AND M. S. MUKERJI.

*Dawson*—for King-Emperor.

*deGlanville*—for accused.

*Reply, Prosecutor's right of—document put in evidence by defence during cross-examination of prosecution witnesses—evidence adduced by accused—Code of Criminal Procedure, ss. 289, 292.*

An accused person who gets documents admitted as evidence by putting them to a witness for the prosecution cannot be said to thereby "adduce evidence" within the meaning of section 292 of the Code of Criminal Procedure and so give the prosecutor a right to the last word.

*Emperor* v. *Abdulali Sharfali*, (1909) 11 Bom. L.R., 177; *Emperor* v. *E. I. Timol*, (1906) 10 C.W.N., cclxvii, followed.

*Emperor* v. *Bhaskar*, (1906) I.L.R. 30 Bom., 421, dissented from.

*Emperor* v. *R. Stewart*, (1904) 1.L.R. 31 Cal., 1050, referred to.

*King-Emperor* v. *H. Manuel*, (1906) 4 L.B.R., 5, overruled.*

Mr. deGlanville claims on behalf of his clients that the prosecutor should not have the right of reply merely because in the course of the cross-examination of the prosecution witnesses certain documents have been put in on behalf of the defence and read to the jury, and that he has the right to the last word. Mr. Dawson contests this claim and argues that, as the law stands, he has the right of reply. In the case of *King-Emperor* v. *Manuel* (1) under somewhat similar circumstances I held that the prosecutor was entitled to reply. The correctness of my ruling is questioned and certain cases, that were not available then, have been referred to in support of this contention. It is pointed out that Brett, J., in the case of *Emperor* v. *E. I. Timol* (2) took the opposite view to myself and to the view of Brett, J., which is referred to in the case of *Emperor* v. *Robert Stewart* (3). Two cases of the High Court of Bombay, *Emperor* v. *Bhaskar* (4) and *Emperor* v. *Abdulali* (5),

* To be noted on page 5 of IV Lower Burma Rulings.

(1) 4 L.B.R., 5.
(2) (1906) C.W.N., cclxvii.
(3) (1904) I.L.R. 31 Cal., 1050.
(4) (1906) I.L.R. 30 Bom., 421.
(5) (1909) 11 Bom. L.R., 177.

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have been referred to in which Batty, J., and Beaman, J., have expressed different views. A case of the Judicial Commissioner in Sind has also been referred to. It is printed in reporting the case of *Emperor* v. *Abdulali Sharfali* (5).

When the Criminal Procedure Code was revised and the present Code (V of 1898) superseded the old Code (X of 1882) the wording of section 292 of the Code was altered. In Act X of 1882 the section ran: "If the accused, or any of the accused, has stated, when asked under section 289, that he means to adduce evidence, the prosecutor shall be entitled to reply." In Act V of 1898 the section runs: "If the accused, or any of the accused, adduces any evidence, the prosecutor shall be entitled to reply." Prior to 1898 the Calcutta and Bombay High Courts held diverse views to the Madras and Allahabad High Courts as to how the production of documentary evidence for the defence during the cross-examination of the prosecution witnesses affected the right of reply of the prosecutor, and to my mind the change of the law in 1898 was meant to finally lay down what the law should be. The judgments which I have quoted above inclusive of my own show that there is still diversity of opinion as to what it is. The points for decision to my mind seem to be, as to whether section 292 must be read in connection with the three preceding sections, and as ancillary to them, or whether it is a section independent of the preceding sections, which provides for a contingency that may arise at any stage of the trial. It is argued that the word "any" in section 292 means evidence produced at any stage of the trial; on the other hand it is also argued that section 292 refers to evidence produced after the accused has been asked whether he means to adduce evidence under section 289. After considering what I believe to be the reason for the change in section 292, the judgments that I have mentioned above and which were not available at the time I passed my order in *King-Emperor* v. *Manuel* (1), and after consulting my learned colleagues and hearing their views, I am of opinion that it is doubtful as to what meaning should be attached to section 292. It may have been intended that it should stand in a time

(5) (1909) 11 Bom. L.R., 177.
(1) 4 L.B.R., 5.

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relation to section 289, in which case the fact that the defence has put into evidence documentary evidence during the cross-examination of the prosecution witnesses would not take away the right of the last word to the defence; on the other hand it may have been intended that, if the accused produced documentary evidence at any stage of the trial, the prosecutor should be entitled to reply. I incline to the latter view; but I consider the matter doubtful. That being so, I am of opinion that the benefit of the doubt should be given in favour of the accused.

I accordingly rule that in this case, if on being asked under section 289 the accused state that they do not intend to adduce evidence and do not do so, the prosecutor shall not be entitled to reply.

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*Civil 2nd Appeal No. 133 of 1913.*

*July 8th, 1913.*

*Before Mr. Justice Twomey.*

## CHANGARAM *v.* RAYA.

*D. M. Karaka*—for appellant (defendant).

*Slander—Action for—"Caste" loss of—"special damage."*

Defendant said in the presence of several persons that the plaintiff was a prostitute. In consequence the plaintiff was "outcasted."

*Held*,—that loss of "caste" sufficed to give ground for "special damage" in an action for slander.

The appellant admittedly said in the presence of several persons that the respondent was a prostitute. She prosecuted him for defamation under section 500, Indian Penal Code, and he was convicted and fined Rs. 100, of which sum Rs. 30 was awarded as compensation to the respondent under section 545, Code of Criminal Procedure. She then brought this civil suit against him for damages and was awarded Rs. 250 by the Subdivisional Court. This sum consists of Rs. 200 for loss of caste *plus* Rs. 80 for injury to the respondent's feelings *minus* Rs. 30 awarded by the Magistrate.

In the criminal case the appellant attempted to prove that the imputation made by him was true, but the witnesses called to show that the respondent was really a prostitute were disbelieved.

In the civil suit he made no attempt to prove the truth of the imputation, though that would have been a complete

answer to the claim for damages. As he was defended by an advocate, it can only be presumed that he was unable to prove the truth of the imputation, and that it was false.

The "Slander of Women Act, 1891" abolished the need of showing "special damage" in the case of words which impute unchastity to a woman. Until that Act was passed a false accusation of immorality was not actionable *per se* in England (1). It is not necessary to consider whether such an accusation is actionable *per se* in this country, for in the present case there is clear proof of special damage, the lower Courts having found that the respondent, a Hindu woman, has lost her caste in consequence of the slander uttered by the appellant. Losing the general good opinion of one's neighbours is not special damage. There must be loss of some material advantage. It is beyond doubt, I think, that membership of this caste is a material advantage in the eyes of a Hindu.

The Divisional Court confirmed the Subdivisional Court's decree, and the grounds of this 2nd Appeal are briefly:—(1) that there was no special damage, (2) that there was no malice on the part of the appellant, (3) that the lower Courts should not have awarded Rs. 150 for offerings and a feast at Jagganath when as a matter of fact no journey to Jagganath has been performed, and (4) that calling the respondent a prostitute would not outcaste her.

I have already dealt with (1). Ground (2) hardly deserved serious notice. Malice in this connection signifies only the absence of just cause or excuse. In this case, as the learned Divisional Judge points out the imputation being false, malice must necessarily be inferred. (3) I agree with the Divisional Judge that the cost of a journey to Jagganath and back and of the customary propitiatory offerings at that shrine may fairly and conveniently be taken as the measure of damages for loss of caste. As regards (4) the lower Courts have found on the evidence that the respondent was outcasted and this decision appears to be right.

The appeal cannot be admitted.

(1) *See* Pollock on Torts, p. 249.

*Civil 2nd Appeal No.* 123 *of* 1912.

*22nd July* 1913.

*Before Mr. Justice Parlett.*

1. LU MAUNG, 2. PO SHIN, 3. THIN ON, 4. PO TIN, 5. PO KHIN. *v.* 1. MAUNG PU, 2. E DOK.

*Lambert*—for appellants (defendants).

*D. N. Palit*—for respondents (plaintiffs).

*Specific Relief Act, 1877, s. 9—Suit under—distinguished from title suit.*

A had been mortgagee in possession of a parcel of land. B, the mortgagor, entered into occupation. A sued for possession of the land. B set up the defence that he had redeemed it.

In the Court of first instance issues were framed and evidence taken, and the decree founded, on the plaintiff's title. B appealed, but A pleaded that no appeal lay as his suit had been brought under section 9 of the Specific Relief Act, 1877.

The first Appellate Court held that, as A had asked only for possession and not for any declaration of title, and had filed his suit within the six months allowed for a suit under the provision abovementioned, his suit was, in effect, one under that provision, and that no appeal lay.

*Held*,—on 2nd appeal, that, in view of the frame of the plaint and the the course of the suit, the suit was intended to be a suit based on title and not a suit under section 9 of the Specific Relief Act, 1877.

*Ram Harakh Rai* v. *Sheodihal Joti*, (1893) I.L.R. 15 All., 384; *Kalee Chunder Sein* v. *Adoo Shaikh*, (1868) 9 W.R., 602; *Ramasami Chetti* v. *Paraman Chetti*, (1901) I.L.R. 25 Mad., 448; referred to.

The sole question in this appeal is whether the suit was in fact brought under section 9 of the Specific Relief Act. The Divisional Court has held that it was because (*a*) the plaintiff was entitled to bring such a suit and (*b*) the suit was filed within six months of the dispossession. In this Court the finding is supported on the further ground that the prayer in the plaint asks for possession only and not for a declaration of title. I consider none of these reasons to be sound. The second paragraph of section 9 shows clearly that no one, though entitled to sue under that section, is bound to do so, but he can always bring a regular suit founded upon title, either in addition to or instead of a suit under that section. As to the time when the suit was filed, because a man seeks his remedy early he does not thereby alter the nature of his suit. As to the prayer I see no reason why a plaintiff who claims possession relying upon title need do more than set out his title and ask for possession.

It is true that in *Ram Harakh Rai* v. *Sheodihal Joti* (1), it was held that a Court should, in all cases in which it applies, give effect to the provisions of the first paragraph of section 9 of the Specific Relief Act, whether that section is expressly pleaded or not, but that is no authority for refusing to entertain a suit based upon title merely because specific relief might be asked for and is not. As was ruled in the older case of *Kalee Chunder Sein* v. *Adoo Shaikh* (2), section XV of Act XIV of 1859 does not affect the general law on the matters to which it relates, but provides a special remedy for a particular kind of grievance. In *Ramasami Chetti* v. *Paraman Chetti* (3), a case very like the present one, the Allahabad ruling was not followed. There plaintiff sued to eject defendants from certain land claiming title to it by purchase and alleging that he had been forcibly dispossessed by defendants. The defendants denied both plaintiff's title and possession and set up title in themselves and alleged that they had long been in possession. The lower Court found that plaintiff failed to prove title by purchase, and declared plaintiff entitled to possession under section 9, Specific Relief Act, but dismissed the suit in so far as it claimed to have plaintiff's title established. The High Court held that the issue concerning title should have been tried. In the present case plaintiff set up a title as mortgagee in possession of certain land of which defendants had taken possession. Defendants alleged that they had redeemed the mortgage and so extinguished plaintiff's title on which his claim to possession was based. Issues covering the question of title were framed and evidence taken, after which the Court of first instance held that defendants had not redeemed the mortgage and that there was abundant evidence to prove plaintiff's title to the land as mortgagee in possession and on the strength of that title granted him possession. It appears to me both from the frame of the plaint and the course which the case took that it was, and was always intended to be, a suit based upon title, and never a suit under section 9, Specific Relief Act, and that plaintiff cannot be heard to assert the

(1) (1893) I.L.R. 15 All., 384.
(2) (1868) 9 W.R., 602.
(3) (1901) I.L.R. 25 Mad., 448.

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contrary. An appeal therefore lay to the Divisional Court. I reverse the decree of that Court and direct that the appeal be readmitted and disposed of according to law, costs to follow the result.

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*Civil Revision No. 122 of 1913.*

*July 24th, 1913.*

*Before Mr. Justice Hartnoll, Offg. Chief Judge, and Mr. Justice Young.*

S. ANAMALLAY *v.* 1. O.M.M.R.M. CHETTY FIRM, 2. ABDUL KARRIM EMANJAN.

*Hamlyn*—for appellant.

*Pauper appeal.—Representation of appeal duly stamped after dismissal of application to appeal as a pauper—Indian Limitation Act, 1908, s. 5, and Schedule I, Article 170—Duties of Officers of the Court—Mistake of counsel in stamping a plaint which is time-barred—Refund of court-fee.*

A applied to be allowed to appeal as a pauper. The application was rejected as time-barred, so A stamped his appeal with the appropriate court-fee stamp and re-presented it. In the meantime, however, the period allowed for appealing had expired.

*Held*,—(1) that the appeal must be considered as having been filed on the day upon which it was presented duly stamped, and, further,

(2) that A could not plead poverty as "sufficient cause" (within the meaning of section 5 of the Limitation Act) for admitting an appeal after the ordinary period of limitation prescribed therefor had expired.

A's counsel asked for a refund of the court-fee on the grounds that he had been misled by the practice of the Court, and that the clerk of the Court should not have accepted the court-fee.

*Held*,—that it was not the duty of the clerk to advise counsel and that counsel having been heard in support of the appeal so stamped, could not apply for a refund thereof.

*Hartnoll, Offg. C.J.*—In this case applicant applied to the Court of the Divisional Judge, Hanthawaddy, for permission to appeal as a pauper. On the 10th May last the application was rejected as time-barred. On the 22nd May applicant's counsel applied to be allowed to stamp the memorandum of appeal that accompanied the application for leave to appeal as a pauper.

The Judge noted that the appeal was apparently time-barred but heard Mr. Hamlyn on the 24th May, and held that on the authority of the ruling in the case of *Bishnath Prasad* v. *Jagarnath Prasad* (1), the unstamped memorandum of appeal

(1) (1891) I.L.R. 13 All., 305.

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which accompanied the appellant's application to be allowed to appeal as a pauper and which, as such, was filed before the period of limitation had expired could not, when stamped after the expiry of the period of limitation, be considered as an appeal filed on the date when the petition to be allowed to appeal as a pauper was first presented, *i.e.* within the period of limitation. The Judge further held that no sufficient cause was shown for an extension of time under the provisions of section 5 of the Limitation Act and rejected the appeal as time-barred. He also refused to return the stamps that had been presented for stamping the memorandum of appeal.

Applicant now applies for leave to appeal *in formâ pauperis* against this decision of the Divisional Judge.

It is urged that the Divisional Court was wrong in its construction of the law of limitation, and at the hearing the case of *Bai Fal* v. *Desai Monorbhai* (2) was referred to. The learned Judges who decided that case differed in the views they took of the provisions of the Procedure Code that relate to pauper appeals. I have referred to the rulings quoted in that case. The case of *Skinner* v. *Orde* (3) is clearly distinguishable from the present one. That case is one in which an applicant for leave to sue as a pauper obtained funds which enabled him to pay the court-fees *during the enquiry into his pauperism*. In the present case the stamps were not forthcoming until after the application for leave to appeal as a pauper had been rejected. My views coincide with the decision arrived at in the case of *Bishnath Prasad* v. *Jagarnath Prasad*(1). When the application for permission to appeal as a pauper was before the Divisional Judge there was no appeal before him, but only an application for permission to appeal as a pauper. The appeal would only come into existence before him on leave being granted. As the application was rejected no appeal ever became alive before the Divisional Court in connection with the application proceedings.

The Divisional Judge subsequently allowed the memorandum of appeal that accompanied the application to be stamped. Only then did it become a memorandum of appeal

(2) (1897) I.L.R. 22 Bom., 849.
(3) (1879) I.L.R. 2 All., 241.

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that could be acted on by the Court. It started a fresh proceeding altogether and could not be received to start such until it had been stamped with the stamp required by law—section 6 of the Court Fees Act. The period of limitation ran from the time it was received by the Court as a duly stamped memorandum of appeal. This was a date when the appeal was admittedly time-barred unless further time could be allowed under the provisions of section 5 of the Limitation Act, and on this latter point I am in accord with the decision passed in the case of *Moshaullah* v. *Ahmedullah* (4), that poverty is not sufficient cause within the meaning of section 5 of the Limitation Act for admitting an appeal after the ordinary period of limitation prescribed therefor has expired.

Lastly, learned counsel asks for a return of the court-fee stamps affixed on the said appeal. He explained that he had been misled by the practice of the Court—that a similar case had been decided in a similar manner some little time before, and if he had known of this decision he would have thought twice before stamping the appeal—that the clerk of the Court should have informed him and declined to receive the fee. I cannot hold that it was obligatory on the Court clerk to have informed Mr. Hamlyn. The learned Judge noted on the 22nd when he wrote that Mr. Hamlyn had applied to be allowed to stamp the memorandum of appeal that it was apparently time-barred. There was no appeal before the Court until the memorandum had been duly stamped—sections 6 and 28 of the Court Fees Act. If Mr. Hamlyn had not presented a duly stamped memorandum or stamped the memorandum that was in the Court he could not have been legally heard at all as to the date from which limitation ran. He was then heard and his argument was not accepted. I fail to see how he can now ask for the return of the stamps.

I would therefore dismiss the application.

*Young, J.*—I concur.

(4) (1886) I.L.R. 13 Cal., 78.

*Before Mr. Justice Young.*

MA NE *v.* 1. ON HNIT, 2. NGWE KYAW, 3. TUN LIN.

*Civil 2nd Appeal No. 219 of 1911.*

*August 1st, 1913.*

*R. N. Burjorjee*—for appellant (plaintiff).

*May Oung*—for 1st respondent (defendant).

*Administrator, Sale by—without permission of the Court,—setting aside of—by creditor of the deceased—plea of* bonâ fide *purchase from vendee—Probate and Administration Act, s. 90, meaning of expression "person interested in the property."*

A creditor of a deceased person who has attached his property in execution of a decree is a person "interested in the property" of such person within the meaning of section 90 of the Probate and Administration Act, 1881, and, as such, is entitled to avoid a sale made by the Administrator without the previous permission of the Court. But he must seek to do so within a reasonable time.

It matters not that the property has been already repurchased by a third party in good faith from the vendee, always provided that the creditor seeks to avoid the original sale in a reasonable time.

*Jagobandhu Dey Poddar* v. *Dwarika Nath Addya*, (1896) I.L.R. 23 Cal., 446, distinguished.

The main question in this appeal is whether a sale without leave by an administrator to a party who resells to a third party can be avoided by a creditor of the estate. The Probate and Administration Act to which the parties are subject provides that a sale without leave of the Court is voidable at the instance of any other person interested in the property and the first question to be decided is whether a creditor is a person so interested. In *Jagobandhu Dey Poddar* v. *Dwarika Nath Addya*, (1) the learned Judges dismissed a somewhat similar contention on the ground *inter alia* that the party who claimed to avoid the sale was not a creditor of the estate, and I have little doubt that a creditor whose debts must be satisfied before a legatee can receive his legacy would be entitled to avoid an unauthorised sale. The law prohibiting an executor or administrator selling directly or indirectly to himself is much the same and is similarly declared to be voidable at the instance of any other person interested in the property sold, and in England where an executor sells fraudulently a creditor has undoubtedly the right to follow the assets but must do so in a reasonable time. In my opinion, therefore, a creditor of the estate has the right, if he applies within a reasonable time, to avoid an unauthorised sale of part of it by an administrator. Nor can I see that the fact that the purchaser has resold will

(1) (1896) I.L.R. 23 Cal., 446.

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in itself defeat his right unless he has lost his right by unreasonable delay in taking action. In the present case, if the administratrix had not taken out letters she could have sold as her mother's heiress and in fact purported to do so, but having once taken out letters the whole estate vested in her, not as heiress but as administratrix, and if she sold in the course of and before the administration was completed her sale would be that of an administratrix and, if made without leave of the Court, be liable to be avoided at the instance of a person interested in the estate. The law apparently makes no exception in favour of a *bonâ fide* purchaser for value, and the sales both to the plaintiff and to the plaintiff's vendor were made before the administration was completed and while proceedings against the administratrix were still pending. The plaintiff's vendor therefore, in my opinion, only obtained and could only transmit a title which was defeasible even if the purchases were *bonâ fide*, provided that the creditor took steps to avoid them within a reasonable time. The creditor in question attached this property within three months of obtaining her decree. In the first instance the present defendant Tun Lin claimed it, though he had sold it to the plaintiff a couple of days before the application for attachment, and it was only when his suit was dismissed that Ma Ne brought the present suit. The question whether she was a *bonâ fide* purchaser is not at all an easy one. The story told by U Shwe Gyôk is a strange one, but his position and history entitle him to respect, and on the whole I should be inclined to accept it and hold that this second purchase was *bonâ fide* so far at any rate as the plaintiff was concerned, differing on the point from the lower Appellate Court. It should also be observed that it was not the creditor but the administratrix who raised the point as to her ability to sell. The point, however, was raised, and raised in the course of or at any rate as a continuation of the lengthy litigation which the creditor had to undertake to establish and realise her claim against the estate. I think she was entitled to raise the plea in answer to the plaintiff's claim and that she must be taken to have associated herself with the second defendant in doing so, and that she did so within a reasonable time. I would therefore dismiss the appeal with costs two gold mohurs.

*Before Mr. Justice Parlett.*

*Special Civil 1st Appeal No. 71 of 1912.*

*September 12th, 1913.*

MESSRS. DIEKMANN BROTHERS & Co.. LTD., *v.* SULAIMAN HAJEE BROTHERS & Co.

*S. S. Patker*—for appellants (plaintiffs).

*J. R. Das*—for respondents (defendants).

*Contract—assignment of—when benefit of a contract may be assigned,—Transfer of Property Act, 1882, ss. 3, 130.*

The benefit of a contract for the purchase of goods as distinguished from the liability thereunder may be assigned, provided that the benefit sought to be assigned is not coupled with any liability or obligation that the assignor is bound to discharge.

*Jaffer Meher Ali* v. *Budge-Budge Jute Mills Co.*, (1892) I.L R. 33 Cal., 702, referred to.

*Nathu Gangaram* v. *Hansraj Morarji*, (1906) 9 Bom. L.R., 114, followed.

*Tolhurst* v. *The Associated Portland Cement Manufacturers (1900) Ltd.*, L.R., (1903) A.C., 414.

*J. H. Tod* v. *Lakhmidas Purshotamdas*, (1892) I.L.R. 16 Bom., 441, distinguished.

The defendants in this case, who are millers, on the 22nd September 1910 sold to Zaretsky Bock & Co. the whole produce of rice meal from their mill for the season 1911 at Rs. 85 per 100 baskets of 45 pounds net, delivery to be taken *ex* hopper at seller's mill from the 1st January 1911 to the end of 1911 season, date at seller's option and payment to be made in cash before any rice meal was removed but not in any case later than immediately after milling and apparently as soon as 1,000 bags were bagged. On the 10th August 1911 Zaretsky Bock & Co. endorsed this contract as transferred to the plaintiff firm and on the same day wrote to defendants informing them of the transfer and asked them to send bills in future to plaintiffs. There was no reply to this letter and on the 2nd September 1911 the plaintiff firm wrote to them asking for a bill and delivery order in respect of about 1,000 bags which they believed them to have ready, and on the 4th September defendants replied repudiating the transfer of the contract as it was made without their knowledge and consent. The plaintiffs' firm purchased 1,100 bags of rice meal in the open market at Rs. 115 per 100 baskets of 45 pounds and have now sued the defendants for Rs. 1,320 damages suffered in the transaction. The

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principal point is whether the contract is assignable without the assent of the defendants, the sellers. A somewhat similar contract was held not to be assignable in *Tod* v. *Lakhmidas Purshotamdas* (1), and cogent reasons for the decision are set out in the judgment in that case. It is however pointed out that it was decided before the Transfer of Property Act came into force, and it is urged that this contract is an actionable claim as defined in section 3 of that Act and can therefore be transferred under the provisions of Chapter VIII. I doubt, however, whether until Zaretsky Bock & Co. claimed delivery on tender of payment and were refused, and actionable claim arose which they could transfer as such to another party. The more recent cases of *Jaffer Meher Ali* v. *Budge-Budge Jute Mills Co.* (2) and *Nathu Gangaram* v. *Hansraj Morarji* (3) were decided after the Transfer of Property Act came into force and in neither was a contract similar to that involved in the present case considered to be transferable merely as an actionable claim. The principle there laid down is that the benefit of a contract for the purchase of goods as distinguished from the liability thereunder may be assigned, understanding by the term benefit the beneficial right or interest of a party under the contract and the right to sue to recover the benefits created thereby, provided that the benefit sought to be assigned is not coupled with any liability or obligation that the assignor is bound to perform. It was expressly stated in the Calcutta case that looking at the terms of the contract it did not appear to impose any liability or obligation of a personal character on the assignor, which would prevent the operation of the rule of assignment, and I feel no doubt that the expression "of a personal character" referred to the obligation only and not to the liability, and that the decision was not intended to qualify the rule that, though the benefit of a contract may be assignable by one party, the burden is not so assignable without the consent of the other party. The House of Lords case of *Tolhurst* v. *The Associated Portland Cement Manufacturers* (4), was referred to as an authority for this contract being assignable, but the decision in that case was arrived at on a consideration of the terms of the particular

(1) (1892) I.L.R. 16 Bom., 441.
(2) (1906) I.L.R. 33 Cal., 702.
(3) (1906) 9 Bom. L.R., 114.
(4) L.R. (1903), A.C., 414.

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contract concerned and the assent of the Lord Chancellor to the opinion of the majority of the Judges was accorded, and that with hesitation, only in view of the length of duration of the contemplated contract, the persons engaged in it, and the nature of the contract itself, in none of which respects had it anything in common with the contract now under review. Looking at the contract in this case I think it clearly imposes liability on the purchasers such as would preclude their transferring it without the consent of the sellers. It contains the following clauses:—

19. If market price of above rice meal declines prior to milling sellers have the option of requiring buyers to deposit a margin between contract and market prices of the day within 24 hours.

11. Should buyers fail to appear to take delivery *ex* hopper or as above sellers to have the right of cancelling this contract and claiming on buyers for any difference in price between sale and market price of the day on which the rice meal was to have been milled.

12. Sellers have the option of disposing of the rice meal by public or private sale for buyers' account should they fail either to deposit margin as above or to pay for it as above within two days of the presentation of the bill.

These provisions in my opinion operate to render the contract not assignable without the seller's consent. The appeal is dismissed with costs.

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*Before Mr. Justice Twomey.*

*Civil 2nd Appeal No. 137 of 1911.*

*November 19th, 1912.*

1. SHWE PI, 2. NYA NA *v.* 1. YU MA, 2. MAUNG PAN.

*Agabeg*—for appellants (defendants).

*Harvey*—for respondents (plaintiffs).

*Limitation—Adverse possession—Mortgage—Transferee of mortgagee,—Indian Limitation Act, Articles 134, 144, 148.*

The plaintiff-respondent's father mortgaged a parcel of land; and one of their relatives, A, obtained possession of the land on payment of the mortgage money (though not under circumstances that would constitute a redemption). A subsequently allowed himself to be dispossessed by B; and the land descended from B to D. B's possession dated sixteen years back from the date of institution of the suit.

*Held*—that a suit for redemption was barred by Article 144 of the 1st Schedule of the Limitation Act, and that Article 148 did not apply.

As the plaintiffs had attained their majority more than three years before the filing of the suit, they were not entitled to an extension of time under section 6 of the Act.

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*Semble*,—Article 134 (relating to a suit against a transferee from the mortgagee) would also not apply to the case.

This was a suit for redemption of land orally mortgaged in usufructuary mortgage by the plaintiffs' father Tun Aung Gyaw to the 1st defendant Aung Zan for Rs. 300 about the year 1885. The facts as found by the lower Courts are as follows. Tun Aung Gyaw died about 1890 leaving surviving him his children the plaintiffs Mi Yu Ma and Maung Pan who were minors. About 1893 the 2nd defendant Po Te obtained the land from Aung Zan on paying him the mortgage debt Rs. 300. Po Te is the brother of the mortgagor Tun Aung Gyaw and it was with the express consent of his niece Mi Yu Ma that Po Te took the land from Aung Zan. This transfer to Po Te is called a redemption and it was clearly intended to be such by Po Te, Aung Zan and Mi Yu Ma. Po Te worked the land for a year and then in 1894 the 3rd defendant Shwe Pi got possession of it. Po Te says that Shwe Pi seized the land forcibly for a debt of some Rs. 600, due by Po Te, but there is no other evidence of any force being used. It seems more probable that Po Te, who admits owing the money, did give up the land to Shwe Pi in satisfaction of the debt. Shwe Pi shortly afterwards sold the land for Rs. 750 to the father-in-law of the 4th defendant Nya Na. Shwe Pi says that this was about a month after he got possession. From that time up to the time the suit was filed, a period of about sixteen years, the land was in the possession of Nya Na's family.

The 3rd and 4th defendants Shwe Pi and Nya Na pleaded that the land was mortgaged to Shwe Pi in 1892 by Maung Po Te and Ma Yu Ma, who afterwards relinquished the land to him unconditionally as they could not pay the mortgage debt. But the Subdivisional Court held that this mortgage and unconditional transfer were not proved.

The plea of limitation was not raised and no issue was framed on that subject. But the question of limitation was clearly involved and both Courts have dealt with it in their judgments.

The Subdivisional Judge does not mention under which article in the Schedule of the Limitation Act he conceives the suit to fall. But he held that the 4th defendant had been in adverse possession for over twelve years and I gather therefore

that he considered Article 144 to be the relevant article. The Divisional Court on the other hand held that the suit came under Article 134, being a suit to recover possession of immovable property mortgaged and afterwards transferred by the mortgagee for valuable consideration. The period of limitation is the same under Article 134 as under Article 144, namely, twelve years.

The lower Courts agreed however in applying the provisions of section 6 of the Limitation Act. The original cause of action arose in 1894. The period of twelve years expired in 1906. The suit was not filed till 1910. But both the plaintiffs were minors in 1894. Maung Pan attained majority about four years before the suit was filed and his sister Ma Yu Ma some years earlier but less than twelve years before the suit was filed. Both Courts held that in these circumstances the plaintiffs were entitled under section 6 to bring their suit within twelve years of attaining majority. Both Courts overlooked the provisions of section 8 which limits the extension of time under section 6 to three years from the cessation of minority. The Act allows as a maximum three years from the cessation of minority or the full period from the ordinary starting point of limitation, that is the original cause of action (here 1894) whichever is more advantageous to the plaintiff. In this case the plaintiffs cannot invoke sections 6 and 8, because when the suit was filed the statutory maximum of three years from the date of attaining majority had already expired. Both the plaintiffs had attained majority more than three years before filing the suit. Consequently the limitation must be computed in the ordinary way, *i.e.*, from the original cause of action in 1894; and as more than twelve years from that date had elapsed when the suit was filed it was barred by limitation, unless indeed it can be held that the lower Courts erred in assigning twelve years as the proper period of limitation for the suit.

It is now argued for the respondents that the suit fell neither under Article 134 nor under Article 144 but under Article 148 which prescribes a period of sixty years limitation. With reference to this argument it may be noted that while both the lower Courts held the proper period of limitation to be twelve years there are passages in each of the judgments which

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indicate that the learned Judges had some doubt on the point. The Subdivisional Judge remarked:—"Arguing in the other way the plaintiffs are mortgagors through their father and the defendants 1 to 4 must be regarded as mortgagees one after the other and the plaintiffs are clearly entitled to redeem." The remarks of the Divisional Judge are as follows:—"I hold further that since the plaintiffs were not parties to the various transfers of the mortgaged property which belonged to them as their father's heirs, all that can have been transferred to any of the subsequent transferees of the property is Ko Aung Zan's right as usufructuary mortgagee, and that the lower Court was right in giving plaintiffs a decree for redemption." In each case the remarks are inconsistent with the finding that the period of limitation is twelve years. For if the 4th defendant, the present holder of the land, merely stands in the shoes of the original mortgagee and is the last of a series of sub-mortgagees or transferees of the original mortgage, then Article 148 would apply and the period of limitation would be sixty years.

I have considered whether the case can be brought within the scope of Article 148 and I am satisfied that it cannot. The transfer by Aung Zan to Po Te is described by both parties as a redemption. Section 91 of the Transfer of Property Act specifies the classes of persons who may redeem. It may be that Po Te was "guardian of the property of the minors" (his niece and nephew) and redeemed the land. But there is no proof that he was their guardian or that he redeemed on their behalf. The fact that Mi Yu Ma consented to the transaction does not show that the redemption was on behalf of the minors. It cannot be treated as a redemption in law. It must be construed as a transfer of the mortgagee's interest to Po Te. The same cannot be said of what took place in 1894. Po Te denies that he made any transfer to Shwe Pi; he says Shwe Pi entered on the land forcibly. However that may be, it is clear that Shwe Pi possessed himself of the land without any reference to the subsisting mortgage. Presumably he knew of the original mortgage to Aung Zan, but believed it to have been extinguished by the transfer to Po Te. This was a natural view to take as Po Te was brother of the original mortgagor. In the circumstances it is erroneous to assume that there was a mere

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transfer of the mortgagee's rights from Po Te to Shwe Pi. Shwe Pi invaded the mortgagee's rights and his possession became adverse to both mortgagor and mortgagee. He cannot be regarded as a sub-mortgagee or as an assignee of the mortgagee and Article 148 is therefore inapplicable. Article 134 also is inapplicable. That Article would apply if Po Te knowing that he had acquired only mortgagee's rights by the transfer from Aung Zan nevertheless sold the land outright as his own property to Shwe Pi. But the actual facts are different. Po Te suffered Shwe Pi to take possession of the land and to hold it irrespective of the mortgage. It is clear that Shwe Pi entered on the land unconditionally and his possession at once became adverse as found by the Subdivisional Court. There was no transfer from the mortgagee such as would bring the case within Article 134.

In my opinion the Article which really applies is Article 144 and under that the suit was barred by limitation. It would also be barred if the Article applicable were found to be Article 134.

The decrees of the lower Courts are set aside. The suit is dismissed with costs in all Courts.

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*Before Mr. Justice Twomey.*

*Civil Revision No. 17 of 1912.*

BALLY SINGH *v.* BHUGWAN DASS KALWAR.

*June 13th, 1913.*

*V. G. Bijapurkar*—for applicant (plaintiff).

*R. N. Burjorjee*—for respondent (defendant).

*Promissory Note—Unstamped,—Suit for Consideration—Indian Stamp Act, 1899, Section 35.*

Where the plaintiff has no cause of action apart from a promissory note he cannot sue for the consideration but only on the note: and, if that note is not duly stamped, a decree cannot be passed thereon, even if the defendant, by admitting execution, dispenses with any necessity for "proving"

*Ma Ein Min* v. *Maung Tun Tha*, 2 U. B. R. (1897—1901), 556 followed.

The only argument before me is one that is not contained in the application for revision, namely, that the defendant having admitted that he executed a promissory note for the amount claimed, it was unnecessary for the plaintiff to produce the document in evidence and the plaintiff was entitled to a decree on the failure of the defendant to prove payment.

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It is admitted that the document itself could not be admitted in evidence or acted on because it is insufficiently stamped, and it is settled law that in such a case the plaintiff can succeed only if he can show that he has a cause of action independently of the document. The law on this subject is fully discussed in the Upper Burma case (1) cited in the judgment of the Township Court and it is unnecessary to go any further.

It is clear that in the present case the plaintiff has no cause of action apart from the document. The promissory note is the contract and section 91 of the Evidence Act debars the production of any other evidence but the writing itself. It is true that the plaintiff did not profess to sue on the promissory note. He knew that he could not do so as it is not properly stamped. But as he had no cause of action apart from it, if he got a decree it could only be a decree on the promissory note. As the District Judge points out, that would be "acting on" the promissory note, in direct contravention of section 35 of the Stamp Act. [*See* the Upper Burma case *Ma Ein Min* v. *Maung Tun Tha* (2) and the rulings cited therein.]

On these grounds I think the decision of the lower Courts is correct. I am also of opinion that even if the decision were wrong the case is not one in which this Court could properly interfere in revision according to the principles set out in *Zeya* v. *Mi On Kra Zan* (3). The facts and the law applicable to them have been duly considered by the lower Courts, which have come to a concurrent decision.

I have not referred to the second and third paragraphs of the application in which it is urged that the document in question is not a promissory note at all but a mere receipt for money. This ground was not argued before me. It is a ground that apparently was never taken in the lower Courts and so far as I can see there is no force in it. The document appears to be a promissory note as defined in section 4 of the Negotiable Instruments Act.

The application is dismissed with costs.

(1) *Nga Waik* v. *Nga Chet*, 2 U.B.R. (1907—1909), Evidence, 5.
(2) 2 U.B.R. (1897—1901), 556.
(3) 2 L.B.R., 333.

*Before Mr. Justice Hartnoll, Offg. Chief Judge, and Mr. Justice Young.*

*Civil Miscellaneous Applications Nos. 7 & 8 of 1913.*

*June 23rd, 1913.*

## THEIN NOO *v.* RAMASAWMY CHETTY.

*J. R. Das*—for petitioner.

*N. N. Burjorji*—for respondent.

*Civil Procedure.—Appeal to King in Council,—s. 110, Civil Procedure Code, 1908.*

The expression "involve some substantial question of law" contained in section 110 of the Civil Procedure Code, 1908, must be construed with reference to the practice of the Privy Council of not interfering with concurrent findings of fact in the Courts below, and a question of law which would arise only in the event of those findings being reversed by the Privy Council is not therefore "involved" so as to give ground for an appeal, under such circumstances, to the King in Council.

*Banke Lal* v. *Jagat Narain* (1900), I.L.R., 23 All., 94 followed.

*Young, J.*—These are two applications for leave to appeal to His Majesty in Council. As the grounds of the application are the same in each case and the cases are closely connected and the applications were argued as one by the same Counsel I propose to deal with both in the same order.

In the one application which arises out of Civil Appeal No. 129 of 1910 and Civil Regular No. 225 of 1909 the Appellate Court stated as follows:—"We cannot shut our eyes to the fact that in one of the other suits the basis of her claim which was also the basis of her claim in the suit out of which this appeal arises was entirely disproved". The basis thus referred to was that in October 1907 she had entrusted her brother-in-law Po Nwe with certain jewelry to be deposited for safe custody in the Bank of Bengal, each suit being to recover portions of the said jewelry from persons to whom the said Po Nwe had pawned it.

The suit in reference to which the above quoted remarks of the Appellate Court were made was heard by the Court of first instance before the suit in reference to which the Appellate Court held that the basis of the plaintiff's case was disproved, and most of the evidence in it was made evidence in the other suit, Civil Regular No. 131 of 1909, which was heard later, but the evidence in Civil Regular No. 131 of 1909 was not made evidence in Civil Regular No. 225 of 1910, which was determined by the Court of first instance solely on its own evidence.

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This Court in its judgment in Civil Regular No. 225 observed as follows:—"This being so the only result is that the pledge was made by Po Nwe with her knowledge and consent for otherwise he (Po Nwe) would not have been in possession of her jewelry at all. Whether the Appellate Court was, strictly speaking, entitled to have regard to evidence taken in another suit may in my opinion be perhaps open to question. It could of course have directed this evidence to be retaken under Order 41, Rule 27, in which case the objection, for what it is under the circumstances of the case worth, would have been removed. So far however from taking the objection the applicant who is represented by the same Counsel in each application which Counsel also represented her in each appeal has expressly treated the evidence in each suit as having been incorporated in the other, referring in the grounds of each application to the evidence of the witness on whom the Appellate Court chiefly relied for its finding that the basis of the appellant's case was disproved, the grounds in each application being precisely similar, so far as this point is concerned. In the later of the two suits, namely Civil Regular No. 131 of 1909, the learned Judge of first instance stated as follows:—"As to the second issue whether she entrusted the jewelry to Po Nwe for deposit in the Bank of Bengal the evidence is the same as in the former case and for the same reasons I would come to the same decision, but there is further and stronger evidence on that point in the present case to which I must also refer," and the Appellate Court stated as follows:—"It is evident that she was either interested in her brother-in-law's business or that for family reasons she helped him. The only conclusion that can be come to is that she placed her jewels at his disposal in order that he might raise money by pledging them." There is therefore a concurrent finding of fact by each Court in each case that she authorised Po Nwe to pledge her jewels; direct evidence of this authorisation could hardly be expected, but the falsity of her case with regard to the purpose for which she alleges she gave her jewels to Po Nwe, her acknowledged intimacy and close relationship with him and her participation in his business affairs, all of which were proved, were ample evidence on which the conclusion might be arrived at. It is

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not for this Court to consider whether those findings were correct or not: leave to appeal in the face of their being concurrent can only be granted if a substantial question of law is involved. I am quite unable to hold that the question whether the Courts were entitled to draw this very ordinary presumption involves a substantial question of law. It is true that if the Privy Council entertained the appeal and came to the conclusion that these concurrent findings were wrong, a substantial question of law as to the construction of section 178 of the Contract Act would be involved, but to borrow the language of Sir Arthur Strachey, C.J., in *Banke Lal* v. *Jagat Narain* (1). I think it is impossible to say that a question which only arises if the concurrent findings of fact of the Courts in India are disregarded, a question which never can arise so long as the Privy Council maintains those concurrent findings of fact, is a substantial question of law which the appeal to the Privy Council involves. I would therefore reject the applications.

*Hartnoll, Officiating, C. J.*—I concur.

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*Before Mr. Justice Hartnoll, Officiating Chief Judge and Mr. Justice Young.*

*Civil First Appeal No.* 21 *of* 1912.

MOOSAJEE AHMED & CO. *v.* BUN SWEE SOON & CO.

*July 24th,* 1913.

*Giles*—for appellants (defendants).

*N. M. Cowasjee*—for respondents (plaintiffs).

Accident,—Clause exempting promisor from liability for breach of contract in case of negligence of promisor causing accident. Maxim "*Causa proxima non remota spectatur*" not applicable in such cases.

Defendant undertook to deliver to plaintiff a certain quantity of rice on a certain date, one clause of the contract being "accidents to machinery... always excepted." The defendant's machinery broke down and he was unable to make delivery. Plaintiff sued for damages and defendant sought to excuse himself from liability therefor under the clause above quoted. It was proved that the breakdown of the machinery was due to the negligence of the defendant.

*Held*—that, although the proximate cause of the defendant's failure to carry out his contract was the breakdown of his machinery, yet the defendant

(1) (1900), I.L.R., 23 All., 94 at page 98.

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could not be excused from liability under the exempting clause, as the originating cause was his own negligence in regard thereto.

*Wilson* v. *Xantho* (1887) L.R. 12 A.C. 503; *Grill* v. *The General Iron Screw Collier Company* (1886) L.R.1. C.P. 611, referred to.

*Hartnoll, Officiating C.J.*—The appellants sold to the respondents 2,000 bags of rice on the 3rd November 1910 at Rs. 291-8-0 per 100 baskets of 75 pounds each, each bag to weigh 225 pounds net. Delivery was to be taken in November ex hopper. Section 16 of the contract was "accidents to machinery, strikes, or sickness of mill hands or coolies always excepted." Delivery of the rice was never tendered to the respondents and they sued in the present suit for damages for breach of contract. The appellants' answer is that there was no breach of contract—that their machinery broke down on the 28th November and was not in order until the 2nd December, and that this breakdown rendered their performance of the contract impossible. The respondents contended that the appellants never intended to perform their contract—that as a matter of fact they were unable to deliver the rice by the 30th November as, at the time the alleged breakdown is supposed to have taken place, they had still 3,000 bags of rice to mill under three milling notices which had been issued on the 26th November and which would have kept their mill fully occupied for over three days as its average milling capacity was not more than 800 bags in 24 hours.

The learned Judge on the Original Side found that the pump of the mill broke down at 4 p.m. on the 28th November and that at that time the appellants had to mill 3,735 bags under four milling notices and also 2,000 bags for the respondents in 2 days and 8 hours, which meant that the mill would have to turn out considerably more than 2,000 bags a day, which was the maximum output of the mill according to the defence. He found that the evidence showed the mill never turned out more than 1,086 bags when it worked for 19 hours. He decided against the contention of appellants' Counsel that if the pump had not broken down the appellants might have milled the respondents' rice and postponed milling under the notices which had issued, because the appellants having expressed their intention of milling for their buyers in a certain order by

issuing the milling notices, they must be bound by their election unless and until they could show that they had altered it. He accordingly gave a decree for Rs. 4,110 damages with costs.

There is no ground for doubting that the mill did break down entirely on the 28th November and was not in order again until the 2nd December. The evidence also shows that there had been trouble from the 20th November with the pump which reduced the capacity of the mill to mill rice. I do not read the evidence of Suliman Haji Tar Mahomed as meaning that the pump trouble did not interfere with the output. He said: "From the 20th till 28th the output became less and less till no output was made at all.....I said the mill gave trouble from the 20th because that is the date the mill worked irregularly. The mill would not stop except when there was no water in the boiler and then would stop for 5 to 25 minutes but that would not affect the outturn. When there was stoppage, the output would be abnormal." The general effect of this evidence seems to me to be that the output was affected. The engineer Abdul Aziz said that from the 20th onwards the mill could only work at half pressure and only half the usual outturn in the hour. From the milling notice book this statement would seem to be an exaggeration. The reduction of output up to the 28th November from the 20th does not seem to me to be to any extent in favour of the appellants; for, if it occurred, it behoved them to work day and night to fulfil their contracts, which they did not do. The book shows that they only worked 8 hours on the 21st, 12 hours on the 22nd, 12 hours on the 24th, and so on.

As regards what would be a reasonable output of the mill after the 20th November I think that it cannot better be decided that considering the output on the 26th when the mill turned out 1,086 bags in 19 hours—say 57 bags an hour. For 24 hours this would make 1,368 bags. The evidence makes the output higher; but I would not take that it could have been more as the pump was out of order, and evidently on the 26th November the mill was being pushed. I am unable to find it proved that there were 3,725 bags to be milled on milling notices issued when the breakdown occurred. As far as I

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can see, the evidence only proves that there was rice to be delivered on the notices 147, 148 and 149.

| | | | | |
|---|---|---|---|---|
| On | 147 | ... | ... | 698 bags. |
| ,, | 148 | ... | ... | 1,000 ,, |
| ,, | 149 | ... | ... | 1,000 ,, |
| | | | Total ... | 2,698 bags. |

This with respondent's 2,000 bags would make 4,698 bags to be milled between the afternoon of the 28th and midnight of the 30th. On the maximum possible output I have found it would be impossible for appellants to have carried out all their contracts, but, if the breakdown had not occurred, and no breakdown had occurred between the 28th and 30th, it would have been possible for them to have carried out respondents' contract if they had so desired. There is no ground for thinking that they ever intended to elect to carry out respondents' contract, and there is a reason for thinking that they never intended to do so. This reason was that their rate with respondents was lower than their rates with their other buyers except in one instance. The milling notices however did not bind them to those whom they noticed for they distinctly say that the "millers take no responsibility in case the rice is not milled at the above appointed time." So there was nothing to prevent appellants noticing the respondents on the 28th and if there had been no breakdown between then and the end of the month they could have carried out respondents' contract. But it seems to me that if appellants wish to escape liability on the ground that it was the breakdown in their machinery that prevented them from carrying out their contract the burden of proof lies clearly on them to show that they are free from liability. What do we find from a consideration of the evidence? The pump began to get out of order on the 20th and gave trouble daily according to the engineer Abdul Aziz until the breakdown occurred. No effective measures were taken to get it properly repaired before the breakdown and then according to the witness Thomas an accident was likely to occur at any moment. It seems to me that there was negligence on the part of appellants or their servants in not causing effective repairs to be done when the pump got out of order—more

especially in view of their obligations to fulfil their contracts. Further, not only were no effective measures taken to effect repairs but, as I have already shown, the mill was not worked day and night but only for the much fewer hours daily which I have already pointed out. Seeing that the machinery was in such a state, surely it was incumbent on appellants to exert themselves to the utmost to fulfil their contracts. Again supposing that on the 28th they had elected to proceed with respondents' contract, it by no means follows that they could have carried it out. Their machinery was in bad order, and as I have pointed out an accident was, according to the evidence, likely to occur at any moment. It is not at all improbable that, if there had not been a breakdown on the 28th, there would have been one on the 29th or 30th before the respondents' contract had been completed. The real cause of their failure appears to have been their neglect to have their machinery attended to when it first became defective and in their laxity at not working day and night from that time so as to perform all their contracts if possible, seeing that they had trouble with their machinery. On these grounds I do not think that they should be allowed to escape liability on the plea that it was an accident to their machinery that prevented them from performing their obligation.

I would therefore dismiss this appeal with costs.

*Young, J.*—I concur. The clause on which the appellant seeks to rely is very analogous to those clauses in a charter party or bill of lading under which a ship-owner seeks to except himself from liability for a breach of contract caused by certain specified causes. The law on this point is laid down in *Wilson* v. *Xantho* (1) by Lord Macnaghten and by Willes, J., in *Grill* v. *The General Iron Screw Collier Coy.* (2). "The shipowner's obligations are not limited and exhausted by what appears on the face of the instrument. Underlying the contract, implied and involved in it, there is a warranty by the shipowner that his vessel is seaworthy, and there is also an engagement on his part to use due care and skill in navigating the vessel and carrying the goods. Having regard to the

(1) (1887) L.R. 12 A.C., 503.
(2) (1866) L.R. 1 C. P., 611.

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duties thus cast upon the shipowner, it seems to follow as a necessary consequence, that even in cases within the very terms of the exception in the bill of lading, the shipowner is not protected if any default or negligence on his part has caused or contributed to the loss." According to the evidence in the case the pump which broke down entirely on the 28th first cracked on the 20th and then kept leaking, with the result that the mill stopped two or three times a day for periods varying from 10—25 minutes. All that was done was to repair the crack with rubber and putty, and from that time on the mill could only work at half pressure and only turn out half the usual outturn. Mr. Thomas, Engineer to the Irrawaddy Flotilla Company, said that a new pump could have been put in in a day and a half. A new one was eventually put in after the breakdown of the 28th and if it had been put in earlier the contract could easily have been performed. In my opinion the mill-owner was negligent and in default in that he did not have the pump properly inspected and attended to on the 20th. I think it was his duty to have and to keep his machinery in proper order and that having failed in this duty he has disabled himself from relying on the terms of the exception. I would dismiss the appeal with costs.

*Civil 1st Appeal No. 76 of* 1910.

*August 5th,* 1913.

*Before Mr. Justice Hartnoll, Officiating Chief Judge and Mr. Justice Twomey.*

V. P. GOVINDASAWMY PILLAY *v.* K. V. K. KOOLAYAPPA ROWTHER.

*Lentaigne*—for appellant (plaintiff).

*N. M. Cowasjee*—for respondent (defendant).

*Commission Agent.—Implied warranty as goods supplied by a—Contract Act, section 113.*

A commission agent in Rangoon, supplying goods to a buyer in Madras, is to be regarded, in some respects, as in the relation of a vendor thereof and, as such, to be bound by an implied warranty that the goods supplied are of the denomination agreed upon.

*Ireland v. Livingston*, L.R. (1871) 5 E. & I. A., p. 395, referred to.

*Twomey, J.*—The case was remanded for further enquiry on the second issue which is as follows:—

"Is delivery of special big mills rice a good delivery under

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a contract for small mills? And can a commission agent buy special big mills when told to buy small mills?"

The issue ought to have been in the past tense, for the questions relate to the custom of the trade at the time of the contract—December 1908. The custom is shown to have changed materially since then. But no confusion has been caused by the want of precision in the issue.

Many witnesses have been examined on both sides and the learned Judge on the Original Side has found on the first question that so far as local dealings between traders in Rangoon are concerned, a delivery of "specials" was not a good delivery under a contract for "small mills." I think the evidence on this part of the issue is altogether in favour of the defendant. A buyer in Rangoon who contracted for "small mills" could insist on getting rice of the milling of one or other of the small mills mentioned in his contract. If the seller wished to supply "specials" instead, he had to get the buyer's express permission for the substitution, and this permission would usually be given only if the "specials" offered by the seller were guaranteed to be equal in quality (*i.e.*, in polish, and in the low percentage of broken rice) to the then prevailing quality of "small mills" rice. It is proved beyond dispute that "big mills special" and "small mills" were well known to the trade as distinct denominations of rice, the former being turned out by big mills, such as Steel Brothers, Bulloch Brothers and Mohr Brothers who milled their best grain for the European market, and the latter by small mills that usually milled only for Eastern markets.

On the second part of the issue also the decision is in the defendant's favour. The learned Judge found that Rangoon commission agents like the plaintiff shipped "specials" to Madras ports against orders for "small mills", and he remarked that the evidence on this point is little less than overwhelming. Evidence was produced to show that even the defendant himself had on other occasions accepted shipments of "specials" against orders for "Chinna mills" (or "small mills"). But in the Judge's opinion the plaintiff failed to prove that the defendant and other purchasers in Madras accepted the "specials" knowingly instead of the "small

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mills" ordered by them. In other words, the Judge found that so far as the evidence shows, the "specials" were accepted on arrival in India in the erroneous belief that they were "small mills" as ordered.

As a matter of fact, the defendant in this case did not refuse to accept on the ground that the rice tendered to him was not what he ordered. He refused because he contended that the plaintiff charged him more than the market rate. But he afterwards discovered that the rice tendered to him was not "small mills" but "specials," and he has therefore taken this as the first line of his defence. It is not disputed that he is entitled to do so.

The appellant's case as explained by Mr. Lentaigne depends on the existence of a well established custom of the trade by which a dealer in Madras Presidency who ordered "small mills" rice through a commission agent in Rangoon was bound to accept "big mill specials" from the commission agent, although, as it now appears most clearly, the commission agent himself was not bound to accept "specials" in fulfilment of his own local orders for "small mills" in Rangoon. This contention rests mainly on the fact, which is certainly strongly supported by evidence, that commission agents in Rangoon, in a large number of cases extending over several years, had shipped "specials" to Madras against orders for "small mills," and that these shipments were accepted by the Madras purchasers without demur.

It has been suggested to us that a commission agent acting for a principal in Madras is not in the same position as an ordinary seller, and that the buyer of the rice in Madras must be taken as allowing the agent in Rangoon a certain latitude in carrying out his orders. The suggestion is that a commission agent is within the scope of his authority if he purchases for his principal rice of a quality approximating to that specified in the order. I think this contention has no force. In a commission agency there is a contract of sale with a contract of employment added to it. The agent undertakes to procure goods of a certain quality according to the terms of the order or as cheaply as he can (1). His limited powers as agent do

(1) See Anson's Law of Contract, Part VI, Chap. 2.

not include authority to vary the subject matter of the contract of sale between him and his employer. Where he is commissioned to supply goods of a specified quality, the employer cannot be required to accept goods of another quality any more than an ordinary purchaser could be required to accept goods of another quality than that which he contracted to buy. The commission agent differs from the ordinary seller in what he stands to gain by the transaction; instead of getting a profit on the price of the rice he gets a payment by way of commission. But in other respects they are on the same footing as regards the buyer.*

The present case appears to be governed by section 113 of the Indian Contract Act which lays down that when goods are sold as being of a certain denomination, there is an implied warranty that they are such goods as are commercially known by that denomination. The illustration (*b*) to the section is as follows:—

A buys.....

"Fair Bengal." There is a breach of warranty.

In the present case the defendant bought unascertained rice under the denomination of "small mills" and if the rice tendered by the plaintiff proves not to have been "small mills," there is a breach of warranty which would entitle the defendant to refuse acceptance under section 118.

Mr. Lentaigne contends that the defendant used the words "small rice" and "Sinna mill" in his telegrams to the plaintiff as abbreviations for "small mills or special," that the general acceptance of "specials" by Madras purchasers who ordered "small mills" shows the terms to be really convertible, and that the words must be construed accordingly, especially as it is shown that the difference between "small mills" rice and "big mills special" rice was very small. It certainly appears from the evidence that the difference in 1908 was small, whether in price or in actual quality, between the rice milled by "small mills" and the "special" quality milled by the big mills. But the evidence also shows clearly that the two were never treated in Rangoon as convertible terms. They had separate quota-

* See Ireland *v.* Livingston, L.R. (1871) 5 E. & I. A., p. 395.

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tions on the market, and the printed forms of contract in use among Rangoon traders recognized the distinction between the two kinds. The contract form, Exhibit 2N, gives a long list of mills big and small. The big mills which turn out "specials" are entered twice in the list, the second entry of each name having the name of the firm's special mark ("Pagoda," "Stork," etc.) appended to it. It is explained that if the contract was for "usual S.Q." all entries in the list would be struck out except the first entries of the big mills. If the contract was for "special $\frac{\text{and}}{\text{or}}$ small mills" the first entries of the big mills would be struck out and there would remain the second entries of the big mills (*viz.*, the entries with the distinctive marks added) and the entries of the smaller mills. If the contract was for "small mills" only, the entries of the big mills (both the first entries and the second) would be scored out and there would remain only the entries of the small mills. If a buyer wished to confine his order to any one or more of the small mills, all entries would be struck out except the names of the selected small mills. An order for "special $\frac{\text{and}}{\text{or}}$ small mill" was apparently not uncommon and under such an order the seller could supply either "specials" or "small mills" subject to any limitations made by the buyer scoring out any of the names in the list of mills.

Seeing that the term "small mills" in Rangoon certainly did not include "specials" I think it was incumbent on the plaintiff to prove clearly that the term "small mills" (or "Chinna mills" or "Sinna mills") in orders from Madras had the wider signification which he wished the Court to attribute to it. The fact that "specials" were for long accepted by Madras purchasers is not alone sufficient. The bags in these cases would have the mark of a Stork, Pagoda, etc., which to a Rangoon rice trader would show that they came from one of the big mills and therefore that they contained rice of the "big mills special" kind. But this knowledge cannot be imputed to the defendant. In the invoices sent to the defendant the "specials" were described as "small mills" and he would therefore have good reason to believe that he was getting "small mills". The quality would be only slightly different from genuine "small mills"

and a purchaser in Madras who had no genuine "small mills" to compare with what he received from Rangoon would not be in a position to detect the difference.

It is urged for the appellant that the Madras purchasers did not mind whether "specials" or "small mills" (properly so called) were sent to them, that it was nothing to them whether the rice was milled in a small mill or in a big mill. They looked only to the quality of the rice and were satisfied with this test. After all, it is argued, they got rice which suited them; it was up to the standard of quality that they expected and the mere name by which the thing went in Rangoon is immaterial. But, looking to the terms of section 113, I think it was not open to the plaintiff to say: "I contracted to sell you 'small mills' rice but as 'big mills special' rice is of about the same quality and you do not know one from the other you are bound to take what I sent you." There is a failure of performance when the thing offered is different from the thing contracted for.

I have not overlooked the two telegrams, Exhibits 3L and 3M, put in by the plaintiff's agent. They are orders from traders in India for "Steel's best Chinna mills" and "Bulloch's Chinna mills." What these orders referred to was apparently the "special" quality milled by the two "big" mills mentioned in them. The telegrams show no doubt that in the minds of the traders who sent them the term "Chinna mills" (or "small mills") had the same meaning as "specials" of big mills. But I cannot regard these telegrams as sufficient proof of the general proposition that an order from Madras for "Chinna mills" meant that the sender wanted "special or small mills." These isolated telegrams are not sufficient to rebut the strong case made out by the defendant showing that "specials" and "small mills" are distinct denominations in the Rangoon market, quoted separately not only in Rangoon but in telegrams to Madras dealers.

On these grounds I would dismiss the appeal with costs.

*Hartnoll, Officiating C. J.*—I concur.

*Criminal Revision No. 274B of 1913.*

*September 2nd, 1913.*

*Before Mr. Justice Twomey.*

## MA THAW *v.* KING-EMPEROR.

*Maintenance,—arrears of—recovery of—Code of Criminal Procedure, sections 386, 387, 488, 490.*

When a person ordered, under section 488 of the Code of Criminal Procedure, to pay maintenance has ceased to reside in the jurisdiction of the Magistrate who passed the order, an order for the recovery of arrears may be made either by the Magistrate who passed the order for payment of maintenance or by a Magistrate having jurisdiction in the place where such person resides.

*The Queen* v. *Karri Papayamma* (1881), I.L.R. 4 Mad., 230 followed (in part).

The facts of this case are set forth in the following extract from the order of reference by the Bassein Sessions Court:—

"On the 28th October 1910 the petitioner, Ma Thaw, was granted, by the 2nd Additional Magistrate of Bassein, in his Criminal Miscellaneous No. 103 of 1910, an order under section 488 of the Criminal Procedure Code, directing her husband, Maung Tut Ni, to pay her monthly the sum of Rs. 20 for the maintenance of herself and her child.

On the 12th August 1913, Ma Thaw applied to the 2nd Additional Magistrate, Bassein, for the recovery of Rs. 200 due as arrears under this maintenance order. On the same day the 2nd Additional Magistrate, Maung San Win, a first class Magistrate, returned the petition to her with an endorsement to the effect that under section 490, Criminal Procedure Code, the order can only be enforced by a Magistrate within whose jurisdiction the respondent now is. In the heading of the petition it was stated that the respondent was an Excise Officer, serving at Minhla, Upper Burma (Thayetmyo District).

Ma Thaw now applies for revision of this order, filing the original petition and order.

In my opinion the Magistrate's order is wrong, section 490 is not very satisfactorily worded, and when taken by itself suggests the view that the Magistrate has taken. But even by itself I do not think it is sufficient to establish that view. As a matter of natural principle if a Magistrate has power to pass an order he has also the power to take the necessary steps to enforce it.

In this particular case it would appear that the respondent was living in the Bassein District when the order was passed. But supposing that no order had yet been passed and that this was an application for an order for maintenance. Then the 2nd Additional Magistrate would have jurisdiction to pass the order provided that petitioner could show that she and respondent had last resided together in this district. See section 488 (*9*). On the Magistrate's view although he could pass that order he could not afterwards enforce it, which is absurd.

In the case of *The Queen* v. *Karri Papayamna* (1), it was held that section 538 of the old code did not deprive the Magistrate who has made an order for maintenance of the power given to him by section 536. The only difference between the two codes seems to be that the words "may be enforced" in section 490 of the present code have been subtituted for "shall be enforceable" in the old one. This does not seem to me to make any essential difference.

The learned Judges of the Madras High Court held, however, that the Magistrate who passed the order (including, of course, his successor) had discretion either to exercise his jurisdiction or to refer the applicant to the Magistrate having jurisdiction at the place in which the respondent is to be found. With all due respect to this opinion I am unable to agree with it. The effect of the law, as the learned Judges interpreted it, and as I understand it, is to give the applicant the option of proceeding either in the Court which originally passed the order or in that having local jurisdiction over the respondent. I know of no authority under which either of those Courts could refuse to exercise a jurisdiction which it possesses merely on the ground that some other Court also has concurrent jurisdiction. If the principle were adopted then it seems to me that any of the Courts referred to in section 488 (*9*) would also have discretion to refuse to exercise the jurisdiction conferred by that clause.

As a matter of fact this portion of section 490 seems to be superfluous. Section 488 (*3*) prescribes the procedure to be adopted in case of a breach of the order, and section 488 (*9*) appears to apply to this clause just as much as to clause (*1*).

(1) (1881) I.L.R. 4 Mad., 230.

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No doubt there may be inconvenience in proceeding in Bassein, but there is obviously at least equal inconvenience if the petitioner is referred to Thayetmyo. She would have to travel there and stay there some time, and it is quite likely that, as she says in her present petition, she cannot afford to do so. In this case the order of the Magistrate would operate to deprive her of her legal right to have the order enforced."

I concur in the learned Sessions Judge's remarks. The provisions of section 490 cannot be held to derogate from section 488 (*3*). Under section 488 (*3*) the Magistrate who has passed the order for maintenance can levy the amount due in the manner provided for levying fines, that is to say he can issue a warrant under section 386 for the distress and sale of any moveable property belonging to the person against whom the order was passed. Such a warrant can be executed either within the local jurisdiction of the Magistrate or without such limits under section 387 when it has been endorsed by the District Magistrate within the local limits of whose jurisdiction the moveable property is found. It must be held that section 490 merely provides an alternative course by enabling the person in whose favour the order was passed to apply direct to a Magistrate in any district where the person bound by the order may be. That Magistrate on satisfying himself as to the identity of the parties and the non-payment of the allowance will enforce the order by issuing a distress warrant in accordance with section 386. I agree with the Sessions Judge in thinking that it is left to the applicant to choose whether she should apply to the Magistrate who passed the original order or to a Magistrate having jurisdiction at the place where the respondent may be.

The order of the 2nd Additional Magistrate, Bassein, returning the petition is set aside and it is ordered that the said Magistrate shall receive it and deal with it according to law.

*Before Mr. Justice Hartnoll, Offg. Chief Judge, and Mr. Justice Young.*

*Civil Reference No. 1 of 1913.*

*August. 11th, 1913.*

## RANGOON ELECTRIC TRAMWAY AND SUPPLY COMPANY, LTD., *v.* THE RANGOON MUNICIPALITY.

*Giles*—for Rangoon Electric Tramway and Supply Company, Ltd.

*McDonnell*—for Rangoon Municipality.

*Tax—Municipal—on buildings, assessment of machinery therein,—Burma Municipal Act, 1898, section 46, sub-sections (1) and (4), section 72.*

Although machinery placed for use in a building is not, as such, liable to be assessed for taxation under section 46(1) (A) (*a*) of the Burma Municipal Act, 1898, yet, in estimating the assessable value of buildings used as an electric generating station, machinery placed therein for the purpose of the business concerned may, in spite of its not being physically attached to the building, be taken into consideration as enhancing the rateable value thereof.

*The Tyne Boiler Works Company* v. *The Overseers of the Parish of Longbenton* (1886) L.R. 18, Q.B.D., 81; *Kirby* v. *Hunslet Union Assessment Committee* (1906) L.R.A.C., 43 followed.

*Hartnoll, Offg. C. J.*—Two questions have been referred to us for decision under the provisions of section 64(*5*) of the Burma Municipal Act, 1898, namely :

(1) whether machinery placed for use in a building is liable as such to taxation under section 46(*1*) (A) (*a*) of the Act ? and if not

(2) what is the principle to be applied in determining when (if at all) it is liable to taxation under that provision ?

The reference has been rendered necessary as the Rangoon Municipal Committee in assessing the Rangoon Electric Tramways and Supply Company has, in arriving at the gross assessable value, included in it a sum of Rs. 6,50,000 on account of machinery.

From the order of the President of the Municipal Committee it would appear that the machinery assessed consists mainly of 4 turbo-generators, and 3 boilers, not built into the power house in such a way as not to be readily removable, but merely bolted to the floor for the purpose of steadying them while in motion.

Section 46 (*1*) (A) (*a*) contains the provision of law under which the tax on the Company has been imposed. It permits

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a tax on buildings and lands not exceeding ten per centum of the annual value of such buildings and lands. Section 46(*4*) defines annual value and is as follows :—

" In this section 'annual value' means the gross annual rent for which buildings and lands liable to taxation may reasonably be expected to let, and, in the case of houses, may be expected to let unfurnished."

On the part of the Company it is contended that in their assessment the value of all machinery which is not so structurally incorporated into their buildings as to form part of them should be excluded ; but on behalf of the Municipal Committee it is urged that the value of all the machinery should be taken into consideration in deciding the annual value. The Municipal Committee relies on the English cases concerning the liability of machinery to be rated ; the Company contends that such cases should not be taken into consideration at all as they are of a conflicting nature and are based on different statutes—that Burma has its own act, and this act alone should be considered in arriving at a decision. It was urged that there are two distinctions between the Statute of Elizabeth—43 Eliz. c. 2—and the Burma Municipal Act. Firstly, that the object of the Elizabethan Statute was to relieve the poor, for which the standard would be wealth ; whereas the object of the Municipal Act is to provide roads, scavenging, lighting and other amenities for the town, the standard for which is the extent to which these facilities are enjoyed by each person. Secondly, under the Statute overseers were employed to tax persons, whereas under the Act the Municipal Committee taxes property.

As regards the present state of the law in England I am unable to find that it is now in an unsettled condition. The case of *The Tyne Boiler Works Co.* v. *The Overseers of the Parish of Longbenton* (1) laid down the rule as to how machinery was to be taken into account in ascertaining the rateable value of premises and the principle laid down in that case was affirmed by the House of Lords in the case of *Kirby* v. *Hunslet Union Assessment Committee* (2). In that case Lord Halsbury said: " It is enough for me that a long series of decisions,

(1) (1886) L.R. 18, Q.B.D., 81.
(2) (1906) L.R.A.C., 43.

for certainly half a century, have established the bald proposition which is all I am insisting on, namely that although the machinery may not be part of the freehold, it yet is to be taken into account, and in saying that, I do not want to muffle it in a phrase, but what I mean by that is, that to increase the amount of the rate which is exacted from the tenant you may enter into that question and form a judgment upon it, although as a matter of fact the machinery may not be attached to the freehold."

With regard to the argument, that in England it is the person who is taxed and in Burma the property, in the *Tyne Boiler Works Company* case all consideration of personal property was left out of account. Only the question of how the value of real property was to be arrived at for the purpose of rating it was considered. *Lord Esher, M.R.*, said: "It is said with respect to some of the cases that they are not authorities because of the provisions of the statute passed with regard to the rating of personal chattels. Difficulties had arisen with regard to the question how far personal chattels were to be taken into consideration in rating the inhabitants of a parish. Those difficulties were set at rest by the statute 3 and 4 Vic., c. 89, but it had nothing to do with the question how the value of real property is to be arrived at for the purpose of rating it. Nobody says that these machines are to be rated as personal chattels. The question is whether they are to be taken into account in estimating the rateable value of the premises which it is admitted are liable to be rated. The statute therefore makes no difference and all the cases with regard to estimating the value of real property remain untouched by it." No weight therefore can be attached in my opinion to such an argument in deciding the present case.

With regard to the argument that the objects of the English Statute and the Burma Municipal Act are not the same, I am unable to see how the objects of the different laws affect the decision of this reference. One of the objects of the Municipal Act is to impose taxes and moreover section 72 of the Burma Municipal Act shows that its objects are not so circumscribed as urged by Counsel.

It was further argued that the word "buildings" used in

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section 46 of the Municipal Act should be construed in its strict sense and should not be taken to mean anything that was not a structural part of the actual buildings—that the same meaning should be given to the word in section 46 as in other sections of the Act such as sections 89 to 92, and this seems to me to be the real point for decision in the reference. Should this contention prevail in interpreting section 46(*4*) ? Or should the established English rule be followed ? Section 46(*4*) lays down how the " annual value " is to be determined and declares that it means the gross annual rent for which buildings and lands may reasonably be expected to let. It was the annual rent, gross or net, that was in issue in the English cases that dealt with the rateable liability of machinery. In the *Tyne Boiler Works Company* case it is set out at page 82 of the report that the mode in which the rateable value of the premises was arrived at was by ascertaining the gross estimated rental which a tenant from year to year might reasonably be expected to be willing to give for the use of them (inclusive of the machinery and plant) and by making the statutory deductions from such rental. The Judges in the English cases relating to machinery were therefore engaged in deciding the same question as we are now being called on to decide. This being so, although we are not bound by the English cases, I fail to see how we can lightly set aside the arguments and the decisions of such Judges who were and are of the greatest eminence, and no argument has been advanced to us which in my opinion would justify us in doing so.

To come to the actual questions themselves it is not contended by the Municipal Committee that machinery placed for use in a building is liable as such to taxation nor is this laid down by the English cases. I would therefore answer the first question in the negative.

The second question I would answer in the words of Lord Esher, M.R., as used by him in the *Tyne Boiler Works Company* case as follows :—

" Machinery, which is on the premises to be rated and which is there for the purpose of making and which make the premises fit as premises for the particular purpose for which they are used, is to be taken into account in ascertaining the rateable

value of such premises. It is not all things on the premises or that are used on the premises, which are to be taken into account; but things which are there for the purpose of making and which do make them fit as premises for the particular purposes for which they are used."

*Young, J.*—I concur.

*Before Mr. Justice Hartnoll, Offg. Chief Judge, and Mr. Justice Young.*

*Civil 1st Appeal No. 46 of 1912.*

*September 5th, 1913.*

P. M. P. A. N. ANNAMALAY CHETTY *v.* 1. SHAIK MAHOMED ISMAIL, MINOR, BY HIS NEXT FRIEND ALI AHMED. 2. AMIRAN BEEBEE. 3. SHAIK GOOLAM KADER.

*Giles*—for appellant.
*B. Cowasjee*—for 1st respondent.

*Mahomedan law,—gift,—settlement,—creation of life—estates,—Burma Laws Act, 1898, section 13 (2),—Transfer of Property Act, 1882, sections 2, 20, 21, 123, 129.*

The Mahomedan law is to be applied in all suits instituted in the Chief Court of Lower Burma relating to gifts among Mahomedans.

The creation of a life estate is inconsistent with Mahomedan law, and, where a life estate is attempted to be created, the donee takes an absolute title.

*Abdul Wahid Khan* v. *Mussumat Nuran Bibi and others* (1885) 12 I.A., 91; *Abdoola Khakibhoy Readymoney* v. *Mahomed Haji Suleman* (1905) 7 Bom. L.R., 306 followed.

*Umes Chunder Sircar* v. *Mussumat Zahoor Fatima and others* (1889) 17 I.A., 201 distinguished: *Fatima Beebee* v. *Ahmed Baksh* (1903) I.L.R., 31 Cal., 319; *Mullick Abdool Guffoor and another* v. *Muleka and others* (1884) I.L.R., 10 Cal., 1112; *Yusuf Ali* v. *Collector of Tippera* (1882) I.L.R., 9 Cal., 138; *Mussumat Hameeda and others* v. *Mussumat Budlun* (1872) 17 W.R., 525; *Suleman Kadr* v. *Dorab Ali Khan* (1881) I.L.R., 8 Cal., 1; *Abdul Gafur and others* v. *Niza' Mudin* (1892) I.L.R., 17, Bom., 1; referred to.

*Hartnoll, Offg. C. J.*—The point for decision in this appeal is whether a deed of settlement is valid or not. A Sunni Mahomedan, one Shaik Dawood Maistry on the 8th April, 1895, executed a deed of settlement, which sets out that, on account of the natural love and affection which he bears to his daughter Amiran Beebee, he transfers and assigns to her and her heirs as mentioned hereinafter a certain plot of land with the buildings thereon in trust, subject to the following terms and conditions.

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The deed then proceeds.

"(1) That I appoint myself as sole trustee of the said property to realize the rents and profits thereof and apply the same towards the maintenance of the said Amiran Beebee who is now a minor till she attains her majority, that should I die before she attains her majority Selima Beebee, her mother, will act as trustee for the aforesaid purpose.

(2) That as soon as the said Amiran Beebee attains her majority she shall be the sole trustee of the said property to apply the rents and profits thereof for her own use and benefit.

(3) That on the death of the said Amiran Beebee her children will enjoy the rents and profits thereof and on the youngest of them attaining his or her majority the said property is to be divided among them in equal shares and in the event of the said Amiran Beebee dying without any issue her brothers and sisters will share the said property among them in equal shares."

The suit has arisen in this way. Amiran Beebee has married and her husband is the third respondent. She has a minor son, Shaik Mahomed Ismail, who is the first respondent and plaintiff and is represented by his next friend and uncle Ali Ahmed. Shaik Dawood Maistry died in 1898. On the 23rd February 1911 the appellant, who is the first defendant, obtained a mortgage decree against Amiran Beebee and her husband, Shaik Goolam Kader, the third respondent, on the property described in the deed of settlement, claiming the same to belong absolutely to Amiran Beebee. Shaik Mahomed Ismail claims that his mother has only a life interest in the property and asks for a declaration to such effect and that the mortgage decree obtained by appellant does not effect the property dealt with by the deed of settlement and that appellant has only a mortgage lien over the life interest of Amiran Beebee in the income of the said property.

The learned Judge on the Original Side has decreed the suit on the authority of the case of *Umes Chunder Sircar* v. *Mussumat Zahoor Fatima and others* (1). The mortgagee—the appellant—urges that by the deed Amiran Beebee has acquired the full property in the premises mentioned in it.

(1) (1889) 17 I.A., 201.

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The first point for decision is whether the Mahomedan law or the general law applies. For the minor it is urged that this is not a question of succession or inheritance and so section 13 (*1*) of the Burma Laws Act does not apply. There is not sufficient on the record to show whether the case is one of succession or inheritance as there is nothing to show what other property the settler had. If he settled all his property on his daughter and the others mentioned by the deed it would in my opinion be an attempt to evade the Mahomedan law of succession and so would be a matter of succession or inheritance within the meaning of section 13 (*1*) of the Burma Laws Act. But supposing that it is only a disposal of his property that does not conflict with the rules of his personal law the question arises whether the Mahomedan law is not applicable in the matter. Section 13 (*2*) of the Burma Laws Act enacts that subject to the provisions of sub-section (*1*) and of any other enactment for the time being in force all questions arising in civil cases instituted in the Courts of Rangoon shall be dealt with and determined according to the law for the time being administered by the High Court of Judicature at Fort William in Bengal in the exercise of its ordinary original civil jurisdiction. That Court administers the provisions of the Transfer of Property Act, 1882. Section 2 of this Act enacts that nothing in the second chapter of it shall be deemed to affect any rule of Hindu, Mahomedan or Buddhist law. The deed of settlement is a transfer of property of the nature of that contemplated by sections 20 and 21 of the Act and they fall within Chapter II. Taking the deed to be one falling within the provisions of Chapter II the law applicable to it in the High Court at Calcutta would be the Mahomedan law and not the law contained in the Transfer of Property Act. Looking at the deed as a gift Chapter VII of the Transfer of Property Act must be considered. Gift is defined in section 123, but section 129 enacts that nothing in the chapter shall be deemed to affect any rule of Mahomedan law. The following cases show that at Calcutta in cases of gifts by Mahomedans, the Mahomedan law is followed: *Fatima Beebee* v. *Ahmad Baksh* (2), *Mullick*

(2) (1903) I.L.R., 31 Cal., 319.

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*Abdool Guffoor and another* v. *Muleka and others* (3), *Yusuf Ali and others* v. *The Collector of Tippera* (4). Therefore in any case I would hold that the law applicable in construing the deed is the Mahomedan law. The consideration now arises as to what rule of the Mahomedan law is applicable. The judgment appealed from says that Shaik Dawood Maistry was a Sunni Mahomedan and this statement was not contested nor traversed at the hearing. I will therefore take it that he belonged to the Sunni and not the Shiah school of Mahomedanism. The Hedaya is therefore applicable to him. The passages at pages 488 and 489 of Hamilton's translation of that work—the second edition—are relied on by appellant and especially the passage concerning an Amree or life grant to this effect: "An Amree moreover is nothing but a gift and a condition; and the condition is invalid; but a gift is not rendered null by involving an invalid condition, as has been already demonstrated." The learned author is no doubt referring to the passage at page 488 where in dealing with a gift with a condition he writes: "Such gift or charity is valid; but the condition annexed is invalid, because it is contrary to the spirit or intendment of the contract; and neither gifts nor charities are affected by being accompanied with an invalid condition because the prophet approved of Amrees (gifts for life) but held the condition annexed to them by the grantor to be void." Learned counsel for respondent urged that the Imam Aboo Haneefa and his disciples Kazee Abu Yusuf and Imam Mohammed differed on the rule of law. I am unable to find that they did on the rule relating to Amree; they differed on the rule of a gift by way of Rikba, which is a different form of gift. The question of gifts with conditions is dealt by Mr. Syed Ameer Ali in his learned book, Volume I (3rd edition), page 77 *et seq.* and also by Sir R. K. Wilson in his learned work—4th edition—page 350. He comments on the case law up to date in the preface to the last edition of the book. In the case of *Mussumat Hameeda and others* v. *Mussumat Budlun and the Government* (5) their Lordships of the Privy Council

(3) (1884) I.L.R., 10 Cal., 1112.
(4) (1882) I.L.R., 9 Cal., 138.
(5) (1872) 17 W.R., 525.

expressed the opinion that the creation of a life estate does not seem to be consistent with Mahomedan usage and there ought to be very clear proof of so unusual a transaction. In the case of *Suleman Kadr* v. *Dorab Ali Khan* (6) their Lordships said: "Their Lordships are by no means satisfied that the gift to this lady of these Government promissory notes subject to a condition that she is to have the interest only for life and that after her death there is to be a trust in perpetuity for all her heirs to all time is not, according to Mahomedan law, in its legal effect, a gift to her absolutely, the condition being void." But they found that it was not necessary to determine the point. In the case of *Abdul Gafur and others* v. *Niza' Mudin* (7) their Lordships expressed the opinion that the creation of a series of life rents was a kind of estate which did not appear to be known to Mahomedan law. But the two most important cases seem to be those of *Abdul Wahid Khan* v. *Mussumat Nuran Beebee and others* (8) and that of *Umes Chunder Sircar* v. *Mussumat Zahoor Fatima and others* already referred to. In the latter case where by a Mahomedan deed of settlement a husband granted lands to his second wife on condition that if she had a child by him the grant should be taken as a perpetual mokurrari and in the case of no child being born as a life mokurrari with remainder to the settler's two sons it was held that the two sons took definite interests under the deed similar to vested remainders though liable to be displaced and that such interests were liable to attachment. The point under decision was which of the parties had acquired the ownership of certain lands first in point of time. There had been two sales in execution of two decrees; and in one case the respondent had bought the interest of her judgment-debtor in the lands, and in the other the appellant's predecessor in interest had also purchased the interest of his judgment-debtor—the same man as respondent's judgment-debtor—in the same lands. The report of the case does not show that the question was ever raised as to whether the settlement was not practically a deed of gift disguised by a nominal consideration and

(6) (1881) I.L.R., 8 Cal., 1.
(7) (1892) I.L.R., 17 Bom., 1.
(8) (1885) 12 I.A., 91.

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whether, if that were so, the Mahomedan rule of law would invalidate either the gift itself or the limiting conditions. This question does not seem to have been raised for decision. In the other case that of *Abdul Wahid Khan* v. *Mussumat Nuran Beebee and others* the legal effect of an instrument of compromise was directly for decision. The compromise was to the effect that one Gauhar Beebee, a widow of one Mouzzam Khan, was to hold possession of and be mistress of certain lands but without power of alienation except in case of special emergency and that two sons of Mouzzam Khan by other wives were to possess and enjoy the lands after her death. The suit was by the sister of one of the sons and half-sister of the other, and others who had acquired an interest in the estate, and was brought, after the death of the half-brothers and Gauhar Beebee, against a daughter and widow of one of the half-brothers and the husband of the daughter. Gauhar Beebee had after the death of the half-brothers executed a deed of gift in favour of the aforesaid daughter. The suit was for a share of the estate on the ground that it was settled that Gauhar Beebee should retain possession of the estate during her lifetime without power of alienation and that after her death both the sons should take the estate half and half. The claim was by virtue of inheritance from the two half-brothers. Their Lordships held that during Gauhar Beebee's lifetime the whole interest in the estate was to be in her and then said: "Then comes the question. What is the interest which is given by the compromise to the sons? To give the plaintiff's a title to the estate it must be a vested interest which, on the death of the sons, passed to their heirs and is similar to a vested remainder under the English law. Such an interest in an estate does not seem to be recognized by the Mahomedan law." Their Lordships concluded their judgment by saying:

"Their Lordships think this is the reasonable construction of the compromise in this case, and that it would be opposed to Mahomedan law to hold that it created a vested interest in *Abdul Rahman* and *Abdus Subhan* which passed to their heirs on their death in the lifetime of Gauhar Beebee."

The question arises as to which of these two cases should be followed in the present one, and as I have held that this case

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is one that must be determined by the rule of Mahomedan law, I would decide that the case of *Abdul Wahid Khan* v. *Mussumat Nuran Beebee* is the one to follow. In that case their Lordships decided on the rule of Mahomedan law, and in the other the rule of Mahomedan law was not referred to nor raised.

It only remains to consider what the actual rule of Mahomedan law is that is applicable to a deed like the one under discussion in the case of Sunni Mahomedans. I have already in this judgment set out the law and authorities relied on. In the case of *Abdoola Khakhibhoy Readymoney* v. *Mahomed Haji Suleman* (9) the Mahomedan law was discussed and it was held on a review of the authorities that the creation of a life estate is inconsistent with Mahomedan law and that where a life estate is attempted to be created the donee takes an absolute estate. That view appears to me to be correct.

I would therefore allow this appeal and reverse the decree passed by the learned Judge on the original side and dismiss the suit with costs to appellant in both Courts.

*Young, J.*—I concur.

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*Before Mr. Justice Twomey and Mr. Justice Parlett.*

*Civil Miscellaneous Application No. 38 of 1913.*

*September 10th, 1913.*

1. A. T. K. P. L. MUTHIYA CHETTY, 2. S. S. SATTIAPPA CHETTY, 3. S. S. R. M. RAMANATHAN CHETTY *alias* KADI VISVANATHAN CHETTY, 4. VALLIYAMI ACHI, 5. S. V. L. MATHURASAPPA CHETTY, 6. V. R. K. R. CURPAN CHETTY, 7. S. N. N. C. T. SITHAMBARAM CHETTY, 8. A. T. M. ANNAMALAI CHETTY *v.* 1. L. A. R. ARUNACHALAM CHETTY, 2. A. T. K. P. L. S. P. SUBRAMANIAN CHETTY.

*Giles*—for applicants.

*N. M. Cowasjee*—for 1st respondent.

*A. B. Banurji*—for 2nd respondent.

*Place of suing—Transfer of suit—Civil Procedure Code, 1908, section 22.*

A Court will not, by taking action under section 22 of the Civil Procedure Code, 1908, deprive a plaintiff of his right to choose in which of

(9) (1905) 7 Bom. L.R., 306.

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several Courts having jurisdiction in the matter in dispute he shall institute his suit unless there is a manifest preponderance of convenience or saving of expense in the trial in the Court to which it is sought to transfer the suit.

*Tula Ram and another* v. *Harjiwan Das and others* (1883), I. L. R. 5 All. 60; *Khatija Beebee* v. *Taruk Chunder Dutt* (1883), I. L. R. 9 Cal. 980; *Geffert* v. *Ruckchand Mohla* (1888), I. L. R. 13 Bom. 178; *Helliwell* v. *Hobson and another* (1858) 3 C. B. R. (N. S.) 761; *Durie* v. *Hopwood* (1860) 7 C. B. R. (N.S.) 835; *Blackman and another* v. *Bainton* (1863) 15 C. B. R. (N. S.) 432; *Church* v. *Barnett* (1871) L. R. 6 C. P. 116 followed.

*Parlett, J.*—L. A. R. Arunachalam of Rangoon filed two suits for dissolution of partnership in the District Court of Bassein. In one case the alleged partnership business was carried on at Ngathainggyaung and there were ten partners; in the other it was carried on at Athok and there were five partners; all of them however were also partners in the Ngathainggyaung firm. Eight of the defendants in the Ngathainggyaung suit and four of those in the Athok suit desire the suits to be tried at Sivagunga in the Madras Presidency and have filed applications under section 22 of the Civil Procedure Code asking this Court to determine in which Court the suit shall proceed. Subramanian Chetty, the 2nd defendant in each of the suits, desires the hearing to be in Bassein, and he is the 2nd respondent in these applications. It will be convenient and sufficient to deal with the Ngathainggyaung suit only, as the remarks made on that case apply, so far as may be, to the Athok suit, and nothing has been said which applies only to the latter suit. Valliyama Achi, 5th defendant and 4th petitioner, originally filed an affidavit supporting the application, but has now withdrawn it and desires the case to proceed in Bassein. The other seven defendants have filed affidavits in practically identical terms, that of the 1st petitioner and defendant, Muthia Chetty, however, containing some additional matter and it alone therefore need be referred to. The petition sets out that the alleged partnership was dissolved at Sirugudalpatti by mutual consent about 1909 and that thereafter seven of the original partners being also seven of the defendants together with three fresh persons formed a new partnership with which the plaintiff has not and never had anything to do; that the main issue in the suit would be whether there was a dissolution of partnership at Sirugudalpatti,

and that the suit has been purposely instituted in Bassein with a view to prevent it being fairly and properly tried; that all the defendants reside at Sirugudalpatti; that all the account books of the partnership are there; that the members of the new firm, the agents who can speak to the account books, and the agents of the dissolved firm during its subsistence, are there, and as these latter persons are no longer in petitioner's employ their attendance at Bassein cannot be procured; that all the evidence necessary for the determination of the suit is at Sirugudalpatti, and that a hearing at Sivagunga will be less expensive and more convenient and expeditious than a hearing at Bassein. These statements are repeated in all petitioners' affidavits, and Muthiya further alleges there that the suit is wholly vexatious and instituted with an ulterior object and has been purposely instituted at the instance of Subramanian, the 2nd defendant and 2nd respondent. This the plaintiff, 1st respondent, denies in his affidavit, and 2nd respondent, who has the books of the partnership sought to be dissolved except those in current use, is prepared to produce them in Bassein whenever required to do so. The plaintiff in his affidavit denies that the plea of dissolution, for which no definite date is alleged by petitioner, is a *bona fide* one, and he files letters written to him by Karuppan, one of the defendants from Ngathainggyaung. on 1st December 1909 and 18th January 1910 indicating that the dissolution had not taken place then and also a copy of a letter written by himself to Muthiya on the 29th December 1911 indicating the same, of which letter the first acknowledgment was a telegram not sent till the 17th January 1912, and no detailed reply was sent till the 1st April 1912. Plaintiff asserts that this belated answer, to which he instructed his advocates to reply at once, was the first intimation he had of the alleged dissolution. He points out the delay and expense which, in the event of a preliminary decree for dissolution being passed by a Court in the Madras Presidency, would be entailed over the realization of the assets and winding up of the business by that Court in the Bassein district, where the assets are situated: and further that the account books of the business cannot be sent from Ngathaing-gyaung and Athok to India without dislocating the business,

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whereas there is no difficulty about bringing the old books from India to Bassein. He also alleges that a former agent of the Athok firm is now at Athok, and a former assistant of the Ngathainggyaung agent is now manager at Ngathainggyaung, while the 1st defendant and petitioner himself has firms in Rangoon, Ngathainggyaung and Athok. He states that a large portion of the evidence in support of his case is in Burma and not all, as the petitioners allege, in Sirugudalpatti; and that it will be impossible for him himself to leave Burma without breaking agreements with his own employers and partners, thereby entailing heavy monetary losses on the former, damage to his own reputation, and dismissal of his son from a lucrative appointment. He also files a letter purporting to come from Muthurasappa, one of the petitioners, dated 2nd July 1913 expressing his willingness to come to Burma as soon as the fates are propitious.

In England it has been repeatedly held that the venue will not be changed from the place where the plaintiff has laid it unless it be shown that there will be a manifest preponderance of convenience in trying the cause elsewhere. Vide *Church* v. *Barnett and another (1)*, *Helliwell* v. *Hobson and another (2)*, and *Durie* v. *Hopwood (3)*, while in *Blackman and another* v. *Bainton (4)*, 25 witnesses and a horse on one side against 10 witnesses on the other were held not such a preponderance of inconvenience as to induce the Court to bring back the venue from the place where the cause of action, if any, arose. Similar principles have been followed in India. *Geffert* v. *Ruckchand Mohla (5)* was a suit for defamation filed in Bombay, the defendant having previously sued for damages for wrongful dismissal in Wardha, and the defendant applied for the defamation case to be tried in Wardha. The learned Judge said, "We find it laid down in the second clause to section 20 that the Court may make such an order as is now asked for if it is satisfied that justice is more likely to be done by the suit being instituted in some other Court. * * *

(1) (1871) L.R., 6 C.P., 116.
(2) (1858) 3 C.B.R. (N.S.), 761.
(3) (1860) 7 C.B.R. (N.S.), 835.
(4) (1863) 15 C.B.R. (N.S.), 432.
(5) (1888) I.L.R., 13 Bom., 178.

It would no doubt be much more convenient to the defendant to have the case against him tried at Wardha. Nearly all of his evidence and probably a large portion of the plaintiff's evidence is only obtainable there, but is that a ground for depriving the plaintiff of the right to bring his suit in this Court? The injury and damage of which he complains have been inflicted in Bombay and many of his witnesses he says are resident here. He desires to vindicate his character in the place where he alleges it has been defamed. I can find no authority for preventing him from doing so. I am not satisfied, to use the words of the section, 'that justice is more likely to be done' at Wardha or elsewhere than in this Court." The present Code omits section 20 of the Code of 1882 which required that the Court must be satisfied that justice was more likely to be done by the suit being instituted in some other Court, but though it leaves unfettered the Court's discretion to determine in which Court the suit shall proceed, as strong reasons must certainly be shown under the new as were required under the old Code for depriving a plaintiff of the right to bring his suit in any Court which the law allows. In *Tula Ram and another* v. *Harjiwan Das and others (6)*, the defendants in a suit instituted at Mainpuri applied under section 24 of the Civil Procedure Code, 1882, that the suit might be tried at Surat on the grounds that it would be tried with greater convenience to them at that place, it was held that there being no balance in favour of either justice or convenience on the side of the Surat Court the suit should proceed at Mainpuri. The Court said, "We have to see whether the defendants-applicants have made out a case to justify us in closing the doors of the subordinate Judge of Mainpuri to the plaintiffs and leaving them to seek their remedy in another jurisdiction. We do not think that they have or that any sufficient cause has been shown for depriving the plaintiffs of the right given them by law to select in which of the Courts they will carry on their suit." In *Khatija Beebee* v. *Taruk Chunder Dutt (7)*, it was held that parties desirous of obtaining the transfer of a case from one forum to another

(6) (1883) I.L.R. 5 All., 60.
(7) (1883) I.L.R. 9 Cal., 980.

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should satisfy the Court that either on account of expense or convenience or otherwise the place of trial ought to be changed. In the course of the judgment it was said, "*Primâ facie* the plaintiff, as the *arbiter litis*, has a right to bring his suit in any Court which the law allows; and section 23 is only intended, as we consider, to provide for those cases where, on the ground of expense or convenience, or some other good reason, the Court thinks that the place of trial ought to be changed. If, for instance in this case, the defendant could have shown us that great expense could have been saved, or that the balance of convenience was strongly in favour of the case being tried at Furridpore." I consider these principles should be the more strictly applied where, as in the present case, we can only determine that a subordinate Court shall not proceed with the suit and cannot direct another Court to proceed with it. The allegations that the suit was purposely instituted in Bassein with a view of its being prevented from being fairly and properly tried, that it is wholly vexatious and instituted with ulterior objects and at the instigation of Subramanian, have not been substantiated and no grounds have been shown for supposing that justice is not likely to be done in the Bassein Court. As regards the balance of convenience, it does not appear why all the defendants need appear in person; and though their evidence in support of the plea of dissolution is in India, it would appear probable that rebutting evidence to show the continuance of the partnership up to the date of suit would be most likely to be obtainable in Burma, as the plaintiff says it is. It was said that plaintiff might appoint an agent to conduct his affairs in Burma while he went to India for the case, but unless for very strong reasons he ought not to be compelled to do so. Stress was laid on the advantage to the Court of the witnesses being examined before it instead of on commission, but some at least of the evidence on one side or the other must probably in any case be taken on commission. As regards the books, it would appear more convenient for the old books to be sent back to Burma than for the current ones to be sent to Madras. No grounds were shown for the allegation that the proceedings in Bassein would be more expensive and protracted than in Sivagunga except that more translation

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might be necessary than in a Court where the language of the accounts was understood; but in a suit of this sort a certain amount of translation will be necessary in any case and, as in the event of a preliminary decree being passed a Commissioner will probably be appointed to take accounts, it should be possible even in this country to appoint as Commissioner some one with the necessary knowledge of the language, while it is clear that the winding up can be more easily effected in the locality where the partnership business was carried on and in the event of a Receiver being appointed, that he should be under the supervision and control of a local rather than of a far distant Court.

In my opinion no sufficient grounds have been shown for declaring that the suit shall not proceed in the Court in which the plaintiff is by law entitled to institute it, and I would dismiss both applications, and award each of the two respondents two gold mohurs costs as advocate's fees.

*Twomey, J.*—I concur.

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*Before Mr. Justice Twomey.*

*Civil 2nd Appeal No. 95 of 1912.*

*September 30th, 1913.*

## MA SEIN *v.* M. M. K. A. MUTHUCURPAN CHETTY.

*Hay*—for appellant.

*Villa*—for respondent.

*Civil Procedure—Mortgage suit,—Parties to—Effect of non-joinder,—Order 34, Rule 1, Civil Procedure Code, 1908.*

Although a Burmese Buddhist wife may sometimes be held to be bound by her husband's acts, as her agent, in mortgaging joint property, yet the mortgagee, if he neglects to add the wife as a party to his suit on the mortgage, cannot enforce the decree so obtained against her.

*Bhawani Prasad* v. *Kallu* (1895) I.L.R., 17 All., 537, referred to.

The plaintiff-appellant Ma Sein's husband Maung Paw mortgaged the land in suit to the defendant-respondent, a Chetty firm. The defendant-respondent brought a mortgage suit against Maung Paw and having obtained a decree for the sale of the land, bought it with the permission of the Court. Ma Sein then brought the present suit alleging that the land

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was the joint property of herself and her husband, pleading that her interest in the land was not affected by the mortgage or the subsequent decree against her husband and praying that her title to one half the land should be declared and that the sale should to that extent be annulled.

The Lower Courts have found concurrently that Ma Sein consented to the mortgage and have dismissed her suit. The circumstances of the case give rise to a strong presumption that Ma Sein assented to her husband's action in mortgaging the land. She had been suffering from paralysis for some years and the management of the property was entirely in the hands of Maung Paw who was living with and supporting his wife and children. There is reason to believe that the loan was contracted for family purposes, and that Maung Paw acted on behalf of his wife as well as himself in mortgaging the land. As in the somewhat similar case of *Ma Nyein Thu* v. *P. S. M. L. Murugappa Chetty (1)* it may reasonably be held that the husband's mortgage was effective against his wife's share as well as against his own and to that extent the decision of the Lower Courts is in my opinion correct.

But the Lower Courts went beyond the rulings of this Court in dismissing the plaintiff's suit. They failed to consider the effect of the Chetty's omission to join Ma Sein as a party to the mortgage suit. It is clear that she was a necessary party under Order 34, Rule 1, which renders it imperative in a mortgage suit to join as parties "all persons having an interest either in the mortgage-security or in the right of redemption." In this case there was no excuse for the omission as the land stood in the joint names of the husband and wife and they were living together. The mortgagee does not and cannot now plead that he had no notice of the wife's interest in the land. In his written statement he merely urged that the mortgage debt was contracted for the benefit of Ma Sein and her family and that Ma Sein was fully aware of it. This is a good plea as against Ma Sein's claim that she was not affected by the mortgage but it is not a good plea as against her claim that she is not affected by the decree in the mortgage suit to which she was not a party. In the Allahabad case *Bhawani*

(1) 6 B.L. Times, p. 113.

*Prasad* v. *Kallu and others (2)*, it was held by a Full Bench that "when a plaintiff mortgagee institutes a suit for sale against his mortgagor who is the father of sons in an undivided Hindu family without joining as parties to the suit the sons of the mortgagor, of whose interests he has notice, and obtains a decree and an order absolute for sale against the father only, the sons can successfully sue for a declaration that the mortgagee decree-holder is not entitled to sell in execution of his decree for sale the interests of the sons in the property comprised in the mortgage given by the father, although the sole ground of their suit is that they were not parties to the suit by the mortgagee." I have examined the proceedings of the Civil Suit No. 4 of 1910 in which the Chetty sued on the mortgage. There is nothing in that suit to suggest that Maung Paw was being sued in the capacity of representative of his wife as well as in his personal capacity, and it is only when a defendant is manifestly sued as a representative that a sale in terms of his interests is allowed to convey the interests of others. If Ma Sein had been a joint executant of the mortgage instrument the necessity of joining her as defendant in the mortgage suit would not have been questioned and there is no reason to hold that the necessity for joining her is any the less because she was an implied and not an express joint mortgagor.

On these grounds I set aside the decrees of the Lower Courts and grant Ma Sein a declaration of title in respect of one half the land in suit with costs in all Courts. I note that the holding of Maung Paw and Ma Sein which was mortgaged to the respondent and afterwards bought by him at the auction sale was holding No. 29 of 1905-06 of Mwelon Kwin measuring 6·38 acres, and this is the holding as to a moiety of which a decree is now granted.

(2) (1895) I.L.R. 17 All., 537.

*Civil Revision No.* 188 *of* 1912.

*November 25th*, 1913.

*Before Mr. Justice Ormond.*

1. MAUNG KYAN, 2. MA TE, *v.* 1. MAUNG PO, 2. MA KET.

*Harvey*—for applicants.

*R. N. Burjorjee*—for respondents.

*Limitation—Suit for money in consideration for which temporary possession of land has been given and lost,—Article applicable to—effect of taking of profits of the land in lieu of interest in extending the period of limitation—Sec. 20, Limitation Act, 1908, Schedule I, Article 97.*

Defendants-respondents owed plaintiffs-applicants a debt which ordinarily would have become time-barred; but in 1906 the former transferred to the latter the possession of a parcel of land under an agreement by which (according to the former) the latter were to take the fruits of the land in lieu of interest on the debt. The defendants-respondents subsequently instituted a suit for redemption, when the plaintiffs-appellants pleaded that the transaction was an outright sale. The Township Court decided in that suit that, there being no registered deed of any kind embodying the transaction, there had been neither sale nor mortgage and gave a decree giving defendants-respondents possession of the land. The plaintiffs-applicants then brought the present suit to recover the debt. The District Judge in appeal held that the claim was based on the original debt and dismissed the suit as time-barred.

*Held*,—that the suit was in effect one for money paid upon an "existing consideration" (*viz.*, possession of the land) which had "subsequently failed" by reason of the defendants-respondents' recovery of the land; and that Article 97 of the 1st Schedule of the Limitation Act, 1908, applied; and the suit was therefore not time-barred.

*Semble*.—In any case the taking (by agreement of the parties) of the profits of the land in lieu of interest would be payment of interest as such by the debtor within the meaning of section 20 of the Limitation Act, 1908.

*Gurmukh Singh and others* v. *Chandu Shah* (1888) Punjab Record (Civil), p. 527, followed.

*Parangodan Nair* v. *Perumtoduka Illot Chata and others* (1903), 27 Mad. 380 referred to.

Defendants-respondents in 1906 were indebted to the plaintiffs-appellants: the plaintiffs say Rs. 400. The defendants admittedly put the plaintiffs in possession of certain land. The defendants allege that they put the plaintiffs into possession as mortgagees reserving the right of redemption. The plaintiffs' case was that the land was sold outright in satisfaction of the debt. The defendants sued for redemption in the Township Court and obtained a decree for possession without any obligation being imposed upon them to pay off the debt. The Township Judge held that as there was no registered document there

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was neither a sale nor a mortgage. The plaintiffs did not appeal, but instituted the present suit to recover Rs. 400, the amount, they say, that the defendants owed them at the time they were put into possession. In this suit the defendants in their written statement admit that they gave the plaintiffs possession of the land on the understanding that there was no interest to be charged on the money and no rent for the land and that the land was redeemable at any time. The plaintiffs obtained a decree in the Township Court, but on appeal the District Judge dismissed the claim on the ground that the cause of action was on the original loan which was made in 1906 and was therefore barred by limitation. The plaintiffs then preferred this appeal. For the respondents it is contended that no second appeal lies because, under section 30 of the Lower Burma Courts Act and of section 102 of the Civil Procedure Code, the present claim was one which was cognisable by a Small Cause Court. I think that contention is good. The plaintiffs then ask me to treat this appeal as an application in revision. I have the power to do so and the question is whether the District Court has acted illegally. From the defendants' admission in their written statement it is clear that if the case were not disposed of on its merits a gross injustice would be done to the plaintiffs. Article 97 of the Limitation Act applies and there is a very similar case to the present decided in 1888 by the Punjab Chief Court, Case No. 1575 of 1887 Punjab Record (1888), page 527. The case reported in 27 Madras 380 is also in point. And even if the cause of action were considered to be the old debt, under section 20 of the Limitation Act I think the fact that the plaintiff was in possession of the land and under an admitted agreement was to take the profits in lieu of interest, such taking of profits would be a payment by the defendant of interest to the plaintiff so as to preserve the claim from being barred. Considering the palpableness of the error and the plain injustice that would occur if this error is allowed to stand, I think it is a case in which I should interfere in revision. I therefore set aside the decree of the District Judge and remand the case to him to be tried on its merits. The costs of this application will abide the result.

*Criminal Appeal No.* 883 *of* 1913.

*December 8th,* 1913.

*Before Mr. Justice Hartnoll, Offg. Chief Judge, and Mr. Justice Twomey.*

## KYA NYUN *v.* KING-EMPEROR.

*May Oung*—for appellant.

*Eggar*, Assistant Government Advocate—for the King-Emperor.

*Criminal Procedure—Verdict, reconsideration of—Jury—Questions to—Sections 302, 303, 307. Code of Criminal Procedure, 1898.*

When a jury, though not unanimously, has returned a clear and unambiguous verdict, a Sessions Judge must either accept that verdict or must submit the proceedings to the High Court in accordance with section 307 of the Code of Criminal Procedure.

He cannot, under such circumstances, put questions to the jury under section 303 of the Code of Criminal Procedure and then require them under section 302 to further consider their verdict.

*Hurry Churn Chuckerbutty and another* v. *The Empress* (1883) I.L.R., 10 Cal., 140.

*Hartnoll, Offg. C. J.*—The appellant Maung Kya Nyun has been tried for murder punishable under section 302 of the Indian Penal Code by the Sessions Judge, Tenasserim Division, and a jury. He was charged with the murder of one Ma Shan Ma by stabbing her with a dagger. In charging the jury the learned Sessions Judge in explaining the law said: "If you find that accused stabbed Ma Shan Ma then you must also find with what intention he did so—

(1) Did he stab with the intention of causing death? If so, then your verdict should be murder under section 302 of the Indian Penal Code.

(2) Did he stab with the intention of causing bodily injury sufficient in the ordinary course of nature to cause death? If so, then your verdict should be murder under section 302 of the Indian Penal Code.

(3) Did he stab with the intention of causing such bodily injury as was likely to cause death? If so, then your verdict should be culpable homicide not amounting to murder punishable under the first part of section 304 of the Indian Penal Code.

(4) Is he guilty of voluntarily causing grievous hurt by means of a dangerous weapon? If so, then your verdict should

find under section 326 of the Indian Penal Code." At the end of the charge the Sessions Judge said practically the same again.

The jury then returned a verdict by a majority of 3 to 2 of culpable homicide not amounting to murder under the first part of section 304 of the Indian Penal Code. Taken in conjunction with the charge this is a clear and unambiguous verdict.

The Sessions Judge was not satisfied with it and put to the jury the following question :—

"Do you not consider that accused stabbed with the intention of causing death or of causing bodily injury and the bodily injury intended to be inflicted was sufficient in the ordinary course of nature to cause death. If you do then you would be justified in bringing in a verdict of murder under section 302 of the Indian Penal Code."

The jury retired again and then returned with the answer that they were unanimously of opinion that accused intended to cause bodily injury sufficient in the ordinary course of nature to cause death. The Judge then said: "Then do you consider the accused guilty of murder?" The answer was "Yes". On this the Judge found appellant guilty of murder under section 302 of the Indian Penal Code and sentenced him to be hanged.

It was urged on appeal that the jury having returned a clear and unambiguous verdict the Sessions Judge erred in putting questions under section 303 of the Criminal Procedure Code and erred in not holding that the verdict under section 304 of the Indian Penal Code was right as a matter of law. The Sessions Judge may have thought that, as the first verdict of the jury was not unanimous, he had the power under section 302 of the Code of Criminal Procedure to require them to retire for further consideration. In my opinion that section gives the Sessions Judge no such power after the verdict has been actually delivered. He could have asked them to retire for further consideration when he ascertained that they were not unanimous and before the delivery of their verdict, but could not do so after the actual delivery of the verdict. If he disagreed with the verdict of the majority, he should have proceeded under section 307 of the Criminal Procedure Code. This is the view taken in the case of *Hurry Churn Chuckerbutty and*

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*another* vs. *The Empress (1)*, but I would not go so far as to say that a Sessions Judge cannot act under section 302 of the Code of Criminal Procedure, when he has merely asked the jury the exact majority and has not actually taken the verdict.

The question remains as to what orders should now be passed. This is the second trial of appellant and a third trial is inadvisable. The first verdict of the jury was clear and unambiguous. I would accept it.

I would alter the conviction to one under the first part of section 304 of the Indian Penal Code and the sentence to one of transportation for life.

*Twomey, J.*—I agree in holding that the action of the learned Sessions Judge was not warranted by law. On receiving the plain verdict of guilty under the first part of section 304, Indian Penal Code, the Judge's only lawful course if he disagreed with the majority was to submit the case with the grounds of his opinion to this Court under section 307. He had no authority in the circumstances to put questions to the jury or to send them back for further deliberation. This view is in accordance with those expressed by the Bench in the Calcutta case to which my learned colleague refers. But I note that the judgment in that case does not go the length of saying that a Sessions Judge may not act under section 302 of the Code of Criminal Procedure when he has merely ascertained from the jury in what proportion they are divided. It is only when the nature of the actual finding has been disclosed that the Court is debarred from sending the jury back.

The charge of murder appears to me to have been fully established by the prosecution in this case, and the result must therefore be regarded as a miscarriage of justice. At the same time and although we have the power to order a fresh trial I think it would be inexpedient to do so seeing that the appellant has been already tried twice.

I therefore concur in altering the conviction to one of culpable homicide not amounting to murder under the first part of section 304, Indian Penal Code, and the sentence to one of transportation for life.

(1) (1883) I.L.R., 10 Cal., 140 at p. 144.

## FULL BENCH.

*Criminal Reference No. 25 of 1913.*

*May 7th, 1213.*

*Before Mr. Justice Hartnoll, Offg. Chief Judge, Mr. Justice Ormond, and Mr. Justice Twomey.*

(Reference arising out of Criminal Sessions Trial No. 6 of 1913 in respect of the charge* to the Jury.)

1. G. S. CLIFFORD, 2. R. F. STRACHAN, 3. S. A. MOWER, *v.* KING-EMPEROR.

*Giles*—for 1st and 2nd applicants.

*DeGlanville*—for 3rd applicant.

*Government Advocate* and *McDonnell*—for King-Emperor.

*Bank balance sheet,—false statements in—,responsibility of directors for—Cheating,—constituents of—,continued deceit—Indian Penal Code, section 420—Charge—amendment of—,Misdirection of Jury,—distinction between "presumptions" and "inferences" suggested to the Jury—Sentences,—cumulative—in same trial,—distinct offences—Indian Penal Code, sections 71, 420—Code of Criminal Procedure, section 35.*

The three accused were charged with cheating three persons and thereby dishonestly inducing them to hand over property in that they induced these three persons to deposit money in a Bank of which two of the accused were Directors and one the Manager by publishing a false balance sheet.

The presiding Judge at the Sessions trial amended the charges by adding the indictment that they had kept the Bank open as a going concern after it had ceased to be solvent, on the ground that the mere publication of the false balance sheet did not constitute the whole of the inducement to depositors. The jury convicted all three accused of the offences with which they were charged and the Judge sentenced them to a separate term of imprisonment in respect of each charge of cheating, *i.e.* in respect of each of the three deposits.

Certain points of law were then raised and a reference was made to a Full Bench under section 434 of the Code of Criminal Procedure, the accused pleading (*inter alia*) that—

(1) They had been prejudiced by the amendment in the charges, for the jury might have found some, at least, of them guilty merely because they kept the Bank open after it had become insolvent; and the addition let in irrelevant evidence of facts subsequent to the issue of the alleged false balance sheet.

(2) That they had been led to believe, from the exhibits prepared by the prosecution, and by the conduct of the prosecution, that the falseness of the balance sheet consisted in its not exhibiting in an "interest suspense account" interest due on bad and doubtful debts, and in reckoning such interest as divisible profit in the "profit and loss" account; in the omission to mention that 5 lakhs of Government paper included among the assets were pledged with another Bank; and the "manipulation" of the "contingency fund" provided for meeting bad and doubtful debts; whereas

* The charge to the jury is printed below.

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according to the summing up the guilt of the accused depended to a great extent on the classification as "good" of the *principal* of debts; a case which took them by surprise and which they were therefore not in a position to meet.

(3) That the consecutive sentences were illegal, in that the three deposits followed on only a single act of deceit alleged, namely the publication of a false balance sheet in August 1911.

*Held*,—(1) As regards the amendment of the charges that inasmuch as the Judge explicitly laid down as a direction of law that the jury were not to find the accused guilty of cheating unless they were convinced that the balance sheet was false the amendment was not illegal; and, as regards the relevancy of the evidence of facts subsequent to the issue of the balance sheet, facts showing that, after such issue and up to the time when the deposits in question were made, the position of the Bank became worse, were relevant as indicating the continuation of the deceit practised on the public up to the time when the Bank accepted the deposits, and that the accused were not prejudiced by the admission of this evidence.

(2) As regards the allegation that the accused were taken by surprise by the emphasis laid towards the end of the trial, on the alleged false classification of the principal of bad or doubtful debts in the balance sheet,—that the prosecution had, both in the committal proceedings and in the course of the trial, made it clear that they challenged the truth of this classification, and the defence had actually produced rebutting evidence on this point.

(3) As regards the legality of the sentences,—that the accepting of each deposit constituted a distinct offence within the meaning of section 35 of the Code of Criminal Procedure and that the cumulative sentences were legal.

*Dovey* v. *Cory* (1901) A.C., 477, distinguished.

The following reference was made to a Full Bench by Mr. Justice Twomey under section 434 of the Code of Criminal Procedure:—

After hearing counsel for the applicants, I am satisfied that the following questions of law should be reserved and referred for the decision of a Bench of this Court under section 434, Code of Criminal Procedure:—

*1st.*—Whether the amendment of the charge in the Sessions Court was bad in law, and, if so, whether the accused were thereby prejudiced in their defence;

*2nd.*—Whether the presiding Judge erred in assuming it to be a substantial part of the case for the prosecution that a large amount, over 22 lakhs of rupees of the debts shown as good debts in the balance sheet of 30th June, were really doubtful or bad debts, and whether the accused had sufficient notice of this part of the case;

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*3rd.*—Whether the presiding Judge misdirected the jury in instructing them as to the value and effect of Exhibits 13 (*a*), 13 (*bb*), 13 (*c*) and 13 (*dd*), being the tabular statements showing the amounts of unpaid interest which, according to the witness Holdsworth, were wrongly credited to Profit and Loss and treated as divisible profit;

*4th.*—Whether the sentences passed on the accused contravened the provisions of section 71, Indian Penal Code.

I do not consider it necessary to refer any other points.

*The opinion of the Bench was as follows:—*

*June 20th,* 1913.

*Hartnoll, Offg. C. J.*—The applicants G. S. Clifford, R. F. Strachan and S. A. Mower have been tried before my learned colleague, Mr. Justice Twomey, and a jury and have been convicted under three heads of cheating and dishonestly inducing delivery of property punishable under section 420 of the Indian Penal Code. They have been sentenced—the first two to eight months' rigorous imprisonment on each charge and the last to six months' rigorous imprisonment on each charge, the sentences to run consecutively. At the conclusion of the trial my learned colleague reserved certain questions of law under the provisions of section 434 of the Code of Criminal Procedure and since then the learned Government Advocate has certified that certain other points should be further considered under section 12 of the Lower Burma Courts Act. The reference under section 434 and revision cases arising out of the learned Government Advocate's certificates have been heard together. The applicants Mower and Clifford were Directors of the Bank of Burma which closed its doors on the 14th November 1911 and Strachan was the General Manager of the same Bank. The cheating alleged and of which they have been convicted was that by means of a false balance sheet for the six months ending the 30th June 1911 and by a false Directors' report and by intentionally keeping the Bank open as a going concern after it had ceased to be solvent they dishonestly induced (1) one Maung Tin Baw to deliver the sum of Rs. 5,000 to the Bank, (2) one John Cumming to deliver the sum of Rs. 40, and (3) one N. Mitter to deliver the sum of Rs. 100. The delivery by Maung Tin Baw was on the 30th October 1911, by Cumming on the 2nd November 1911, and by Mitter on the 10th November 1911.

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I propose to deal with the points referred and dealt with by the learned Government Advocate's certificates in the order in which they were argued. The first point is whether the learned Judge erred in assuming it to be a substantial part of the case for the prosecution that a large amount, over 22 lakhs of rupees of the debts shown as good debts in the balance sheet of the 30th June, were really doubtful or bad debts and whether the accused has sufficient notice of this part of the case. One of the acts of deception alleged was that the balance sheet showed that there was a profit of Rs. 1,62,277-12-5 for the half-year, whereas in reality there had been a loss of over Rs. 55,000 and that the way that this had been arranged was to credit to profit and loss unpaid interest due on bad or doubtful debts which should really have been put to an interest suspense account. One of the witnesses was the Official Liquidator of the Bank, Holdsworth, and it was on his initiative that the prosecution took place. He alleged certain other defects in the balance sheet which in his opinion showed its false and deceptive character. These were also gone into at the trial, but Mr. Justice Twomey, as shown in his summing up, found that they were not matters that should be considered in deciding whether the offence of cheating was established or not. He therefore found in applicants' favour as far as these other matters were concerned. The convictions have been obtained on the ground that unpaid interest on bad and doubtful debts has been dishonestly credited to profit and loss and rendered divisible as profit and also on the ground that the principal of these debts was treated as good in the balance sheet. Holdsworth to support the case prepared amongst others three Exhibits, Nos. 13, 18 and 39. No. 18A is a statement setting out certain debtors of the Bank, the amount of their debts on the 30th June 1911 and on certain subsequent dates, the securities lodged with the Bank to secure their repayment, their market price as regards quoted securities and nominal value as regards unquoted on the abovementioned dates and the balance being deficiency in value of quoted securities. Exhibit 13 is a series of statements showing certain of the debtors shown in Exhibit 18, their balances on the 1st January 1911 and 30th June 1911—increase in balance—debits including interest debited every month—credits if any—and

difference between debits and credits. Exhibit 39 is a balance sheet drawn out by Holdsworth to illustrate the case put forward by him, though he says that it is not in the form he would approve. It is allowed that it does not necessarily follow that, because a debtor is in Exhibit 18, his debt is considered bad or doubtful. In fact it is allowed that some of the debts in Exhibit 18 are good. The defence therefore say that Exhibit 18 does not give them notice that there was according to the prosecution a large amount of bad or doubtful debts, that it merely shows unsecured balances, and that these unsecured balances may be good if the personal capacity or other resources of the debtors are taken into consideration—that it was for the prosecution to prove that the personal capacity of the debtors or their other resources were negligible quantities in considering whether the unsecured balances could be realized. Exhibit 13 is objected to in that Holdsworth's standard was, that if a debt, or a portion of a debt, is not secured, the interest if not paid should always be placed to a suspense account unless it is certainly recoverable, and that that standard is too high. It is objected that in saying that all unpaid interest shown in Exhibit 13 should go to a suspense account sufficient attention has not been paid to the other capacities of debtors to pay. Exhibit 39 is objected to as it does not specifically show the Rs. 28,68,123 set out under head "Debts for which the Bank holds no securities" as bad or doubtful. As regards Exhibit 13 it was pointed out that if the principal of the debts was alleged to be bad or doubtful credits should have gone to the reduction of principal and not—as has in fact been done—in reduction of interest. It is allowed that a certain amount of evidence has been led which goes to show that the principal of certain of the debts was bad, but it is argued that some of this evidence was called to create prejudice with the jury. Mr. DeGlanville says that he thought it was called to merely corroborate Holdsworth. There seems to me to be no doubt that it was part of the case for the prosecution, that the principal of the debts shown in Exhibit 13 was bad or doubtful and that the accused had sufficient notice of this part of the case. It is not denied that in the Magistrate's Court that this was part of the case, but it is urged that, as section 409 of the Indian Penal Code was abandoned in that Court, it was not

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understood that in the Sessions Court the principal of the debts would be again attacked. I would note here that in the Magistrate's Court Holdsworth distinctly said that he did not consider the debts, Rs. 28,68,123, which he classed as debts for which the Bank holds no security, to be good. It was contended that the words recorded have not this meaning and that they mean that he did not consider whether they were good or not; but the meaning appears to me to be clear enough. Evidence was given at the trial that interest on the principal debts had not been paid for a considerable period and this is a distinct indication that the principal may be bad or doubtful. It was an indication that should have come to the notice of the defence, and when further evidence was given that went to attack the principal such evidence clearly meant that the principal was being attacked. As regards the debts referred to in the learned Government Advocate's certificate, I will refer to the evidence as to their being bad or doubtful when I come to them. The Exhibit 14 shows that the personal capacity of S. Buckingham to pay was attacked. As regards Britto no interest had been paid since 1st January 1910 and the proceeds of the jewelry pledged did not clear the debt. Evidence was given that W. H. Clifford had not paid interest for six months and that he wrote on 10th June 1911 and said he was not prepared to pay anything monthly at the moment. Evidence was produced to show the salaries of Moberly, Dennis, Gorse, Teehan, A. Stephen and F. Rajh. Holdsworth says he made enquiries into the position of Dennis, Gorse, Moberly. Holdsworth describes how that as regards T. A. Fraser with the exception of Rs. 248-12-0, paid on 12th November 1910, no interest had been paid since 1st January 1906. Some Rs. 1,300 worth of securities were sold in December 1910 and February 1911. The debt was Rs. 18,639 on 30th June 1911. Holdsworth describes how Mossop and Bartlett paid no interest from 1st December 1909 when the account started. He is taken through all the names. He says that he enquired into Rajh's position. Evidence is given as to Reid's salary. Letters are put in to show Teehan's position. Then when Holdsworth is cross-examined by Mr. Giles he distinctly says that one of the grounds on which he alleges that the balance sheet is false and

fraudulent is that some of the debts which were bad were treated as good. Peters was asked about his means and was cross-examined as to his resources. Tsounas was also called and examined as to his means. Sen was called to prove the badness of G. Stephen & Son's estate. All the above evidence clearly involved the goodness or doubtful character or badness of the principal, and it is not now for the defence to turn round and say that they did not have notice. From Mr. Justice Twomey's notes the Government Advocate in his opening speech said that the balance sheet drawn up by Holdsworth showed a loss of Rs. 55,000 instead of a profit of Rs. 1,62,000—that is if due allowance is not made for bad debts—if due allowance be made for bad debts the result would be much worse. On the 26th February Mr. Justice Twomey's notes show that he held the question of the badness or doubtful character of the debts shown in Exhibit 13 was in issue. This was in answer to an objection by the defence. Mr. Justice Twomey does not remember whether he read the order out; he says he did not sometimes read out his orders *in extenso*. I would also refer to his notes of the 26th March and 2nd April. The mere fact that Holdsworth in Exhibit 39 dealt with the interest and not specifically with the principal as bad or doubtful should not in my opinion be held to be a sufficient ground for considering that there are reasonable grounds for holding that the defence were misled in consideration of the facts I have set out and am going to set out in discussing the evidence as to the badness or doubtful character of the debts in the Government Advocate's certificate.

I will now deal with the first ground referred by my learned colleague:—

"Whether the amendment of the charge was bad in law, and, if so, whether the accused were thereby prejudiced in their defence."

The words objected to are "and by intentionally keeping the Bank open as a going concern after it had ceased to be solvent." In page 3 of the summing up my learned colleague deals with these words, and here he expressly says: "You cannot find the accused guilty of cheating as charged unless you are satisfied that the balance sheet was in fact false to the knowledge of

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the accused." Nearly at the end of the charge he said, "As I have already laid down you are not justified in finding any of the accused guilty unless the balance sheet is proved to your satisfaction to be false. As I have said before the mere carrying on after the 30th June would not by itself constitute cheating. The carrying on after the 30th June must be considered only with reference to the balance sheet and the knowledge which can be imputed to the accused as to the character of the balance sheet. The case hinges entirely on this balance sheet on your decision as to whether it was really false and deceitful. If you find that it was not, the accused should all be found not guilty." It is urged that these words are only expressions of opinion, and that the jury may have found the accused—especially Mower—guilty on the ground that the Bank was kept open after it became insolvent; but I cannot allow this plea. The words are not an expression of opinion but are a clear direction of law not to find the accused guilty unless they found the balance sheet false. The meaning to be attached to the words was explained. I am therefore unable to hold that they may possibly have misled the jury in giving their verdict. As regards the actual words themselves it is objected that they have let in evidence of events that took place after the signing and issue of the balance sheet, and that such evidence is irrelevant. I am unable to hold that such evidence is irrelevant. The allegation is that the profit in the balance sheet was fictitious, as it should all have gone to suspense account being interest unpaid and due on bad and doubtful debts. This was the deceit. The evidence as to subsequent events was to show that the position grew worse—that the debts became more and more doubtful and bad till the last deposit was made—*that is, that the deceit being practised on the public of showing the Bank in a flourishing condition became worse.* In these circumstances I am of opinion that it was open to the prosecution to prove such subsequent events and the accused's knowledge of them as part of the deceit being practised and also as showing the continuance of dishonest intention on their part.

I will now turn to the matters dealt with in paragraph 1 of the certificates of the Government Advocate given in the cases of Clifford and Strachan.

*Attia's debt.*—There is the evidence set out in the summing up. It should be observed that the guarantee by Mower & Co., dated the 1st August 1906, extends to the whole of Attia's debts. This guarantee would clearly be a reason for Mower & Co. keeping touch with Attia and his affairs. Exhibit 46 (*c*) shows that Attia had a big stake in Mower, Cotterell & Co. in October 1910; and the exhibits down to Exhibit No. 58 and Exhibit No. 93 show how he was interested in the same ventures. He signs as a Director in the Aung Ban Oil Company in March 1910. Exhibit 89 (*b*) shows how the Bank did business and may be taken as an indication of the relations between Attia and the accused. Attia also appears in Exhibit 85 (*c*). The evidence seems sufficient for the jury to draw a conclusion.

*Mower & Co.*—Besides what is stated in the summing up there is Exhibit 26 (*a*) which was put in by Holdsworth early. This surely is a most important document by which the jury would be able to judge whether Mower & Co. had extraneous resources to meet its unsecured debt. Then again Exhibit 23 goes to show that prices had been falling from January 1911 and this factor might well be taken into consideration by the jury in gauging the resources of Mower & Co. Exhibit 26 (*a*) does not merely deal with the position in October 1911 but from 1909. Holdsworth said that Clifford had told him that Mower & Co. had lodged all available security with the Bank and this evidence is corroborated by Clifford's letter of the 13th February 1912 to the shareholders (Exhibit 6), from which it is clear that the Bank called upon Mower & Co. and indeed on all debtors to furnish further security as the values of securities declined. As regards Clifford's knowledge Exhibits 45 to 60 show how interested he was in the companies, the shares of which the Bank held as securities. It is reasonable to conclude he would know of their condition and market prices. Considering the extent the Bank was interested in them, surely it is reasonable to think that he would consider what effect falls in value would have on the Bank.

*Mount Pima Company.*—Before the examination of Allan there were the Exhibit 15 which showed that the company was

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unsuccessful and that Mower & Co. had made over their claim as sole creditors. Interest had not been paid for some time. Surely this was evidence attacking the principal. After Allan's evidence taken with that given before there seems to have been sufficient evidence to go to the jury.

*Aung Ban Oil Company* and *Rangoon Refinery Company.*—The summing up shows what evidence there was, and that there was sufficient to go to the jury to form a conclusion as to whether the debts should be classed as bad or doubtful. But Mr. Giles contended that my learned colleague misdirected the jury in not directing them that these debts were recoverable from any or all of the shareholders. The Government Advocate has not certified that the direction by my learned colleague on this point should be further considered by this Bench; but Mr. Giles was allowed to argue that there was such a misdirection. The evidence in connection with the distribution of the shares in the British Burma Petroleum Company to the shareholders of the Aung Ban and Rangoon Refinery Companies is contained in the cross-examination of the witnesses Holdsworth and Maunder. Holdsworth says that a large number of the 100,000 shares received from the British Burma Petroleum Company as the price of the Aung Ban Oil Company's undertaking were distributed in dividends to the shareholders of the Aung Ban Oil Company. He also stated that he was considering whether he should take steps to enforce the claim of the Bank against the Aung Ban Oil Company. The Rangoon Refinery Company sold its undertaking to the British Burma Petroleum Company for 435,000 shares in the latter company and Maunder says that about 294,000 of these shares have been distributed by the liquidators amongst the shareholders of the Rangoon Refinery Company by way of an *interim* dividend. Now it is perfectly clear that Mower and Clifford knew of the payment of these *interim* dividends. They were prime movers in the formation of the British Burma Petroleum Company and were according to Exhibits 48 and 50 shareholders in the Aung Ban and Rangoon Refinery Companies, Mower having large holdings. They were two of the Bank's Directors and it is clear to me that the Bank acquiesced in the payment of these dividends. Exhibit 85 (*a*)

shows that as regards Saymons Buckingham's account his Rangoon Refinery shares held by the Bank as security were exchanged for British Burma Petroleum shares and his Aung Ban shares were similarly transferred. Exhibit 88 (*d*) and Exhibit 18 (*a*) show that Peter's Rangoon Refinery shares held by the Bank must have been transferred for British Burma Petroleum shares. Exhibit 85 (*e*) said by Holdsworth to be G. Clifford's account shows that 1,405 Rangoon Refinery shares were exchanged for 1,686 British Burma shares and 600 Aung Ban shares for 690 British Burma Petroleum shares. According to Exhibit 22 the Bank held some 400,000 British Burma Petroleum shares. Exhibit 50 shows that the Bank itself held 45,058 shares in the Rangoon Refinery Company. It is extremely probable that many of the British Burma Petroleum shares held by the Bank were received in exchange for shares of the Aung Ban and Rangoon Refinery Company's shares held by them. The record shows that the Bank never objected to the distributions by the liquidators and never entertained any intention or idea of pursuing the British Burma Petroleum shares into the hands of those who received them with a view to satisfying their debts due from the Aung Ban and Rangoon Refinery Companies. Their action in waiving the claim of the Rangoon Refinery Company against the British Burma Petroleum Company, which amounted to over £70,000, for a sum of £5,000, indicates clearly that they never intended proceeding against the shareholders as it seems that such action effectually prevented them from doing so. If they had only recovered about half of the £70,000 the debt would have been satisfied. Their acquiescence may possibly have been due to the fact that they considered the liquidators would be able to meet the debts. The liquidators had large claims against the British Burma Petroleum Company in respect of the Aung Ban Company as well as in respect of the Refinery Company which it would appear from a consideration of Holdsworth's evidence, page 2, Williamson's evidence, page 4, and Exhibit MM (1), page 8, were not met in full to a considerable extent. It is impossible to disregard the inter-relations of all the parties. W. J. Cotterell and C. Clifford were the liquidators. Mower & Co. were the Managing Agents of the Aung Ban Company according

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to Exhibit 48. Mower, Cotterell & Co., of whom W. J. Cotterell was a partner, were the Managing Agents of the Rangoon Refinery Company according to Exhibit 50. Page 4 of Exhibit MM (1) shows how Mower & Co. knew of the conduct of affairs by the liquidators, for as regards the expenditure on the Refinery the report runs :—"The payments when made, however, all came to the notice of Mower & Co. and they doubtless satisfied themselves that they got value for the work done." The consideration arises, that, if it had not suited the Bank's interest, they would not have assented to the change of shares without protest or enquiry.

Considering that the Bank acquiesced and all the circumstances of the case I think it extremely improbable that the Bank could have proceeded successfully against the shareholders. This is in effect the same conclusion as is contained in my learned colleague's charge to the jury and I therefore see no reason for interference on this ground.

*Meagher.*—The evidence is in the summing up and is in my opinion sufficient to go to the jury. It is objected that my learned colleague should have referred specifically to some of the evidence. The whole of it was before the jury and it cannot be expected that every particle of evidence can be put to the jury.

*Cotterell.*—Besides what is said in the summing up there are the facts that he had paid no interest since August 1910, and that he is down in 85 (*c*) coupled with the fact that a close business connection is shown between him, Mower and Clifford in Exhibits 45 to 60 which would cause them perhaps to have a knowledge of his affairs and so indirectly cause Strachan to do so through his Directors. According to Holdsworth, page 25, he could not clear his account at once.

*Moberly.*—There is nothing more to be said than is set down in the summing up.

*Sevastopolo.*—In addition to what my learned colleague said the counsel for the Crown has brought to our notice that more than half the debt was unsecured.

*A. Stephen.*—More than half the debt was unsecured and no interest except from realization of securities was paid after January 1910. Mr. Giles drew attention in the course of his argument on this debt that my learned colleague in his remarks

on the debt relied on a passage in the witness Sen's evidence that was not relevant, when he said in re-examination: "When the Official Receiver took charge of the estate from the Bank of Burma, the Official Receiver considered it doubtful whether the estate was solvent." This point was not one of those certified by the Government Advocate as one that should be further considered. The last sentence of his cross-examination was "When the Bank of Burma was appointed Receiver, G. Stephen & Son's estate was considered solvent because the debtors were considered solvent and rightly in my opinion." That opinion must have been based on Sen's knowledge of the papers in his office and on his opinion of the value of the assets at that time. In re-examination after the passage objected to, Sen said that the Official Receiver took over charge in December 1910. Then Sen was not Official Receiver but he would still be competent to give the effect of the records in his office and state the official opinion that was come to on these records at the time the office took over the estate. The answer was never objected to as far as the record shows. If such objection had been made the sources of his knowledge might have been gone into. I am not satisfied that the passage of the evidence objected to was inadmissible.

There is Exhibit 30 to consider in connection with all these debts.

To sum up, I consider that there was evidence to go to the jury with regard to all these debts though it was meagre in the case of Sevastopolo and A. Stephen.

I now turn to the second point certified by the Government Advocate for all three accused.

It is objected that the sentence in Mengen's evidence referred to three times in the summing up is different to an earlier statement of Mengen, and that both statements should have been put to the jury. I do not think that there is anything in the objection. The earlier statement was made in respect of a loan which was covered by security in respect of the principal and not the interest. In Exhibit 30 the interest on unsecured loans is referred to and he is speaking with regard to Exhibit 30.

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I would now deal with the third point referred by my learned colleague. I have already set out what the Exhibits 13 are and have discussed them. Mr. Giles' contention is that they were prepared on the principle that unless the interest was certainly recoverable it should not go to profit and loss, that this high principle vitiates the whole of it, and that, unless it was considered in the light of Holdsworth's explanation, it should not have been put to the jury at all. Looking at Holdsworth's evidence as a whole and especially that portion of it at page 18 of his printed evidence I am of opinion that he does not differ very much from the other experts. He no doubt said that interest should be certainly recoverable before it was credited to profit and loss, but he also said that it might be so credited if a debtor had all his ready cash for the moment tied up or if he was a man of whom there was no doubt as to his financial stability. Mr. Giles argued that the statements should not have been put to the jury as there was no attempt to prove the debts were bad or doubtful. It seems to me that the exhibits were put to the jury in the right way. They were used to show the amount of interest that it was alleged should have been put to interest suspense account on the ground that the debts themselves were bad or doubtful, whereas it was really credited to profit and loss, and the jury were asked to consider which portion of the debts themselves were bad or doubtful, as in that case the "unpaid interest relating to such portion ought to have been taken to interest suspense or deferred interest account or at any rate ought not to have been treated as divisible profit in the profit and loss account." An attempt was made to prove that the debts themselves were bad or doubtful and this is where Mr. Giles' argument fails.

I now turn to the certificate granted by the Government Advocate in the case of the accused Mower.

The first point I have already dealt with. There was evidence in my opinion from which the jury could, if they so desired, come to a conclusion as to whether Mower's debt was good, bad or doubtful, and as regards the knowledge of Mower it is not an unreasonable assumption that he would know the affairs of his own firm and of the securities that were pledged with the Bank as security for the firm's debt, that he would

know the fall in the value of the securities from January 1911 and the position of his firm as set out in Exhibit 26 (*a*). Then there are the letter Exhibit 30—whether he saw Exhibit 30 or was told of its contents was a question for the Jury to decide—and the conduct of his wife with regard to her moneys as also the other inferences that could be drawn as set out in the summing up.

The second point in Mower's certificate I have already dealt with.

The third is that my learned colleague erred in stating to the Jury that " the Auditor is not there for the Directors . . . to learn on " and in not directing the Jury that the decision in *Dovey* v. *Cory* (1) governed the matter. The summing up, which was very lengthy, must be taken as a whole. In the passage referred to the learned Judge was explaining how one of the main duties of an Auditor was to protect the shareholders. I am unable to hold that the jury were misled by the words complained of, nor can I see that the case of *Dovey* v. *Cory* (1) does govern the matter. In that case the allegation that Cory was a party to the fraud was withdrawn and no moral obliquity was imputed to him at the hearing of the appeal. In this case actual fraudulent conduct is alleged against Mower—that he knew the balance sheet was false when he signed it. The jury were told to acquit him if they had any reasonable doubt about this matter. I cannot see that there has been any misdirection in dealing with *Dovey* v. *Cory* (1).

I now come to the matter of presumptions dealt with by the Government Advocate's certificate and I would say to commence with that the summing up must be read as a whole, and that my learned colleague more than once said that his opinion was not binding on the jury. At page 26 of the summing up he said, " I am entitled to give my opinion on this point and on other points of facts, but it is an opinion which does not bind you as I said before and you can reject or follow it as you think fit." Also it must be remembered that all the evidence that was before the jury was not always referred to in connection with the passages complained of.

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CLIFFORD'S CERTIFICATE.

*1st presumption.*—I cannot see any objection to the first sentence. As regards the next two there were before the jury the facts and considerations I have set out in discussing Atcia's debt. Giving them due weight I am unable to hold that there was any misdirection.

*2nd presumption.*—I can see nothing wrong in the words. Clifford had a full knowledge that the claim was disputed and of the affairs of the Refinery and British Burma Petroleum Companies.

*3rd presumption.*—This was an opinion, and a strong one, expressed by the Judge; but it must be remembered that the Jury were told that they were not to be bound by his opinion and that they could follow or reject it as they chose.

*4th presumption.*—I can see nothing to object to in the first sentence. There were facts before the jury from which to deduce knowledge as I have shown above in this order. The second sentence appears to me to be in order, the more especially considering the great knowledge Clifford had of the various companies, the shares of which the Bank held as security for the different debts.

*5th presumption.*—The words I have just written are equally relevant to the first sentence, and also the second, nor can I see any good reason for objection to the third sentence except perhaps the reference to Stephen.

STRACHAN'S CERTIFICATE.

*1st presumption.*—I have already dealt with.

*2nd presumption.*—It was left to the jury to form what opinion they liked.

*3rd presumption.*—Strachan certainly would be conversant with the estate and its affairs, and as I have said the Judge expressly told the jury that they were not to be bound by his opinion.

*4th presumption.*—The words appear to me to be justifiable. They are very general and broad.

MOWER'S CERTIFICATE.

*1st and 2nd presumptions.*—I have already dealt with.

*3rd presumption.*—The inference the Judge drew was based on facts nor was the jury bound by it. He just before said that he had introduced his remarks to assist them in deciding the two Directors' actual knowledge.

*4th presumption.*—I have already dealt with; but I would say that this passage must be read with what preceded it. There were grounds based on facts for saying that Mower had great knowledge of the state of the companies the shares of which the Bank held as security.

*5th presumption.*—The passage must be taken with what succeeds it, and the whole passage seems to me to be one that it was quite fair to put forward for the consideration of the jury.

*6th presumption.*—It must be remembered that in addition to the letter Exhibit 30, Allan had advised the non-payment of a dividend. The jury were asked to consider and not ordered to draw any presumption. The second sentence may perhaps be too strong when the word practice is used; but there was no such misdirection as could possibly influence the jury in their verdict.

*7th presumption.*—I can see no objection to the passages and moreover they were merely an expression of opinion which the jury were told to follow or not as they chose.

*8th presumption.*—I can see no objection to these passages. They must be read with what had been said before. There were facts from which the jury could come to a conclusion. It was not a matter of constructive knowledge. There was evidence of facts from which an inference could be drawn. In saying that Mower was not a mere dummy there was evidence, as has been put before us, to show that he was not a mere dummy. His large interests alone in the various companies would lead to such a conclusion. Exhibit AA (2) makes Mower the senior partner. The minute book of the Bank shows Mower presided at meetings.

*9th presumption.*—It is objected that the evidence is irrelevant. I am unable to hold that it is. The sum was large—

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over Rs. 70,000. It was at Rs. 7 per cent. Mower returns on the 1st August. On the 11th measures begin to be taken to move it out of the Bank and place nearly all of it in Government paper at 3½ per cent. Mower is a Director of the Bank. The point at issue is whether the balance sheet signed on the 1st August was false and fraudulent to Mower's knowledge. The relevancy of the fact seems to me to be obvious.

There remains for consideration the last point referred by my learned colleague:—

"Whether the sentences passed on the accused contravened the provisions of section 71 of the Indian Penal Code."

I have no doubt that they do not do so. The essence of the offence under section 420 of the Indian Penal Code is cheating and dishonestly inducing the person deceived to deliver property. Here, not one but three persons were deceived and induced to deliver property, and each one was induced to deliver his property at a different time. It was not one sum of money that was delivered but three different sums. The argument that there was only one deceit practised in respect of all three persons does not seem to me to bring the dishonest inducing three separate persons within the first part of section 71 of the Indian Penal Code. It is illustration (*b*) to that section in my opinion which governs this case, and not illustration (*a*).

In the result I see no reason for any interference and would now commit the applicants to jail to undergo the sentences passed on them.

*Ormond, J.*—The second and third questions referred by the Judge relate to the objection of the defence that they were not given to understand that it was part of the case for the prosecution that the principal of the debts mentioned in Exhibits 13 was doubtful or that the interest on these debts due for the six months previous to the 30th June 1911 was doubtful, except in so far as interest on such debts had not been paid and the debts were unsecured. Exhibits 13 were admittedly prepared by Holdsworth to show what interest should have been put to an Interest Suspense Account instead of to Profit and Loss Account. Mr. Giles relied upon Holdsworth's statement that unpaid interest on an unsecured debt should go to an Interest

Suspense Account unless there are very good reasons for believing that such interest is recoverable: even so, I think the prosecution would be bound to show that there were no good reasons for such belief on the part of the accused; or in other words, to show that such interest was doubtful to the knowledge of the accused. And the only practical way of showing that the interest was doubtful would be to show that the principal of such debts was wholly or in part doubtful. Evidence was adduced by the prosecution to show that the principal of each of the debts mentioned in Exhibits 13 was doubtful, except Murrey's—Murrey was called by Mr. Giles to show that his debt was good—in order to show that Holdsworth's reasons for putting unpaid interest to a suspense account were deficient; and he cross-examined the witnesses for the prosecution as to the quality of the debts in order to show that the interest on these debts could honestly have been thought to be recoverable. This would lead one to suppose that he must have known that the prosecution were trying to show that these debts were doubtful in order to show at least that the interest on them was doubtful. Mr. Giles seems to have assumed that such evidence was adduced by the prosecution principally in order to prejudice the Jury; but I cannot see any ground for this assumption. Mr. DeGlanville understood that the purpose for which the prosecution adduced evidence as to the doubtfulness of the debts mentioned in Exhibits 13 was to show that the interest should have gone to suspense account; and to show that the basis adopted by Holdsworth, in putting unpaid interest on unsecured loans to suspense account, worked out correctly. It must be remembered that T. A. Fraser's interest was included by Holdsworth in Exhibit 13 (*bb*) because he thought it doubtful; and that the principal of this debt is not included in Exhibit 18 (*a*) because he could not say that the principal was not fully secured, whilst the unsecured debts of the Rangoon Oil Company and Solomon on which the interest was unpaid are not included in Exhibits 13 because Holdsworth considered those debts good. This should have been sufficient to show the defence that Exhibits 13 comprised a list of debts prepared by Holdsworth (principally no doubt, though not invariably, upon the basis of the debts being

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unsecured and the interest unpaid), in order that the prosecution should prove that the interest on these debts was doubtful, and should therefore not have been put to Profit and Loss Account. In Exhibits 13 Holdsworth has credited payments to interest which in strict accounting should have been credited to the principal, if the debts were doubtful. This however could not have been taken by the defence as an admission by the prosecution that the debts in Exhibits 13 were good. Exhibits 13 were prepared for a certain purpose, *viz.* to show the least amount of interest that should have gone to an Interest Suspense Account, and the crediting of payments to interest was by way of a concession to the defence. In the Magistrate's Court Holdsworth prepared a "model" Balance Sheet which shows a loss of Rs. 55,000 odd instead of a profit of Rs. 1,62,277 which would be the result, if the interest on the debts in Exhibits 13 were put to Suspense Account instead of to profit and Loss. If the principal of those debts was doubtful and put to a Reserve Account the loss appearing in this balance sheet should appear as being so much more. But this Exhibit 39 cannot have been taken by the defence as an admission by the prosecution that the principal of these debts was good, for the document was prepared at a time when the prosecution alleged criminal breach of trust, which necessarily involved the badness of these debts. Moreover, Holdsworth explained that he omitted the words "considered good" against the item of 28 lakhs because as he said in the Magistrate's Court he did not consider these debts good; and as he said in the Sessions Court because he was not dealing with the question whether the debts were good or bad; and later on he explains that he prepared Exhibit 39 with reference to two questions, the Interest Suspense Account and what amount of debts were secured or unsecured. In answer to Mr. Giles, Holdsworth says, "One of the grounds on which I allege the balance sheet is fraudulent and dishonest is that some of the debts which were bad were treated as good." He was then being cross-examined as to securities, so his answer I think clearly had reference to the principal of the debts and not merely to debts of interest. And in the Judge's notes it is recorded at an early stage of the proceedings that the doubtfulness of the debts had been a fact

in issue all along. It is true that the prosecution have not specifically stated what debts they asserted to be doubtful, but they adduced evidence to show that many of the debts in Exhibit 13 were doubtful and the defence could have had no doubt that any debts asserted by the prosecution to be doubtful must be included in those exhibits. Murrey was called by the defence to prove that his debt was good; his subpœna was taken out on 17th February; and at a later stage the defence sent for Major Meagher from Madras to prove that his debt was good. Allan was examined by the defence to prove that in his opinion the other debts were good; and they could have called other evidence if they had been so mended. The doubtfulness or goodness of the debts in Exhibits 13 was gone into both by the prosecution and the defence. In my opinion the question as to the doubtfulness of the debts in Exhibits 13 was necessarily involved in the question whether the interest on those debts should have been put to an Interest Suspense Account instead of to Profit and Loss, which was admittedly part of the case for the prosecution. I think that the defence have no good reason for saying that they were misled by the conduct of the case for the prosecution, into the belief that it was no part of the case for the prosecution that the debts in Exhibits 13 were doubtful.

The first question referred by the Judge relates to the amendment of or addition to the charge. The amendment was fully and clearly explained by the Judge to the Jury (*see* pages 3, 20 and 29 of the printed copy of the summing up). It is urged that the Jury might have given their verdict upon a finding simply that the Bank had been kept open and received deposits when insolvent: the answer is that that was never the case of the prosecution and the Jury were in effect told emphatically that they were not to do so. The Judge told the Jury that the case hinges entirely upon the Balance Sheet; the keeping open of the Bank was put to the Jury as a continuing invitation to persons to make deposits upon the strength of the representation contained in the Balance Sheet as to the Bank's financial position; and if the Balance Sheet was false and fraudulent, the keeping of the Bank open was an aggravation of the dishonesty of the Balance Sheet (it being admitted that the financial position of the Bank became steadily worse subsequent to the time

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of the signing and publication of the Balance Sheet). The Judge also directed the Jury that they must be satisfied with regard to each of the accused that he knew the Balance Sheet to be false when he signed it. It is urged that the amendment of the charge let in evidence as to the subsequent financial position of the Bank and as to subsequent knowledge of the accused, which would not have been admissible for the purpose of showing the financial position of the Bank on the 30th June previously, or the knowledge of the accused at the time of the signing and publishing of the Balance Sheet. Evidence as to the subsequent financial position of the Bank would in my opinion be evidence to go to the Jury in order to determine its financial position on the 30th June previously, and would also be relevant as to the dishonesty of the accused at the time of accepting the deposits. The amendment of the charge was, I think, merely an amplification of the charge. The accused were charged with obtaining three deposits on three separate occasions by means of a false representation contained in the Balance Sheet: it was a continuing representation up to the time of the deposit, and in my opinion operated as a representation at the time of the deposit, as to the financial position of the Bank on the 30th June. If a Director innocently signs a false Balance Sheet but subsequently comes to know that it is false, it becomes a false representation by him from that time. The knowledge of the accused as to the falsity of the Balance Sheet should therefore be determined as at the time of the deposit; and I think that the Judge should have directed the Jury to that effect. The direction of the Judge that such knowledge should be determined as at the time of signing or issuing the Balance Sheet was, however, in favour of the accused. The financial position of the Bank and knowledge of it by the accused at the time of the deposit were also, I think, relevant facts, for if the deposit is not dishonestly received there is no cheating. In my opinion the amendment of the charge was not bad in law and the accused were not prejudiced thereby.

The last question referred by the Judge is whether section 71 of the Indian Penal Code is contravened by three consecutive sentences having been passed on each of the accused. The offence in respect of each of the three deposits was a separate

and distinct offence and therefore section 71 has not been contravened. I have no doubt that the Judge when awarding the sentences considered them in the aggregate; and I think it would have been more appropriate if the accused had been sentenced to the aggregate amount of the three sentences in respect of each offence, the sentences to run concurrently.

The first question referred to us under the certificate of the Government Advocate in the case of Clifford and Strachan, is whether the Judge misdirected the Jury in failing to direct that there was not sufficient evidence for them to decide whether certain debts were bad, etc. This means:—Was there any evidence to go to the Jury upon which they could come to such findings? In my opinion there was such evidence as to each of these debts. If so, that disposes of this question, but Mr. Giles was allowed to argue that the Judge had otherwise misdirected the Jury on certain matters in connection with some of these debts. This Court has no power of Revision in cases tried by it in its Original Criminal Jurisdiction, except such as is given to it by section 434 of the Code and by section 12 of the Lower Burma Courts Act. Such power must be construed strictly and as being limited to the necessity of the case when determining the question or questions of law referred. In my opinion the Court has no power to question the decision of any points of law other than those referred by the Judge or referred under the certificate of the Government Advocate. As regards the application of the decision in *Dovey* v. *Cory* (1), that case decided that a Director may trust his co-Directors, and if he is in fact ignorant of the fraud perpetrated by them, he is not liable in damages. The question left to the Jury in this case was:—If the Balance Sheet was fraudulent, had the three accused respectively knowledge of its falsity? I fail to see how the decision in that case of *Dovey* v. *Cory* (1) governed the present case, or that the Judge misdirected the Jury as to the law in connection with that case.

I see no misdirection in the Judge's reference to Mr. Meugen's evidence. I understand Mr. Meugen's evidence on this point to be, that if interest on a debt is credited to deferred interest

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account it follows that the principal should be reserved against as a doubtful or bad debt unless there is security sufficient to cover the principal; and that crediting interest on unsecured loans to Interest Suspense Account presupposes that they are doubtful debts.

With regard to the "presumptions" referred to in the Government Advocate's certificates, they are inferences which the Judge suggests to the Jury should or could be drawn from certain facts. One of the directions complained of is at page 10 of the printed summing up where the Judge says that "the Directors and the Manager of the Bank would be likely to follow the fortunes of such a debtor as Attia with special interest." If the only fact to support this inference was that Attia some years before had been connected with Mower & Co. itself, there would be no evidence to go to the Jury to find knowledge on the part of the accused as to Attia's financial position in June 1911. But the summing up must be read as a whole and there was other evidence to support a finding as to such knowledge. The Judge impressed upon the Jury that they alone were to decide the facts and to draw such inferences as they thought reasonable. As to the other alleged misdirections mentioned in the certificate of the Government Advocate, in my opinion they are not misdirections. There is evidence in each case from which the Jury could draw the inferences suggested. I would dismiss these applications.

*Amendment of charge.*

*Twomey, J.*—The reasons for amending the charge are as set out in the summing up. Seeing that the condition of the Bank grew steadily worse in the interval between the issuing of the Balance Sheet and the receipt of the deposits—2 to 2½ months later—it seemed to me that this fact was highly relevant in determining the intention of the accused when they accepted the three depositors' moneys in October and November. The three offences were incomplete until then, and if the Balance Sheet was issued dishonestly, the dishonesty was aggravated by keeping the Bank open when its condition was worse even than its true condition on August 1st. The representation made by the Balance Sheet was that the Bank was in a sound state and there was a continuing representation to this effect up to the time when the deposits were paid in. But the Jury were

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strictly cautioned against finding the accused guilty on this part of the charge alone. They were told also that they need not concern themselves as to the precise date on which the Bank actually became insolvent in the sense that all its capital and reserves were exhausted. This question was not fully investigated at the trial and I do not think it was a material question. It was shown that the Bank if not actually insolvent was at any rate in a desperate plight when the deposits were received.

If after the Balance Sheet had been issued, the Bank had a sudden access of prosperity which placed it in a sound condition by the time the deposits were received, there would then have been no cheating. For though the accused may have intended to cause wrongful gain or wrongful loss when they issued the false Balance Sheet this dishonest intention could no longer be imputed to them at the time of accepting the deposits if the state of the Bank at that time agreed with the representation made by them. It appears to me that the dishonest intention in August would not be punishable as cheating if the intention at the time of accepting the deposits was not also dishonest.

*Allegation that accused were misled by extension of charge.*

As regards the principal of the debts we have heard the learned counsel for the defence at great length on their complaint that this part of the prosecution case was left in obscurity until a late stage of the trial and then suddenly sprung upon them. It is true that printed statements were put in embodying in statistical form the witness Holdsworth's opinion as to the amounts which ought to have been shown as "secured," and "unsecured," and the amounts which should have gone to an Interest Suspense Account, but we have no specific statement anywhere in the evidence of the amount of principal which should have been shown as doubtful or bad or else should have been reserved against. But it is clear that evidence was led in the Magistrate's Court for the purpose of showing that the unsecured portions of the debts in Exhibits 13, etc., were doubtful or bad, and this evidence was repeated at the Sessions trial. The accused Mower's learned advocate admits that the principal of the debts was called in question in the Magistrate's Court with reference to a proposed charge under section 409 of the Indian Penal Code and that this

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evidence was also relevant on the question of crediting unpaid interest to profit and loss. No charge was framed under section 409, but the interest question was admittedly a main ground of attack by the prosecution in the Sessions trial no less than in the Committing Magistrate's Court. The evidence as to the principal of the debts being relevant on that question in the Magistrate's Court was equally relevant in the Sessions Court, and that being so, I think the Court was bound to consider this evidence in all its bearings, that is to say, the Court had to determine whether the unsecured part of the principal should have been treated as doubtful in the Balance Sheet, and not merely with the question whether the interest on these debts should have been put to Interest Suspense.

The learned advocate for Clifford and Strachan does not admit that any question as to the doubtfulness or badness of the principal was ever put in issue by the prosecution. He contends that the evidence on this part of the case was called merely for the sake of prejudicing the minds of the Jury against the accused. He also urges that this evidence goes but a very little way towards establishing the doubtfulness of the debts, and that the defence could not be expected to see that the principal of the debts was really impugned where the attack was so feeble as to be beneath contempt. But the cross-examination of the first witness Holdsworth indicates that there was at any rate at that time no illusion as to this part of the prosecution case. It seems to me that it was clear on the surface of the case that the unsecured portions of the debts shown in Exhibits 13 (*a*), etc., were challenged by the prosecution as doubtful or bad debts throughout the trial and that no mystery was made about it. These exhibits include all the debts which were admittedly reckoned as bad by the Bank itself at the July audit, and as regards the other debts it was a matter of clear inference that the prosecution challenged them as doubtful. For it is only when the unsecured portion of a debt is doubtful that any question arises of putting the unpaid interest on it to Interest Suspense, and this was in fact the line taken throughout the trial by the defence no less than by the prosecution. I therefore adhere to the opinion I

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expressed in summing up the case that the complaint of surprise is unfounded.

*Value and effect of Exhibits 13 (a), etc.*

With reference to Exhibits 13 *(a)* and the connected statements relating to unpaid interest, I concur in Mr. Justice Ormond's remarks. I think he has analysed correctly the arguments placed before us with reference to these exhibits. The facts that the debts in Exhibits 13 (*a*), etc., were to a large extent unsecured and that the interest accruing on these debts had remained unpaid for a long time were indications that the debts were doubtful. These were no doubt the primary grounds for Holdsworth's opinion that the interest should have been provided for in an Interest Suspense Account and not taken as earned income. But the prosecution did not let the case rest on these indications alone. They produced evidence both before the Magistrate and at the trial to show that the debts were doubtful debts, and the defence endeavoured to rebut this evidence in some cases. The Exhibits 13 (*a*), etc., were put to the Jury as showing the amounts of the debts and the amounts of unpaid interest and the credits to the various accounts during the half-year and it was left to the Jury to decide on all the materials before them whether the prosecution had made out their case that the debts were in fact doubtful or bad to the knowledge of the accused.

It is said that Holdsworth treated all the debts in Exhibits 13 (*a*), etc., as good debts except the Refinery Company's debt because in Exhibit 13 (*dd*) he gave credit towards interest for all payments during the half-year except on the case of the Refinery's debt. It would have been more logical if he had treated all the debts as he treated the Refinery's debt, and the reasons which he gave for the difference of treatment are unconvincing. I mentioned this point to the Jury. But his intention was clear enough. It was to show the amount which in his opinion ought to have gone to Interest Suspense on the assumption most favourable to the accused, namely, the assumption that all receipts during the half-year may properly be reckoned in reduction of the accrued interest instead of being reckoned as part satisfaction of the principal, the latter being the natural course to follow in the case of doubtful or bad debts.

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I cannot see that the Jury were misdirected as to the value or effect of these exhibits.

If there was a complete absence of evidence as to the doubtfulness or badness of the various debts it would have been necessary to instruct the Jury to that effect. But this was not the case. I reminded them of the principal facts appearing in evidence with regard to each of the debts, leaving it to them to decide as to the sufficiency of the evidence. I do not think that this method of dealing with the matter was incorrect. The learned Officiating Chief Judge has given a summary of the evidence relating to the debts and has mentioned several points which were not specifically noticed in the summing up. It is unnecessary for me to go over the same ground. But as regards Mower & Co.'s debt it is desirable to refer to Exhibits 92 (*a*) and QQ(I) which are now relied upon as showing that Mower & Co. had a large margin of security which could have been made available for their debt to the Bank of Burma. Exhibit 92 (*a*) was put in by the prosecution and it was never contended by the defence that the securities shown in that exhibit as lodged with the Bank of Bengal and Perchiappa Chetty were more than sufficient to cover the liability of Mower & Co. to those creditors. Towards the close of the case QQ and QQ(I) were put in by the defence but only for the purpose of showing that Clifford had disclosed the position of affairs unreservedly to the Bank of Bengal when he went to Calcutta in November 1911 to ask for assistance from that Bank. It was not suggested at any time during the trial that these securities would yield a surplus so that Mower & Co. could have given a second or third lien on them to the Bank of Burma. The values of the immoveable property mentioned in the exhibits was not examined and the terms of the first and second liens to which the securities were already subject were not disclosed. The Exhibits 92 (*a*) and QQ(I) went to the Jury without any allegation on the part of the defence that they bore upon the question of the goodness or badness of Mower & Co.'s balance due to the Bank of Burma. They have been referred to now merely as showing that the defence were misled into thinking that the goodness or badness of Mower & Co.'s debt was not in issue. But, as I have already said, I think there is no foundation for this complaint. As the

*The Government Advocate's certificate in the case of Clifford.* Para. 1.

defence did not rely upon Exhibits 92 (*a*) and QQ(I) for the purpose of proving Mower & Co.'s balance to be good, I think it must be inferred that this method of proving it would not have been successful.

With regard to the Aung Ban and Refinery Companies' debts I wish only to say that the process which a creditor would have to follow in order to recover the shares distributed by the liquidators was not fully investigated at the trial. It was no doubt incorrect to suggest that the creditor could only follow up the shares in the hands of the persons now holding them. The matter has now been threshed out and the conclusion arrived at is stated in the order of the learned Officiating Chief Judge. It shows, I think, that I was right in instructing the Jury that the Bank had very little prospect of recovering any substantial part of the distributed shares.

*Certificate of Clifford.* Para. 2.

Mr. Meugens said that if the unearned interest on a debt is credited to deferred interest it does not follow that the principal should be reserved against as a doubtful debt, and this remark was not repeated by me to the Jury. He explained this remark by saying that the security might be sufficient to cover the principal but not the interest. Later on, when telling Mr. Giles what he thought of Allan's letter of 1st August, he remarked of his own accord that crediting interest on unsecured loans to Interest Suspense presupposes that the unsecured loans are doubtful. He probably assumed that the debtors referred to in Allan's letter had furnished all the security they possessed (as indeed appears to have been really the case—*see* Exhibit 6). If the debtors were people of undoubted financial capacity apart from the security they had furnished, Allan would not have made this recommendation at all.

In the circumstances I do not think that there was any inconsistency between Mr. Meugen's first remark and his second remark which was made with special reference to the circumstances of this case as indicated by Allan's letter. I cannot admit therefore that there was any misdirection in what I said to the Jury as to Mr. Meugen's opinion about Interest Suspense.

*Presumptions —page* 10 *of summing up.*

As regards Attia, Mr. Justice Hartnoll has indicated the main grounds for thinking that this debtor of the Bank was closely connected with Mower & Co., even after he ceased

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to be a partner in the firm. Looking to all the circumstances appearing in evidence on this point and especially to the fact that Mower & Co. were guaranteeing Attia's debt to the extent of 1½ lakhs, I think it is a reasonable inference that the Directors and Manager would follow his affairs closely.

Page 15. The Director Clifford certainly knew in July that practically the whole of the claim against the British Burma Petroleum Company was disputed. The Bank would bring serious pressure to bear on the British Burma Petroleum Company by suing them on the liquidators' claim for £70,000 or by threatening such a suit. The effect of such a suit at that time would be highly detrimental if not ruinous to the British Burma Petroleum Company. I think this is clear from Mr. Williamson's evidence and from the terms of the Trust Deed. As a Director of the British Burma Petroleum Company and as a partner in Mower & Co., the Managing Agents, the accused Clifford could hardly be ignorant of the factors governing the situation.

Page 20. I stated the inference which appeared to me to be deducible from the facts as to Mower and Clifford's strong motive for keeping the Bank afloat. The inference was justifiable in my opinion, but it was left to the Jury to form their own conclusion.

Page 24. The use of the word "opportunities" in this passage was no doubt unsuitable. But I do not think the Jury could have been misled by it. The meaning of the whole passage from which this is abstracted was plainly that the Jury should decide whether Mower and Clifford had actual knowledge of the state of the debts and securities, and the Jury's decision was to be based on the evidence before them showing the close connection of the two Directors with the affairs of the debtor companies (Aung Ban, Refinery, and Mount Pima) and with Attia and Cotterell.

As regards the second extract from page 24 I can see no valid ground for objection. It was admittedly a time when Mower & Co.'s financial resources were strained to the utmost and when the shares in the Mower Companies which formed the bulk of the securities held by the Bank had much depreciated. Moreover, the Director Clifford's attention had been drawn specially to the critical condition of the Bank's

affairs by the Auditor's advice not to pay a dividend. In these circumstances, I think the presumption was justifiable that Clifford who was the only Director in Rangoon was cognizant of the principal factors by which the profit of Rs. 1,62,000 was arrived at, and this presumption is borne out by the report of his own speech to the shareholders on the 16th December (page 46 of the Minute-book, Exhibit 4).

*Strachan's certificate.* Paras. 1, 2 and 3. Page 10 of summing up.

The grounds stated in paragraphs 1 and 2 have already been discussed in my remarks on Clifford's certificate. As regards the passage on page 10 of the summing up it seems to me that there is nothing unreasonable in presuming that Bank Managers are conversant with the financial affairs of borrowers. It is a principal part of their business to keep themselves acquainted with the vicissitudes of fortune that befall the clients of the Bank. Of course Bank Managers sometimes neglect this part of their business, and if a Bank Manager lost touch with a borrower through mere negligence he might go on honestly reckoning the debt a good debt after it had become doubtful. But I do not think there was anything wrong in reminding the Jury of the general course of business in this matter. They were in a position to judge for themselves whether the accused Strachan belonged to the class of merely negligent Managers.

Page 15.

I see nothing wrong in this passage. Strachan admitted that he discussed the question of the disputed claim with Clifford, and has never alleged that Clifford misled him as to the nature and extent of the dispute. This being so it was left to the Jury to draw their own conclusion as to what Strachan was told by Clifford.

Page 17.

The inference suggested in this passage as to Stephens & Son's estate appears to be correct. As to the admissibility of the witness Sen's evidence about the solvency of the estate at various periods, I have nothing to add to what has been said by the learned Officiating Chief Judge.

Page 26.

The passage objected to on this page is little more than a repetition of what was said on page 10 and I have already referred to that.

*Mower's certificate.* Para. 1.

The learned Officiating Chief Judge has referred to the evidence indicating that the unsecured balance of Mower & Co.'s

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debt was doubtful to the knowledge of the accused and I have nothing to add to the remarks I made on this point in dealing with paragraph 1 of Clifford's certificate.

I have already dealt with paragraph 2 of Mower's certificate. It is the same as paragraph 2 of Clifford's certificate.

Para. 3.

In paragraph 3 it is stated that I misdirected the Jury in stating to them that the Auditor is not there for the Directors and Manager to lean upon and in not directing them that the decision in *Dovey* v. *Cory* (1) governed the matter.

My remarks as to the functions of an Auditor are in a part (page 21) of the summing up entirely distinct from my remarks on the *Dovey* and *Cory* case (page 25). In dealing with Auditors I pointed out that their principal duty is to protect the shareholders, to see that the Directors and Manager are issuing true Balance Sheets. In that connection the statement that the Auditor is not there for the Directors and Manager to lean upon seems to be appropriate. The Jury would understand that I was merely emphasising the principle that it is the shareholders who are entitled to rely on the Auditor as a check on the Directors. The remark would have required qualification if I had used it in commenting on *Dovey* v. *Cory* (1) in a later part of the charge to the Jury. I pointed out to them the differences between the facts of that case and this, but did not call attention to the ruling of the House of Lords which was to the effect that the Director Cory was not bound to go into details himself and was not to blame for acting on the assurances of his co-Director and Manager that all was as it should be. It seems to me that the present case is sharply distinguished from *Dovey* and *Cory* by the evidence direct and indirect of knowledge on the part of the accused Mower and Clifford who were not only Directors of the Bank but themselves constituted the firm of Mower & Co. which with its connected Companies and firms absorbed by far the greater part of the funds of the Bank, and who apparently instituted the Bank with the main object of financing these various enterprises. Having regard to Mower's arrival from England on the very day on which he signed the Balance Sheet it might

(1) (1901) A.C., 477.

have been better to remind the Jury expressly that Mower, *if he had no reason for suspicion*, was entitled to accept the figures as set before him by the Manager and Auditor. But I do not consider that the omission amounted to a misdirection in the circumstances.

The learned Officiating Chief Judge has dealt with the presumptions or inferences extracted in this paragraph and I concur in his remarks. In each case I merely stated to the Jury my own opinion as to the inferences that might be drawn from the facts appearing in evidence. I think the inferences were reasonable, but in any case the Jury were left free to form their own opinion on the facts. Para. 4.

As to the sentences I agree with my learned colleagues. The money was taken from the three depositors each on a different date, and as I have already pointed out the dishonest intention which is the gist of the offence in each case is not merely the dishonest intention when the Balance Sheet was issued but the dishonest intention at the time when the offence was completed by the acceptance of the deposit. I cannot see therefore how the three offences can be regarded merely as parts of one composite offence under the first part of section 71 of the Indian Penal Code. *Sentences.*

I concur therefore in thinking that the three applications should be dismissed.

## *Charge to the Jury.*

*April 11th*, 1913.

*Page 1 of the summing up.*

GENTLEMEN OF THE JURY,—It is nearly eight weeks since you were empanelled for the trial of this case, which is perhaps as important and at the same time as intricate as any case in the history of the Chief Court. It would be difficult for me to speak too highly of the patience and attention with which you have followed these lengthy proceedings and of the personal sacrifices which you have made in attending Court for so many days. I feel confident that you now have a thorough grasp of the main facts of the case and the questions which you have to decide. Several questions of law have been raised on which it will be my duty to instruct you, and in the course of summing up the evidence I shall have to express my opinion, more or

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less strongly on the principal questions of fact. On questions of law you have no alternative but to accept my decision; but where the question is one of fact you must always remember that the duty of deciding it rests with you alone. Though I may tell you what strikes me as a reasonable conclusion from the evidence on any particular point you are not bound to agree with me in my opinion but you are at perfect liberty to form your own judgment. I am exceedingly glad that there are several gentlemen on the jury with an intimate knowledge of banking and accounts, men who are specially competent to deal with the difficult questions of banking practice and procedure that have arisen in the case. It relieves me of much anxiety to know that the decision of the case rests with men of business who will be able to apply ordinary business standards in weighing the evidence and the probabilities. It is also a great source of satisfaction to me that the three accused have been so very ably defended. You have been addressed for several days by the learned counsel for the defence and I think there is no point and no argument to be urged in their favour which has not been laid before you fully and clearly. Whatever may be the result of the case I think the accused persons will at any rate be unable to reproach their advocates with want of skill or want of zeal in their defence.

Now I will say a few words as to how this case came to be instituted. The accused Mr. Mower and Mr. Clifford were Directors and the accused Mr. Strachan was the Manager of the Bank of Burma, and a balance sheet with Directors' report was issued over their signature on the 4th August 1911 for the half-year ending 30th June. This balance sheet represented that the Bank had earned a large profit during the half-year and out of this profit it was recommended by the Directors that a dividend at the rate of 7 per cent. per annum should be paid to the shareholders; that is the same rate as in the previous half-year and I think in the half-year before that also. It is beyond dispute that the position of the Bank, according to this report and balance sheet, was sound and prosperous. The Rev. Mr. Cumming on reading the report and balance sheet thought that the Bank must be exceedingly prosperous. Mr. Black, an experienced Banker, says that the balance sheet

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appeared to him sound and satisfactory. The balance sheet was certainly calculated to create public confidence in the stability of the Bank and to lead depositors to believe that their money would be safe if they placed it in the Bank. Less than three months afterwards the affairs of the Bank had come to such a pass that without assistance from outside the Bank must close its doors. The Directors applied to the Bank of Bengal for assistance and as that Bank could not see its way to give the desired assistance, that is to say, could not accept the proposal to take over Mower & Co.'s loans aggregating some 45 lakhs of rupees, the Bank closed on the 13th November: it was then clearly impossible to carry on any longer. A large number of deposits were falling due in November and there was good reason to believe that all deposits would be withdrawn: a feeling of uneasiness about the Bank was abroad, the shares of the Bank were falling and a run on the Bank was imminent. The Manager and Directors realized that it would be impossible to issue a favourable balance sheet for the half-year ending 31st December 1911. It is clear that the continuous fall in the value of the securities lodged with the Bank had a good deal to do with the collapse, but the mere fall of securities was not sufficient by itself to account for it, for the fall in securities was a phenomenon that affected other Banks also. At any rate the striking contrast between the prosperous outlook of the Bank as represented in the balance sheet of the 30th June and the report issued with the balance sheet and the actual state of affairs after such a short interval gave rise, after the closing of the Bank, to an enquiry as to the truth of the statements and the figures in the balance sheet and report and the present prosecution is the result of that enquiry. It is alleged by the prosecution that the balance sheet and Directors' report were false and fraudulent to the knowledge of the Directors and Manager; that instead of making a profit the Bank had in reality suffered a loss during the half-year; that if the truth were known about this a run on the Bank would have inevitably followed and that the accused persons issued the balance sheet and kept the Bank open with the object of deceiving the public and concealing the true state of affairs on 30th June, rather I should say on 4th

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August, the date on which the balance sheet was issued. The closing of a Bank is an event that gives rise to all sorts of comments in the Press and among the public. It is now 17 months since the Bank of Burma closed and during that time the conduct of the Directors and Manager, their motives and intentions, the policy by which they were guided, and the causes of the collapse of the Bank—all these matters have been the subject of gossip in clubs, hotels, and other resorts. Also when a Bank fails the air is filled with the lamentations of the unfortunate people who have lost their money and the atmosphere generally is not likely to be friendly or even fair to the management of the Bank. We know from the evidence in this case that the general attitude towards the Directors and Manager was one of resentment, not to say hostility. This being so, the learned advocates for the defence were certainly right in warning you to free your minds from all prejudice, and I cannot too strongly impress upon you the importance of doing so. You should clear your minds as far as you can from anything you may have read in the newspapers, or heard spoken outside about this case. You are to deal with it in the light of what you have seen and heard in this Court and to discard everything else. The materials for your decision are the evidence that has been put before you and the inferences you can draw from that evidence as reasonable and sensible men of business. It is only common justice to the accused that you should base your decision on these materials and on nothing else. It is perhaps hardly necessary for me to remind you also that the accused are not on their trial for mismanaging the Bank or for dealing imprudently with its affairs. You may have formed opinions adverse to the accused on this score, but however imprudent their management may have been that is not a matter which should influence your decision at all. It is not part of the charge that the accused mismanaged the affairs of the Bank. The charge against the accused is briefly that, by means of a false balance sheet and Directors' report and by keeping the Bank open as a going concern after it had become insolvent, they deceived certain specified persons and dishonestly induced these persons to deposit their money in the

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Bank, with the result that they lost their money or the greater part of it. Three persons are picked out from the mass of depositors because the law does not permit of more than three charges of the same kind to be tried jointly in one trial. Strange as it may seem, to issue a false balance sheet does not by itself constitute a substantive offence under the Indian law. It is an offence under section 74 of the Companies Act not to issue a balance sheet at all; the Directors are bound to issue a balance sheet and if they fail to do so they are liable to a fine under that section, but there is no specific offence of issuing a balance sheet knowing it to be false and fraudulent. The prosecution were therefore obliged to have recourse to that part of the Indian Penal Code which deals with cheating. Cheating is defined in section 415, Indian Penal Code (reads it). That is the general definition of cheating, but you see that it includes some kinds of cheating that do not concern us at all in this case. The whole of the latter part of the section, for example, has nothing to do with this case at all: the part about intentionally deceiving the person and so on, that is not germane to this case at all. We are concerned only with the kind of cheating which is described more fully in the later section of the Code which makes it a punishable offence to cheat, and thereby dishonestly induce the person deceived to deliver any property to any person. The accused are charged with cheating in this way the three depositors named in the charge sheet. This kind of cheating, that is cheating by dishonestly inducing the delivery of property, is of course included in the general definition which I have just read, but the law regards it as an aggravated form of cheating and therefore provides for it in a separate section which is section 420. The only part which concerns us is the first part, "Whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, * * * shall be punished" and so on (section 420). You will see that the elements of the offence are, that the accused has deceived some person and that the accused has thereby dishonestly induced the person deceived to deliver property to any person. The word "property" includes money and the word "person" includes a Company, such as a Bank. Thus the offence is

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committed if the depositors named in the charge or any of them have been deceived by the accused and have been dishonestly induced by the deceit to pay money into the Bank. But it is very necessary to explain to you that the word "dishonestly" in this section or in the Penal Code generally is not used in its loose popular sense but is strictly defined in the Penal Code and I will read the definition to you (reads section 24). You see he must do that with an intention of causing wrongful gain to one person and loss to another person. Then the words, "wrongful gain" and "wrongful loss," also have a technical meaning as used in the Penal Code (reads section 23). The word "unlawful" there is not defined in the Penal Code, but there can be no doubt, I think, that it applies to such a case as the issue of a false balance sheet to the public and that a Bank which obtains money in that way is not legally entitled to it. If the Bank obtained money by issuing a false balance sheet, then that gain would be wrongful gain. But you will observe that in the definition of "dishonestly" the intention of the doer is an essential ingredient. A man's act may cause wrongful gain or wrongful loss, but it does not necessarily follow that he is dishonest if it was not his intention to cause the wrongful gain or wrongful loss: so that, in a case of this kind, you have to determine whether the accused had the dishonest intention that the law expressly requires. Now, a man's intention is something hidden in his mind and the only way to discover the nature of his intention is to observe his external acts, words and conduct. You have not only to look at what he did and said but you have to consider also what must have appeared to him at the time to be the natural consequence of what he said and did. From these observations and consideration you can determine by inference what was his intention in saying or doing it, for a man is presumed by law to intend the natural and ordinary consequences of his acts. Thus, take the case alleged by the prosecution against these accused—the case of a Bank weighed down by a large amount of debt which there is little or no prospect of realizing. The Directors and the Manager in these circumstances conceal the true state of affairs by issuing a false balance sheet representing the Bank to be in a sound and flourishing condition, and they keep the Bank open and continue

to invite and receive deposits for over three months, just as if everything was in order, and in consequence of this action of the Directors and the Manager members of the public deposit money, all of which they lose by the failure of the Bank soon afterwards. If such were the circumstances—I am of course only now putting the prosecution case in a purely hypothetical form—it would be right to presume that the Directors and Manager intended to cause wrongful loss to depositors and wrongful gain to themselves, which loss and gain resulted as the natural consequence of their acts. It matters not what the motive was. Motive and intention are two different things. In the hypothetical case which I have just put to you the motive might be to enable the Bank to prevent the collapse of a number of commercial ventures in the success of which the Bank or the Directors of the Bank were more or less directly interested. There would be nothing necessarily improper in such a motive, but if wrongful gain or wrongful loss is intentionally caused it matters not what the motive was. The motive does not affect the criminality of the act or series of acts concerned. It therefore comes to this. You cannot find the accused guilty of cheating as charged unless you are satisfied that the balance sheet was in fact false to the knowledge of the accused; that the natural result of publishing this balance sheet and keeping the Bank open was the payment of money into the Bank by depositors and that in the circumstances of the case the depositors would as a natural consequence lose their money or part of their money. You will remember that I altered the charge by adding certain words "intentionally keeping the Bank open as a going concern after it had ceased to be solvent". The reason for this addition is that the publication of the balance sheet alone did not complete the inducement to depositors. Even if the balance sheet were false there could be no cheating unless the Bank was kept open afterwards. The balance sheet was published in August 1911 but the last of the three payments did not occur until the 9th November. The balance sheet, therefore, was before the public throughout the intervening period and the feeling of security engendered by the balance sheet and Directors' report was operative up to the time of the last of the three deposits in November. During all this time

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the Bank kept its doors open for the receipt of deposits among other things. If the purpose of issuing that balance sheet was to deceive the public as contended by the prosecution, the action of the management in keeping the Bank open was a necessary factor in the execution of that purpose. In other words, it may be said according to the prosecution that the Bank was kept open in pursuance of a design of which the first overt act was the issue of a false and deceitful balance sheet.

Now the Bank was a Company incorporated under the Indian Companies Act and limited by shares. The Act prescribed the form of balance sheet of which you have copies. It is laid down in the Act that the balance sheet is to contain a summary of the property and liabilities of the Company arranged under the heads appearing in that form or as near thereto as circumstances admit. The act requires a balance sheet to be published yearly, but in the Articles of Association framed for this Bank under the Act it is further provided that a balance sheet shall be published half-yearly and you may take it that the provisions of the Companies Act regarding balance sheets apply fully to this balance sheet of the 30th June 1911. I should tell you that the provisions about issuing balance sheets are contained in the part of the Act which relates to the "Protection of Members," that is, shareholders. The balance sheet is intended by law to be a correct summary of the Companies' financial position, so that all who have relations with the Company may have means of knowing how the Company stands financially and whether it is safe to deal with it. I should also point out that a Bank balance sheet is not necessarily a true balance sheet merely because it sets forth correctly the totals of the different accounts in the Bank. It would be no safeguard to the public unless it showed with reasonable fidelity the true state of affairs in general terms. Thus, if credit were taken in the books for assets which did not exist or if the assets were grossly overstated in the books and transferred with arithmetical correctness to the balance sheet with the effect of inflating the assets by large fictitious sums then the balance sheet would be a false balance sheet though it might be in perfect agreement with the books of the Bank.

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You have seen many balance sheets in the course of this case and it is evident from these that the prescribed form is not

strictly followed in practice—there are wide departures from it—for example, the assets side of the prescribed form has a heading "Doubtful and Bad debts." But though probably every Bank has some doubtful or bad debts included amongst its assets, you will search for them in vain in the balance sheets. They are there but only in a veiled form being included among the debts considered good. We have the opinion of several expert accountants that this course is unobjectionable but with this important proviso, *viz.*, that the bad and doubtful debts are fully reserved against on the liability side of the account. That proviso is essential; for example, the Bank of Burma admittedly had some Rs. 2,94,000 doubtful or bad debts which they showed among the good debts on the asset side, but on the liability side they included a secret reserve or contingent fund for about the same amount—I believe it is a few hundred rupees more than the actual amount of the bad or doubtful debts. No dishonesty whatever can be imputed to them for reckoning these doubtful or bad debts as good assets as they reserved against them on the liability side. In doing this they were merely acting according to the recognised practice of Bankers and Auditors all over India. But if the doubtful or bad debts are not reserved against on the liability side then the Bank is bound to show them specifically as doubtful or bad debts on the asset side and if there is a special reserve fund for doubtful or bad debts on the liability side—but this reserve is not sufficient to cover the whole of the debts known to be doubtful or bad, then the difference, that is the excess of doubtful or bad debts, must be disclosed expressly as doubtful or bad debts on the asset side. This appears to be common sense and we have Mr. Meugens' authority for it and his opinion agrees with the other expert accountants who appear as witnesses in this case.

In the prescribed form of balance sheet you will see that the primary division of debts on the assets side is entered as "Debts which are considered good" and "Debts which are doubtful or bad:" that is the main line of division. Then "the debts considered good" are subdivided in heading 6, "For which the Company holds bills or other securities" and 7 "For which the Company holds no security." There has been some doubt as to which of the good debts should go under heading 6 and which of

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them under heading 7. Heading 6 seems wide enough to cover any kind of security. Even the sole promissory note of a debtor is a security though it may be a security of a very attenuated kind. The Act does not distinguish between high class security and security which may be called merely nominal security. Moreover, it might be permissible to include under the first head a debt for which security is held however much the security may have depreciated, for the debt will still be a debt for which the Company holds bills or other securities, that is to say, the depreciated security is still available for the whole debt although the security when realized may not yield anything like the amount of the debt. But if it is still a good debt—that is the main point—then it could properly remain under head 6. In short, whatever the views of auditors on this subject may have been, the Act does not require that the good debts entered under heading 6 should be good debts which are *fully secured*. Mr. Holdsworth and, I think, Mr. Tanner construed the heading in this way. They thought the debts to be placed under heading 6 should only be debts which are fully secured; but I think they are wrong. It may be that the Legislature intended that only debts which are fully secured should be put under heading 6, but we cannot consider what the intention of the Legislature may have been except in so far as the intention is expressed in the words of the enactment. We must look at the actual words, and in this case I think the plain meaning is that any debt for which there is security may go under heading 6 and not merely fully secured debts. You will see, gentlemen, that in my opinion at any rate, there was no obligation under the Companies Act to show the good debts fully secured separately from those which are not fully secured. But from Mr. Allen's and Mr. Meugens' evidence it appears that auditors generally have decided for themselves that the classification of good debts in subdivisions 6 and 7 of the prescribed balance sheet is misleading and therefore a practice has grown up among auditors in India of showing under heading 6 only fully secured debts or the fully secured portions of partially secured debts. This has been the usual practice of Bankers and Auditors for some time and it appears as a matter of fact from the Manager Mr. Strachan's written statement in this case and from the Auditor

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Mr. Allen's evidence about the balance sheet of 30th of June that they distributed what they treated as good debts between headings 6 and 7 on these lines, that is to say, they put those parts of the debts which they considered secured under heading 6 and those parts which they considered unsecured under heading 7. But it is obvious, gentlemen, that we could not hold the Manager and Auditor blameworthy if we find that some of the debts under heading 6 are as a matter of fact not fully secured and should under their scheme have gone under heading 7. So long as the whole of the debts are good debts and so long as *some* security is held for the debts under heading 6, there would be no reason to find fault. You may think that the safeguard afforded by the publication of a balance sheet will be much weakened if a Bank is at liberty to put under heading 6 a debt for which it holds any security, even a promissory note of a debtor, or however much the security may have depreciated. But as a matter of fact the really important safeguard is not in the subdivision of good debts into secured and unsecured but lies in the main classification of debts into good debts and debts which are doubtful or bad. If a debt is really a good debt it matters not to the Bank or to the public whether the certainty or practical certainty of recovering it depends upon the fact that specific security is held sufficient to recover the full amount of the debt or whether, as often may be the case, the certainty of recovery depends upon the high financial standing of the borrower. Of course, if the debt is classed as a good debt because actual securities are held of a value equal to the full amount of the debt and if these securities afterwards depreciate or cease to be available then it becomes a question not of transferring the unsecured portion from heading 6 to 7, but of transferring it from heading 6 to heading 8 "Doubtful and bad debts." It behoves the management of the Bank in each case of that kind to consider whether they have sufficient reason to consider it as a good debt any longer having regard to the depreciation or extinction of the security. That appears to be the crux of the whole matter. I am not going to lay down a definition of a good debt in the abstract: it is not a term of law: it is a business term and it is for you as men of business to apply what you regard as the proper business standard in

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deciding on the evidence before you, whether any particular debt is good or not. If a debt is not good it follows that it is either doubtful or bad and here you will bear in mind that the question whether a particular debt should on its merits be classed as good or not, would often be a matter upon which opinions might honestly differ. Where there is room for such an honest difference of opinion no Bank official could be blamed for taking the more favourable rather than the less favourable view. It lies upon the prosecution when they say a debt is doubtful or bad to prove it strictly to your satisfaction and if you think, after considering all the circumstances, that there is still room for an honest difference of opinion as to the classification of any particular debt you should take the more favourable view rather than the less favourable. But I need hardly say there are cases also in which there is no room for any such difference of opinion: cases in which no reasonable man could honestly hesitate to class a debt as other than doubtful or bad.

Now, gentlemen, in what respects is it contended by the prosecution that this balance sheet is false and misleading? We have spent a good many hours in hearing opinions and arguments about the omission of a note in the balance sheet, about the pledge of 5 lakhs of the Government paper to the Bank of Bengal and about the way in which the contingent fund of Rs. 2,94,000 has been manipulated. I use the word "manipulated" here in no bad or sinister sense. As to the question of Government paper I think the general effect of the evidence is that while it would have been better to mention the matter prominently in the balance sheet, yet there was no positive obligation on the Bank to show it and we have good authority for saying that it may not have even occurred to the Manager or Auditor that an express disclosure of the fact of this pledge was called for. I will not weary you by recalling in detail what each of the expert witnesses has said on this topic. The whole of the evidence has been printed and is in your hands. I think I have stated generally the effect of the expert evidence on this point. It appears that whatever the man in the street may have thought, at any rate a man versed in accounts would not think that the whole of the 15 lakhs of

Government paper on the assets side were free from liability seeing that there were nearly 5 lakhs on the other side of the balance sheet which are noted as "Secured per contra." In my opinion the worst that can be said of this matter is that if the balance sheet were otherwise false and deceitful the omission of a note about the pledge of Government paper would to some extent tend to assist the fraud which was contemplated. On the other hand if the balance sheet is otherwise true and honest then the omission of the note about the Government paper has no sinister significance whatever. Then Mr. Holdsworth laid great stress upon the method adopted by the Bank in dealing with the contingency fund or secret reserve for doubtful and bad debts which amounted to Rs. 2,94,000 and is included in the item of 118 lakhs on the liability side. His opinion was that the amount of the doubtful and bad debts for which the contingency fund was reserved should have been shown under head 7 and not under head 6 on the asset side. Now in this balance sheet the amount of the doubtful and bad debts is included in the heading corresponding to number 6, that is, 116 lakhs odd. The effect of this according to Mr. Holdsworth is to make the balance sheet more attractive by reducing the figure of unsecured debts from Rs. 9,36,000 odd to Rs. 6,36,000 odd and correspondingly increasing the figure of secured debts from 113 lakhs odd to 116 lakhs odd. This opinion of Mr. Holdsworth is no doubt based to some extent on his assumption that heading 6, "Debts considered good for which the Company holds bills and other securities," can lawfully include nothing but fully secured debts, but this assumption I have already held is erroneous. I think, gentlemen, in view of the evidence of other expert Bankers and Accountants, we have no alternative but to reject Mr. Holdsworth's opinion on this point. It appears that having provided for Rs. 2,94,000 for bad debts in the secret reserve no exception can be taken to the way in which those debts were shown on the assets side. Mr. Meugens gave us his opinion that, according to the strict reading of the prescribed headings 6 and 7, the Bank would be justified in showing the whole of their debts under heading 6 and nothing under 7, *always assuming* that they had some security for all the debts and that all the debts could honestly

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be considered good debts with the exception of Rs. 2,94,000 which was specifically provided against. I have given this my most careful consideration and I have come to the conclusion that Mr. Meugens' opinion on this point is correct.

So that now we have come to close quarters with the fundamental issue in the case, and that is whether the balance sheet is false in taking credit as *good* assets for a large amount of debts which could not honestly be considered as good debts and in crediting to profit and loss and treating as earned income divisible as profit a large amount of interest on these doubtful and bad debts on which interest was unpaid and which there was no reasonable prospect of recovering.

Before I go any further I think I had better comment on the protest which was made by the learned Counsel for the defence to the effect that we have no right to deal with the question whether the principal of these debts was good or not. The learned Counsel for the defence contend that the prosecution has all along impugned the balance sheet only on the grounds that unearned interest was dishonestly put to profit and loss, that the contingency fund of Rs. 2,94,000 was dishonestly dealt with and that the omission of a note about the 5 lakhs of Government paper was dishonest. They say that to impugn the action of the Bank in treating the principal of the debts as good assets is to introduce fresh matter of which the accused had no notice and which they were not prepared to meet. I confess that these arguments took me by surprise and I think they lack substance and reality. It is true that a good deal of time has been consumed in hearing evidence and arguments about the contingency fund Rs. 2,94,000 and the 5 lakhs of Government paper, matters which as it now appears are of comparatively minor importance. But what has been the essence of the charge against these accused from the outset? Has it not been that they dishonestly declared a large profit and distributed handsome dividends when there was in reality no profit at all but a serious loss? What does that mean if it does not mean that they reckoned as good assets a large mass of doubtful and bad debts? How can it be supposed that the only question raised by the prosecution with regard to the debts is that the Bank showed as secured what they should have

shown as unsecured? If a debt is really good it is a matter of small consequence to include it in one subdivision of good debts rather than in the other subdivision of good debts. The main thing about it is that it is a *good* debt, whether it is good by reason of the security held or by reason of the unquestionable capacity of the debtor apart from any specific security. The expert witnesses have been questioned not only as to the necessity of putting interest on doubtful or bad debts to an interest suspense account but they have also been questioned as to the necessity of making special reserve provision against the principal of such debts and as to the necessity of showing them expressly as doubtful or bad debts if no such provision is made. It has never been suggested by the prosecution that a debt which is merely unsecured must necessarily for that reason alone be treated as a doubtful or bad debt to be provided against as regards the principal in a special reserve fund and as regards the interest in a suspense account. What the prosecution have contended all along is that we have here a large mass of unsecured debt which having regard to the circumstances of the debtors as disclosed in the oral and documentary evidence could not honestly be treated as good and should therefore have been reckoned as doubtful or bad, that it was wrong and dishonest to show a large profit on the strength of such debts and that it really amounted to paying profits out of the monies of depositors. It is for you to say whether the prosecution have established these contentions to your satisfaction.

Mr. Holdsworth prepared a tentative balance sheet, exhibits 39 and 39 (*a*), showing the position of the Bank on 30th June according to his view. In that balance sheet he did not divide the debts into those considered good and those which are doubtful or bad. He divided them only into secured debts and unsecured debts. But though he did not divide the unsecured debts in his balance sheet into good debts and doubtful or bad, it is our duty to consider this matter as an essential part of the case and to decide it according to the materials at our disposal.

The prosecution, it should be noted, have not contended that any debts should be shown specifically as doubtful or bad

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in the balance sheet if they are reserved against on the opposite side. The contention is that a large amount of doubtful or bad debt which is nowhere reserved against has been included among the good debts.

I would also say that it does not lie on the prosecution to show that a debt is absolutely bad. It is sufficient for the purposes of this case if it can be shown that a debt is so seriously doubtful that it could not honestly be treated as a good debt, that is, without at the same time providing for it in a special reserve or otherwise on the liability side of the account.

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I will now ask you, gentlemen, to refer to the detailed statistics about loans and interest which have been submitted by the prosecution. They are contained in 18 (*a*) and 18 (*b*). Will you kindly refer to these and exhibits 13 (*a*), (*bb*) and (*c*) and exhibit 13 (*dd*). These exhibits give in tabular form the result of Mr. Holdsworth's examination of the accounts of the Bank as it stood on the 30th June. It has been shown that exhibit 18 (*a*) is not entirely free from inaccuracies but the mistakes in it, such as they are, have been brought to your notice and corrected. The defence have prepared a similar statement, exhibit LL, which gives practically the same figures as are contained in Mr. Holdsworth's statement except that a value is given to certain shares which Mr. Holdsworth treated as valueless, but in all other respects I think the figures and information given in exhibit 18 (*a*) have been adopted in the preparation of defence statement, exhibit LL. I think you will agree with me that the errors which were brought to light in exhibit 18 (*a*) are not errors of any serious consequence, that is to say, they do not materially affect the inferences to be drawn from the printed statements. Mr. Giles went so far as to say that this statement of loans and overdrafts is not admissible in evidence because it is not a correct abstract and because it is not made up from the books of the Bank. I admitted the statement in evidence and you must assume I admitted it rightly. Mr. Holdsworth's evidence show that besides comparing it with exhibit 18 which was the original statement presented in the Magistrate's Court, he also checked it with the audit papers and security register as regards the security. It

is not disputed that it shows the amounts of the debts correctly. In the important case of Mower & Co.'s debt the nature and number of shares shown in exhibit 18 (*a*) correspond with the information given to the Official Liquidator Mr. Holdsworth by Messrs. Mower & Co. in exhibit 92 (*a*), and Messrs. Mower & Co.'s account is the most important account of all. Exhibit 18 (*a*) is open to criticism on the ground that it does not show some securities which Mr. Holdsworth considered as valueless—promissory notes of debtors and joint promissory notes in a few cases, the personal guarantee of Mower & Co. in the case of Attia, and one or two other securities to which Mr. Holdsworth found that he was unable to assign any definite value. I think it would have been better if he had put in every kind of security even those he thought worthless; but we know by now what those securities are and we are in a position to consider all these securities along with those shown in exhibit 18 (*a*). As regards the mistakes which were brought to notice in exhibit 18 (*a*) I am not surprised to find that mistakes have been made. Even in exhibit LL for the defence, it was necessary for Mr. Allen to go into the witness-box and explain some mistakes which he made and I think the mistakes in exhibit 18 (*a*), such as they were, were *bona fide* mistakes and have been put right. The work of compilation was difficult and intricate and it would be surprising if the result was free from errors. Mr. Holdsworth seems to me to have performed his task on the whole with care and skill. He was under our observation in the witness-box for a number of days and it appears to me he acquitted himself creditably. We may not accept all the opinions that he expressed but I think there can be little doubt that he held those opinions in good faith. As to the facts and figures about which he gave evidence I think you may rely upon him as a trustworthy witness, but it is for you, gentlemen, to form your opinion on that point. You will remember that he was a stranger to the Directors and Manager; he had no previous business with them or with the Bank before he undertook the work of Liquidator. He seems therefore to have approached that task with an independent mind. It has been urged against him that he afterwards adopted a partisan attitude and that he neglected to consult the Directors and

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Manager of the Bank as freely as he might have done in order to obtain explanations of facts which he thought suspicious. It is also urged that in his joint report with Mr. Ferguson and in his affidavit to the Civil Court he gave the results of his investigation in a way which was prejudicial to the accused; that he omitted to mention facts which told in their favour especially as regards the contingency fund and as regards Mr. Mower's absence in Rangoon for some months before the day he signed the balance sheet. The Liquidators' joint report is not in evidence. So I need not refer to it. As regards the affidavit to the Civil Court that is in your hands I think it must certainly be said that it is a brief for the prosecution and gives the Court little or no information on matters which the Court ought to know with regard to the defence. But Mr. Holdsworth may well have expected that the Directors and Manager would have an opportunity of replying to the affidavit. As a matter of fact it appears that the defence was not gone into in the Civil Court; but that apparently was not the fault of Mr. Holdsworth. On matters of opinion, as I have said, I mean opinion on questions of accounts and audits, you must compare Mr. Holdsworth's evidence with the evidence given by other experts, some of whom are men of greater weight and experience than Mr. Holdsworth. They do not agree with Mr. Holdsworth's positive views about the 5 lakhs of Government paper and about the contingency fund. His opinion that the balance sheet is false was formed at an early stage of the investigation and it is based partly at any rate on assumptions which are shown to be doubtful, if not erroneous. I mean the assumption that the omission of the note about the 5 lakhs was necessarily dishonest or that the good debts are required by law to be divided into fully secured and unsecured and that the bad and doubtful debts reserved against in the contingency fund should have been included under head 7 and not under head 6. His views on all these points have been examined and it is found that they do not hold water and those views of his may well have prevented him from looking too curiously into facts which might tell in favour of the accused and may have led him to adopt too suspicious an attitude from the beginning. But as I have said before as regards the facts and figures brought to

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light by his investigation of the accounts and correspondence of the Bank you have to decide whether he has set out the results of his investigation fairly and correctly before you in the printed statements and in his evidence. My own view is that he has done so to the best of his ability. If he has extenuated nothing, he does not appear to me to have set down aught in malice.

Now, gentlemen, it cannot be contended and the prosecution have never contended that the whole of the debts shown as unsecured in exhibit 18 (*a*) and 18 (*b*) ought to have been taken as doubtful or bad debts in the balance sheet. Exhibit 18 (*a*) must be read with exhibit 18 (*b*). In the former credit is given only for the quoted security but exhibit 18 (*b*) shows the unsecured balances of the various debts after giving credit not only for the quoted securities but also for the unquoted shares except Moola Oils and Irrawaddy Petroleums. The total deficit of security as shown in exhibit 18 (*b*) is Rs. 33,68,000 odd and it includes a number of minor debts which Mr. Holdsworth regarded as good debts and which there is no sufficient reason to classify as otherwise though they are not fully secured. You may put a mark G against them. These are the unsecured portions of the debts of Bartlett & Bartlett, Halliday, Hicks, Ko Maung Gyi, Minnit, Mandalay Trading Company, Solomon, Smith, Browning & Browning, C. Clifford, Swales & Pullar. I am at present dealing with the smaller debts. You must add to these the debt of Fraser & Stephen, which though it was taken as doubtful by Mr. Allen, has since been paid up in full. The total of these unsecured minor debts according to Mr. Holdsworth is about half a lakh. Then the total of Rs. 33,68,000 also includes some Rs. 2,94,000 reckoned as doubtful or bad at the audit—these are the debts of Caunter, Gorse & Rajh, Michael, Gorse, Maunder, N. T. L. S. P. Curappen Chetty, D. Rajh, J. Reid, I. Rajh, Stathacopoulos, P. Teehan and against these doubtful and bad debts there was as you know a sufficient secret reserve in the balance sheet. Well, if you deduct the amount of the secret reserve and the half lakh of minor good debts from the total of exhibit 18 (*b*) there remains about 30 lakhs in round figures. This figure of 30 lakhs however includes the Rangoon Oil Company's debt of Rs. 7,90,000 odd

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and I think I had better deal with that debt before going any further. Mr. Holdsworth told us that he treated it as a good debt though he thought the security for it was worthless. He treated the interest on this debt as having been actually paid. Well, it is a matter of comparatively little importance whether there is security for a debt or not, if it is a good debt. I have already explained this point fully. It is therefore a work of supererogation to examine the question of security for the Rangoon Oil Company's debt. But I may say that after giving the matter the best consideration I could, I have come to the conclusion that the lien* given to the Bank by the Rangoon Oil Company Directors on the 8th July 1911 constituted a valid charge notwithstanding the covenant in clause 37 (*h*) of the trust deed of the British Burma Petroleum Company. The Rangoon Oil Company was not a party of that Trust Deed and the covenant could not bind them in any way. It is true that the lien being a hypothecation of moveable property was liable to be defeated by a subsequent incumbrancer who obtained possession. This presupposes that the Rangoon Oil Company would commit fraud by giving a subsequent lien, which as a matter of fact, they did not do. You may think that the men who in their capacity of Directors of the British Burma Petroleum Company made the covenant with the trustees for debenture holders were guilty of sharp practice afterwards in giving the lien to the Bank in their capacity of Directors of the Rangoon Oil Company. But, if there was sharp practice, it was sharp practice with which we have nothing to do in this case. It is clear enough that the British Burma Petroleum Company regarded the lien as a valid lien, and that they had to exercise pressure on the Bank in November in order to procure the surrender of the lien undertaking on their part to repay the money due by the Rangoon Oil Company to the Bank. So, if from the figure of 30 lakhs you deduct the Rangoon Oil Company's debt, Rs. 7,90,000, there is a residuum of about 22 lakhs which according to the prosecution the Bank had no right to include among the good debts in the balance sheet.

* Exhibit 20.

This sum of 22 lakhs odd is made up principally of five

large items aggregating Rs. 19,81,500. The figures are as follows:—

| | Rs. | A. | P. |
|---|---|---|---|
| Attia ... .. .. . | 3,62,500 | 0 | 0 |
| Mower & Co. .. .. .. | 7,52,700 | 0 | 0 |
| Mount Pima . .. .. | 1,38,300 | 0 | 0 |
| Aung Ban .. .. .. | 1,67,200 | 0 | 0 |
| Rangoon Refinery Co. .. .. | 5,60,800 | 0 | 0 |
| The total of these five large debts I think you will find to be .. .. | 19,81,500 | 0 | 0 |

Then there are 11 smaller items which it is necessary to refer to and which you may call deficiencies on smaller debts. *Page 9 of the summing up.*

| | Rs. | A. | P. |
|---|---|---|---|
| Major Meagher .. .. | 38,600 | 0 | 0 |
| Britto .. .. .. | 1,200 | 0 | 0 |
| W. H. Clifford .. .. | 1,500 | 0 | 0 |
| Cotterell .. ... .. | 59,900 | 0 | 0 |
| Moberley .. .. .. | 82,900 | 0 | 0 |
| Murray .. .. .. | 4,600 | 0 | 0 |
| Peters .. .. .. | 11,700 | 0 | 0 |
| Sevastopolo .. .. .. | 5,600 | 0 | 0 |
| Tsouias .. .. .. | 4,500 | 0 | 0 |
| A. Stephen .. .. .. | 61,800 | 0 | 0 |
| Buckingham . .. .. | 2,400 | 0 | 0 |
| The total amounts to .. | 2,74,700 | 0 | 0 |

but you should straightway strike out Murray's unsecured debt of Rs. 4,600, because his debt was shown at a late stage of the trial to be, though unsecured, a good debt. It is admitted to be so by the prosecution. Well, excluding Murray, the total of these minor debts is Rs. 2,70,100 making when added to the five large items a sum of about 22 lakhs which according to the prosecution should have been shown as doubtful or bad. I will deal first with the five larger debts amounting to Rs. 19,81,500. The materials you have for deciding whether any particular debt is a doubtful or bad debt are various. You should have of course to take into account the actual value of the debtor's security on the 30th June and the proportion that the value of this security bore to the amount of the whole debt. In some cases, but not in all, you have information as to the length of time for which the debt has been outstanding and the length of time during which the interest on the debt remained

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unpaid and there is evidence as to what payments, if any, have been made to each account. Part of the evidence is contained in exhibit 13 (*a*) and the connected exhibits and there is also a good deal of evidence in Mr. Holdsworth's deposition as to the various accounts. Then you have to consider whether the debtor was good to fill up the deficiency of the security and if not whether it can be said that his financial standing was such that further security could reasonably be dispensed with. It seems to me that a debt to be a good debt should be recoverable or realizable within a reasonable time; but that of course is for you to decide yourselves. What is a reasonable time will vary with the circumstances of each case. These are matters entirely for you to determine on the evidence, whether the debts or any considerable portion of them alleged by the prosecution to be doubtful or bad were really doubtful or bad to the knowledge of the accused on the 1st of August 1911 when they signed the balance sheet. As I said before it is not necessary for the prosecution to prove that the debt is absolutely bad. It is sufficient to show that it is seriously doubtful, but I should add that it is not sufficient for the prosecution to throw a vague suspicion on a debt. It is not sufficient for them to "hint a fault" and leave us to presume that the debt is doubtful. You must remember that there should be really serious ground for classifying a debt as doubtful for one to go the length of reserving against it and putting the interest on it to an interest suspense account, and it is only where the prosecution have established the existence of such reasons to your satisfaction that you should treat a debt as doubtful. In the case of each debt that I will now deal with I will try to draw your attention to the chief considerations relied on by the prosecution for holding that it is a doubtful debt, leaving you in each case to decide whether the evidence as to its doubtfulness is really sufficient. It is in this matter that your business experience and knowledge of the world will be of the greatest use to you.

First, there is the debt of Attia, Rs. 3,62,500, that is the unsecured portion of the debt on the 30th of June. The total of his debts as shown in exhibits 18 (*a*) and 18 (*b*) is Rs. 10,48,642. Deficiency in quoted security was Rs. 8,08,752, but if the

unquoted shares be taken at full nominal value then the deficiency in Attia's account is still over 3½ lakhs. It has been urged that the prosecution is bound to prove that the unquoted securities were worth no more than their par value, *i.e.*, the prosecution should have shown that they were not worth more than the full nominal value. As to this, gentlemen, I think we may safely assume that the auditor who took them at par value did not undervalue them. I think that it is a legitimate assumption. Moreover it appears to me that the auditor looked askance at these unquoted shares. His letter of 1st August shows this (exhibit 30). He mentions that the security consists largely of unquoted shares. This was one of the points which caused him uneasiness. I think we are safe in assuming that these unquoted shares, if they were worth their full nominal value, certainly were not worth more on the 30th of June, and their full nominal value has been given to them in exhibit 18 (*a*) leaving, as I said in the case of Attia's account, an unsecured balance of 3½ lakhs. This balance was recognized at the time of the audit to be unsecured and it also appears that the auditor thought it not only unsecured but doubtful, because he wrote the word "doubtful" at first and then crossed it out on Mr. Strachan's assurance that Attia was all right. *Page 10 of the summing up.* You should refer to Mr. Strachan's written statement and Allen's evidence about Attia's financial standing in Rangoon at the time. This is what the accused Mr. Strachan says about Attia (reads his written statement *re* Attia). Mr. Allen was justified in accepting the Bank Manager's opinion as to the financial position of a debtor of the Bank. But though he accepted this opinion, he still seems to have entertained some serious misgivings about Attia's debt, for this 3½ lakhs, the unsecured portion of Attia's debt, is the principal item in the Rs. 6,36,000 which was taken as unsecured at the audit and you will remember that in his letter of the 1st of August written 3 days after he signed the balance sheet, he wrote to the Directors and recommended that the interest on most of the unsecured loans, *i.e.*, the interest on most of the Rs. 6,36,000 should go to an interest suspense account, if credited at all, and should not be taken as profit. Does not that mean that Mr. Allen thought Attia's debt to be doubtful in spite of

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Mr. Strachan's assurance. Mr. Meugens told us if you consider it necessary to put the interest on a debt to interest suspense account, that presupposes that the debt is a doubtful debt. So that Mr. Allen apparently when he wrote that letter of August 1st still thought that the word "doubtful" which he had crossed out against Attia's unsecured balance should not have been crossed out, *i.e.*, that the word ought to have been restored. That seems to me the legitimate inference from the letter of the 1st of August. There were certain receipts from sale of security which were credited to Attia's account during the half year amounting to Rs. 23,000 odd. Mr. Holdsworth told us that after the 30th of June only Rs. 175 was credited to his account. Of course in addition to the securities for Attia's debts shown in exhibit 18 (*a*) there was also a guarantee by Mower & Co. which Mr. Holdsworth omitted to show in exhibit 18 (*a*). The value of this security depends entirely on the question whether Mower & Co.'s own account was good at that date. If as a matter of fact you find that Mower & Co. had a large unsecured balance which they were not in a position to pay up to the Bank, then the value of their guarantee of Attia's unsecured balance would be nil. In considering Attia's financial position you will of course have regard to the letter of the 17th of October, exhibit 84 (*a*), which was referred to by Mr. Rutledge yesterday. That letter certainly seems to show that in October at any rate he was in very serious financial straits being practically insolvent. It does not follow of course that he was in great straits on the 30th of June or 1st August when the balance sheet was signed, but it is a fact which has to be taken into consideration in estimating his financial position a few months earlier. Of course, the Manager of the Bank is supposed to be conversant with the financial affairs of the borrowers of the Bank and the fact that Attia in October, so soon after the balance sheet was issued, was in this difficult position, is a point for your consideration. It is also to be remembered that Attia had some years before been intimately connected with Mower & Co. and had been a partner in Mower & Co. itself. The state of this debtor's affairs would probably be known to the Directors and Manager for the Bank in a general way. They would be likely to follow the

fortunes of such a debtor as this with special interest. Of course, the offer contained in the letter, exhibit 84(*a*), was not accepted by the Bank, it was only mentioned as showing the position of this debtor so soon after the time at which Mr. Strachan considered him to be in a flourishing financial position.

The next large debt on this list of 5 is the debt of Mower & Co., Rs. 7,52,700, that is, the unsecured portion of the outstanding loans and overdrafts on the 30th June as shown in exhibits 18 (*a*) and (*b*). Mower & Co. were the principal debtors of the Bank. The total amount of their debts on the 30th of June was Rs. 42,78,000 which shows an increase of 1½ lakhs since the 1st of January. In quoted securities the deficiency is Rs. 26,56,000 but deducting unquoted security the deficiency is reduced to about 7½ lakhs. But this takes no account of the large number of Moola Oil Company and Irrawaddy Petroleum shares which were put in by Mower & Co. as further security for their outstanding loans. As regards other unquoted securities as I have already said, I think we are entitled to assume that they were not of any higher value at the time of the issue of the balance sheet than the value assigned to them at the audit. That is to say, that they were not worth more than the nominal par value. I will now deal with the question of the Moola Oil and Irrawaddy Petroleum shares. You have been told, and it is apparently correct to say, that if the liquidator put as low a value as 5-11 per share the deficiency of the security on Mower & Co.'s account would be fully covered. You have therefore to consider whether the prosecution has satisfied you that these shares which were deposited for Mower & Co.'s account were really worth nothing like 7½ lakhs, the amount of deficiency of this account. By the liquidator Mr. Holdsworth they are called mere prospecting companies and he has been taken to task for disparaging them by the use of this expression. But the Bank auditor Mr. Allen seems to have referred to them in terms which were hardly more respectful. In his letter of the 1st August (exhibit 30) he expressed his misgivings about the loans which could not be easily realized and mentioned *inter alia* "loans on the security of certificates of prospecting companies." You have been referred to

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the balance sheets, lists of shareholders and the original agreements which led to the formation of these companies [exhibits 59 (*b*) to (*f*) and 60 (*b*) to (*g*).] I do not think I need refer to them any further. The facts about these companies will be fresh in your memories. I think the documents show at any rate that the description of the Moola Oil Company and Irrawaddy Petroleum Company as prospecting companies is not very inaccurate. There was an enormous number of shares but no paid up capital, the shares being vendors' shares and it appears that their only substantial asset at the time of the formation of the companies was the right conferred by the prospecting licenses to search for oil on certain demarcated blocks in Upper Burma. It is true that if the property really yielded oil in paying quantities these companies would make a good thing out of it, for they had got the Rangoon Oil Company and British Burma Petroleum Company who were already working in this neighbourhood on their own property to exploit their territories for them on the basis that the Rangoon Oil Company and British Burma Petroleum Company would pay whatever royalty was due to Government and over and above this royalty would pay further royalty to these companies. Everything depended on oil being obtained in paying quantities, but whether oil could be got in such quantity seems to me to be a matter of pure speculation. The geologists' reports had been favourable, but such reports are by no means infallible and it by no means follows that oil will be found merely because you get indications of oil. There are strong indications of oil in the Minbu mud volcanoes, but it has not been found possible to work them as a commercial proposition. Government has marked off into square mile blocks a large area in Minbu and adjacent districts which from their geological conditions may be expected to yield oil but it is always a matter of pure speculation whether if you bore on any given block you will get oil in paying quantities. As to the actual state of affairs of these two companies on the 30th of June we have the evidence of a man from the spot, Mr. Kirk. Extracts have already been read to you but perhaps I had better read the principal parts of the evidence again. (Read from examination-in-chief "I know the territories of Moola Oil Company and the Irrawaddy

Petroleum Company.....shallow wells.") That is as regards the Moola Oil Company: you see it was worked by the British Burma Petroleum Company only and all that they knew about it is that it had a shallow test well which they said had the smell of oil. Then as regards the Irrawaddy Petroleum Syndicate, Mr. Kirk says that both companies were working on this territory and that the Rangoon Oil Company started the work in November 1909. (Read from "The Rangoon Oil Company started work.....sunk no other wells after July 1911"). Then he says further down "at the present time the yield of both territories is 150—200 barrels a day." Then he says the British Burma Petroleum Company also worked on this block (18S). (Read from "the British Burma Petroleum Company began to work.....it was a delayed well"). So that in June or July 1911 no oil had been struck in the Moola Oil Company territories and as regards the Moola Oil Company the position was that the Rangoon Oil Company had made one unsuccessful attempt to bore a well and had dug a second well which was yielding 40 to 50 barrels a day, and in respect of this well difficulties were encountered in the shape of water breaking into the well which had to be cemented off. As regards the Moola Oil Company territory it was said in cross-examination there was only a smell of oil in the hand-dug well, and that it was an extremely good indication to get oil in such a hand-dug well (read from "I am pretty sure.....down any deeper.") Then we are told that the British Burma Petroleum Company had entered into a contract with a contractor for drilling in this particular block and also the British Burma Petroleum Company had paid some royalty to the Moola Oil Company in respect of oil taken in this block over and above the Government royalty, and the Moola Oil Company runs no risk of the expenses of unsuccessful wells. They are in the same position as well owners in Yenangyaung. If oil is won the Moola Oil Company gets the profit, if no oil there would be no loss. Then we are told that the Moola Oil Company owned a block adjoining 19P and had struck oil on that block before the development of 19P began, but in a different sand than the one which was struck in 19P. The prosecution say that is no indication that oil will be found

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in 19P. Then it also appears that when the Rangoon Oil Company struck oil in 18S, the Burma Oil Company hurried up rigs on the southern boundary of 18S and started drilling, so as to get the benefit of this oil. The nearest well was about 860 or 900 feet away from the Rangoon Oil Company's well that struck oil and the oil that was struck in 18S was at a depth of 700 feet which was very satisfactory. Mr. Kirk says "One is apt to meet.....does not detract from the value of the oil well." It appears to me that it must detract from the value of an oil well if you have to go to the expense of cementing off the water. Then we are told by Mr. Kirk that a million gallon tank was put up to take the oil from this block and that a pipe was made, 2 or 3 miles long, from the fields to the river-bank. All I can say to you is that the construction of the tank and pipes showed great optimism on the part of the company looking to the indication of oil shown in Mr. Kirk's evidence. I call your special attention to Mr. Kirk's evidence: of course a great deal depends upon it and you should read it carefully before you decide this point. It is one of the most important depositions in this case. You have to consider on that evidence whether the territories were proved oil-fields in June-July 1911 or whether they were still in the initial speculative stage. My own opinion is after hearing Mr. Kirk's evidence that they could not be called proved oil-fields and that if any one gave a substantial price for the shares of these companies on the strength of the indications that there were at that time, he was a speculator whose optimism would amount to mere foolishness, but that is a matter entirely for your decision and not for mine. It may be of course that exaggerated rumours were spread in Rangoon and that the result of these rumours was to cause the isolated purchases of the shares as to which evidence has been given by Mrs. Smith and Mr. Ady. Mr. Ady says that he sold 100 Irrawaddy Petroleum Company shares at 17-8-0 a share some time before May 1911 when no oil at all had been found on the Irrawaddy Petroleum Company territories. Still we are told they were sold at 17-8-0 a share. Mrs. Smith says that 100 Irrawaddy Petroleum Company shares were sold for Rs. 12 per share: no records were kept of this transaction. The *Rangoon Gazette* of 3rd June published a list showing that.

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there were buyers of Irrawaddy's Rs. 10 shares at 12-8-0. As regards the Moola Oil Company shares the only transaction is apparently the sale of 100 shares at Rs. 10 in September. I gather there was no transaction up to the time the balance sheet was issued. It seems to me there was very little justification, if any, for these prices and it is of course a significant fact that about this time Mr. Ady and Moola Dawood went to London to try and float a company in connection with these territories. It would be a very good thing to have definite transactions in shares to point to in Rangoon and that is a fact which you cannot overlook in considering whether these transactions were really genuine or not. There were no transactions at all on the stock exchange. Such transactions as are mentioned in evidence were all outside the Stock exchange. As I said before, Mr. Allen thought it was to some extent a blemish on the shares that they were not quoted on the stock exchange. If he did not think so why should he refer to this fact in his letter of 1st August where he mentions that many of the securities are "Shares for which there is no market quotations". Of course, it suits the purposes of the defence to dismiss the Rangoon Stock Exchange with a shrug of the shoulders calling it a *coterie* of superior gentlemen. But it is nevertheless the principal market of the largest city in Burma and it is a place where as a matter of fact we find business done on a considerable scale in all the well established oil companies. It would perhaps not be right to go so far as to call the outside transactions hole and corner transactions, but at any rate without disrespect to the ladies and gentlemen who carry on business as outside brokers it may be said, I think, that transactions outside the stock exchange which are not publicly advertized do not carry the same weight as transactions on the stock exchange. At any rate, gentlemen, the absence of quotations in the recognized market is a fact that you cannot altogether disregard, in considering whether these various transactions represent genuine dealings in these shares. You know very much more about these matters than I do and I think you must recognize that the question of the value that might properly be put on these shares on 1st August is a matter of very great importance in this case and is another matter in

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which your knowlege and experience will help you to come to a right decision. My own opinion is that there were no sufficient grounds for giving any substantial value to the Moola Oil Company and Irrawaddy Petroleum Company shares on 30th of June. That is the conclusion to which I have come, but you are not at all bound by my opinion on that point. A great deal has been said about Mr. Holdsworth's letter, exhibit Q, written in May 1912, to Mr. Moberley's solicitor, which has been taken as an admission that these shares had some value at that time. In fact, Mr. Holdsworth in cross-examination admitted that the letter could not bear any other construction. We know, gentlemen, that this letter was drafted by a subordinate in Mr. Holdsworth's office and not by Mr. Holdsworth himself, though he said he looked through it and signed it. It may well be that he did not consider the effect of the letter as regards these oil shares when he signed it. There is no reference in it to Moola Oil or Irrawaddy Petroleum Company shares. The object of the letter was to put the screw on Mr. Moberley and get him to pay something on account. You will have to give due weight to that letter, and you will also have to consider whether this letter is a sufficient foundation for the inference that you are asked to draw from it. The question is whether the Moola Oil and Irrawaddy Petroleum Company shares were so valuable in June-July 1911 as to cover Mower & Co.'s deficit balance of 7½ lakhs, whether the Bank could honestly take them to be of sufficient value as to fill up such a gap as that. As regards the negotiations in London for the floating of sterling companies, we have only Mr. Ady's evidence and the copies of telegrams which have been put in, exhibits SS, SS1. I leave it to you to put your own value on these proposals of company promoters in London knowing as you do, better than I do, what company promoters are. You know at any rate to what a small extent the Moola Oil and Irrawaddy Petroleum prospecting territories could be considered established oil-fields in June-July 1911 when these negotiations were in progress. It seems to me, gentlemen, that these abortive negotiations throw no light on the question whether these shares had any substantial value in June-July 1911.

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I now come to the third debt on the list of the five larger debts, namely, the Mount Pima Company liquidation, *i.e.*, Rs. 1,38,300 in exhibit 18 (*a*). The security for this debt is shown as a letter from Mower & Co. undertaking to make over to the Bank their claims as sole creditors of the company, but Mr. Holdsworth omitted to mention that there were also two promissory notes for this debt signed by Mower & Co. as Managing Agents of the Mount Pima Company and also by Mower & Co. on their own behalf. The Company was wound up in March, the general opinion at a meeting of the shareholders being that it was useless to attempt its re-construction. So that the Company went into liquidation and since then a sum of about Rs. 46,000 has been realized by the liquidators, that is about one-third of the debt due to the Bank. This sum I understand has been paid to the Bank under the terms of Mower & Co.'s letter, exhibit 15 of the 4th July, which makes over to the Bank as security of the Mount Pima debt their claim as sole creditors of the company. We have no reason to believe that they were not the sole creditors. There is nothing left to be realized, I understand, but the disused ore-crushing mill at Pyawbwe as to which you may refer to Mr. Allen's evidence. He was questioned at length about this mill and what use it could now be turned to. His firm has been entrusted with the liquidation and he presumably knows more about the assets which are available than anybody else. Mr. Strachan says that it was on Mr. Allen's assurance that the Bank took the debt as good. The question for you, therefore, to decide is in the first place whether apart from Mower & Co.'s guarantee of the Mount Pima's debt, Mr. Allen or Mr. Strachan could have honestly thought that the assets of the defunct company were really worth so much as Rs. 1,38,000 odd and that this debt would be recovered. You will not overlook the correspondence about the proposal to lease the mill as a going concern to the Burma Mines Company. Exhibits NN, NN1 for the defence, which have been printed, show the correspondence on that subject, but the proposal came apparently to nothing for it was decided in July 1911 that the Mines were worthless even as a prospect. (See Mr. Allen's evidence on that point.) It seems to me that there are serious elements of doubt about

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this debt apart from Mower & Co.'s guarantee. As regards that guarantee the value of it depends entirely on the view you take of the Moola Oil and Irrawaddy Petroleum shares which were lodged by Mower & Co. as security for their own debts, for, if Mower & Co.'s account was fully covered, then their guarantee of the Mount Pima debt was no doubt a valuable additional security and made the debt practically a good debt.

I now pass on to the Aung Ban Company's debt next on the list, *i.e.*, Rs. 1,67,200. From exhibit 18 (*a*) it appears that no interest was paid on this debt for over twelve months. There was no security for it except the promissory note signed by the liquidators of the Company. Exhibits 69 (*a*), (*e*) and (*b*) show the correspondence of May 1911 between the Bank and the liquidators. They were warned that no further debits would be allowed on their account with the Bank. Exhibit 69 (*c*) of June the 5th shows that the manager and the auditor were going to treat the debt as unsecured, as they contended that the liquidators had parted with the assets to the British Burma Petroleum Company, when the Aung Ban's undertaking was merged in that Company. Then you have the letter, exhibit 11, dated the 30th June 1911, which shows that the assets of the Company did not cover the liabilities. The Aung Ban Company had a claim against the British Burma Petroleum Company on what is called an intromission account of the liquidators and it appears that the auditor required a letter of lien on this claim to be obtained by the Bank from the liquidators in order to show the debt as fully secured. By an oversight this letter of lien was not obtained and there was no security for the debt up to the time the balance sheet was issued except the liquidators' pro-notes. As a matter of fact it appears from Mr. Williamson's evidence that the claim of the liquidators against the British Burma Petroleum Company was settled in June 1911 for a cash payment in which a sum of Rs. 83,000 claimed by the Aung Ban Company against the Rangoon Oil Company was specifically included. This Rs. 83,000 was included as a liability by the Rangoon Oil Company in their balance sheet of the 31st March 1911, but in the next balance sheet of 31st March 1912, though it was still shown on the liability side of the Rangoon Oil Company balance sheet

it was shown as not admitted by that Company. Well, after the money received from the British Burma Petroleum Company in June-July 1911 had been paid to the Bank there was left an unsecured balance of over Rs. 80,000 due to the Bank by the Aung Ban Company. The only chance of recovering any part of this balance would apparently be by suing the liquidators who had committed what Mr. Giles called the appalling error of distributing to the shareholders of the Aung Ban Company by way of dividend the 90,000 odd shares in the British Burma Petroleum Company in which the Aung Ban Company had been merged. The shareholders should not have been given this dividend by the liquidators until the claims of the creditors of the Company had been satisfied and theoretically at any rate the shareholders could be forced to disgorge the shares they had received by way of dividend. But when it comes to actual legal proceedings to accomplish this purpose the difficulties may be so great as to be insuperable. The suit would apparently have to be against the liquidators and unless the liquidators personally could pay up, the litigation would probably be infructuous to a great extent at any rate. It does not need a trained lawyer to see that any legal proceedings with a view to following up the actual shares into the hands of the persons who now hold them would be beset with difficulties. The shares may have changed hands many times and the chances of recovering any substantial number of them would be to say the least problematical. At any rate it seems to me that the prospect of recovering any considerable portion of the outstanding balance Rs. 80,000 by this means is highly doubtful. Mr. Giles estimated that it would be sufficient if the Bank could recover 16,000 of the 90,000 shares at the present market value. But it is for you, gentlemen, in view of all the circumstances to decide whether the prospeet of recovering these shares is so likely that the Bank were under no obligation to treat the Aung Ban Company's debt as a doubtful debt.

There remains only the Rangoon Refinery Company's debt the unsecured balance of which is taken as Rs. 5,60,800, exhibit 18 (*b*). The total debt is Rs. 12,44,000 including the 5 lakhs for which the Bank of Burma had pledged Government paper as a guarantee with the Bank of Bengal. The documents relating

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to the Refinery debt are scattered all through the exhibits. I think they are about 50 in number and they are not arranged in chronological order. It was considered better to adhere to the order in which the exhibits were put in evidence in the Magistrate's Court rather than to renumber the exhibits which would cause confusion. I am not sure now that it would not have been more convenient in the case of the Refinery exhibits to arrange them in a group by themselves chronologically. But we are indebted to Mr. Giles for going through these documents in order of date and reading out the more important parts of them in course of his speech. I think you all noted at the time the order in which they should be referred to when you were considering them. The question of the Refinery debt was fully discussed by both Mr. Giles and Mr. Rutledge and as the main facts are fresh in your memory I need not go over the whole ground again. I will deal only with what I consider to be the salient points in those exhibits. First, as to the security before 30th of June 1911. It is true that there were certain agreements of lien on the Refinery Company's assets [exhibits 21 *(a)* to *(d)*]. These agreements were made in the early part of 1910 before the Company went into liquidation. Subsequently when the liquidators sold the undertaking to the British Burma Petroleum Company they sold it free from incumbrance. It has been pointed out that in the actual conveyance in December 1910 (exhibit 72*h*), the liquidators conveyed the undertaking free from incumbrance only as regards their own acts and conduct and that the conveyance therefore did not affect the lien given by the Company to the Bank before the Company went into liquidation, that it is to say, before any liquidators began to deal with the Company. I think it is highly doubtful whether any such position could be maintained in a Court of Law and this was apparently the view held by the Bank and Auditor for they pointed out to the liquidators in May-June 1911 that the debt of the Refinery Company must be taken as unsecured. Mr. Strachan says that these letters were written in order to bring pressure to bear on the British Burma Petroleum Company, but I think it is at least equally probable that they expressed the view which he took of the agreements made in the early part of 1910. Subsequently on the 29th of

July 1911 the liquidators gave the Bank a lien on any money they might receive from the British Burma Petroleum Company against which they had made certain large claims, amounting I think to over £70,000. They also transferred to the Bank 135,000 British Burma Petroleum Company's shares as part security for their debt. Writing on the 4th March 1912 (exhibit 21P) Mr. Clifford said that this arrangement satisfied himself and Mr. Strachan and the Auditor and they therefore treated the Refinery debt as fully secured and as a good debt. The question you have to decide is whether they were too easily satisfied, whether Mr. Clifford at any rate could honestly have been satisfied. The position was this: giving full credit for the 135,000 shares [exhibit 18 (*a*) you see they are given credit for Rs. 6,83,437-8-0, that is, the Rangoon Refinery's debt on the last page of exhibit 18 (*a*)] the Bank had good security for under 7 lakhs of a debt of Rs. 12,44,000 odd. For the balance Rs. 5,60,000 they had a lien on the liquidator's claim against the British Burma Petroleum Company. Ultimately in November they released this claim accepting Rs. 75,000 in full satisfaction from the British Burma Petroleum Company. The Director, Mr. Clifford, knew in July that the claim was disputed, not a small part of it but practically the whole. The telegram of 6th July [exhibit 72 (*g*)] from John Taylor & Sons shows this to be so. Thus, Mr. Clifford knew that the British Burma Petroleum Company after paying £20,000 without prejudice in June disputed practically all the rest of the claim, over £70,000. It is urged that this telegram did not amount to a repudiation of the liquidators' claim and that the British Burma Petroleum Company after sending the telegram retreated from the position which they had taken up. Mr. Williamson's evidence shows what actually took place. The liquidators of the Refinery Company, Mr. Cottereil and Mr. Charles Clifford, were in London. Mr. Charles Clifford told the British Burma Petroleum Company's Board that if the persons acting for him in Rangoon were to know that the whole of the balance of the claim was repudiated he would have no option but to telegraph to Rangoon to institute legal proceedings to enforce the claim. The Board then agreed to write a letter to Mr. Cotterell in London "neither too strongly affirmed the repudia-

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tion nor too definitely closing the matter," in other words, they wanted to gain time. This letter was actually written on 1st August 1911 to Mr. Cotterell and Mr. Charles Clifford in London. It is exhibit 74 (*e*) and it has been read to you. It supports Mr. Williamson's evidence as to the extent to which the Board climbed down. But the telegram of 6th July to Rangoon was not cancelled. The only thing the Board did was to cable to Rangoon that the liquidators need not be informed *officially* of the contents of the telegram of the 6th July [exhibits 106 and 106 (*a*)]. On the 31st of July Messrs. Mower & Co. wrote to John Taylor & Sons that the position as regards the liquidators' accounts was truly bad and that it was difficult to foresee what the outcome would be. This was two days after the Bank got the lien from the Attorneys to the liquidators in Rangoon. It is clear that Mr. Clifford, who is a Director of Mower & Co., the Agents of the British Burma Petroleum Company, as well as the Director of the Bank, knew that the whole of the balance of the Refinery claim was being disputed by the British Burma Petroleum Company. It is true that the letter of the 1st August to the liquidator Mr. Cotterell in London shows that the British Burma Petroleum Company were anxious for delay and did not wish to run the risk of a lawsuit which might have resulted in the collapse of the British Burma Petroleum Company. It was a temporizing letter. But the Board did not modify their instructions to their Rangoon Agents which they sent in their telegram of the 6th July. So that matters stood practically as they were. Ultimately the Bank in November waived their claim against the British Burma Petroleum Company accepting a merely nominal sum of Rs. 75,000 in full satisfaction and it is explained that the Directors did this, because to refuse would have ruined the British Burma Petroleum Company. And this was an important matter for the Bank because the shares of the British Burma Petroleum Company formed a very large portion of the security held by the Bank. The Bank had some 400,000 of these shares and had a large holding also in the Burma Investments Company of which the principal asset was about 400,000 British Burma Petroleum shares. Therefore the Bank was interested directly or indirectly in the British Burma Petroleum Company to the extent of about

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800,000 shares. The minutes of the Bank Directors' meeting on 1st November (page 37 of the Minutes) shows exactly what was done at a special meeting of the Directors on the 1st November.

"Present Messrs. Mower, Clifford and Okeden,

It was decided having regard to the fact that the Bank of Burma, Limited, was interested to so large an extent in the Rangoon Oil Company, Limited, and the British Burma Petroleum Company, Limited, that it was incumbent on the Bank to take every measure necessary to safeguard these two companies and to meet the demand of the trustees to the debenture-holders in the matter of releasing the equitable mortgages, and of otherwise putting the companies on the soundest possible position in respect of the Rangoon Oil Company debts. It was further considered necessary to secure a second signature to the bond which is available from and offered by the British Burma Petroleum Company. As to whether the Bank was placed at a disadvantage by accepting the bond referred to was fully considered, and it was unanimously considered that such was not the case, having regard to the fact that the Bank had only a second mortgage and in all respects ranked after the prior claims of the Bank of Bengal, whereas under the above arrangement the Bank secured a separate and distinct security of the guarantee of the British Burma Petroleum Company, Limited. It was resolved therefore that the Directors of the British Burma Petroleum Company and the Rangoon Oil Company, Limited, be informed that the Bank requires this arrangement carried into effect, it being understood that no further debts are incurred on the security of the assignable assets of the Rangoon Oil Company, Limited. In the same connection, the matter of taking over the liabilities of the liquidators of the Rangoon Refinery Company, Limited, and giving the liquidators thereof an acquittance of their debts to the Bank was considered. It was resolved that the arguments applying to the matter of the loan to the Rangoon Oil Company, Limited, were equally applicable hereto, in so far as they related to the necessity of safeguarding the interests of the Rangoon Oil Company, Limited, and the British Burma Petroleum Company. It was further considered that no good

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purpose could be answered by opposing the arrangement in that it was generally admitted that the liquidators of the Rangoon Refinery Company, Limited's claim on the British Burma Petroleum Company, Limited, could not be made good and therefore the Bank's position as a creditor was not worth maintaining."

It appears therefore that if the Bank refused to release the claim the British Burma Petroleum Company might have to go into liquidation and the last state of the Bank would be worse than the first. The Directors of the Bank were confronted with this unfortunate dilemma and they chose to let the Refinery claim go in order to save their British Burma Petroleum shares. It is for you to decide whether on the information before him in July Mr. Clifford could have foreseen that this was a probable outcome of the situation knowing as he did know that the whole claim was disputed and knowing also that the Bank could not bring any serious pressure to bear on the British Burma Petroleum Company without bringing that Company to the verge of ruin. It seems to me that such a result must have been plain to him but it is for you to decide. If that result was visible to him (Mr. Clifford) could he have regarded the lien on the liquidators' claim as good security for the 5½ lakhs due by the Rangoon Refinery Company to the Bank over and above the value of the 135,000 shares. Is the security which a creditor dares not enforce a good security? Is it appreciably better than no security at all? You have to decide whether the Bank had any right to treat this deficiency of 5½ lakhs as a good debt in the balance sheet. It is urged of course that as in the case of the Aung Ban Company's debt, the Bank could have recourse to the shares in the British Burma Petroleum Company, about 300,000 I think, which the Refinery Company liquidators had distributed as dividend without stopping to consider how they were going to pay the creditors of the Company. My remarks as to the shares distributed by the Aung Ban Company's liquidators apply also to the shares distributed by the Rangoon Refinery Company's liquidators and I have nothing to add to them. There was in my opinion only a remote possibility that the Bank could recover any of these shares. If the Rangoon Refinery Com-

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pany's debt was doubtful to the extent of 5½ lakhs I do not think that it was to any material extent less doubtful on account of the British Burma Petroleum shares which the liquidators had distributed by way of dividend. I should add, however, that Mr. Strachan does not appear to have seen the telegram of the 6th of July nor Mr. Allen. So that full knowledge of the true state of affairs can hardly be imputed to Mr. Strachan though he admits of course that he did discuss the question about the disputed claim with Mr. Clifford, and it is for you to form your own opinion as to what Mr. Clifford must have told Mr. Strachan about it. That is all I have to say about the larger debts aggregating Rs. 19,81,500; but I will have to refer again later on to some of these debts in dealing with the question of crediting unpaid interest.

Then there are the smaller debts about which I have little to say, namely, the debts of Major Meagher, Britto, Clifford, Cotterell, Moberly, Peters, Sevastopolo, Tsounas, A. Stephen and Buckingham aggregating Rs. 2,70,000. As regards Major Meagher's debts you have to look at exhibit 90, the Manager's letter of the 27th of June 1911, which shows that in the opinion of the management of the Bank in Rangoon Major Meagher's position was considered hopeless and the Manager in Madras was told to sell his stock as a going concern and realize all he could. Durwans were to be placed in charge of Major Meagher's stock. The total of Major Meagher's debts was Rs. 72,000, of which a sum of Rs. 38,000 odd was unsecured. It is admitted that this debt became bad when the Bank closed in November. The question you have to decide is whether it was bad or seriously doubtful in June. The letter which I have just referred to shows, I think, that in the opinion of the Manager here it was highly doubtful at that time and what you have to consider is whether there was anything in Major Meagher's evidence to warrant a different opinion. He puts the blame on the Madras Corporation for his financial difficulties and he may be right as to this, but what we have to consider is not whether the Madras Corporation treated him badly but whether his debt to the Bank was really a doubtful debt. He has produced a profit and loss statement for June for one

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month showing a profit of Rs. 2,000 on two farms that he had in Madras. There is no profit and loss statement for any other month and we have no assurance that the farms could be relied upon to yield anything like this sum as a normal monthly profit. As regards his statement of assets we have little means of checking it, but judging from the amount realized by the official liquidator of the stock, I think it was Rs. 8,000 against some Rs. 40,000 or Rs. 50,000 valuation of the stock by Major Meagher, that valuation appears to have been very excessive. Major Meagher appears to be a man of a very optimistic temperament. You will have to consider how far you can rely upon his statement that he was really in a financially sound position at the time the balance sheet was prepared.

The next debt is that of Mr. Britto, a debt of Rs. 2,300. The deficiency of security is I think Rs. 1,200. There were no credits to this account during the half year, but we have very little else as indications that the debt was bad or doubtful. It has been stated in evidence that Mr. Britto had a dispensary in the town and he deposited jewellery as security. This jewellery may have been sold by the official assignee at a disadvantage. On the whole, it appears to me there is no sufficient ground for treating Mr. Britto's debt as doubtful. I would therefore strike out this debt.

Then there is Mr. W. H. Clifford's debt of Rs. 5,605 for which the value of the security was Rs. 4,059. The amount which is unsecured is Rs. 1,546. Exhibit 16 shows that he was not in a position to pay any instalments, but the amount is a small one. Mr. Clifford was in receipt of a salary from a firm and I think you might safely strike out this debt also. I do not think there are sufficient grounds for holding that it was a doubtful debt.

Then Mr. Cotterell's debt. The total debt is Rs. 1,34,247. There were no credits at all during the half year. There is a deficiency of Rs. 80,000 on the quoted security but he had deposited also by way of security 13,125 Moola Oil shares to cover this deficiency. It would be sufficient if these shares realized Rs. 4-9-0 each for the whole of this deficiency to be covered. It depends, gentlemen, on your decision, about the

Moola Oil shares which I have said you will have to consider very carefully.

Mr. Moberly's debt, Rs. 1,91,600. Taking the unquoted as well as the quoted securities [exhibit 18 (*a*)] the deficit is Rs. 82,900. There were no credits in the half year. Mr. Moberly's pay as Agent of the Bank in Rangoon was about Rs. 2,000 a month and he had a free house. To cover the deficiency of Rs. 82,900 there were 30,000 Moola Oil shares and 1,000 Indian Petroleum shares. I have already referred you to the letter to Mr. Moberly's solicitor, exhibit Q, in which it was admitted that Mr. Moberly's debt would be fully realized if all the securities were sold out and it appears that if these Moola Oil and Indian Petroleum Company shares realized as little as Rs. 2-12-0 per share that would be sufficient to cover the whole of this deficiency of Rs. 82,900. As in the case of Mr. Cotterell's debt you will have to decide the question of Mr. Moberly's debt with reference to the value which you think can honestly be put on the Moola Oil and Indian Petroleum Company shares.

Peters' debt was Rs. 36,500, the securities being Rs. 24,700. There was a deficiency of about Rs. 11,700. There were no credits in this account during the half year. It appears that at one time some years ago he was in a prosperous condition living in a fashionable part of the town and his wife was well off. He had his sons educated in England and had all along received a good salary,—I think about Rs. 700 a month. It is also very probable that he did not tell us the truth about his original purchase of the Rangoon Oil Company shares. As far as the records of the Bank go it appears that he did contribute about one-third of the amount paid for purchasing these shares, the Bank contributing only two-thirds and getting the shares as security. The question is not whether he was well off in 1908-09, nor whether the advances were originally made were properly or improperly made to him, but whether the balance due on 13th June 1911 was as a matter of fact good or whether it was doubtful or bad at that time. Rupees 11,700 is a large sum for a married man on Rs. 700 a month to pay up and though Mr. Peters apparently had other resources some years ago, that does not show that he is in a position to pay this debt

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or that he is likely to pay it within a reasonable time. However, it must certainly be admitted that Mr. Peters was a very shifty and evasive witness and he may have resources which he did not admit. Therefore you will have to consider that point in determining what value to put on Mr. Peters' statement that he is unable to pay. You will remember also that the burden of proving the debt to be a bad or doubtful debt lies upon the prosecution.

Then as to Sevastopolo. His debt is Rs. 9,600 with security to the value of Rs. 3,900, a deficiency of Rs. 5,600. There were no credits in the half year and there have been none since except by the sale of shares which realized a sum of Rs. 3,000. Mr. Allen says Mr. Sevastopolo is trading in coal to Calcutta and he considers his debt to be good. No interest has been paid since the 1st March 1910 when his account was opened. He never paid any interest on his loan: that is an indication of course the debt is somewhat doubtful, but it is for you to decide whether that is alone sufficient to make a debt so doubtful that it ought to have been classed as doubtful in the balance sheet. There is of course the negative indication that he was not so far as Bank records show called upon to furnish further security to make up the deficiency.

Next comes Mr. Tsounas' debt, Rs. 63,300 with security of Rs. 1,800 leaving a deficiency of Rs. 4,500. In this case also there were no credits in the half year, but he was in receipt of a salary from Macropolo & Co., and he was receiving half profits as Manager of the firm. It is also to be remembered that he borrowed a considerable sum of money on a previous occasion from the Bank, which loan he paid up in full. He has given evidence here and he seems to have given a true account of his affairs as far as I could judge. On the whole I should be inclined to say that in this case the Manager of the Bank might reasonably think that there was good prospect of recovering the unsecured balance.

Then as to A. Stephen's account. The unsecured balance is Rs. 61,800. He was a partner in G. Stephen & Sons. The balance sheet of the Stephen's estate (exhibit O) was drawn up by Mr. Strachan. He was the Receiver of this estate up to the end of December 1910. The balance sheet shows a substantial

amount to come to the partners after paying off all liabilities. But this hopeful balance sheet was not realized at all. It is said that the failure of R. Moodeliar and of Nahapiet were the chief causes which prevented the assets from being realized. With regard to this account you will have to refer to Mr. Sen's evidence (the 26th witness for the prosecution). He has given evidence to the effect that when the Official Receiver took over the estate in December 1910 from Mr. Strachan the solvency of the estate was considered doubtful. If it was doubtful then I think it is a legitimate inference that it was more doubtful in June 1911 and Mr. Strachan, if any one, was conversant with the affairs of this estate having himself been receiver up to a period of six months before the issue of the balance sheet of the Bank which we are considering. Mr. Sen also told us, you will remember, that the unsecured creditors of the Stephen's estate may receive one anna in the rupee. That is the position in which the Bank of Burma now stands as regards the unsecured debt due by A. Stephen.

A great deal has been said about Seymour Buckingham's account which is a very small one. The deficiency after deducting security was only Rs. 2,471. I need say very little about it. The exhibits relating to this account are exhibits 14(*a*) to (*f*). The correspondence regarding Buckingham's composition with his creditors certainly suggest that his account with the Bank was doubtful on the 30th of June. I mean that there is nothing in these documents to show that the Bank's debt was excepted from the composition with the creditors. It is suggested by the defence that the Bank was not a party to the composition, but you will read exhibits 74(*a*) to (*f*) and decide whether there is any reason to believe that the Bank was excepted from it. Exhibit 14(*f*) in particular expresses the disappointment of the Manager at Seymour Buckingham's neglect to pay up in accordance with the composition arrangement. On the other hand, there is evidence for the defence that Buckingham was earning money as agent of certain firms at Singapore including the Steam Rope Manufacturing Company and that as a matter of fact some money is still due to him as agency commission by one or more of these Companies. This debt is a very small one and I do not think I need say anything more about it.

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Well, gentlemen, I have dealt with the larger debts aggregating Rs. 19,81,500 and the lesser debts aggregating Rs. 2,70,000 which together amount to over Rs. 22,00,000. I leave it to you to decide whether any considerable portion of these unsecured debts should have been treated as doubtful in the balance sheet and either shown to be doubtful or else provided for by some sort of reserve on the other side.

I now turn to the question of interest. The details of this part of the case are set out in exhibits 13(*a*), (*bb*) and (*c*) and there is a summary in exhibit 13(*dd*). Column 1 of exhibit 13(*a*) shows that on the 1st of January 1911 there was due a total sum of about 45½ lakhs in round figures on the accounts in exhibit 13(*a*) and the next page, exhibit 13(*bb*), shows over 17½ lakhs due on the accounts printed on that page. The total of these sums is 63 lakhs; it includes in round figures 3 lakhs of debts which were afterwards treated as doubtful or bad at the audit in July. You must exclude these 3 lakhs for which provision was made, both as to principal and interest in the contingency fund. But there remains roughly a sum of 60 lakhs of debt the unsecured portion of which according to the prosecution was doubtful or bad. Of course, the 60 lakhs represents the total debts, the secured as well as the unsecured portions. The unpaid interest on the whole of these debts, the unsecured as well as the secured portions, was taken to profit and loss and treated as profit. You will remember Mr. Giles' suggestion that in the case of doubtful or bad debts which were partially secured the Bank was entitled to take the unpaid interest on the secured portion of the debt as earned income. I think the expert evidence shows this to be wrong. You cannot split up a doubtful or bad debt for the purpose of interest into two parts, a secured part and an unsecured part. It is only if the security is sufficient to cover the interest as well as the principal of *the whole* debt that unpaid interest can be taken to profit and loss and that is the system which Mr. Holdsworth has followed in preparing these statements. He had shown in these statements the interest on the whole of these debts, not merely on the unsecured portions but on the secured portions as well. There is a summary in exhibit 13 (*dd*) and in this summary the sum of Rs. 12,44,000, the Refinery debt, is added in and its unpaid

interest of over half a lakh, Rs. 53,000, is also shown. This interest was also taken to profit and loss. The total amount of interest wrongly credited to profit and loss according to this statement of Mr. Holdsworth is Rs. 2,26,000 odd. As regards some Rs. 20,000 of this amount we need not concern ourselves for as I have said it may be taken that provision was made for this amount of interest in the contingency fund on the 30th of June, that is to say the interest on debts recognized to be doubtful or bad at the audit. If this sum of Rs. 20,000 is deducted the balance is Rs. 2,06,000 odd and this represents the amount which the prosecution still contend should have gone to interest suspense or deferred interest account and not to profit and loss and which should not have been distributed as profit by the Bank. The principal items in this sum of Rs. 2,06,000 (these figures you might note down against the list I gave you of larger and smaller debts, you can put the figures in a separate column, "interest wrongly credited to profit and loss according to the prosecution") are against Attia, Rs. 24,500, against Mower & Co., Rs. 90,400, against Mount Pima, Rs. 6,200, against Aung Ban, Rs. 9,400 and aginst the Rangoon Refinery Company, Rs. 53,500. If you add up these figures you will find that the total is Rs. 1,84,000. Then among the lesser debts the only figures that need attract your attention are those relating to Cotterell, Rs. 5,800, Moberly, Rs. 6,200, Peters, Rs. 2,100 and A. Stephen, Rs. 5,700. These are the four larger items and I need not trouble you with the rest. The total of these four is Rs. 19,800. So that adding Rs. 19,800 interest on these four items and Rs. 1,84,000 on the five larger items you get roughly Rs. 2,03,800. That is the total of these items I have given you. To arrive at these figures I have followed the same course as followed by Mr. Holdsworth in calculating the figures for the table at the top of exhibit 13(*dd*), that is to say, I have in each case taken the figure for total interest in column 6 of exhibits 13(*a*) and 13(*bb*) and deducted from the total receipts shown in column 11. The net amount of interest actually debited to each of these accounts and afterwards taken to profit and loss by the Bank during the half year is thus arrived at. In the case of the Refinery Company's debt [exhibit 13(*c*)] looking to the state of the account and the nature of the payments you will have to

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decide whether Mr. Holdsworth was justified in treating the credits in columns 10 and 11 of exhibit 13(*c*) during the half year, entirely as credits to the principal of the Refinery debt. I would like to remind you of what Mr. Holdsworth said about this (page 37 of his evidence) (Read *re* Rangoon Refinery Company from "The whole of the interest should have been credited to interest suspense account . . . . value of the security). That was in admission he made in answer to Mr. Coltman's question. In this case, *i.e.*, of a Company in liquidation, it depends entirely on security." Then he said in answer to a question I put to him, "The reason why I make a difference between the Rangoon Refinery debts and other debts in exhibit 13 is that in the case of the Refinery accounts a large amount was advanced during the period (Rs. 16,06,492), and the amount received was much less (Rs. 11,20,110), and there was a large balance of Rs. 5,39,950 increase in the total balance due at the end of the period and this debt was unsecured and doubtful to a large extent at the close of the period. In the other accounts there were practically no transactions during the period." Well, gentlemen, you must decide whether he was justified in doing that, *i.e.*, in treating this Refinery account in this exceptional way. You have his reasons which I have read out to you and I leave it to you to decide whether they are sufficient. It is a question on which I think you will be able to form a better opinion than I could. It seems to depend a good deal on what view you take of the Refinery debt, the principal of the debt. I have already dealt with the question whether that debt could be regarded as good debt at the time of the balance sheet. If you come to the conclusion that the Refinery debt was a doubtful debt, then I think you must decide also that the credits to this account during the half year should have been taken only in reduction of the principal and that there was no justification for treating the unpaid interest as profit. So also as regards the unpaid interest on the other debts, those of Attia, Mower & Co., Mount Pima, Aung Ban, Cotterell, Moberly, Peters, and A. Stephen. It is only if you find these debts to have been doubtful or bad on the 30th June 1911 that you need consider the further question whether the unpaid interest accruing on them was properly taken to profit and loss. The Bank were of

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course entitled to reckon as profit the unpaid interest on any debt which was honestly considered to be a good debt. On the other hand, it may be said that whatever portion of the debts you find to consist of doubtful or bad debts the unpaid interest relating to that portion of the total debts ought to have been taken to interst suspense or deferred interest account or at any rate ought not to have been treated as divisible profit in the profit and loss account. I would like to remind you of what the experts said about the interest suspense account: perhaps it is not fresh in your memory. Turn to Mr. Black's evidence on pages 1 and 2 of his deposition (read from " taking an account which is bad..... such interest would be credited to interest suspense account"). Further down on the same page he says " in my opinion the mere increase of an overdraft account.....the Bank was satisfied of the debtor's ability to pay." Then in cross examination by Mr. Coltman he said (read from " Regarding the crediting of unpaid interest.....noted in the books or not"). Then there is Mr. Tanner's evidence, pages 1—3. He says (read from " If a debt is considered good..... to be a firm of repute "). Further down he says " Interest on bad or doubtful debts.....' reserve for bad and doutful '." He also said at page 3 of his deposition (read from " I agree that the only object of the interest suspense account..... before the account is published"). Then there is Mr. Warren, former agent of the Bank of Bengal in Rangoon, who was the 7th witness for the defence. He says " The practice of the Bank of Bengal.....which the Bank holds for it." Then last of all I will refer you to what Mr. Meugens said on page 6 of his deposition at the bottom (read from " if a debt is seriously doubtful.....or otherwise reserved against "). Then on page 3 he said " I heard Mr. Warren's evidence..... may depend on other things". So I think there is no substantial difference of opinion among these gentlemen as to the principles which should guide a Bank in this matter, no real difference as to the circumstances in which you may credit interest to profit and loss and as to the cases in which the Bank ought to take such interest to interest suspense account. I think, however, that Mr. Holdsworth in saying that " you must

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have absolute certainty of recovering before you can deal with the interest as earned income " is going beyond the mark. It is unnecessary that the recovery of the interest should be absolutely certain; the consensus of opinion among the other experts who were examined shows that absolute certainty is not necessary. It is sufficient if the Manager of the Bank or the Directors honestly consider the debt a good debt and believe that the interest will be recovered. If they had a reasonable certainty to that extent I think that would be sufficient. I think that is the effect of the evidence given by these expert gentlemen. Well, applying these principles and using the knowledge you have gained of the various debts, you have to decide whether the management of the Bank could honestly treat this interest amounting to over two lakhs of rupees on these debts as earned income available for profit-reckoning in the balance sheet. This is of the greatest importance, for you will remember that the available profit shown in the balance sheet was Rs. 1,62,000 odd and therefore the genuineness of this profit depends to a great extent on this question of unpaid interest. If, as the prosecution contend, the Bank had no right to credit this 2 lakhs odd to profit and loss, then there was no profit at all but a loss and the balance sheet was necessarily false. Even if you decide that any large portion of the two lakhs was wrongly credited to profit and loss you will have to work out the effect of your decision as regards the net profit of Rs. 1,62,000 and see how far the aspect of the balance sheet would have been changed if that portion of the interest had been put in an interest suspense account instead of going to profit and loss. I may say that in this part of the case there is no suggestion that the prosecution have sprung a surprise on the accused. The question of crediting unpaid interest to profit and loss has been conspicuous in the forefront of the prosecution case from the beginning. In connection with this branch of the subject you will no doubt bear in mind the Auditor's letter of the 1st August 1911 in which he strongly advised that interest on most of the unsecured loans should be credited to an interest suspense account or not at all. Now, gentlemen, that advice was given before the balance sheet was issued, but after it was printed. The unsecured loans according

to the Bank Manager and the Auditor amounted to Rs. 6,36,000 and the interest on that sum was not taken to an interest suspense account in this balance sheet, but was reckoned as divisible profit. Mr. Allen says he meant this advice of his to be applied in the ensuing half-year. But if it was strongly advisable for the ensuing half-year, it is not easy to understand why he did not insist on the same course being followed in the balance sheet for the half-year ending 30th June 1911. You will remember that Mr. Allen at first contended that provision for the interest on the unsecured debts had actually been made in the contingency fund on the 30th of June 1911 and that he merely meant to convey to the Directors that it would be better in future to make provision for such interest in an interest suspense account month by month rather than to make a lump sum provision at the end of the half-year when deciding how much was to be added to the contingency fund. That would of course be a mere matter of book-keeping and Mr. Allen went on to explain to us the superiority from the book-keeping point of view of putting doubtful interest month by month in an interest suspense account rather than providing for it in a contingency account at the end of the half-year. But the next day it was shown that Mr. Allen's answers on this subject were not correct. For he was obliged to admit that as a matter of fact the contingency fund on the 30th of June 1911 was only a few hundreds of rupees in excess of the principal and interest of debts taken to be doubtful or bad at the audit, that is to say, Rs. 2,94,000, and therefore it was all but exhausted in providing for these debts and their interest and therefore it is plain that the balance sheet of 30th June 1911 contained no reserve provision at all for the interest on unsecured loans respecting which Mr. Allen had expressed his misgivings in his letter of the 1st August to the Directors. It also appears to me from the Auditor's advice on this point and from his advice about not paying a dividend that he entertained serious doubts about most of these unsecured loans and though he does not expressly say so, his letter at any rate suggests the inference that the Bank should not merely have credited interest on these loans to interest suspense account but should also have made special reserve provision of some kind for most of the principal of these debts amounting to

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Rs. 6,36,000. You will remember Mr. Meugens' remark that if you say the interest on the unsecured loans should go to interest suspense account that is tantamount to saying that these debts are doubtful. He said it presupposes that these debts were dobutful. So that we have some grounds—I do not know how substantial they appear to you to be—for thinking that as regards the Rs. 6,36,000 the Bank ought to have made reserve provision not only for interest but also for principal. It is true that there was a reserve fund of 5 lakhs, but no part of this fund was ear-marked as provision for doubtful and bad debts and we have it on Mr. Meugens' authority that if any part of the ordinary reserve fund is to be used for this purpose it must be expressly stated so in the balance sheet; that is to say, the reserve fund or such part of it as may be required for the purpose of meeting bad or doubtful debts should be described as a reserve for doubtful and bad debts. In the absence of such express description, you cannot include bad and doubtful debts, principal or interest, among your assets, unless of course you have provided for them otherwise by a secret reserve or contingency fund.

In what I have said up to now I have dealt with the case generally and have tried to lay before you the principal considerations to be taken into account in deciding whether the balance sheet and Directors' report were false and dishonest, and whether the dishonesty was aggravated by keeping the Bank open till November. It remains for me to deal with the case against each of the accused separately. But before doing that it is advisable to touch upon the question how far the accused would have been justified in relying upon the Auditor's certificate on the balance sheet. You will have noticed that both Mr. Mower and Mr. Clifford in their written statements and throughout their defence have relied to some extent on this certificate : they have relied upon it as *prima facie* evidence that all was right. But you have to consider the case of the balance sheet being false and fraudulent. In that case it is a necessary inference from Mr. Mower and Mr. Clifford's reliance upon the Auditor's certificate that the fraud or dishonesty, if any, were confined to the Manager and the Auditor whose signatures were on the balance sheet when it was laid before them, or, in other words, that the Directors were taken in by Mr. Strachan and

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Mr. Allen who prepared a false balance sheet for them to sign; that is putting the matter quite baldly, but I think it is a legitimate inference from this line of defence. But such an inference I submit to you, would manifestly be absurd, for it was not Mr. Allen and Mr. Strachan so much as Messers. Mower and Clifford who were concerned to prevent the Bank from collapsing, and we may reject as wholly improbable any suspicion that Mr. Allen and Mr. Strachan would concoct a false balance sheet and keep the Directors in the dark about it. The law on the subject of Company audits is contained in section 74 of the Companies Act (read it). Then there are the provisions in the Articles of Association of the Bank which are binding on all concerned (Exhibit II). The articles are 110, 113, 114, 115 (articles read). I also will read for your guidance a passage from a recognised authority on Company Law which describes the duties of auditors, that is Lindley on Companies, page 617:—

"The first duty of auditors is to ascertain what duties are imposed upon them by the Companies' regulations, and by the Acts by which it is governed, and to conduct the audit accordingly. Speaking generally, it is their duty to examine the company's books and accounts, and to report whether the balance sheet exhibits a correct view of the companies' financial position at the time of the audit; and in doing this they ought not to confine themselves to verifying the arithmetical accuracy of the figures in the balance sheet. It is, however, no part of their duty to consider whether the business is prudently or imprudently conducted; nor is it their duty to take stock. If special knowledge is required to value the stock or for any other purpose connected with the audit, they are entitled to act on an expert's opinion. If the company's officers have, or may reasonably be supposed to have, such special knowledge the auditors may trust to them if they have no reason to suspect their honesty. If, as is usually the case, it is their duty to report to the shareholders, they will not discharge their duty by reporting to the Directors. Moreover, except perhaps under very exceptional circumstances, their report ought to contain the information to which the shareholders are entitled; if it merely gives the shareholders the means of information, it will not be

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sufficient. Auditors are bound to exercise a reasonable amount of care and skill in the discharge of their duties. The amount of care and skill which is reasonable depends on the circumstances of each case; if there is nothing to excite their suspicion, less care will be reasonable than if their suspicions were, or ought to have been, aroused.

Auditors who honestly discharge their duties with the requisite amount of care and skill incur no liability even though they have committed errors of judgment and the balance sheet and accounts are in fact false and misleading if they do not do so, they will be jointly and severally liable to make good any loss caused thereby, *e.g.*, if dividends are improperly declared and paid on false or misleading accounts certified by them as correct they will be jointly and severally liable to make good all monies so misapplied with interest."

You see that an auditor has to ascertain the true financial position of the Bank at the time of the audit and to report to the shareholders. He is not there for the Directors or Manager to lean upon. His main function is to protect the interests of the shareholders: that is what an auditor is for. I said before that section 74 of the Companies Act about balance sheet and auditors occurs in a part of the Act which is headed "Protection of members." What the auditor has to see is that the Directors and officials are publishing true statements of the Bank's affairs, not merely arithmetically correct list of balances copied from the ledgers of the Bank. For example, the auditor should see that the sums shown as good assets in the balance sheet bear some close relation to the actual present market value of those assets, and that debts which are doubtful or bad are duly reserved against. In the case of unsecured debts, of course, the auditor has to rely principally upon the Manager and Directors as to the solvency of those to whom they have given credit. In this case Mr. Allen was justified in accepting the Manager's statement about Attia. He apparently had some doubts as to whether the Manager's opinion was correct. There is little doubt I think that Mr. Allen did not feel quite comfortable about the Bank's debts. Before the audit actually began we find Mr. Strachan writing to the Aung Ban Company and the Refinery Company liquidators and telling them that the

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auditor was threatening to take their debts as unsecured. Letters of lien were obtained from some of the big debtors and Mr. Allen was satisfied. Through an oversight it appears that no such letter of lien was procured in the case of the Aung Ban Company's debt but Mr. Allen apparently did not know of this omission. But he was still not altogether satisfied with the debts that were shown as unsecured. His letter of the 1st of August which has been referred to more than once is most important. To my mind at least, it shows that he passed the balance sheet in spite of serious misgivings about the debts. He points out the weakness of the security for a considerable number of the loans and comments unfavourably on the kind of security and on the absence of market quotations, then follows the advice "we strongly advise that the interest on most of the unsecured loans be credited to an interest suspense account or not at all," and he points out that after deducting the amount of the secret reserve from Rs. 9,36,000 unsecured loans, the balance is in excess of the reserve fund of 5 lakhs. What could that mean but that the auditor had misgivings about this sum of Rs. 6,36,000 odd. If there was no doubt about this large sum, then why should he recommend interest on it to go to interest supense if credited at all. Mr. Meugens says that presupposes that they were doubtful debts. If Mr. Allen thought these debts to be good debts I do not think he would have any reason to make such a recommendation to the Directors. It is for you to decide whether Mr. Allen should have contented himself with writing to the Directors. It seems to me that he should not. Looking to his position as a sort of "watch-dog" for the shareholders, I think he ought to have reported to the shareholders the doubts he had about the securities and the advice he was giving to the Directors about the crediting of unpaid interest on the unsecured loans especially as the balance sheet which he was certifying to be correct treated the unpaid interest on these loans as part of the good assets of the Bank. I think the omission in the auditor's certificate of all reference to this matter was hardly justifiable, especially when Mr. Allen thought the situation was so serious as to warrant him in recommending that no dividend should be paid for the half-year. Then again as regards the Moolla Oil and Burma Petroleum shares, I think the auditor

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relied too much on the Director Mr. Clifford's assurance as to the value of these undertakings. In ordinary circumstances Mr. Allen would be entitled to take what a Director might tell him on such a point and to act upon it, but in this instance he should have been mindful of the fact that Mr. Clifford was not only a Director of the Bank but was also a Director of the Bank's principal debtor, Mower & Co., and that Mower & Co., had deposited shares of these very Companies in the Bank as security for some seven lakhs of rupees. Mr. Allen has told us that he still considers that this balance sheet honestly and correctly sets forth the position of the Bank at the time. I think you have some reason to doubt whether he can really hold that opinion. It is true that Mr. Allen had very little to gain personally by keeping the Bank open, but if he had stated the true position of affairs and a run on the Bank followed the Bank might have to close and the auditor would lose his fees as auditor of the Bank and of Mower & Co., and any of the Mower Companies that might be involved in the crash. It is hard to believe that the loss of these fees would be a sufficient motive for passing a balance sheet, which he knew or had reason to believe to be a false balance sheet. We are, however, not concerned with his motive. We have to look only at what he actually did. My own opinion is that Mr. Allen's action with regard to the audit and the balance sheet showed a degree of complaisance towards the Directors and Manager which renders it necessary to discount his evidence considerably. But it is entirely for you, gentlemen, to put your own construction upon Mr. Allen's actions and to form your own opinion as to the value of his evidence.

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11-4-13. Gentlemen, when the Court adjourned yesterday I had been dealing with the question whether it would be reasonable to give any weight to the suggestion that if the balance sheet is false the Directors, Mr. Mower and Mr. Clifford, could have no responsibility for it because they were entitled to rely on the certificate of the auditor and on the Manager's signature. I told you that in my opinion it is highly improbable in this case that the Manager with the connivance of the auditor would concoct a false balance sheet and keep the Directors in the dark about it.

It is necessary now to say a few words about another line of

defence, which relates to Mr. Okeden's connection with the Bank. It has been suggested that though Mr. Okeden did not actually sign the balance sheet he was here throughout the greater part of the interval between the signing of the balance sheet and the closing of the Bank, and he must therefore have known the actual state of affairs just as well as the other Directors. Here it is argued he is a man of undoubted integrity who with a full knowledge of the facts saw nothing legally or morally wrong in keeping the Bank open till November the 13th. In such circumstances how can you say that the other Directors or the Manager acted dishonestly, in doing precisely the same thing. There is a fallacy in this argument and that fallacy lies in the assumption that Mr. Okeden had a knowledge of the state of affairs equal to that of the other Directors—the present accused. It is quite clear I think that he had not. He had no concern in the various Mower Companies and he knew little or nothing about their affairs. He has appeared before you as a witness and has said among other things that he considered he duly exercised the control which according to the Articles of Association are vested in the Directors. It seems to me that Mr. Okeden's control was of a very flimsy description and that he was practically an ornamental figure on the Board and nothing more. He did not even know that Mower & Co. banked with the Bank of Burma. He attended the meetings of the Directors and read any notes which the Manager might think fit to circulate for the information of the Directors. But I think it is evident that he exercised no effective control and had only the sketchiest knowledge of what was going on. His evidence shows that he never thought it necessary to look into things for himself but relied implicitly upon what was told him by his co-Directors and by the Manager. Even matters of first class importance such as Andesashia's complaint to the Bank in March 1910 and the auditor's letter of 1st August 1911 did not put Mr. Okeden on inquiry for himself and did not ruffle his confidence in the other Directors and Manager. Though Mr. Okeden may have been a negligent Director I think it is certain that he was not a dishonest one and that this must be so is indeed admitted by the defence. If the balance sheet was really false he at any rate appears to have known nothing

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about it. His case is distinguished from that of the three accused who all approved and signed the balance sheet and whose state of knowledge as to the contents of the balance sheet we must now consider.

It would have been very convenient if I could have put to you first the question whether the balance sheet is in fact false or not: that is the foundation of the whole case. It would be convenient to get your decision on that question before dealing with the further question, how far each of the accused is shown to have had guilty knowledge, for if you are satisfied that the balance sheet was not false or rather if you are not satisfied that it was false there is an end of the matter. But I cannot put the case to you piece-meal: it must all go together. You will understand therefore that the remarks that I have to make as to the degree of knowledge of each of the accused are for your consideration only if you do find the balance sheet to be in fact false and not otherwise. You have to consider the case of each one of the accused separately, for it does not by any means follow if one is found to be guilty that the others must necessarily be guilty. It may well happen in a Bank prosecution like this where the Manager and certain Directors are prosecuted jointly that only the Manager or, it may be, one of the Directors is found to have acted with the guilty knowledge and intention requisite for a conviction. It is easy to imagine such a case. Therefore in the present trial it is for you to decide not only whether the balance sheet was false but whether as regards each of these persons he knew it to be false when he signed it. If you find as a matter of fact that one or more of them signed without knowing or having good reason to believe that it was false, then as regards that accused or those accused, you should certainly bring in a verdict of not guilty. I must repeat that it is not enough for a conviction of this offence to prove that an accused was very careless or very negligent, that he relied too much on the assurances of others as to the correctness of what he was signing. The law requires much more than carelessness or negligence. It requires positive dishonesty and there is a very wide gulf between the two. Without actual knowledge that the balance sheet was false there would be no dishonest intention, and dishonest intention as I

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have already pointed out to you, is an essential element, indeed it is the main element, in the offence charged against these accused. You have therefore to decide as to the knowledge of each of the accused at the time of the signing of the balance sheet on the 1st August. And for your guidance in considering this question I will read to you the words of the Judge in summing up the City of Glasgow Bank case, a case which resembles this one in many respects. In that case as in this there was a balance sheet which the prosecution alleged to be false and the Jury had to decide not only as to the falseness of the balance sheet but also as to the guilty knowledge of the accused Directors individually.

The Judge says "As to the knowledge of the Directors as to their knowledge that these balance sheets were fabricated. Now, what the prosecutor has undertaken to prove, and says that he has proved, is not that these Directors were bound to know the falsity of the statements in the balance sheets—not that they lay under obligations to know it, not that they had the means of knowledge—but, that, in point of fact, they did know it, and that is what you must find before you can convict the prisoners of any part of the offences attributed to them. You must be able to affirm in point of fact, not that they had a duty and neglected it, not that they had the means of information within their power and failed to use them, but that, as a matter of fact, when that balance sheet was issued they knew that the statements contained in it were false. I say that, because there has been some phraseology used in the course of this trial that would seem to indicate that a constructive knowledge was all that was required for such a case. Constructive knowledge might be quite sufficient if we were dealing here simply with an action for civil debt or civil reparation; for what a man is bound to know he shall be held to have known. But that has no place at all when a man is charged with crime. His crime is his guilty knowledge, and nothing else. He is charged with personal dishonesty, and you must be able to affirm that on the evidence before you can convict him. But while I say that, gentlemen, I by no means mean to say that the knowledge which you must find must necessarily be deduced from direct evidence of it. You are not entitled to assume it; but you are entitled to infer

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that fact, as you are entitled to infer any other fact, from facts and circumstances which show and carry to your mind the conviction that the man when he circulated, or when he made that balance sheet, knew that it was false. You must be quite satisfied, however, before you can draw that conclusion, not merely that it is probable or likely, or possible that he knew, but that he did, in point of fact, know the falsehood of which he is accused."

I will take first the case of the two Directors, Mr. Clifford and Mr. Mower, and as regards these two accused it is necesary to deal with an aspect of the case which distinguishes it from other Bank trials. I refer to the inter-dependence of the Bank of Burma on the one hand and what are referred to as the Mower Companies on the other. This is a fact which leaps to the eye and which I consider highly relevant to the charge. It is undisputed that these two accused, who were the original Directors of the Bank and continued to be Directors till the Bank closed in November 1911, were also Directors of Mower & Co., the principal debtors of the Bank, and had either through Mower & Co. or as individuals, a very large and in many cases a controlling interest either as managing agents or Directors or principal shareholders, in most of the other large companies which were financed by the Bank. To make this quite clear it is sufficient for you to refer to Mr. Clifford's note, exhibit 26(*a*). It is attached to the Manager, Mr. Strachan's note of the 30th October, exhibit 26. It has been read to you more than once and I do not think I need read it to you again. It shows the close connection between Mower & Co. and most of the other companies. A statement, exhibit 89 (*b*), has been prepared to show the extent with which the funds of the Bank were used for the purpose of financing the Mower group of companies. There is another statement, exhibit 89 (*a*). Exhibit 89 (*a*) is a revised edition of another exhibit 89 put in evidence in the Magistrate's Court for the same purpose. It has been pointed out that there are great differences between the two exhibits. Mr. Holdsworth explained that the omissions in the second statement were in favour of the accused, but it is a pity that more pains were not taken to compile the information correctly in the first instance. I prefer to draw no inference from

exhibit 89(*a*). As regards exhibit 89 (*b*), however, the figures in that statement have not been challenged and I think you may take the information given in that statement into consideration. As I have said, Mower & Co. themselves were the greatest debtors of the Bank. For information as to the other companies mentioned in exhibit 89 (*b*) you can look at the balance sheets and the lists of shares in exhibits 45 (*a*) to 58 (*c*) and exhibit 60 (*f*). You will notice among other things that two-thirds of the Burma Investments' shares was held by S. A. Mower and that the Burma Investments Company had more than one-half of the Rangoon Oil shares afterwards converted into British Burma Petroleum shares. So that S. A. Mower had a controlling interest in the Rangoon Oil Company. Attia, whose accounts are shown in exhibit 89 (*b*), was originally a partner in Mower & Co. but retired in 1907. Mr. Cotterell was a partner in Mower Cotterell & Co. which afterwards became Mower Limited. He was also a partner of Marshall Cotterell & Co. in which Messrs. Mower and Clifford and the firm of Mower Cotterell & Co. held more than half the shares. At the bottom of exhibit 89 (*b*) you will see a summary of the figures. According to this summary, the total amount of loans and overdrafts due to the Bank on 30th June 1911 was 122¾ lakhs in round figures, and out of this total the Mower Companies with Attia and Cotterell were responsible for over 105 lakhs. Out of Rs. 9,21,000 odd shown as bills receivable in the balance sheet the Mower Companies together with Attia and Cotterell were interested as drawers or drawees or both in all but a small fraction. These figures have been worked out by Mr. Holdsworth and their accuracy has not been questioned. It is impossible, in my opinion, to shut our eyes to these facts or to overlook the important bearing they have on the case. They lead to the conclusion that the Bank of Burma, founded by Messrs. Mower and Clifford, existed primarily for the purpose of obtaining funds with which to carry on the operations of the Mower Companies. I am not saying that the Directors were contravening the law in getting funds for their various companies in this way. So far as I can see there was nothing illegal in it. The prescribed form of balance sheet has a heading on the assets side " Sums due by a Director or other officer of

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the Bank." But this refers to sums due by them in their personal individual capacity. It does not refer to sums due by Companies in which they are interested, however intimate or preponderent their interest in such companies may be. This is a matter to which the Legislature have turned their attention in framing the new Companies Act, but under the present law (Indian Companies Act of 1882), the law which applies to this case, it appears that the Directors of a Bank could also be Directors and Managing Agents and part-owners of any number of Companies indebted to the Bank and there would be no legal obligation on them to disclose such facts to the public. You must therefore dismiss from your minds any shadow of bias against the accused on this score. You may think it a vicious system which allows the funds of the Bank to be used mainly for the purposes of oil-winning and other industrial concerns in which the Directors themselves are among the persons chiefly interested but it would be entirely wrong to let any such views influence your decision as to the guilt or innocence of the Directors in this case. They did nothing more than the law permitted in this matter. I have introduced these remarks for a different purpose altogether, that is, to assist you in deciding the question of the two Directors' actual knowledge of the affairs of the Bank on the date that they signed the balance sheet. It seems to me that the close connection of Messrs. Mower and Clifford with these companies and with Attia and Cotterell gave them special, not to say unique, opportunities for knowledge of the state of the principal debts. It must be said that they had better opportunity than Bank Directors ordinarily might be expected to have. I find it difficult to believe that they kept their knowledge of the affairs of these various companies in a brain compartment entirely shut off from the brain compartment which was brought into use in perusing and approving the balance sheet, the profit and loss statement and the Directors' report of the Bank. This, however, is a matter entirely for you as business men to settle for yourselves. Opportunity and knowledge are not the same thing. You are entitled to make any reasonable inferences but they must be reasonable. The law about inferences of this kind is that you may presume the existence of any fact which you think might have happened,

regard being had to the common course of natural events, human conduct and public and private business in their relation to the facts of the particular case before you and bearing that in mind you will have to decide what inferences you can legitimately draw from the opportunities of knowledge which the accused Directors had. Your common sense and business experience will enable you to decide how far actual knowledge of the state of the debts and securities can reasonably be inferred from the opportunities which these two Directors had by reason of their connection with the affairs of the debtor companies and their connection with Attia and Cotterell.

Taking first the case of Mr. Clifford you will see he was the sole Director present in Rangoon for some months before the balance sheet was issued. He denies that he took any part in the preparation of it: this is in contradiction of what he is reported to have said at the meeting of shareholders after the Bank closed. He said "In June of this year when the half-yearly balance sheet was issued, the securities held by the Bank were subjected to close scrutiny by the Auditors and Directors, and valuations assessed at a minimum market price." He says the report of that meeting is inaccurate, and it is clear that it is inaccurate at any rate in one respect because it mentions Directors in the plural and I understand that there was only one Director in Rangoon at the time of the audit. I think Mr. Clifford's explanation may be accepted at any rate to the extent that he did not take any part in preparing the details of the balance sheet. But you will have to consider the likelihood of the Bank Manager deciding for himself without reference to the sole Director in Rangoon such radical questions as the total amount of debt to be credited as good, the amount to be classed as doubtful or bad and against which provisions should be made by way of reserve in a contingency fund. As to that of course you must also remember the evidence given by Mr. Kesteven. He said "I am a Director of a few companies. So far as my knowledge goes the Directors usually rely on the auditors as to the accuracy of the accounts and do not go into the figures themselves." I see he also says however in cross-examination that the Directors are supposed to be generally cognisant of the affairs with which the balance sheet deals but not with all the

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details of the affairs. This gentleman, Mr. Kesteven, was apparently never a Director of Bank though he was a Director of other companies. It is true that wide powers were conferred on the Manager by the power-of-attorney (you see the power-of-attorney among the exhibits), but these powers were not conferred to the exclusion of the Directors' powers. It would be absurd to hold the Director responsible for any mere details of bank management but in large matters such as I referred to just now, it is not unreasonable to presume that the Manager acted in consultation with the Directors. At least so it seems to me, that this is a matter which you have to decide for yourselves. You will remember that paragraph 86 of the Articles of Association laid down that the management and control of the Bank shall be vested in the Directors, that is to say, they are left no option but have the duty of managing the affairs of the Bank expressly laid upon them. Whatever powers they confer on the General Manager the Directors cannot divest themselves of the general duty of management and control, or perhaps I should say the general supervision and control, so long as they continue to be Directors. I think therefore you must presume that Mr. Clifford as the sole Managing Director in Rangoon at this time did exercise the supervision and control that were vested in the Board of Directors and that in exercising these functions he would naturally become conversant with all really important matters concerning the Bank. Mr. deGlanville drew attention to an English case in which it was laid down that a Director is entitled to trust the officers and servants of a Bank to do their duty honestly and that of course is perfectly true as a general proposition; but that English case was a civil case in which somebody tried to make the Director responsible for the misdeeds of a dishonest Manager. The balance sheet which was laid before that Director, the defendant, falsely represented the Bank to be flourishing and the Director's report falsely stated that proper provision had been made for bad debts. It was very like the case alleged by the prosecution here in those respects. But in that case though the balance sheet was really false, the Director, who was the defendant, believed the balance sheet and report to be perfectly true and

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he had no reason to suspect the honesty or competence of the Manager. He was himself deceived by the Manager. He was deceived by the false balance sheet and report and it was held that he was not civilly liable to make good the money which had been improperly paid away as dividends on the basis of this false balance sheet and report—that was the case—much less would he be liable criminally. It appears in that case that not only the Manager but another Director who was a Managing Director had for years before fraudulently concealed the true facts of the value of the outstanding debts and other matters which it was their duty to bring to the notice of the Board and which might have been discovered by the defendant Director if he had made a careful examination and comparison of the accounts of the Bank. You will see, gentlemen, that in this English case the circumstances were very different from those alleged in the present case. It is not pretended by any one that Mr. Strachan deceived or had any motive for deceiving Mr. Clifford and Mr. Mower in any way. The suggestion of the prosecution on the contrary is that they all acted in concert.

Well, gentlemen, whatever you think about the minor debts of the Bank it seems to me that you might reasonably infer that Mr. Clifford knew most of what was essential to know of the large debts—those of Mower & Co., the Refinery, Aung Ban, Mount Pima, Cotterell, Moberly and Stephen. This is an important question of fact which you will have to decide. You must give all due weight to the circumstance that has appeared in evidence that Mr. Clifford at the time of the audit was suffering from sprue. A man who was in bad health might not take such a close interest in his business affairs as he would if he were in good health. There is some conflicting evidence about this because one witness Compton said that at this time Mr. Clifford was attending office and kept very late hours. He says "I came out to Rangoon at the end of May 1911 in the service of the British Burma Petroleum Company. At that time I worked in the office of Mower & Co. The work in that office was very heavy from that time until November 1911. Mr. Clifford had very frequently to remain in office until late at night. I had also to do the same, six months on end, three or

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four nights a week. We worked until midnight sometimes." It is not clear, whether, Mr. Clifford was ill in June and July, but it appears it was about this time at any rate that he was suffering from sprue, and you have to give due weight to that fact. It is clear, however, that Mr. Clifford knew the auditor's opinion that in the circumstances no dividend should be declared. He was advised of that fact in the course of the audit and he was in a position to understand fully why the auditor gave that advice. It is impossible to disassociate that advice given by Mr. Allan from the letter which Mr. Allan wrote on the 1st August, exhibit 30, which shows that the auditor was uneasy about the securities and thought that the unsecured loans for Rs. 6,36,000 were somewhat shaky at any rate. Mr. Clifford was aware of course of the nature of the securities for the Refinery debt and the extent to which the liquidators' claim was disputed in July 1911. As Managing Director of Mower & Co. he knew all about that matter. I discussed the Refinery debt yesterday and the security for it. I left it to you to exercise your own judgment as to whether the lien on the liquidators' claim against the British Burma Petroleum Company could be regarded as a good security or whether it could only be regarded as a sort of makeshift to tide over the audit. If you take that view of the security for the Refinery debt you must also consider whether Mr. Clifford realised when he signed the balance sheet that this lien on the liquidators' claim should be so regarded, that is, as a makeshift to tide over the audit. Did he realize or did he not, you should ask yourselves, that the British Burma Petroleum Company must needs take action to have this lien surrendered by the Bank and that the Bank would inevitably have to give way for fear of ruining the British Burma Petroleum Company of which they held such an enormous number of shares. Then you will also remember that Mr. Clifford was actively directing the affairs of Mower & Co. during for some months before the balance sheet was issued and he was also the active controller of the large interests of Mower & Co. and of Mr. Mower in all the various other Mower Companies. It seems that he had full opportunities for knowing the extent of all the large debts of the Bank and in a general way at any rate of the security which the bank held for

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these debts. You must look to the nature of the security, which consisted chiefly of British Burma Petroleum shares, Burma Investment shares and shares in companies which were controlled and financed by Mower & Co. Looking to that circumstance it appears that Mr. Clifford must have known as well as any one the realizable value of those securities at the time the balance sheet was issued. If the balance sheet did take credit as good assets for a large amount of debts which are really doubtful or bad if you come to that conclusion and if you come to the conclusion that the resulting profit shown on the half year's working was for that reason fictitious, I think there are substantial grounds for believing that Mr. Clifford was at any rate cognisant of this state of affairs. I am entitled to give my opinion on this point and on other points of facts, but it is an opinion which does not bind you as I said before and you can reject or follow it as you think fit. You will of course give weight to the fact that Mr. Clifford did not sell out his shares in the Bank and as regards his account in the Bank, which as we know was pledged as security for Mower & Co.'s debt, there appears to be no real ground for urging that he tried to take money out of the Bank for his own purposes when the collapse of the Bank appeared to be imminent.

Next as to the General Manager, Mr. Strachan. He accepts full responsibility for the figures in the balance sheet which were all prepared by him with the exception of the two inner columns dividing the good debts into debts for which security was held and debts for which no security was held. That sub-classification of the good debts was effected by the auditor in consultation with Mr. Strachan. We have the auditor's evidence about that, and it agrees with what Mr. Strachan says. It was Mr. Strachan's duty as General Manager to be conversant with the financial positions of persons and companies to whom money had been lent by the Bank, and it may fairly be presumed that he was posted at any rate in a general way in reference to all or most of the debtors. As to A. Stephen's debt he had some special means of knowledge because he had been the liquidator of Stephen and Son's estate up to December 1910 and he was in position to know how far A. Stephen's balance could be considered a good recoverable balance.

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Major Meagher's account has specially occupied his attention: he wrote that letter, exhibit 96, to the Manager in Madras specially about this debt. In connection with Major Meagher I should like to correct what appears to be a mistake in what I said yesterday. I said that Major Meagher's stock was sold for Rs. 8,000. But I find that as a matter of fact this figure was merely suggested to him in cross-examination and he said he did not know that the stock had been sold for. So you have to dismiss from your minds that remark I made to you as to Major Meagher's stock having been sold for Rs. 8,000. You have no evidence as to the price realized. He did say, however, that his debt to the Bank became a bad debt because the Bank closed and because the liquidator had sold off his stock.

Mr. Strachan had been specially interesting himself about Major Meagher's account just before the balance sheet was issued, and he therefore had means of knowing or knew as well as any one in the Bank could know what prospect there was of recovering that debt. He knew the state of the accounts of all the minor debtors and with reference to the large debts, Mower & Co., Mount Pima and so on, you will see from his written statement that he was conversant with the state of affairs regarding each of these debts. As regards the Refinery debt in particular, he denies that he knew that the whole of that debt was being disputed with the liquidators, but in his examination by the liquidator, Mr. Holdsworth, exhibit 21 (*o*), he admitted that he must have discussed this matter with the Director, Mr. Clifford. It is not suggested that Mr. Clifford concealed anything from him in the course of that discussion, but on the other hand there is no evidence that Mr. Strachan saw or was told the contents of the cable of the 6th July from John Taylor & Sons, exhibit 72 (*g*). As regards the Aung Ban debt, Mr. Strachan admits that the promissory notes of the liquidators were the security, apparently the only security held by the Bank. It appears that Mr. Strachan did not get a letter of lien on the Aung Ban liquidators' claim such as he did get in the case of the Refinery Company. We have no evidence as to why he did not get it: it may have been by inadvertence. At any rate there was no security for the Aung Ban debt except the pro-notes of the liquidators. Then he received

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the auditors's letter of the 1st August—he received that letter on the day on which it was written and he saw in it the auditor's recommendation as to crediting the interest on the unsecured loans to an Interest Suspense Account. As in the case of Mr. Clifford I think you will have no difficulty in deciding that Mr. Strachan knew the true state of affairs as regards most of the debts of the Bank and the securities held for them, and if the balance sheet of 30th June 1911 was really false and fraudulent he at least must have been aware of it. But as I said with regard to Mr. Clifford's knowledge I say also with regard to Mr. Strachan's knowledge that this is a pure question of fact for you to decide on the materials before you and you can discard my opinion altogether if you disagree with it. If the balance sheet was false there was a strong probability that the Manager who drafted it and worked out the figure of profit Rs. 1,62,000 was cognisant of its falsity. At the same time you must remember that if the Bank had collapsed in August 1911 it could not have been as vital a matter for Mr. Strachan as it was for Mr. Clifford and Mr. Mower. He was not interested as they were in the Mower Companies though he certainly knew how closely the fortunes of the Bank were bound up with the Mower Companies. If it was necessary for the safeguarding of the Mower Companies to keep the Bank open and to shore it up with false balance sheets: that motive would not operate so strongly with Mr. Strachan as with the others. But it is of course possible that he might be a party to this design out of a mistaken sense of loyalty to Messrs. Mower and Clifford. However, his motive is not what we are concerned with but what he actually did, and if as a matter of fact you do find the balance sheet to be false and deceitful, you must decide whether Mr. Strachan with the means of knowledge which were at his disposal as General Manager of the Bank, could honestly believe that all the debts with the exception of those provided for in the Contingency Fund were good assets of the Bank and that the profit he showed in the balance sheet was a real and not a fictitious profit.

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I now turn to the case of the 3rd accused, S. A. Mower. He was the Senior Director of the Bank from the beginning and was the leading figure in the Mower Companies and also the

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leading figure in the Bank. Though he presided at the Meetings of Directors when he was in Rangoon it does not appear that he took any active part or any great part in the management. He was absent in Europe a good deal and in fact he was absent for several months before the balance sheet was signed on 1st August. He arrived from England on that day. It is clear therefore that he could have had no hand in the preparation of the balance sheet and that he had a very short time—at most a few hours—to look into the balance sheet before the Directors' Meeting which was held on the day of his arrival. The Minutes of the Directors' Meeting is at page 33 of the Minute Book. It is possible of course that Mr. Mower did not look into the balance sheet but signed it offhand. The Minutes of the meeting are as follows:

"Minutes of the 36th Meeting of Directors held at the Registered office of the Bank on Tuesday, the 1st August 1911.

*Present*: G. S. CLIFFORD, *Chairman*, and S. A. MOWER.

The Minuties of the 35th Meeting of Directors was read, confirmed and signed. The audited accounts and balance sheet and Profit and Loss accounts were placed on the table and signed. The Directors decided to confirm the allocation of the available profits amounting to Rs. 1,62,277-12-5 as follows:—

| | Rs. | A. | P. |
|---|---|---|---|
| To declare an *ad interim* dividend at the rate of 7 per cent. per annum free of Income-tax absorbing ... .. ... | 61,687 | 8 | 0 |
| To place to Reserve Fund making that Fund Rs. 5,75,000 ... .. ... | 75,000 | 0 | 0 |
| To carry forward .. .. ... | 25,590 | 4 | 5 |
| Total ... | 1,62,277 | 12 | 5 |

The Directors were glad to see that the working Capital of the Bank had increased during the half year from Rs. 1,53,13,703 to Rs. 1,69,31,785 and that the Bank's investments in 3½ per cent. Government paper had been increased by Rs. 50,000 to Rs. 15,68,800.

(Sd.) S. A. MOWER,
*Chairman.*"

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The only Directors present were Mr. Clifford and Mr. Mower. We are told that the Manager was also present at these Meetings.

These minutes show that Mr. Mower knew at any rate that a sum of Rs. 1,62,000 odd net profit was represented as having been earned in the half-year including the amount carried forward from the previous half-year and the question arises whether it is likely that he signed it without any inquiry from his co-Director, Mr. Clifford, or from the Manager as to the method by which this large figure of profit was worked out. I suggest to you that he must have known that Mower & Co., and the Mower Companies were the Bank's principal debtors. Would he not also have known or have a general knowledge of the nature and extent of the security held by the Bank for the debts of these companies? The fall in the value of shares in Rangoon had been going on since the beginning of the year. There is a document which mentions that fact (exhibit 23) Mr. Strachan's note circulated to the Directors during the week ending 2nd September 1911. "During the past eight months (from January 1911) the share market in Rangoon has gone through a very critical period and prices of shares are now the lowest that have been known. This has resulted in the secured position of the Bank being considerably jeopardised." Well, it is not reasonable to suppose that Mr. Mower was ignorant of the trend of affairs in Rangoon as regards the share market. It may be that he had no precise knowledge about the various liens obtained from debtor companies by the Bank while he was absent in England. But you must consider whether Mr. Clifford and Mr. Strachan kept these important matters to themselves or whether they were communicated to Mr. Mower on 1st August. The time was short for such communication, at most a few hours, but there was time. Mr. Clifford's memorandum at the foot of exhibit 30 (the Auditor's letter of the 1st of August) suggests that it was his practice to talk over important matters with Mr. Mower when Mr. Mower happened to be in Rangoon, and as regards that letter you have to decide for yourselves whether it had been seen by Mr. Mower before he signed the balance sheet. If he saw that letter before signing the balance sheet he would know at any rate that the Auditor was uneasy about the secu-

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rities and that the Auditor had an uncomfortable feeling also about the unsecured loans. Whether it was seen before the balance sheet was signed depends a good deal upon the date when Mr. Clifford's memorandum was written. It appears to me to have been written on 1st August but you will have to form your own opinion from an inspection of the document. It may be, however, that the discussion referred to therein occurred on the 1st August but after the balance sheet was signed. It was signed then but it was not actually issued until the 4th August. As regards the Auditor's advice not to pay a dividend it is possible that Mr. Clifford did not inform Mr. Mower about this but it seems to me that this was a matter which Mr. Clifford was very likely to communicate to Mr. Mower. Mr. Clifford's interests and Mr. Mower's interests were almost, if not, entirely identical and it is difficult to think that it would not have occurred to Mr. Clifford to inform Mr. Mower of this important matter as bearing on the balance sheet which was being signed and issued. You will have to consider, gentlemen, whether Mr. Mower must not be held to have known the position and prospects of the Moola Oil Company and Irrawaddy Petroleum Company in which his firm had such very large holdings and the shares of which had been deposited by his firm as security with the Bank to such a large extent. You must also take into account in deciding as to Mr. Mower's degree of knowledge the fact that though he was the Senior Director of the Bank and of Mower & Co., he did not take the most active part in the affairs of the Bank or of Mower & Co. It was apparently Mr. Clifford who was the active controller. But though Mr. Mower is shown by the evidence to have come to office only for one or two hours a day and then to have done no office work I think there are no grounds for holding that he was a mere sleeping partner in these firms. As might be expected from his age and seniority, he left most of the work and most of the details of management to Mr. Clifford, but one may presume that Mr. Mower was no mere dummy and that he took a prominent part in directing the affairs of Mower & Co., and of the Bank. It appears to me that this is not a case of mere constructive knowledge. It is a case in which you will have to ask yourselves whether Mr. Mower must have really possessed the

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requisite knowledge about the falseness of the balance sheet having regard to all the circumstances, that is to say, having regard to his position and opportunities and the probabilities that he really used those opportunities as a reasonable man would, and having regard to his relationship with Mr. Clifford. Looking to these matters you will decide whether Mr. Mower really had this knowledge or not when he signed this balance sheet. If you think there is a reasonable doubt about it—if you lean to the view that he signed the balance sheet blindly relying on the Manager's and Auditor's signatures without troubling to ask for any information about the large profit shown in the balance sheet and honestly believing that the profit had been really earned, then, however careless and negligent he may have been you should acquit him even though you think the balance sheet to be false and fraudulent. Some stress was laid by the prosecution on the fact that Mr. Mower drew out all the money he had in the Bank. I admitted the evidence also that Mrs. Mower was allowed to withdraw her fixed deposits without penalty for it seems to me that she may reasonably be presumed to have acted in this matter under her husband's advice. It seems very doubtful from the evidence we have whether any favour was shown to her in the matter of interest and the evidence on that point is unsatisfactory. I do not think you will be justified in presuming that any favour was shown to her with regard to interest. But she took out all her money in August and put in Government paper. Mower's account went on till November; but he cleared out before the Bank closed.

These matters are of importance only if you come to the conclusion that the balance sheet was actually false and that Mr. Mower knew it to be so when he signed it. In that case they furnish corroborative evidence on the question of carrying on the Bank, for these facts tend to show that he was aware of the impending collapse of the Bank at an early period and that he took steps to save his relatives from being involved in the disaster. You must also remember that though Mr. Mower and Mrs. Mower withdrew their money Mr. Mower did not part with his shares in the Bank. Both Mr. Mower and Mr. Clifford might have paid up the amount due on their shares and then have sold them at a considerable profit when they were

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125 or 130. This is a fact which weakens any presumption arising from the withdrawal of cash from the Bank by Mr. and Mrs. Mower. But again it may be remarked that if either of these two Directors were to sell a number of their Bank shares it might have aroused suspicion and in that way hastened the fall of the Bank which they were anxious to avert as long as possible.

As I have already laid down you are not justified in finding any of the accused guilty, unless the balance sheet is proved to your satisfaction to be false. If the balance sheet was not false it follows that the Bank was in a sound and even flourishing state on the 30th June 1911, and if the difficulties which led to its ultimate failure began later than the date on which the balance sheet was issued, then the carrying on for a month or two longer while the Directors were endeavouring to avert the catastrophe, might or might not be justifiable, but it could not in my opinion be regarded as positively dishonest, and of course without clear proof of positive dishonesty there can be no conviction in this case. According to the defence the Bank was in a sound financial state on the 30th of June and its collapse in November was due to the rapid depreciation of security in the meantime and to the action of the British Burma Petroleum Company in repudiating the Refinery debt. It is certainly the case that the securites of the Bank fell in value to a very great extent after June. But according to the prosecution the Bank was already in a sinking condition in June-July 1911 being weighed down with a load of doubtful and bad debts, and the fall in securities after that date only precipitated the collapse which was in any case bound to come soon. We have Mr. Warren's and Mr. Kestivan's evidence as to the steps taken by the accused, G. S. Clifford, when it was realized that the Bank could not possibly issue a favourable balance sheet for the half-year ending December 31st, 1911, *i.e.*, unless assistance was given from outside. We have no reason to question the propriety of the steps taken by the Directors at that stage. It would be difficult to say at what date the Bank became insolvent in the sense that all its reserves and capital were gone. It depends upon a great many factors. But you need not concern yourselves with this point at all. Whether the Bank

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was insolvent or not, the carrying on the business of the Bank on the strength of a false and deceitful balance sheet, would be an aggravation of the dishonesty of the balance sheet. As I have said before, the mere carrying on after the 30th June would not by itself constitute cheating. The carrying on after the 30th June must be considered only with reference to the balance sheet and the knowledge which can be imputed to the accused as to the character of the balance sheet. The case hinges entirely on this balance sheet, on your decision as to whether it was really false and deceitful. If you find that it was not the accused should all be found not guilty. If you find that it was then you will have to decide further with regard to each one of these men: whether it was false to his knowledge when he signed it and you will give your verdict of guilty or not guilty accordingly on each of the three charges of cheating.

I want to make a few remarks on general matters which have have been referred to by the learned Counsel for the defence before closing. First, about Teehan's debt and Mr. Coltman's remark that the evidence relating to this debt was introduced only for the sake of prejudice. I think the prosecution were fully justified in putting in as exhibits the correspondence regarding Teehan's debt. They were not produced to show that the Bank had made loans imprudently in the past. Mr. Coltman's point is that the Bank having shown the debt as bad at the July audit, it was superfluous to put in the correspondence. But the prosecution were concerned to show that the Bank had no right to show the interest on this debt as earned income. We have now been told that the interest, though taken to Profit and Loss was afterwards taken out again or "written back" as the technical phrase goes, in the provision of Rs. 71,000 which was added to the contingency fund on the 30th June. But there was nothing in the books of the Bank to show this and it was an entirely new procedure for this Bank. The practice up to October 1910 had been to put interest on doubtful or bad debts to what is called a "Deferred Interest Account." It is exhibit 9. You will see that the deferred interest account was in abeyance from October 1910 up to July 1911. The practice of crediting to deferred interest account was the usual practice of the Bank and this

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practice was resumed after the issue of this balance sheet during the half-year ending December 1911. It was therefore a reasonable presumption on the part of Mr. Holdsworth that the interest on the doubtful and bad debts in the half-year ending 30th June 1911 was taken as profit for he had nothing to show what that sum of Rs. 71,000 in the Profit and Loss statement was meant to provide for. Even Mr. Allan, the auditor, seems to have been in doubt as to what these figures really included, for in one part of his evidence he said these figures included provision for unpaid interest on unsecured loans which were not bad or doubtful, but he afterwards admitted that this could not be so because the contingency fund was all but exhausted in making provision for principal and interest of the bad or doubtful debts recognized as such at the audit. There was nothing left over which could be taken as interest on unsecured loans. Well, if the Bank's auditor was uncertain as to the contents of the contingency fund it is hardly surprising that it did not occur to Mr. Holdsworth to look for the provision for interest on the bad debts in the contingency fund. The matter has now been explained by the defence and I think the prosecution and you, gentlemen, will accept the explanation that provision for the interest on the bad and doubtful debts which were recognised as such at the audit was really included in the secret reserve or contingency fund, that is to say, in the sum of Rs. 2,94,000 odd. I have only to repeat what I said yesterday that no imputation of dishonesty rests on the accused as regards their treatment of the debts of Teehan, Gorse, Dennis and the other persons whose debts were taken by the Manager and auditor as bad or doubtful at the audit in July 1911. It is no part of the prosecution case at all that the interest on these debts was wrongly credited to Profit and Loss.

*Page 30 of the summing up.*

As to the order passed by Mr. Justice Robinson I agree with Mr. Coltman in advising you to pay no attention whatever to the fact that this prosecution was ordered by the Civil Court. The order was passed *ex parte*, that is to say, without hearing the defence and the fact that the Judge thought fit to order a prosecution on Mr. Holdsworth's *ex parte* affidavit should of course not influence you at all. The fact that this order had actually been passed was allowed to be proved merely as intro-

ductory matter explaining how the prosecution was initiated. It would be entirely wrong for you to rely on that order in any way as conclusive of the guilt of the accused or even as furnishing any substantial ground whatever for holding them to be guilty.

Another point is that in exhibit 40 (*b*), the Profit and Loss statement of the Bank of Burma, a considerable sum was written off for depreciation of furniture, provision for income-tax and other matters. The total amount I think was Rs. 17,000 exclusive of the provision for contingencies and the provision for bad debts. It is urged that if the Bank management were really in difficulties in July 1911, if they did not know where to turn to show a profit, the first thing that would naturally occur to them would be to forego or rather to postpone the writing off for depreciation and other matters. This is certainly a point in favour of the honesty of the balance sheet. Of course it would be a stronger point if the amount were greater; as it is the amount is not really very large.

Another strong point in favour of the accused is the fact that no fraudulent entries or fabrications have been brought to light in the books or correspondence of the Bank. Mr. Holdsworth, I think, said in his affidavit that there were such entries but he was at a loss to substantiate this accusation. Of course it is possible to regard the rating of the Moolla Oil and British Burma Petroleum Oil shares at their full par value as false and fraudulent. That entirely depends upon the value which you are going to attach to these shares. You must remember also that the essence of the charge against the accused is that the bank management took credit for large sums as good debts which at least were very doubtful: that is the prosecution case, and this is a kind of fraud which can be carried out without making positively fraudulent entries in the books. The fraud if any would be in the minds of those who were responsible for the balance sheet and in the guilty knowledge they had that the debts put down as good debts were really not good debts. At the same time you should certainly take into consideration this point in the accuseds' favour and especially in the Manager's favour, that so far as can be seen they have handed

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over all their accounts and correspondence files complete without any attempt to fudge or fabricate the accounts or to burke correspondence which it might have been inconvenient for them to disclose. I would specially refer to exhibit 30 which has been so much commented upon and which I remarked is *primâ facie* at any rate a damaging piece of evidence.

Then as to the amount of ready money at the disposal of the Bank when it closed its doors. I do not think this matter affects the question you have to decide. Deposits came flowing in from India to the extent of 40 lakhs in the interval between the issue of the balance sheet and the closing of the Bank. This was in the ordinary course and as a matter of fact the disbursements of deposits kept pace with the receipts. It has been shown that at the time of closing the Bank there was considerably less money belonging to other people in their hands than they had on the 30th June 1911. It is quite clear that the Bank closed because the management saw that a run on the Bank was imminent, and saw also that they had not the funds to meet the run and had no prospect of getting the funds either by realizing their securities or by borrowing from another Bank. I think I have now touched on all points which it was necessary for me to mention and the issues you have to determine should now be clear to you. I have only to say in conclusion that the accused persons are entitled to the benefit of any reasonable doubt in your minds, whether it is a doubt as to the actual falseness of the balance sheet or a doubt as to the knowledge of its falseness by the accused. By a reasonable doubt is meant the sort of doubt which would influence you as conscientious and sensible men in deciding momentous questions in your own lives. If you entertain a doubt of that kind as to the guilt of the accused or any of them it would of course be wrong to convict him, but I need hardly say that a doubt springing from indecision or from disinclination to make up your minds is not a reasonable doubt. You have a clear and definite duty to perform, that is to say on the evidence which has been placed before you whether the accused or any of them are guilty of the three specific offences of cheating which are set forth in the charge. I am confident that you will apply your minds earnestly to this task and that you will bring in a verdict according to

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your consciences. Whatever your verdict may be I venture to think it will command respect.

Before you retire, gentlemen, I should like to say that it is specially desirable that your verdict should be unanimous and if you can come to an unanimous verdict I hope that you will do so.

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*Before Mr. Justice Twomey.*

*Criminal Reference No. 52 of 1913.*

*August 5th, 1913.*

## KING-EMPEROR *v.* SULAIMAN.

*Criminal Procedure—"Reference" to a High Court—Sections 423, 438, Code of Criminal Procedure.*

There is no provision of the Code of Criminal Procedure under which an Appellate Court, having once admitted an appeal, can "refer" it to the High Court for a decision on a point of law. The Appellate Court must dispose of the appeal itself in one of the manners prescribed by section 423 of the Code of Criminal Procedure.

In a Criminal Appeal now pending before the Sessions Judge, Tenasserim Division, a question of law has arisen as to the proper construction of section 57, Excise Act. The learned Judge considers that it is an important question on which there should be an authoritative ruling and he has therefore referred it to this Court for decision.

When an Appellate Court does not dismiss an appeal summarily it is bound by the provisions of section 423 of the Code of Criminal Procedure which define its powers—these powers do not authorize the Court to refer to the High Court for decision a question of law arising in the appeal. Nor does section 438 confer any such authority; that section permits the Sessions Judge to report for orders the result of his examination of any proceeding before an inferior Criminal Court but does not apply to appellate proceedings pending before the Sessions Judge himself. It is clearly the intention of the law that all questions arising in a criminal appeal should be determined by the Appellate Court itself.

Since the question referred by the Sessions Judge is not properly before the Court no decision can be given on it. The learned Judge will have to decide it according to his own judgment. If either party should be aggrieved at the Sessions Court's orders in appeal it will be open to that party to move this Court in revision if he thinks fit.

Civil 1st Appeal No. 22 of 1913.

July 24th, 1913.

*Before Mr. Justice Hartnoll, Officiating Chief Judge, and Mr. Justice Young.*

## A. K. A. S. JAMAL *v.* MOOLA DAWOOD SONS AND COMPANY.

*Giles*—for appellant.

*N. M. Cowasjee*—for respondents.

*Vendor and purchaser,—Re-sale on failure to take delivery,—Measure of damages in case of—s. 107, Contract Act, 1872.*

A vendor of shares, on failure of the purchaser to take delivery, gave notice of his intention to re-sell at the latter's risk, but did not carry out his intention and ultimately sold the shares at a higher premium than at the time of the purchaser's breach of contract :

*Held*,—that although the usual measure of damages in such cases is the difference between the price agreed upon and the price obtainable in the market at the time of the breach, yet the higher price subsequently obtained on re-sale should be taken into consideration in assessing the damages.

*Semble*—An unpaid vendor, having given notice of his intention to take action in accordance with section 107 of the Contract Act, is not thereafter precluded from resiling from this course and pursuing his other remedies.

*Oldershaw* v. *Holt*, (1840), 12 A. & E., 590 ; followed. *Brace* v. *Calder*, (1895), 2. Q. B. D., 253 ; *Smith* v. *M'Guire*, (1858), 27. L. J. R., 465 ; *Pott* v. *Flather*, (1847), 16. L.J.Q.B., 366 ; *Buldeo Doss* v. *Howe*, (1880), I.L.R., 6 Cal., 64 referred to.

*Hartnoll, Offg. C. J.*—In this suit appellant sued to recover from the respondents Rs. 1,09,218-12-0 compensation for breach of contract. His case was that by six contracts between April and August 1911 he contracted to sell 23,500 shares in the British Burma Petroleum Company at certain rates per share which were set out and for delivery on or before the 30th and 31st December 1911.

The market price on the 30th December was Rs. 4-3-0—a price that was very much less than the prices contracted for. The shares were tendered to respondents but not taken delivery of or paid for.

Appellant therefore sued to recover Rs. 1,09,218-12-0 the difference calculated on the amount due, taking the contract prices and the market value of the shares on the 30th December calculated at Rs. 4-3-0 a share.

The appellant sold 100 of the shares on the 28th February 1912 at Rs. 4-3-0 and the rest of the 23,500 on dates between April and October 1912 at prices higher than Rs. 4-3-0 but lower than

the contract prices arranged between him and respondents except in one instance.

In this way appellant realized for the shares Rs. 1,04,261-10-9. At contract prices appellant should have received Rs. 1,84,125-10-0. The difference is Rs. 79,862-15-3 and this is the sum for which a decree has been given him by the learned Judge on the Original Side. Appellant lays this appeal claiming a further sum of Rs. 29,355-14-9, the difference between the amount claimed and the sum awarded.

On the 30th December 1911, when appellant tendered the shares to respondents his advocates wrote: "Failing compliance with this request by to-day our client will be forced to sell the said shares by public auction on or about the 2nd proximo responsible for all losses sustained thereby." On the 2nd January 1912 he again through his advocates expressed the intention of re-selling the shares and instituting a suit against respondents for the recovery of any loss which might result from that course. On the 4th January he reiterated his intention to do so. Nothing was then done till the 26th February 1912 when appellant's advocates wrote to respondents and claimed Rs. 1,09,219-6-0, the amount arrived at by deducting Rs. 74,906-4-0: the value of the 23,500 shares at Rs. 4-3-0 a share from Rs. 1,84,125-10-0, the agreed price of the shares. In assessing the damages the learned Judge on the Original Side has given respondents the benefit of the higher prices realized by appellant when he sold the shares. His reasons for doing so were as follow :—

"One of the 'rules' on back of the contract notes states that in default of payment for the shares on the date of settlement or by noon on the day following, the seller shall have the option of re-selling the shares by auction at the exchange at the next meeting, and any loss arising shall be recoverable from the buyer. The plaintiff had no other right of re-sale beyond that. At the time that he first gave notice of his intention to re-sell he still had that right, but he subsequently failed to exercise it, *i.e.*, though he has sold these shares at a higher rate than the rate of the due date, he did not purport to re-sell them as against the defendant. Can then the defendant-firm claim to have the benefit of the higher prices realized by the plaintiff?

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I think they can. If a seller having the right of re-sale, elects to exercise such right, he must give notice of his intention to re-sell; and having done so he has made his election between the two measures of damages that were opened to him. After giving such notice, it is his duty to re-sell either at the time (if any) appointed by the contract or within a reasonable time after the date of the breach. If he delays, he takes upon himself all risk, arising from further depreciation. And if he sells at a higher rate, such sale will be taken to be a re-sale in pursuance of his notice: for otherwise he would be allowed to benefit by his own wrong."

The grounds of appeal are—

"1. For that the learned Judge on the Original Side erred in law in holding that the appellant having expressed an intention to re-sell the shares but not having sold the same in pursuance of such expression of intention was precluded from recovery as damages the difference between the contract prices and the market rate at the time of the breach.

2. For that the learned Judge on the Original Side erred in law and in fact in holding that the appellant had exercised a binding election to re-sell the shares.

3. For that the learned Judge on the Original Side erred in law in holding that the sales in fact made by the appellant should be taken to be re-sales in pursuance of his notice to re-sell.

4. For that the learned Judge should have awarded as damages the difference between the contract prices and the market rate at the time of the breach, namely, Rs. 1,09,218-12-0 instead of the sum of Rs. 79,862-15-3.

5. In the alternative that if the said expression of intention to resell amounted to a binding election the learned Judge should have awarded as damages the difference between the contract prices and the market rate at the time when the shares should have been re-sold.

6. That the decision of the learned Judge in awarding the sum of Rs. 79,862-15-3 only as damages was otherwise wrong in law and in fact."

There is no doubt as to what appellant's true measure of damages is. It is the difference between the contract prices

and the market price when the contracts ought to have been completed,—that is, in this case the date of the breach, the 30th December 1911—for the appellant could then have taken the shares into the market and obtained the current price for them. This was the principle followed in the case of *Pott and another* v. *Flather* (1). But it was argued that as in the beginning appellant chose to proceed under section 107 of the Indian Contract Act he should be kept to such choice. It is clear that though at first he expressed the intention of pursuing the course set out in section 107 he did not keep to his intention for, when he brought his suit he had only sold 100 shares and this was on the 28th February and he sued for his whole measure of damages. Appellant's counsel urged that, though appellant at first expressed the intention of following the course laid down by section 107, he was not bound to carry out such intention and could change his mind if he liked. This view appears to be correct. The words of section 107 are permissive and not compulsory. In the case of *Buldeo Doss* v. *Howe* (2) the view was taken that section 107 does not deprive an unpaid vendor of goods of any other remedy he may have. I am therefore unable to agree with the views expressed by the learned Judge on the Original Side as to appellant being bound to proceed under section 107.

But I think that there is abundant authority for holding that the respondents are entitled to the benefit of the higher prices realized by appellant in mitigation of the sum payable by them as damages. The subject is dealt with at pages 771 and 772 of Leake on Contracts, 6th Edition, and page 207 of Mayne on Damages, 8th Edition.

I would especially refer to the following cases: In *Oldershaw* v. *Holt and another* (3) where the plaintiff claimed as damages certain monies from the defendant owing to his failing to carry out certain terms of a building lease and where plaintiff entered into a new agreenmet with another tenant the jury were directed to have regard to the new and ultimately more advantageous agreement entered into in calculating the amount of

(1) (1847) 16, L. J. Q. B., 366.
(2) 1880) I. L. R., 6 Cal. 64.
(3) (1840) 12 A. & E., 590.

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damages due. In *Smith* v. *M'Guire* (1) which was a suit to recover damages for failure to carry out the terms of a charter party, that is, to load a ship with a cargo of oats, Martin B. said: "It would be doubtful whether a party who breaks a contract has a right to say to a person with whom he breaks it: 'I will not pay you the damages arising from my breach of contract, because you ought to have done something else for the purpose of relieving me from it.' I am not satisfied that the person who breaks a contract has a right to insist on that at all; *but if the ship had earned anything the defendant would be entitled to a deduction in respect to that.*" Again in *Brace* v. *Calder and others* (2) where the plaintiff was employed by the defendants, a partnership consisting of four members as manager of a branch of their business and the agreement was that he was to be employed for a certain period, but before that period had expired two of the partners retired and the business was transferred to and carried on by the other two in an action for wrongful dismissal, it was held that the plaintiff was only entitled to nominal damages, as the continuing partners were willing to employ the plaintiff on the same terms as before for the remainder of the period and so the plaintiff would have suffered no damage. In that in the present case the appellant reduced his loss by selling the shares at a higher price than obtained at the date of the breach, I think it only equitable to give the respondents the benefit of the higher prices realized. I would therefore dismiss the appeal with costs.

*Young, J.*—I concur.

(1) (1858) 27, L. J. R., 465.
(2) (1895) 2, Q. B. D., 253.

*Before the Chief Judge and Mr. Justice Hartnoll.*

*Civil Miscellaneous Appeal No. 105 of 1912.*

*March 12th, 1913.*

R. M. RAMAKRISHNA PILLAY, *v.* 1. M. L. V. E. R. M. FIRM BY THEIR AGENT, RAMAN CHETTY, 2. K. N. K. R. M. M. R. M. CHETTY FIRM.

*Maung Pu*—for appellant.

*Chari*—for respondents.

*Provincial Insolvency Act, 1907, section 46—appeals how made.*

For an appeal against any order not made under the sections mentioned in 46 (2), the leave of the District Court or the High Court must be obtained.

The petition was dismissed because the judge thought there had been fraud on the part of the petitioner, and that the petition was an abuse of the process of the Court.

Sub-section 2 of section 46 of the Act gives an appeal from an order made under section 15, but this order was not made under that sub-section.

For an appeal against any order not made under the sections mentioned in sub-section 2, the leave of the District Court or of the High Court has to be obtained. The appellant applied to neither Court for leave to appeal. The appeal must be dismissed.

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*Before Mr. Justice Parlett.*

*Civil Revision No. 138 of 1912.*

*December 4th, 1913.*

THE BRITISH INDIA STEAM NAVIGATION Co., LTD., *v.* 1. M. N. FAKIR MAHOMED, 2. THE COMMISSIONERS OF THE PORT OF RANGOON.

*Hartnoll*—for applicants.

*Bilimoria*—for 1st respondent.

*Giles*—for 2nd respondent.

*Pleadings—not mere formalities—Civil Procedure Code, Order 6.*

Pleadings are not mere formalities, but statements required by law to be true. Any wilful falsification of them is punishable by the crimina law.

The original plaint sets out in para. 1 that 15 casks of oil were shipped by plaintiffs' Agents in good order and condition

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in the British India Steam Navigation Company's steamer "Tara", of which 14 casks were delivered in good order and condition and one, being tendered practically empty and damaged, was refused. The British India Steam Navigation Company's first Written Statement admits that the 15 casks were shipped in good order and condition, alleges that they were all landed in good order and condition at one of the Port Commissioners' jetties, and that the damage to the cask occurred after it had been so landed, and pleads that they are not liable for damage which may have subsequently occurred. Later on they obtained leave to file an amended Written Statement in which they say that, though shipped in good order and condition, 5 of the 15 casks were certified on landing as leaking by the Port Commissioners and that under the endorsement on the bill of lading the Company is not liable for damage by ordinary leakage. It is admitted that an auger-hole had been bored in the cask through which the contents were abstracted, but the Written Statement contains no allegation as to when that hole was bored. The plaint was eventually amended so as to join the Port Commissioners as defendants. In their Written Statement the latter pleaded *inter alia* that the cask was landed in a damaged and leaky condition and that no damage occurred to it while it was in their custody. The Superintendent of the Wharf gave evidence that on landing the 5 casks, which were old, were leaking through the joints; the one referred to in this suit was at the time less than half full. The auger-hole was not noticed, but the cask does not appear to have been closely examined and as the hole is only one-quarter of an inch in diameter, it might easily have escaped notice unless on close scrutiny. The British India Steam Navigation Company's witness states that he examined the cask on landing; that it was one of about a dozen which were leaking, but though especially examined for breakage, none was found and the auger-hole was not in it. This witness has been disbelieved and damages have been decreed against the Company. It is now urged that it was for plaintiffs to prove their case and that, unless they did so which it is claimed they did not, a decree could not be given in their favour, although the defence

was disbelieved. It is clear however that the damage occurred when the cask was in the custody of one or other of the defendants. The question as to which of them was liable was one to be determined as between the defendants. I am unable to agree that the lower Court had not the materials for its determination. The Port Commissioners' Written Statement clearly alleges that no damage occurred to the cask while it was in their custody and this has never been challenged save by discredited evidence. The Wharf Superintendent's evidence, so far from showing that there was no hole in the cask when landed, strongly supports the contrary; for it is admitted, that whether leaking through the joints or not, the bulk of the oil was abstracted through the auger-hole, and the evidence is that more than half the oil was gone when the cask was landed. Next it is argued that the endorsement on the bill of lading raises the presumption that this cask was shipped already leaking. The written statements and the bill of lading show it to have been shipped in good order and condition: a leaking cask cannot be said to be in good order and condition. The bill of lading says the 15 casks were shipped in good order and condition and the endorsement runs, "casks old. Not responsible for leakage or breakage and for leakage from plugged holes or otherwise." The Company's witness indeed does not shrink from suggesting that even with a hole bored in it, the cask is still in good order and condition in the terms of the bill of lading. The meaning of the whole is however in my opinion clear; the casks, though old, were when shipped not leaking, but in view of their age, the Company disclaimed responsibility for leakage etc., which might occur in transit. The Company explicitly pleaded that all 15 casks were landed in good order and condition. It is now suggested that this was "a formal plea to put the burden on the plaintiffs." No such excuse can be accepted for reckless disregard of facts; pleading so far from being mere formalities are statements required by law to be true, the wilful falsification of which is punishable by the criminal law. The plea was verified by a representative of the Company as true to his own knowledge, and he swears that he had personally examined all the casks. Finally it is argued that the Company should not have to pay the Port Commissioners'

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costs. It is obvious however that the latter were joined as defendants in consequence of the Company's plea throwing the liability on to them. I decline to interfere with that order. The application is dismissed with costs, two gold mohurs to each respondent.

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*Special Civil 2nd Appeal No.* 220 *of* 1912.

*December* 11*th*, 1913.

*Before Mr. Justice Ormond.*

MYAT GALE *v.* 1. SAN THA, 2. MA THU, 3. SHWE NI, 4. SAN E, 5. LON MA.

*J. N. Lentaigne*—for appellant.

*Po Han*—for respondents.

*Benamidar—real purchaser's right to sue—Civil Procedure Code, s. 66.*

Plaintiff purchased a piece of land at an auction sale in execution of a decree in 1902 through the 1st defendant her son-in-law, and though the sale certificate was issued in his name, she had been in possession ever since. The 1st defendant a year before institution of suit transferred the land to the names of his children. The plaintiff sued for a declaration of ownership.

*Held*—that despite section 66 of the Civil Procedure she should be given a decree declaring that she was entitled to possession as against the defendants.

*Sasti Churn Nundi* v. *Aunopurna* (1896), I.L.R. 23 Cal., 699, followed.

*Bishan Dial & 1* v. *Ghazi-Ud-Din* (1901), I.L.R. 23 All, 175, referred to.

The plaintiff-appellant bought land with her own money at an auction sale in execution of a decree through her son-in-law, the 1st defendant, and a certificate was made out in his (1st defendant's) name. She has been in uninterrupted possession of the land since 1902 until the institution of the suit. About a year before the institution of the suit 1st defendant transferred the land into the names of his children, the other defendants. The plaintiff stated these facts in the plaint and sued for a declaration that she was the owner. The plaintiff obtained a decree in the Subdivisional Court, but on appeal the Divisional Court held that the suit was barred under section 66 of the Civil Procedure Code. That section states that, no suit shall be maintained against any person claiming title under a purchase certified by the Court in such manner as may be

prescribed, on the ground that the purchase was made on behalf of the plaintiff.

The case of *Bishan Dial and another* v. *Ghazi-Ud-Din* (1) is very similar to the present case. In that case it was held that the plaintiff based his claim on the benami purchase from the Court and although he alleged he had been in uninterrupted possession the Court held that the suit was barred by the corresponding section of the old Code, section 317. The case of *Sasti Churn Nundi* v. *Aunopurna* (2) is also a very similar case. There the plaintiff asked that his right might be declared and possession confirmed and that defendant might be restrained from interfering with his tenants. In that case it was held that the suit was not barred by section 317 because the plaintiff was entitled to rely upon his title by possession only; that the defendant had to set up the sale certificate which stood in his name, and that plaintiff was entitled to rebut the defendant's case by showing that the certificate was benami and that she was in fact the real purchaser as against the defendant. I think it is the duty of the Court to grant such relief as is warranted by the facts stated in the plaint—if those facts are true. It is admitted that the plaintiff has been in uninterrupted possession. It would therefore be for the defendant to make use of this benami certificate; and if he had to sue the plaintiff for possession, he would not be allowed to succeed under that certificate: the defendant would be entitled to say that he was not entitled to possession because the certificate was benami. So too in this case the plaintiff is entitled to show that the certificate set up by the defendant is benami. The decree of the Lower Court is set aside and a decree will be passed declaring that the plaintiff is entitled to possession as against the defendants. Each party to bear their own costs.

(1) (1901) I.L.R., 23 All., 175 (2) (1896) I.L.R., 23 Cal., 699.

*Special Civil 2nd Appeal No. 213 of 1912.*

*December 23rd, 1913.*

*Before Mr. Justice Ormond.*

## PO MAUNG *v.* 1. MAUNG KAING, 2. MA ME.

*Ba U*—for appellant.

*Ba Dun*—for respondents.

*Transfer of Property Act, section 55 (6)(b)—Contract of sale—Charge on purchase money—Burden of proof.*

A bought land from B shortly before or after January 1st, 1905, without any registered deed of conveyance. C got decree against B and attached the land as being property of his judgment-debtor, but attachment was removed on application by B. C then sued for declaration that land was property of B. It was admitted that A had paid purchase-money and been in possession some years.

*Held*,—firstly that if transaction between A and B took place after January 1st, 1905, A had under section 55 (*6*)(*b*) of Transfer of Property Act a charge on the property for the amount paid as purchase money and for interest thereon.

Secondly, that burden of proving that transaction took place after that date was on C.

*Ma Lon Ma and one* v. *Maung Shwe Byu* (1909), 4 B.L.T., 115, dissented from,

*Lalchand Motiram and another* v. *Lakshman Sahadu* (1904), I.L.R., 28 Bom., 466, followed.

The plaintiff-appellant obtained a money decree against San Nyein and attached the land in question and a house thereon as being the property of his judgment-debtor. The defendant Maung Kaing applied to have the attachment removed and succeeded. The plaintiff then brought this suit for a declaration that the land and house was the property of his judgment-debtor and liable to be attached by him. In this appeal the plaintiff-appellant abandons his claim for a declaration as to the house. It is admitted that some years ago the defendant Maung Kaing agreed to purchase this land from San Nyein; that he paid San Nyein the purchase money Rs. 1,000 and was put into possession as owner and has continued in uninterrupted possession up to date. There was no registered conveyance. The question then arose whether the transaction was made before the 1st January 1905 or not. If the transaction was subsequent to that date, the Transfer of Property Act applies, and the sale was invalid:—but the defendant having paid the purchase money and being in possession under the contract of sale, has under section 55, sub-clause (*6*), clause (*b*), of that Act, a charge

on the property for the amount paid by him in advance as purchase money, and for interest on that amount.

I am referred to a case of *Ma Lone Ma and one* v. *Maung Shwe Byu*(1), in which the learned Judge held that the defendant was not entitled to a charge on the property which he had bought under an invalid sale and of which he was in possession. I think the learned Judge overlooked the provision of section 55, sub-clause 6(*b*) of the Transfer of Property Act. The case of *Lalchand Motiram and another* v. *Lakshman Sahadu* (2) is an authority on the point. If then the transaction took place since the 1st January 1905, the plaintiff would be entitled to attach the land in question, subject to the charge of Maung Kaing for Rs. 1,000 *plus* interest at 6 per cent. from the time of the contract of purchase. But if the transaction took place before the 1st January 1905, the sale to Maung Kaing would be a good sale. The case was heard in March 1912. The plaintiff's witness San Nyein says he sold the land about 7 years before. The defendant and his witnesses say that the transaction took place about 8 years before;—in 1903 or 1904. The evidence as to the date of the transaction is very indefinite. The District Judge thought the evidence for the defence was the more reliable. I think the decision on this point must depend upon the question: upon whom does the onus lie to show that the transaction as a sale was valid or invalid. It is admitted that the defendant is in possession and was put into possession as owner, by San Nyein who was then the owner. The onus I think is on the plaintiff to show that the transaction took place since the 1st January 1905 and that the defendant did not thereby acquire the right of ownership in the land. This onus the plaintiff has failed to discharge. I therefore dismiss this appeal with costs.

1) (1909) 4 B.L.T 115.
(2) (1904) I.L.R., 28 Bom., 466.

*Civil Revision No.* 108 *of* 1912. *January 27th,* 1914.

*Before Mr. Justice Twomey.*

## PO KIN *v.* MAUNG KALA.

*Hay*—for applicant.

*Palit*—for respondent.

*Master and servant—Justifiable dismissal.*

Misconduct inconsistent with the faithful discharge by a servant of the duties for which he is engaged is good cause for his dismissal.

The plaintiff-respondent Maung Kala was engaged by the defendant-applicant Maung Po Kin as a field labourer to work for the season for sixty baskets of paddy to be paid at harvest. When Maung Kala had performed about two-thirds of the work he was turned out of his employer's house as he was caught in an intrigue with his employer's daughter. Maung Kala sued for his wages and Po Kin in his written statement set up only one defence, namely, that Maung Kala had left the work of his own accord. The Township Court found as a matter of fact that Maung Kala was not dismissed by his employer Po Kin, but left of his own accord and the suit was dismissed on this ground. There can be no doubt however that Maung Kala was turned out by his uncle at the request of Po Kin's wife Ma Paw. Maung Po Kin himself was away from home at the time and in requesting Maung Kala's uncle to turn him out, Ma Paw was acting as her husband's agent. When Po Kin returned he appears to have approved of Maung Kala's dismissal, took no steps to re-instate him and engaged another man to complete the work.

Maung Kala appealed to the District Court. The District Judge appears to have misread the evidence, for the defendant Maung Po Kin made no admission that he complained to Maung Kala's uncle. But the learned Judge was right in finding that Maung Kala was really turned out by Ma Paw who was angry with him on discovering the intrigue with her daughter. As stated above, Maung Po Kin was bound by his wife's action in the matter. On this ground the District Judge dissented from the Township Court's decision and decreed the plaintiff's suit. The learned Judge failed however to consider the question whether the dismissal was justified. It is true that this defence

was not raised in the written statement and no direct issue was framed as to justification. But it has not been urged before me and it cannot be held that the defendant is on this account debarred from relying on the defence of justification. He no doubt acted in good faith in setting up the defence that he did not actually dismiss Maung Kala, for the actual ejection of Maung Kala from the house was effected by Maung Hmat Kyauk. Maung Po Kin may very well have thought that this defence would hold good and that it was unnecessary for him to publish the facts about his daughter's intrigue with Maung Kala. The Township Court having learnt from the examination of the parties that the plaintiff's uncle Ko Hmat Kyauk had come and turned him out of Po Kin's house at the instance of Po Kin's wife might well have questioned the parties further as to the explanation of this incident, and the Judge would then have perceived the importance of framing an issue as to justification. The facts as to the intrigue between Maung Kala and Po Kin's daughter are not disputed and it cannot be said that the plaintiff-respondent was prejudiced by the absence of a definite issue on the legal question of justification. It is an established rule of English law that misconduct inconsistent with the due and faithful discharge by a servant of the duties for which he was engaged is good cause for his dismissal. This rule is in accordance with justice, equity and good conscience and may therefore be adopted in the absence of any specific Indian enactment inconsistent with the rule.

A field labourer in this country usually lives in his employer's house almost on the footing of one of the family and it appears that Maung Kala was living in this way in Po Kin's house ever before he was engaged for field work. Such an arrangement enables the employer to keep close supervision over his labourer. Maung Kala grossly abused his employer's hospitality by seducing his daughter. A petty cultivator like Po Kin has to live in close personal relations with his one or two hired men and it would be highly unreasonable to expect him to continue such relations with the man who had brought shame to his household.

I therefore hold that the plaintiff-respondent's misconduct was inconsistent with the due discharge of his duties and that

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his dismissal was justified. As the dismissal took place before Maung Kala had completed his work and earned the stipulated wages for the season, he was not entitled to any remuneration for the broken period.

The decree of the Lower Appellate Court is set aside and the plaintiff's suit is dismissed with costs in all Courts.

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*Civil Miscellaneous Appeal No. 205 of 1913.*

*February 16th, 1914.*

*Before Sir Henry Hartnoll, Officiating Chief Judge, and Mr. Justice Ormond.*

JANNAT ALLY, APPELLANT (IN THE MATTER OF THE WILL OF MOHAMED ALLY, DECEASED).

*Auzam*—for appellant.

*Will—construction of—executor by implication.*

The deceased left a will in which he did not definitely appoint an executor, but did give direction for the administration of a certain piece of property on trust for a younger son by an elder.

*Held*,—that there was no sufficient indication that the testator intended the elder son to be executor of the will.

*Seshamma and another* v. *Chennappa*, (1897), I.L.R., 20 Mad., 467, followed.

*Hartnoll, Offg. C. J.*—The point for decision is whether appellant was appointed executor by implication of the will of Mohamed Ally deceased. The will is to the following effect.

"I write this will voluntarily and with sense and consciousness (to the effect) that my one house is at Rangoon in No. 46th Street and the house is No. 66, that after my death, son Jannat Ally's share is one half and son Hassan Ally's share is one-half in that house. The age of son Hassan Ally is twelve years at present and if after my death, this son Hassan Ally has not reached the age of twenty-one years, I appoint son Jannat Ally—as his "trustee". On deducting every expense from the rent of this house, son Jannat Ally shall pay to him—son Hassan Ally—the moneys in respect of his half share out of the balance moneys for rent and this son Hassan Ally shall live where he likes and when his marriage would take place, son Jannat Ally shall, after selling this house, spend his share of the moneys in his wedding expenses and if there is a surplus, son Jannat Ally

shall pay it up to him on his reaching the age of twenty-one years. Son Hassan Ally's marriage should be performed after his reaching the age of eighteen years. If in case the sale of this house appear advantageous to son Jannat Ally before the marriage of son Hassan Ally has taken place, he can sell this house and shall invest his—son Hassan Ally's—half share of the moneys on interest at a good place and shall pay whatever is accrued out of this sum for board, education, etc., of son Hassan Ally. But if the money realised out of this sum be less than Rs. 20 (twenty) each month, he should pay out of the principal sum: as long as his marriage has not been performed, son Hassan Ally should not get less than Rs. 20 (twenty).

In addition to this house, I may during my life give to any one in charity, gift, whatever cost, immoveable property, shares, etc., I may have got and after paying for whatever expenses I may have asked to incur after my death, one-half share of whatever is left of son Jannat Ally and one half share is of son Hassan Ally.

Whatever moneys, property, etc., that son Jannat Ally may have got are of his own earnings to which neither I nor Hassan Ally has a right."

I can see no reason to differ from the conclusion arrived at by the learned Judge on the Original Side. It is clear that by the terms of the will appellant Jannat Ally was appointed to be trustee of his brother Hassan Ally with respect to a house described as No. 66 in 46th street in the event of the testator dying before Hassan Ally attained the age of twenty-one years and the will contains detailed instructions as to how Jannat Ally was to deal with the house in such case; but the will gives no sufficient indication that Jannat Ally is appointed to generally execute the will. He is given by the will half of the property left by his father exclusive of such as may be given away and Hassan Ally is given the other half: but nothing is said as to who is to pay the debts, funeral expenses, etc., and to collect the assets. If the testator had died after Hassan Ally had attained the age of majority, could it be said that the will appoints an executor? The case *In the Goods of Punchard* (1)

(1) (1872) L.R., 2 P. and D., 369.

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may be usefully considered in coming to a conclusion in the present one. Also the present case is not dissimilar to that of *Seshamma and another* v. *Chennappa* (2) where the will provided that the plaintiff should take care of the estate during the minority of a son who was to be adopted to the testator and imposed upon them the duty of providing for the maintenance of the persons therein named, and in which it was held that the plaintiffs were not appointed executors by implication.

There is to my mind no sufficient indication that the testator meant to confide the execution of his will to Jannat Ally other than that he directed him to deal with a certain house as the trustee of a minor son in the event of the testator's death during such minority.

I would therefore dismiss this appeal.

*Ormond, J.*—I concur.

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*Civil Revision No. 98 of 1907.*

*January 29th, 1908.*

*Before Sir Charles Fox, Chief Judge.*

TOON CHAN *v.* P. C. SEN, Official Receiver.

*R. M. Das*—for applicant.

*J. R. Das*—for respondent.

*Mortgaged property—rent paid in good faith in advance to mortgagor in possession—Transfer of Property Act, section 50.*

The defendant had in good faith on October 27th, 1906, paid five months' house rent in advance to a mortgagor who was in possession and let him into possession. On December 10th a Receiver was appointed in a mortgage suit for the rents of this house amongst others and he subsequently sued the defendant for the rent for December 1906 and January and February 1907.

*Held*,—that the rent paid to the mortgagor by the defendant was paid in fulfilment of an obligation made under his contract with the mortgagor and that the defendant was protected by section 50 of the Transfer of Property Act from having to pay again.

*De Nicholls* v. *Saunders and anr.* (1870) L. R. 5 C. P., 589 and *Cook* v. *Guerra* (1872), L. R. 7 C. P. 132, distinguished.

This was a suit brought by the Receiver appointed in a mortgage suit for rent of one of the mortgaged houses for the months of December 1906 and January and February 1907. The defendent resisted the suit on the ground that he had on

(2) (1897) I.L. R., 20 Mad., 467.

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the 27th October 1906 paid five months' rent in advance to the mortgagor who was in possession and who let him into possession. The circumstances under which he paid the rent in advance were not in dispute. As previous tenants had left the house without paying the rents due by them, the mortgagor made the defendent pay in the five months' rent in advance.

The plaintiff Receiver was appointed on the 10th December 1906. He claimed the rent for December apparently on the ground that the rent for that month fell due upon its expiry.

The Receiver stood in the shoes of the mortgagees of the house. Whether it was open to him or them to claim for rent is doubtful—*vide* the notes to *Moss* v. *Gallimore* in Smith's Leading Cases, 11th edition, volume I, page 514. Assuming that he could, the question remains whether he could make the defendent pay to him rents for months for which the defendant had already paid in advance. In support of the contention that he could do so *De Nicholls* v. *Saunders and Anr.* (1) and *Cook* v. *Guerra* (2) were relied on, but those cases are distinguishable from the present inasmuch as according to the contracts in those cases the rents were not due until the expiry of certain periods. In the present case the lessor made it a condition of her letting the premises that rents for five months should be paid in advance. There is no provision of law forbidding such a contract, and when such is the contract, the basis of the reasoning on which the abovementioned cases were decided is absent.

If a lessee pays his rent before it is due it may well be said that he does not pay in fulfilment of an obligation upon him, and that such payment must be regarded as an advance to the lessor with an agreement that on the day when the rent becomes due such advance shall be treated as a fulfilment of the obligation to pay rent. But when it is part of the contract, as it was in the present case, that the lessee should pay rent in advance, and the lessee pays in advance, he does so in fulfilment of an obligation under the contract. In such a case section 50 of the Transfer of Property Act, in my opinion, protects him from having to pay over again to a person who may subsequently

(1) (1870) L. R. 5 C. P., 589.
(2) (1872) L. R. 7 C. P., 132.

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become entitled to the rents or profits of the property leased.

On these grounds I think the decision of the Small Cause Court was erroneous in law.

The decree is set aside, and the suit is dismissed with costs. The plaintiff must pay the defendant's costs of this application.

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*Before Mr. Justice Twomey.*

*Criminal Revision No.* 376B *of* 1913.

*January* 30*th*, 1914.

## PWA ME *v.* SAN HLA *alias* LEONG FOKE SHU.

*Wiltshire*—for applicant.

*Dawson*—for respondent.

*Maintenance—marriage law applicable—Chinese Buddhist—Criminal Procedure Code, section 488.*

A woman cannot obtain a maintenance order under section 488 of the Criminal Procedure Code unless she can prove that she was respondent's wife according to his own personal law. A Chinaman or semi-Chinaman may adopt many Burmese Buddhist customs, yet remain a Chinese Buddhist.

In this maintenance case under section 488 of the Criminal Procedure Code the applicant Ma Pwa Me is a Burmese Buddhist and the respondent San Hla *alias* Leong Foke Shu is the son of a Chinese father by a Shan mother. The parties are proved to have cohabited for six or seven years and to have had two children, one of whom is living, but there was no marriage ceremony of any kind. The Magistrate has found that even if they were both Burmese Buddhists the circumstances do not give rise to a presumption that there was a legal marriage. He has found further that the respondent San Hla was not a Burmese Buddhist and that there was no marriage according to the Chinese customary law applicable to the respondent.

As regards the latter finding it is clear that a maintenance order could not be granted against the respondent unless it was proved that the applicant was his legal wife according to his own personal law. An attempt was made to prove that San Hla was converted to the Burmese form of Buddhism but the evidence is not sufficient. He paid reverence to *pongyis*; and listened to their sermons, and when one of his children died he

took part in ceremonies which are usually performed by Burmese Buddhists. He also became a member of a Society for promoting Buddhism, but it is admitted that several other Chinese belong to this Society without abandoning their own special form of worship. One witness states that when San Hla was a boy he was Shinpyu'd during the April holidays. But this is denied by his father and the allegation cannot be regarded as proved. The respondent produced several witnesses who state that he has always followed Chinese forms of worship. I agree with the following remarks of Mr. Justice Parlett in *Tun Tha* vs. *Ma Pu* (1). "The grounds on which the Magistrate considered applicant a Burmese Buddhist are that he is commonly known by a Burmese name; that he worships at pagodas, pays reverence to Buddhist monks and keeps fast days at Buddhist monasteries; and that he built a Buddhist monastery and dedicated it according to the ritual observed by Burmese Buddhists in such cases. It is a matter of common knowledge and experience that Chinamen long resident or born in this country adopt a Burmese name. As regards the other points they indicate that he is a Buddhist, as he admits he is, but there is nothing to show that the practices he followed differ from those followed by all Chinese Buddhists, whether in Burma or elsewhere, much less that they are the peculiar characteristics of Burmese Buddhists". I think the Magistrate was right in deciding against San Hla's alleged conversion to the Burmese form of Buddhism. Even if this conversion had been proved I doubt whether it would follow that San Hla should be held amenable to the customs by which the marriages of Burmese Buddhists are regulated. But as I find that San Hla is a Chinese Buddhist it is clear that the validity of the marriage alleged in this case must depend on the customary law applicable to Chinese Buddhists. It is admitted that there was not even the semblance of a marriage according to Chinese custom. It is not alleged that any of the preliminary steps enumerated in Parker's work on Chinese Family law were fulfilled.

As I find that the respondent is a Chinese Buddhist and that there was no marriage according to Chinese Customary law, it

(1) 3 B. L. T., 67.

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is not necessary to deal with the further question whether the relationship of the parties would have amounted to a legal marriage if they had both been Burmese Buddhists.

The application is dismissed.

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*Criminal Reference No. 93 of 1913.*

*February 3rd, 1914.*

*Before Sir Henry Hartnoll, Officiating Chief Judge and Mr. Justice Ormond.*

## PO MYA *v.* KING-EMPEROR.

*Eggar*—Assistant Government Advocate for the King-Emperor.

*Misjoinder of charges—two persons jointly tried for two distinct offences committed jointly—Criminal Procedure Code, sections 234 and 239—discretionary power of High Court on revision.*

To enable more persons than one to be charged and tried together for more offences than one the offences must all form part of the same transaction. Sections 234 and 239 of the Criminal Procedure Code, can not be read together so as to permit of 2 persons accused of two distinct offences of the same kind, in both of which both men took part, being tried jointly at the same trial for the two offences. A High Court is bound on appeal to set aside a trial in which persons have been jointly so tried. If however it is acting on revision, its powers are discretionary.

*Budhai Sheik* v. *K.E.* (1905), I. L. R. 33 Cal., 292 followed; *Subrahmanian Aiyar* v. *K.E.* (1901), I. L. R. 25 Mad., 61 and *K.E.* v. *Tha Byaw*, (1908) 4 L. B. R., 315 referred to.

*Criminal Appeal No. 979 of 1913.*

*December 23rd, 1914.*

The following reference was made by Mr. Justice Twomey to the Bench :—

The appellant Nga Po Mya was tried jointly at one trial with another accused Tun Lin for two distinct offences of house-breaking by night and theft under section 457, Indian Penal Code, the first offence having been committed at the house of one Maung Lwin on the 30th August 1913 and the second at the house of one Maung Saung in another village on the 30th September 1913.

The joint trial was in my opinion illegal. Under section 233, Criminal Procedure Code, the general rule is that there shall be a separate charge and a separate trial for every distinct offence. Sections 234, 235, 236 and 239 state certain exceptions to this general rule. Sections 235 and 236 are clearly not applicable to the present case. Section 234 permits the trial of an accused person at one trial for three offences of the same kind committed within twelve months, but this section

does not apply to the case of two persons being tried together. The section which governs such a case is section 239, and it is an essential condition for the joint trial of two or more persons under that section that the offences with which they are charged should have been committed *in the same transaction*. It is not sufficient for this purpose to show that they were afterwards in joint possession of the proceeds of the several offences with which they are charged.

It might be argued from the concluding part of section 239—"*and the provisions contained in the former part of this Chapter shall apply to all such charges*"—that section 239 and section 234 may be read together and that when two or more persons within the space of 12 months have been engaged jointly in more than one Criminal transaction they may be tried jointly at one trial for any number of the joint offences not exceeding three. It does not appear to me that this is the true meaning of the concluding part of section 239; I think the words "*the former part of the Chapter*" refer only to the part headed "Form of charges" sections 221 to 232 inclusive.

In view of the decision of the Privy Council in *Subrahmanian Aiyar's* case the question is one of great importance for if the misjoinder is contrary to the provisions of the Code the convictions and sentences must be set aside and retrials must be ordered whether the accused persons have been prejudiced or not by the misjoinder. It is desirable that there should be an authoritative ruling on the matter.

I therefore refer to a Bench of this Court the question whether the joint trial of the two accused persons in this case for two distinct offences was contrary to the provisions of section 239, Criminal Procedure Code.

*The opinion of the Bench was as follows :—*

*Hartnoll, Officiating C. J.*—I can see no reason for differing from the opinion expressed by Mr. Justice Twomey. The meaning and applicability of section 239 of the Code of Criminal Procedure was considered by a bench of the Calcutta High Court in the case of *Budhai Sheik* v. *Emperor* (1) and I am in accord with the reasoning of the learned Judges who

(1) (1905) I. L. R. 33 Cal., 292.

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decided it. To enable more persons than one to be charged and tried together for more offences than one the offences must all form part of the same transaction. Section 233 of the Code of Criminal Procedure lays down the general rule that there shall be a separate charge for each accused and that such charge shall be tried separately. The following sections lay down exceptions to the general rule. Sections 234 to 238 apply to cases where one person may be dealt with at one trial for more than one offence. Section 239 applies to the trial of more persons than one jointly. The last words of section 239 do not in my opinion mean that section 239 and section 234 are to be read together. I am of opinion that they only refer to sections 221 to 232 inclusive. The charges in the present case were not therefore authorized by law as they relate to distinct offences not committed in the same transaction. It was urged that if this view be taken a new trial need not necessarily be ordered. As I read the decision in the case of *Subrahmanian Aiyar* v. *King-Emperor* (1) there must necessarily be a retrial in the case of Maung Po Mya, who has appealed. I notice however that Maung Tun Lin pleaded guilty and has not appealed and that his case was called for on revision by Mr. Justice Twomey. Our revisional powers under section 439 of the Code of Criminal Procedure are discretionary and in the case of *King-Emperor* v. *Tha Byaw* (2) a full bench of this Court did not set aside a conviction where an accused pleaded guilty and had not personally applied for revision although there was a misjoinder of charges in his case. It will be open to the Assistant Government Advocate to bring this case to the notice of Mr. Justice Twomey when he finally deals with the case of Maung Tun Lin.

I would answer the question referred by saying that the joint trial of Maung Po Mya and Maung Tun Lin in this case for two distinct offences was contrary to the provisions of section 239 of the Code of Criminal Procedure.

*Ormond, J.*—I concur.

(1) (1901) I. L. R. 25 Mad., 61.
(2) (1908) 4 L. B. R., 315.

*Before Mr. Justice Twomey.*

*Criminal Appeal No. 3 of 1914.*

*February 23rd, 1914.*

1. HTAUNG, 2. SWAY TAUNG, 3. CHIN KEE, 4. E. MAUNG, 5. KWAN SHOO, 6. ENG CHOO, 7. AH TAIN, 8. YOO WA, 9. CHIN SWI, 10. AH HON, 11. AH SHU, 12. PHAUNG, 13. PA U, 14. KYIN, 15. MUTU, 16. TAMBI *v.* KING-EMPEROR.

*Alexander*—for appellants.

*Gaunt*—the Assistant Government Advocate for King-Emperor.

*Gambling Act, sections 6 and 7—irregular addition to list of articles—presumption when not affected—" Club " when a " common gaming house".*

Before the presumption referred to in section 7 of the Gambling Act can arise, the provisions of section 103 of the Criminal Procedure Code with regard to searches must have been complied with, but a list of articles found in the course of a search, if properly made, is not necessarily invalidated by subsequent additions.

A " Club " is legally a person and a " Club house " may be a " common gaming house " within the meaning of the Gambling Act.

*Twomey, J.*—In this appeal it is contended that the presumption allowed by section 7, Gambling Act, does not arise as the provisions of section 103 of the Criminal Procedure Code regarding searches were not observed as required by section 6 of Gambling Act. It is also contended that if the presumption does arise it has been rebutted by the defence evidence showing that the place was a club and that the money taken by way of commission from the players "was not spent for the profit or gain of the club but in payment of the regular club expenses."

As regards the first point it is alleged that when the list of property seized was signed by the two "respectable inhabitants" who witnessed the search, the list was not complete. I regard it as established that the list was drawn up at the place of search and signed there by the police officers and the two witnesses. The witness King said at first that he did not sign till he got to the police-station, but he corrected himself afterwards and explained that what he signed at the police-station was not the list of property seized but a security bond. In view of the other witnesses' statements I think this explanation is probably correct and King's statement as to signing the search list at the police-station was a *bonâ fide* mistake.

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There can be no doubt that items 28 and 29 were added to the list at the police-station, that is to say after the witnesses had signed the list. These two entries relate to (1) a sum of Rs. 36-5 found in a locked box and (2) a bunch of keys taken from one of the accused when he reached the police-station. The locked box was already in the list (item 6) though it was not opened till it reached the police-station and the bunch of keys was obtained. The Inspector should not have added the Rs. 36-5-0 and the keys to the already completed list. But I cannot hold that his doing so was a breach of section 103 of the Criminal Procedure Code invalidating the search. The list was already complete and in order when he made these unnecessary entries. It appears also that two empty tin boxes that were taken away by the police were not shown in the list. These boxes had no bearing whatever on the case and it was pure officiousness to bring them away. I cannot regard their omission from the list as a circumstance invalidating the search.

In my opinion there are no sufficient grounds for holding that the provisions of section 103, Criminal Procedure Code, were contravened and I therefore think that the presumption allowed by section 7 of the Gambling Act may properly be made.

The accused produced one witness who said the place was a Club belonging to the "Ong" Chinese clan, that he was the Honorary Secretary, and that the profits of the Gaming carried on at the club are devoted to feasting and to the general purposes of the club. A place may be called a Club and yet may be a "common gaming house" within the Act. It is not proved that the gambling at this Club was confined to members of the Club. Even if the profits of gambling were devoted to Club purposes, the place might still be a "common gaming house" as defined in section 3 of the Act, for the word person in that section includes any body of individuals [Burma General Clauses Act, 1898, section 2 (*44*) *e.g.*, a Club.]

On these grounds I think the convictions should stand. But I can find no justification in the evidence for the imposition of heavier fines on the third, ninth and fourteenth accused than on the other accused convicted under section 11.

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The fines imposed on Chin Kee, Shin Shwe and Kyin are reduced to five rupees each and the balance of the fines paid by these three appellants will be refunded to them. The appeals of the others are dismissed.

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*Before Sir Henry Hartnoll, Officiating Chief Judge and Mr. Justice Ormond.*

*Special Civil 2nd Appeal No.* 169 *of* 1914.

*June* 1*st*, 1914.

MA KYAING *v.* 1. SHWE THIN, 2. KYE DAN, 3. AUNG KIN, minors by their guardian MAUNG KALA.

*Maung Gyi*—for appellant.

*Arbitration award—order refusing to file not a decree—how far appealable—Civil Procedure Code, section 104.*

An order refusing to file an award in an arbitration without the intervention of the Court is not a decree. An appeal lies against that order, but the order of the Appellate Court on appeal is final.

*Hartnoll, Officiating C. J.*—I am of opinion that this appeal does not lie.

Ma Shwe Thin applied under rule 20 of the Second Schedule of the Code of Civil Procedure that an award be filed in Court. The Court refused to file the award and dismissed the application with costs. A decree was then drawn up.

An appeal was then laid to the Divisional Court. It was clearly against the order refusing to file the award, though it asked for the reversal of the judgment and decree of the District Court. The order of the Divisional Court was that the decree of the Lower Court was set aside and that there will be a decree for the plaintiff-appellant for enforcement of the award, as prayed for, the costs of plaintiff-appellant in both Courts being borne by the respondents. A decree was drawn out in accordance with the order.

An appeal was given from the order of the District Court refusing to file the award by section 104 (*1*) (*f*) of the Code of Civil Procedure. That portion of the so-called decree of the District Court which dealt with the refusal to file the award was not a decree as by section 2 (*2*) of the same Code a decree shall not include an adjudication from which an appeal lies as an appeal from an order. The decision arrived at by the

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Divisional Court is not expressed in correct terms. That Court should have ordered the award to be filed and then should have proceeded to pronounce judgment according to the award, and then on the judgment so pronounced a decree should have followed. The present appeal in substance is one against the decision of the Divisional Court that the award was valid and should be enforced. In effect it is an appeal against an order passed in appeal directing an award to be filed.

Such an appeal is forbidden by section 104 (2) of the Code. That portion of the decree of the Divisional Court which concerns the order for the filing of the award clearly comes within the provisions of section 104 (2). It is only this part of the decree that is objected to and it is not alleged that the decree is in excess of or not in accordance with the award.

I would therefore dismiss the appeal.

*Ormond, J.*—I concur.

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## FULL BENCH.

*Criminal Reference No. 91 of 1913.*

*April 6th, 1914.*

*Before Sir Henry Hartnoll, Officiating Chief Judge, Mr. Justice Ormond, Mr. Justice Twomey, Mr. Justice Robinson and Mr. Justice Parlett.*

### PO YWET *v.* KING-EMPEROR.

*Hamlyn*—for appellant.

*McDonnell*—for prosecution.

*Criminal breach of trust—paddy advances—what constitutes a trust—Indian Penal Code, section 405.*

The accused entered into an agreement with the complainant company under which he received Rs. 4,500 by way of advance and undertook to employ the money in the purchase and transport of paddy to it. There were stipulations in the agreement to the effect that he was to hold the money in trust for the company and that the property in the money and the paddy purchased therewith was to remain with the company. These stipulations were however inconsistent with other clauses of the agreement which *inter alia* laid on the accused the responsibility for any loss of either paddy or money, whatever the cause.

*Held*—(Hartnoll, J., dissenting) that there was no real trust and that the accused was not guilty of criminal breach of trust in failing to devote the money to purchase and transport of paddy.

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*Criminal Appeal No.* 921 *of* 1913.

*December 22nd*, 1913.

*Po Seik* v. *King-Emperor*, 6 L.B.R. 62 and *Hock Chong and Company* v. *Tha Ka Do*, 7 L.B.R. 16, referred to.

The following reference was made to a Full Bench by Mr. Justice Parlett.

Nga Po Ywet had been convicted of criminal breach of trust in respect of Rs. 4,500 advanced to him by Joseph Heap & Sons for the purpose of purchasing paddy for them.

At the hearing of the appeal it was urged that the payment of the money to him was not proved. It appears that for some time prior to the 12th March 1913 accused had been supplying paddy to the firm as sub-broker under their broker Maung Maung. The procedure was for the accused to bring consignments of paddy to the mill and received from the firm the price of the same either direct or through Maung Maung and then after deducting the commission of Maung Maung and himself to pay the sellers of the paddy what was due to them. Such paddy is described as "outside paddy." The transactions in it appear to have been all cash transactions. On the 12th March 1913 he entered into the agreement which gave rise to the present case. Under it he was to apply sums supplied to him by the firm in the purchase of paddy, tender the same to the firm who were to pay for or credit him with the price of the same. The firm's manager gave evidence that on the 12th March Rs. 4,000 was handed to the accused under the agreement, and a further Rs. 500 on the 14th March. He was corroborated by a broker Maung Po Hlaing (6 P.W.). Accused's own witness, Hla Baw, also said that he saw the money paid. Accused himself admitted receipt of it, but afterwards said that the amount represented what he at the time owed the firm, and Hla Baw subsequently tried to make out the same. Apart however from the absence of any attempt to prove that he was then indebted to the firm in that sum and of any explanation of why, if he were so indebted, he did not give one acknowledgment for the whole amount, instead of two on different dates, in view of the evidence, I have no doubt that he did receive the sums of Rs. 4,000 and Rs. 500 in cash on the 12th and 14 March respectively. It appears further that on the 12th April accused brought two boat-loads of paddy to the mill and the firm believing that that paddy was purchased with the money ad-

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vanced in the previous month cancelled the two acknowledgments for these sums. It was in reality "outside" paddy and on the 15th April accused came with a man named Po E, the real seller of the paddy, and the price Rs. 3,728 was paid in cash, two new receipts being taken from accused for Rs. 3,000 and Rs. 1,500. It is not clear why credit for Rs. 4,500 was given on the 12th April for a consignment valued three days later at only Rs. 3,728, nor why on the 15th two separate receipts were taken. It is however admitted that such was the case, and that no paddy has been purchased with or supplied against the Rs. 4,500 and that the accused is liable civilly for the money. He states that the amount has been set against heavy losses which he alleges he sustained in his dealings with the firm prior to the 12th March 1913, and that at the time he was prosecuted he was unable to supply paddy for this Rs. 4,500 on account of the Rangoon price being so much lower than that in the districts, but that if market conditions improved later on he might be able to do so. If the Rs. 4,500 was a trust fund the accused was not entitled to use it to recoup himself for losses of his own money. The real defence is that the money was not held by him in trust, but lent to him. This depends upon the legal effect of the agreement of the 12th March which runs as follows :—

*Paddy Brokers' Agreement.*

Agreement made the 12th day of March 1913 between Joseph Heap & Sons, Ltd., hereinafter called "The Company" of the one part and Maung Po Ywet hereinafter called "the Broker" of the other part.

Whereas :

The Broker has represented to the Company that he can purchase for their benefit paddy in the district and has requested the Company to entrust him with advances of money to be made at the discretion of the Company in order that he may make such purchases and whereas the Broker hereby acknowledge that he will receive all such advances as the Company shall make to him and hold the same in Trust for the Company now it is hereby agreed :—

1. The Broker is not the agent of the Company and shall not be at liberty to bind them in any manner whatsoever.

2. The Broker shall employ the monies of the Company in and about the purchase and transport of paddy to the Company's mill at Dawbong.

3. The property in the money and paddy purchased therewith shall be and remain in the Company.

4. The Broker shall immediately upon arrival of the paddy in Rangoon tender the same to the Company at their said mill.

5. The Company shall take delivery of the paddy and at their option either pay for or credit the Broker with the price of the same at the current market of the day prevailing amongst.

The Broker agrees to accept payment for the paddy at the said current market rate whether the same shall be higher or lower than the rate at which he purchased the paddy.

6. The Company shall pay to the Broker (either in cash or by crediting his account with the amount thereof) brokerage at the following rates:—

7. The Broker shall be responsible for the payment of the money or the supply of paddy to the value thereof to the Company and it is hereby expressly agreed that if either the money or the paddy shall be lost by any means (including the Act of God, thieves, or other causes over which the Broker has no control) the Broker shall indemnify the Company against all loss.

8. This agreement shall govern all advances hereafter to be made by the Company to the Broker so that if the Company shall hereafter make further advances to the Broker such further advances shall be subject to this agreement and the trusts hereof and it is hereby also agreed that if the Broker shall at any time obtain paddy with money advanced hereunder and receive the price thereof from the Company in cash he will set apart out of such price a sum equivalent to the amount of the outstandings so used and treat the same as a further advance holding it on the same trusts as the original advance.

It is argued for accused that the terms of the 5th and 7th clauses of the agreement are contradictory of its other terms and are incompatible with accused being a trustee. No doubt if the effect of the agreement as a whole is *not* to create a trust and *is* to transfer the property in the money advanced to the accused, then the mere statements in the document that there

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*is* a trust and that the property *did not* pass to accused, cannot alter its effect. In *Hock Chong & Co.* v. *Tha Ka Do* (1) the agreement specified a time within which the paddy was to be supplied and the approximate quantity to be supplied: in other respects the agreement appears to have been essentially the same as that in the present case, except that here words are added that the money is held in trust and remains the property of the Company. The question whether this addition alters the effect of the agreement is one of importance and I therefore refer for the decision of a Bench the question whether monies advanced to the accused in pursuance of the agreement of the 12th March 1913 set out above were entrusted to him within the meaning of section 405, Indian Penal Code.

Pending the decision of the appeal, accused may be released on Bail in Rs. 5,000 with two sureties.

*The opinion of the Full Bench was as follows :—*

*Hartnoll, Offg. C. J.*—Maung Po Ywet was advanced by Joseph Heap and Sons Rs. 4,500, Rs. 4,000 on the receipt Exhibt D, dated the 12th March 1913 and Rs. 500 on the promissory note Exhibit E, dated the 14th March 1913, to purchase paddy for them. These sums were advanced in pursuance of an agreement he signed on the 12th March 1913 and which is Exhibit A. Subsequently by mistake Exhibits D and E were cancelled, but they were replaced by the receipts, Exhibits B and C, dated the 15th April 1913, for Rs. 3,000 and Rs. 1,500 respectively. The order of reference gives the facts in detail and it is unnecessary to repeat them. The point referred to us for decision is whether the monies advanced to Maung Po Ywet in pursuance of the agreement of the 12th March 1913 were entrusted to him within the meaning of section 405 of the Indian Penal Code. The case is a sequel to the cases of *In re Po Seik* v. *King-Emperor* (2) and *Hock Choung and Company* v. *Tha Ka Do* (1). A new form of agreement has been entered into between the miller and the man who is advanced money for the purchase and supply of paddy—in this instance Maung Po Ywet—and it is urged that in accordance with the terms of it there is an entrustment of the money within the meaning of

(1) 7 L.B.R., 16. | (2) 6 L.B.R., 62.

section 405 of the Indian Penal Code. The essentials of the agreement between the two parties are practically the same as in the previous cases except that in the present agreement the Company binds itself to take delivery of the paddy purchased. The man taking the advance is to be credited for the paddy he supplies according to the rate current on the day of supply; if he has paid for the paddy at a higher rate, he is to bear the loss, but if at a lower rate, he is to enjoy the profit. Also if the money or paddy is lost by the act of God, thieves or other causes over which he has no control he is to bear such loss. *But* the agreement expressly declares that the person to whom the advances are made and who is called the broker holds the same in trust, that the property in the money and paddy purchased therewith shall be and remain in the Company and that the broker shall immediately upon arrival of the paddy in Rangoon tender the same to the Company and that the Company shall take delivery of it and at their option either pay for or credit the broker with its price at the current market rate. The reasons on which my decision was based in the former cases apply generally to the present case. But in this case an express trust is declared. It is stipulated that the property in the money and paddy purchased therewith remain in the Company and the Company bind themselves to take delivery of the paddy. The same agreements arise that such terms of the agreement are inconsistent with those relating to profit and loss. It is urged that, as Maung Po Ywet has to bear all loss as set out in paragraph 7 in the agreement and also loss caused by a fall in market price between the time of his purchase and the time the Company takes over the paddy, he cannot be said to hold the advances and paddy purchased with such in trust—that the mere fact that a trust is declared by the agreement cannot create a trust the other conditions of the agreement being as they are.

It seems to me that the present agreement evidences more than a loan with a condition attached and more than an advance with an undertaking to use it in the purchase of paddy, and that there is an entrustment within the meaning of section 405 of the Indian Penal Code. The money was advanced for a specific purpose and in consequence of confidence reposed in Maung Po Ywet by the Company. He has expressly agreed to hold the

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monies in trust for the purchase of paddy and for no other purpose. It is expressly agreed that the property in the money and paddy purchased therewith is to remain in the Company. The mere facts that, if the money or paddy is stolen or lost otherwise, and if the market value falls between the time of the purchase and the time of supply to the Company, the broker is to bear the loss, do not seem to me to remove the arrangement between the parties from one of entrustment. The equitable interest in the property remains in the Company and the broker has agreed to apply the money or paddy purchased with it for the use and benefit of the Company. The fact that he has contracted to bear any loss that may be incurred in the manner he has does not seem to me to make him any the less a trustee.

It was stated that the first paragraph of the agreement is inconsistent with the rest of it and this would appear to be so as the broker would be the agent of the Company for the purchase of paddy with the money advanced to him for the purpose; but even if it is so inconsistent I do not see that it affects the matter. Irrespective of whether a man is an agent or not he may be a trustee.

I would answer the question referred by saying that in my opinion the monies advanced to Po Ywet in pursuance of the agreement of the 12th March 1913, set out in the order of reference were entrusted to him within the meaning of section 405 of the Indian Penal Code.

*Ormond, J.*—It has been decided by a Full Bench of this Court that a breach of trust cannot be committed in respect of money taken on loan—because the property in the money passes to the borrower. If A takes money from B, on loan or otherwise, upon a false representation of fact, he is guilty of cheating. The representation of fact may be that it is A's intention to buy paddy with the money and sell it to B. If A, at the time of taking the money, had that intention but subsequently abandoned that intention and spent the money in some other way, he would not be guilty of cheating; and he would not be guilty of criminal breach of trust unless the property in the money remained in B. In this case the dealer took the money from the Company for the purpose of using it

in his business in buying paddy and selling it to the Company, in order that he might make as much profit as possible for himself. The Company could not, at will, recover the money from the buyer; because he had the right to retain it in order to use it in the above manner. And they could not recover the paddy bought by the dealer; because they are entitled to receive only so much paddy at their mill in Rangoon the value of which, at the current rate at the time of 'tender' by the dealer, would be equivalent to the amount advanced to the dealer. And any loss of money or paddy falls on the dealer. Thus although there is a term in the contract that the property in the money and paddy purchased therewith shall be and remain in the Company, the usual incidents attaching to property, so far as the Company is concerned, are altogether absent.

The agreement no doubt says that the dealer shall "indemnify" the Company against all loss; thereby implying that the loss of the 'trust' property in the first place falls upon the Company and that the dealer insures the Company against loss. But this is merely an indirect way of saying that the dealer holds the money, and the paddy until delivered at the mill, at his own risk. As pointed out by Mr. Justice Parlett in his reference, this agreement is, in its effect, the same as the agreement which was considered by the Full Bench in *Hock Choung & Co. v. Tha Ka Do* (1). The question whether A entrusted property to B is one which depends upon the actual facts of the case; and not merely upon the legal terms employed by the parties. If the real nature of the transaction is a loan, the fact that the parties in writing call it a trust, or agree that for the purposes of the Indian Penal Code the property in the money shall be deemed to remain in the original owner, or agree that the party receiving the money shall be liable for criminal breach of trust if he applies the money to a purpose other than that agreed upon, would not bring the transaction within the scope of section 405, Indian Penal Code.

The Penal Code cannot be altered by agreement of parties so as to make section 405 applicable to a transaction which is

(1) 7 L. B. R. 16.

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in its real nature a loan. If A receives money from B for certain specified purposes, I do not think the money is 'entrusted' to A within the meaning of section 405 of the Indian Penal Code, if A is to be liable for the money to B in any event. In my opinion the trust (if any) in this case is merely a technical or colourable trust. I would answer the question referred in the negative.

*Twomey, J.*—It seems to me that if a trust arises at all in such cases as this, it can only arise from the relation of the parties to one another as principal and agent. This view is supported by the statement of the learned counsel for the prosecution (at the hearing of the reference) that though the "Broker" is declared in clause 1 of the agreement under consideration not to be the agent of the Company, he should nevertheless be regarded as their agent for the limited purpose of buying paddy. But it is difficult to understand how we can regard the "Broker" as an agent at the moment of expending the money and not as an agent previously when he received and held the money and subsequently when he has the paddy in his possession before delivering it to the Company.

If the money was advanced to the accused as agent of the Company, the Company would retain the beneficial ownership thereof and a case of trust would necessarily arise; and conversely, if the beneficial ownership is shown to have remained in the Company then the accused must be regarded as an agent and as having held the money in trust. The agreement contains express declarations that the money is received in trust and that the property in the money and the paddy purchased therewith shall be and remain in the Company. But these declarations do not conclude the matter. They cannot have effect if the contract contains other terms which are plainly inconsistent with a continuance of the Company's ownership. To begin with I would point to the word "tender" in clause 4 which seems to imply that the paddy is the property of the Broker till it is made over to the Company; the word "tender" would not be appropriate to the case of a man buying paddy as agent of another. This however is a small point and might be regarded as a mere slip in drafting the agreement. It would not be enough by itself to show that the paddy was not

already the property of the milling company. Not so however as regards clauses 5 and 7 which are in my opinion altogether inconsistent with the contention of the Company. Clause 5 provides that they are to pay for the paddy at the rate prevailing (at Rangoon) on the day the Broker delivers it to them (and not the rate at which the Broker bought the paddy). Under clause 7 if the money or paddy is lost from any cause whatever the Broker is to bear the loss. These conditions nullify the effect of the declaration that the property in the money and paddy is to be and remain in the Company. They are consistent only with the interpretation that the beneficial ownership in the money passed to the broker at the time of the advance and that the property in the paddy is with him till he delivers it to the Company. Notwithstanding the express declarations referred to, it is the duty of the Court to examine all the terms of the transaction with the strictness required in a criminal matter and to determine whether it is really a case of "entrusting" money to an agent in the sense of the Penal Code. If it is found that the other terms are inconsistent with such an interpretation or even if there is any reasonable doubt about it the Court is bound to decide that the money was not "entrusted" within the meaning of section 405, Indian Penal Code, and that the property in the money did in fact pass to the Broker. If the property passed, there could be no "criminal breach of trust" for this offence always involves "criminal misappropriation" and a man cannot commit criminal misappropriation of his own property.

The terms of clauses 5 and 7 are incompatible with a view that the Broker was employed as an agent at all. An agent would be required to exercise reasonable diligence but would not be responsible, as he is made responsible in this agreement, for loss in any event. Any paddy that an agent buys would be held by him entirely subject to the directions and control of the principal from the time of purchase, whereas this agreement does not bind the Broker as to his dealings with the paddy except that he shall "tender" it to the Company. He can choose his own time for delivery, can hold up the paddy he has bought and take advantage of a rise in the market before delivering it to the Company. Moreover, if the market rises

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he is not bound to deliver all the paddy he has bought but only the equivalent at the increased market rate of the amount of the advances received from the Company. On the other hand, if the market falls he has to make good the difference out of his own pocket. These incidents are at variance with the notion of agency. The accused in this case was not subjected to the directions and control of the Company. He agreed to buy paddy for them, but the manner and means of performance were left to his discretion except so far as they are specified in the agreement. In these circumstances he must in my opinion be regarded as an independent contractor and not as an agent. The Company cannot have it both ways, that is to say they cannot retain dominion over the money until the Broker expends it, and at the same time enjoy immunity from the ordinary risks and liabilities incidental to the ownership of the money and of the paddy bought with it. The maxim *qui sentit commodum sentire debet et onus* applies to the case.

Not because this agreement contains an express declaration that the Broker is not the agent of the Company, but because it further provides that the money and paddy are to be held entirely at the Broker's risk, and seeing that the Broker is left to conduct his paddy buying business at his own discretion unfettered by the control and direction of the Company, I would decide that the Broker cannot be regarded as the agent of the Company, and that therefore he was not "entrusted" with the money *qua* agent. Nor in my opinion is there any reason to hold that he was "entrusted" with the money otherwise.

On these grounds I would answer the reference in the negative.

*Robinson, J.*—The only apparent change in the facts of this case from those covered by the Full Bench decision in *Hock Chong & Company* v. *Tha Ka Do* (1) is that there is a declaration in the agreement executed that a trust is created and a statement that the property in the money advanced and the paddy purchased therewith remains in the Company. More allegations of this kind cannot in themselves create a trust nor

(1) 7 L. B. R. 16.

create ownership in the money after it has been handed over and in this as in every criminal case it is necessary to weigh all the facts and circumstances and then decide on them as a whole. For the purposes of a criminal charge under section 405, Indian Penal Code, there must be an entrustment of the property or of dominion over property followed by a dishonest misappropriation or conversion, or by a dishonest use or disposal of the property in violation of a legal contract made touching the discharge of such trust.

The entrustment may be "in any manner" but if this money when handed over became the property of the Appellant or if it ceased to be the property of the Company there can have been no entrustment. What then are the facts? I take it to be incontestable that the agreement in this case has been deliberately drafted so as to endeavour to create such a state of facts as will allow of a criminal charge if the money is not expended in purchasing paddy and supplying it to the Company. The difficulty experienced in arriving at such a result is due to the care necessary to avoid rendering the Company liable to third parties owing to the acts of the person receiving the advance. If such person becomes merely the agent of the Company the latter may be liable to outside claims. Hence we find that the first clause declares the "Broker" shall not be at liberty to bind the Company in any manner and that he is not the agent of the Company. If not the agent I fail to see in what capacity he could act while the property in the money still remained in the Company and I understood during the argument that it was urged that he was not the agent in one sense but was in another. In fact Counsel was in a dilemma out of which he could not extricate himself satisfactorily. The agreement provides he is to employ the money only in the purchase of paddy and its transport to the Company's mill; he is to tender it to the Company immediately on its arrival in Rangoon and the Company undertakes to take it over at the market rate current on the day of delivery and the Broker to accept that rate. The Broker is to get brokerage. The "Broker" is to take in addition all profits arising from this arrangement and is also to bear all loss including the loss arising from the act of God, etc., over which he has no control.

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The agreement states the "Broker" is not the agent of the Company. If that is so in my opinion the Company fails in its endeavour to make him criminally liable. But that statement will be of no avail if the result of all the terms and conditions is to create the legal status of principal and agent. If the Company is to remain owner of the money it must be liable for losses arising from a proper expenditure of the money in terms of the agreement and it would be entitled to the profits. Under the agreement the "Broker" must act in all the contracts he makes for the acquisition of paddy as a principal and all the incidents of the contracts fall on him. He approaches the Company and says "I can get you the paddy you want and I will do so if you help me by lending me money". The Company agrees provided he will use the money for this purpose only but expressly stipulates that it undertakes no liabilities and will not claim any profits. If the ownership in the money remains in the Company then the ownership in any paddy acquired vests in the Company; it is merely the money converted into another form. But this is expressly provided against by the provision that the Company is not to be liable to third parties or for loss by the act of God, etc. In my opinion the agreement merely shows that the Company being desirous of getting paddy employs the services of the "Broker" and gives him an advance but it declines to make the Broker its servant or agent. This being so the ownership in the money is transferred to the Broker and no entrustment is created.

Let us suppose the "Broker" duly expends the money in strict accordance with the terms of the agreement but the paddy is then lost by the act of God or owing to thieves through no fault of the "Broker". The Company claims in one clause that the ownership in the paddy lies in it and not in the Broker, yet in another that the Broker must bear the loss and he is to be still liable for the advance. Can the Company be heard to say he is not their agent for the purchase but that the paddy when bought belongs to it and yet again that when it is lost it belonged to the "Broker"?

In my opinion this agreement evidences a loan accompanied by a promise to use the money in a particular way but the

ownership in the money and the paddy bought with it must on a consideration of all the terms of the agreement be held to have vested in the "Broker".

I would therefore answer the reference in the negative.

*Parlett, J.*—The legal aspect of the agreement has been so fully dealt with in the foregoing judgments that I do not think that I can usefully add anything to what has been said, but it is interesting to trace how matters would work out according to the strict terms of the agreement in a simple concrete case.

Supposing there was only one advance to Po Ywet of Rs. 1,000 and that he found he could buy paddy in the district at such a rate that delivered at the mill it would cost him Rs. 90 per 100 baskets and that he expended the whole Rs. 1,000 in its purchase and transport; he would thus have approximately 1,111 baskets to deliver. If the market rate in Rangoon on the date of delivery was Rs. 100 per 100 baskets, the value of the paddy would be Rs. 1,111. By paragraph 5 of the agreement the Company have expressly reserved to themselves the option of paying for or crediting the broker with the price of the paddy tendered. They could therefore insist upon forcing Rs. 1,111 upon Po Ywet and compelling him under paragraph 8 to hold Rs. 1,000 of it on trust for them; the agreement giving him no power to terminate the trust he would be driven to a suit if he wished to do so; meanwhile he would be responsible for the whole amount though he deposited it in a Bank and that Bank failed. Nay, if he so deposited it at interest he might be prosecuted criminally for using the money otherwise than in and about the purchase and transport of paddy to the Company's mill. On the other hand the company might, if they wished, merely credit him with Rs. 1,111 wiping out the Rs. 1,000 advance and showing a balance in his favour of Rs. 111 but paying him nothing. A credit entry in his favour in the books of Joseph Heap & Sons would be of little use to Po Ywet for the purpose of meeting his current expenses. Only if the Company deigned to credit his account with Rs. 1,000 and so close it, and pay him Rs. 111 in cash, could the trust be terminated and could Po Ywet get any real profit out of the transaction at all. This shows how one-sided the agreement is and how completely designed merely to protect the

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Company from loss under all circumstances and in any event.

Again suppose in the case suggested above Po Ywet spent Rs. 900 of the Rs. 1,000 in buying and delivering 1,000 baskets of paddy, the Rangoon price on the date of delivery being Rs. 100 per 100 baskets, and that the Company credited him with Rs. 1,000. According to the agreement the Rs. 100 left in Po Ywet's hands always had been and would still remain the property of the Company and they would be under no obligation to transfer it to him; on the contrary he would be bound to expend it in the purchase and transport of paddy, and if he used it otherwise would be liable to be prosecuted. But would any Criminal Court be found to convict if he put it in his pocket as representing his profit over the transaction? Surely not. Once however it is conceded that if the market conditions sufficiently favoured him Po Ywet was not bound to expend on paddy the whole of the amount advanced to him, it is clear that his position is merely that of a trader operating on his own account, and the fiction that the property in the money remains in the Company and that he is a trustee in respect of it is at once exploded.

It cannot be gainsaid that a trustee may be remunerated for the services which he performs, but no case has been quoted in which the remuneration even remotely resembles that purporting to be offered in this case; and what does it amount to? Merely the chance of making a profit in the ordinary course of trading, with, it is true, the additional advantage of an assured market for the goods up to a limited quantity at the price prevailing on the date of delivery. I consider that this cannot be called remuneration for carrying out duties as a trustee. Po Ywet takes merely the ordinary risks of profit or loss incidental to trading incurred by a man operating on his own account, who has secured a contract to place a certain quantity of his goods at certain prices. Whether he makes a profit or a loss the agreement provides that the Company shall incur no loss in any event. The fact that they can under no circumstances bear the loss of the money implies I think that they are not the owners of it.

I would answer the question referred in the negative.

*Before Mr. Justice Ormond and Mr. Justice Twomey.*

*Civil Miscellaneous Appeal No. 8 of 1914.*

*June 1st, 1914.*

## (1) E ME, (2) MA THI v. MA E.

*Agabeg*—for appellants.

*Ba Dun*—for respondent.

*Administrator—sale by, without consent of court—who is person interested—Probate and Administration Act (V of 1881), section 90 (4).*

The property referred to in sub-section (4) of section 90 of the Probate and Administration Act is immovable property, and a creditor to the estate of a deceased person is not interested in his property within the meaning of that sub-section unless he has a charge upon it.

Ma E Me as administratrix to the estate of her deceased husband had incurred certain costs in litigation with Ma E.

Ma E attached certain immovable property as being part of the estate of the deceased; but Ma Thi obtained the removal of that attachment on the ground that she had purchased the property from the administratrix, Ma E Me. Ma E then applied to set aside the sale by Ma E Me to Ma Thi as having been made by the administratrix without the leave of the Court. The District Judge granted the application and set aside the sale and he held that by setting aside the sale the order removing the attachment was *ipso facto* set aside.

Ma E Me and Ma Thi now appeal. The first question is whether Ma E as a creditor of the estate is a person "interested in the property" within the meaning of section 90, sub-section (4), of the Probate and Administration Act. That provision relates to the alienation of immovable property and therefore, the words "interested in the property" must be "interested in the immoveable property disposed of". Now a creditor has no interest in the immovable property of his deceased debtor unless he has a charge on that property. Under the provisions of section 69 of the Probate and Administration Act and section 250 of the Succession Act, under which the District Judge may issue citations calling upon all persons claiming to have any interest in the estate of the deceased to come and see the proceedings before the grant of probate or letters-of-administration, a creditor has no *locus standi* to come in and object to a grant of probate or letters unless he objects to the grant on the ground that the Will is set up in fraud of the

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creditors. In this case the creditor does not allege that the sale was made in fraud of the creditors.

We think the creditor Ma E had no *locus standi* to have the sale set aside under section 90. Even if the sale by the administratrix had been properly set aside by the Court under section 90 the Court had no power to set aside the order of the Township Court removing Ma Thi's attachment. The sale by the administratrix to Ma Thi would be good until it was set aside and it was therefore good when the Township Court ordered the removal of Ma E's attachment. If the order of the District Court setting aside the sale under section 90 had been correct, it would still have been necessary for the creditor to make a fresh application for the attachment of the property.

We allow the appeal and set aside the order of the District Court with costs, three gold mohurs.

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*Civil 2nd Appeal No.* 100 *of* 1913.

*July 17th,* 1914.

*Before Mr. Justice Twomey.*

1. HLA DUN, 2. MYA YIN, 3. MAUNG MAUNG (minors under their natural guardian and mother MA HLA DUN, 1st appellant, heirs and legal representatives of MAUNG PU, deceased) *v.* 1. M. L. R. M. CHETTY FIRM, by their duly constituted agent and attorney CHINA TAMBI PILLAY, 2. PO OH, 3. SO ME, 4. BA CHO.

*Clifton*—for appellants.
*Chari*—for 1st respondent.
*Mya Bu*—for 2nd to 4th respondents.

*Jurisdiction of Civil Court—claim as to ownership of crops—Land and Revenue Act, sections 55 and 56.*

A claim to the ownership of crops is not the same thing as a claim to the use or enjoyment of the land on which the crops are grown.

A Civil Court may inquire as to possession incidentally and collaterally and for the purpose of deciding who is entitled to the crop and in so doing does not exercise jurisdiction as to a dispute "as to the use or enjoyment of land" within the meaning of section 56 of the Lower Burma Land and Revenue Act.

The plaintiff-appellant Maung Pu sued for a declaration of title to the paddy crop reaped on certain land which he worked in the rains of 1911. The defendant-respondent (4) Maung Ba Cho was in possession of the land the previous season, but as he failed to pay the land revenue for

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that agricultural year the land (in respect of which landholder's rights had not been attained) was resumed by Government, and the village headman afterwards allotted it for cultivation to Maung Pu in May. Maung Pu's case is that he thereupon ploughed the land and sowed paddy broadcast and that the crop belonged to him. But after the land had been resumed Ba Cho went and paid up the revenue arrears and the order of resumption was withdrawn by the Deputy Commissioner who was apparently not aware that the land had in the meantime been allotted to a fresh occupier, Maung Pu. Ba Cho went to the land and built a hut on it during the rains and claims to have ploughed it and sown paddy after Maung Pu's ploughing. In the course of the rainy season of 1911 the defendant-respondent (1), a Chetty firm, in one case, and defendants-respondents (2) and (3) in another case obtained money decrees against Ba Cho, and when the crop on the land came to maturity these decree-holders attached the crop in execution as if it belonged to Ba Cho. The crop was harvested and sold under the orders of the Civil Court and the sale proceeds are now in deposit.

In the Subdivisional Court Maung Pu's suit for a declaration of title was unsuccessful. Maung Pu and Ba Cho each produced evidence as to the working of the land in the 1911 rains. The Subdivisional Judge appears to have based his decision less on the evidence as to ploughing and sowing than on the fact, which he held proved, that "Ba Cho is the owner of the land in question or is entitled to possession".

Maung Pu appealed to the Divisional Court where it was held that though Maung Pu had ploughed the land, and sown the crop, the Civil Courts are debarred from granting him a declaratory decree because of the provisions of the Land and Revenue Act excluding the jurisdiction of the Civil Courts. The learned Judge held that "a claim to the title of paddy produced on such land" (*i.e.*, land in respect of which landholder's rights have not been attained) "is a claim to the use and enjoyment of the land" as contemplated in section 55(*b*), Land and Revenue Act. The Judge goes on to say:

> "Were I to decide to the contrary effect it would mean that I decided that, although Ba Cho was allowed to pay

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the revenue for the land for 1910-11 and therefore according to ordinary usage recognized as the possessor as against other individuals by the Deputy Commissioner, Maung Pu should be recognized as the possessor for 1911-12".

I am unable to concur in these views. A claim to the ownership of crops is not the same thing as a claim to the use or enjoyment of the land on which the crops are grown. It is a claim to the use or enjoyment of something yielded by the land. If the use or enjoyment of the land includes the use or enjoyment of what the land yields, then the jurisdiction of the Civil Courts would be ousted even when the crop has been harvested, and the grain transported to another locality, and such a result would be manifestly absurd. It might be argued that the jurisdiction of the Civil Court is ousted at any rate as long as the crops are standing. But in my opinion even this would involve an unjustifiable extension of the words "use or enjoyment of such lands" in section 55. For "standing crops" are moveable property under the Code of Civil Procedure, and are liable to attachment under section 60. The person who grows the crop may be a mere licensee with no permanent heritable and transferable rights of use or occupancy and the land is in that case not liable to attachment under section 60. But he has complete disposing power over the crop which he has grown, and may exercise this power even before the crop is reaped. The standing crop being liable to attachment by the Civil Courts in execution I think it follows of necessity that the Civil Courts may exercise their ordinary powers of determining claims and objections in respect of the attachment. It is objected by counsel for the respondents that a suit for a declaration of title to the crops may involve as this does an enquiry as to who was in lawful possession of the land when the crop was planted or sown, and that the Civil Courts are prohibited from making such an enquiry by section 56, Land and Revenue Act. But section 56 merely lays down that no Civil Court shall "exercise jurisdiction as to" (*inter alia*) "disputes as to the use or enjoyment of such lands". A Court does not exercise jurisdiction in such a dispute by enquiring as to possession

incidentally and collaterally and only for the purpose of deciding who is entitled to the crop. To exercise jurisdiction in a dispute means to adjudicate and determine it. The Civil Court may have to form an opinion as to who was in lawful possession of the land as a relevant fact in determining the rightful ownership of the crop, but that is not exercising jurisdiction in respect of disputed possession.

Turning to the evidence in this case I think there can be no doubt that Maung Pu was in lawful possession under the permission given to him by the village headman, and that the land was ploughed and the crop sown by Maung Pu, as indeed the Divisional Judge has found. It was not till the 20th June that the orders for resumption of the land were cancelled and Maung Pu had then been in possession under the village headman's permit for a month. During that time he worked the land with four pairs of bullocks and four labourers. There is no reason to distrust the evidence of the neighbouring cultivators, Ko Maung and Tun E, on this point, and it is corroborated by the evidence of Maung Pu's coolies, one of whom is related to Ba Cho. Ba Cho's witnesses, Tun Aung and Tun Baw, are related to him; Parayachi is an inaccurate witness who is unable to say definitely whether Ba Cho ploughed or sowed; Ko Tun gives definite evidence in favour of Ba Cho but his cross-examination shows that he is at enmity with Maung Pu's father-in-law. The probabilities and the weight of evidence are both in favour of Maung Pu.

I therefore set aside the decrees of the Lower Courts and grant a decree to the plaintiff as prayed with costs against the defendants-respondents in all Courts. The advocates fee in this Court is fixed at 5 gold mohurs.

*Criminal Reference No. 2 of* 1914.

*April 8th,* 1914.

*Before Sir Henry Hartnoll, Officiating Chief Judge, and Mr. Justice Ormond.*

## MYA GYI *v.* PO SHWE.

*J. R. Das*—for applicant.

*Contract—construction of—hire and purchase agreement—bailor and bailee—criminal breach of trust.*

A gave possession of a sewing machine to **B** on the latter's paying Rs. 15 down and executing an agreement to pay Rs. 10 a month, so long as he retained possession of the machine. When the sums paid aggregated Rs. 120, the machine was to become **B**'s property. Meanwhile **B** could terminate the agreement at any time by returning the machine in good order, but was bound not to sell or pledge the machine. **A** prosecuted **B** for criminal breach of trust alleging that he had sold the machine in contravention of the agreement.

*Held*,—that though the agreement constituted a standing offer to sell by **A**, there was no agreement to buy by **B**, and that **B**, being in the position of a bailee, had been entrusted with the machine within the meaning of section 405 of the Indian Penal Code.

*Singer Manufacturing Company* v. *Elahi Khan*, 2 U. B. R. (1892-96), 291; *Musa Mia* v. *M. Dorabji*, 5 L. B. R., 201, dissented from. *Helby* v. *Matthews* (1895), A. C., 471; *Gopal Tukaram* v. *Sorabji Nusserwanji*, (1904), 6 Bom: L. R., 871, followed.

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

*Criminal Revision No.* 288B *of* 1913.

*January 29th,* 1914.

The facts alleged in this case are that on the 26th November 1912 respondent obtained possession of a sewing machine from the complainant, an agent of the Singer Manufacturing Company, upon payment of Rs. 15 down, and executed an agreement to pay Rs. 10 per month every month in advance as rent, so long as he retained the machine, on condition that when the payments so made by him aggregated Rs. 120, the machine was to become his absolute property. He could however at any previous time terminate the agreement by returning the machine in good order: meanwhile, until he so returned it or until he had completed payments to the amount of Rs. 120, he was not to sell or pledge the machine. He was to keep it in his own custody at a place named in the agreement and was not to remove it thence without the previous consent in writing of the Company. On the 5th January 1913 respondent paid Rs. 10 but it is alleged that he has never paid any more. On the 1st May 1913 he sold the machine for Rs. 50 to Maung Kyaw Din and Ma Hnin Shwe, to whose village it was removed. Respon-

dent was prosecuted under section 420, Indian Penal Code, and discharged. It is now sought to have further enquiry made into the case against him on the ground that the facts alleged disclosed the offence of criminal breach of trust.

The Magistrate in discharging the respondent quoted long extracts from the judgment of this Court in *Musa Mia* v. *M. Dorabjee* (1) and based his order on the decision therein without however expressly referring to that ruling. The agreement in that case was substantially the same as that in the present case, and it was held to be simply an agreement to sell and buy a sewing machine for a price named, by a payment down and by monthly instalments afterwards. In that view I think it would be a contract for sale of ascertained goods where part of the price was paid and the goods were delivered. Accordingly the property in the goods would pass to the respondent under section 78 of the Contract Act, and if he was also the beneficial owner of the goods, he would not be guilty of criminal breach of trust had he sold it. The decision was come to after a consideration of the Upper Burma case of the *Singer Manufacturing Company* v. *Elahi Khan* (2) and the English case of *Helby* v. *Matthews* (3). The Upper Burma case was decided very soon after the English case which is dated 9th May 1894. But a year later the English decision was reversed by the House of Lords (4), which fact does not appear to have been brought to the notice of this Court at the hearing of the case referred to above. The agreement in *Helby* v. *Matthews* appears to be essentially similar to that involved in the present case, and had the interpretation put upon it by the House of Lords been before this Court, I think it probable that a different finding as to the full meaning and effect of the agreement would have been come to. In *Gopal Tukaram* v. *Sorabji Nusserwanji* (5), the Bombay High Court held that a similar agreement was one for hire and did not become one for purchase, until the specified conditions were fulfilled. Though served with notice, the respondent has not appeared or instructed Counsel to argue the matter. In view of the importance of

(1) 5 L. B. R., 201. (2) 2 U. B. R. (1892-96), 291.
(3) (1894), L. R. 2 Q. B. D., 262. (4) (1895), A. C., 471.
(5) (1904), 6 Bom. L. R., 871.

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the question involved and of the decision of the Bombay High Court, I think the question of the meaning and effect of the agreement entered into in this case should be reconsidered by a Bench of this Court and I refer it accordingly.

*The opinion of the Bench was as follows:—*

*Harinoll, Offg. C.J.*—The facts have been set out by Mr. Justice Parlett and it is unnecessary to repeat them. The question is what is the true meaning of the contract entered into by the two parties. The contract entered into by Maung Po Shwe is not essentially different to that discussed in the case of *Helby* v. *Matthews* (6), and the same considerations that governed the decision in that case must govern the decision in the present case. It was held in that case that upon the true construction of the agreement the hirer was under no legal obligation to buy, but had an option either to return the piano or to become its owner by payment in full. Lord Watson said: "In order to constitute an agreement for sale and purchase there must be two parties who are mutually bound by it. From a legal point of view the appellant was in exactly the same position as if he had made an offer to sell on certain terms and had undertaken to keep it open for a definite period. Until acceptance by the person to whom the offer is made, there can be no contract to buy. So long as the agreement stood unaltered there could in this case be no contract by Brewster until he had complied with the term of the option given him and had duly made the thirty-six monthly payments which it prescribes as the condition of his becoming owner of the piano.....whilst in popular language the appellant's obligation might be described as an agreement to sell, it is in law nothing more than a binding offer to sell. There can, in such a case, be no agreement to buy, within the meaning of the Act of 1889, until the purchaser has exercised the option given him in terms of the agreement." So in the present case though there was a binding offer to sell by the Singer Manufacturing Company, through its agent, there was no agreement to buy by Maung Po Shwe until he had exercised the option given him by the agreement. He could terminate the agreement before pay-

(6 (1895); A. C., 471.

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ing the Rs. 120 by instalments by returning the machine. The agreement being construed in this manner there was no agreement to buy and consequently no sale within the meaning of section 78 of the Contract Act. The property in the machine therefore remained with the company and the possession of Maung Po Shwe was merely that of a bailee and he would be entrusted with the machine within the meaning of section 405 of the Indian Penal Code. The Magistrate in his order of discharge held that for breach of the agreement the company would only be entitled to damages in the Civil Court.

In the case of *Musa Mia* v. *Dorabjee* the House of Lords' case was not brought to my notice, but only the case between the same parties as it was decided by the Court of Appeal. The question in *Musa Mia* v. *Dorabjee* was the amount recoverable for breach of the contract.

I would direct the District Magistrate, Bassein, by himself or any of the Magistrates subordinate to him to make further inquiry into this case with the object of deciding whether Maung Po Shwe is or is not guilty of an offence punishable under section 406 of the Indian Penal Code, and of punishing him for such offence if it be found that he has committed it.

*Ormond, J.*—I concur.

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*Before Sir Henry Hartnoll, Offg. Chief Judge, and Mr. Justice Twomey.*

*Special Civil 2nd Appeal No.* 251 *of* 1912.

*January 5th,* 1914.

1 RATHNA PILLE, 2. MA MYIT, *v.* N. P. FIRM by its Agent SIVARAMAN CHETTY.

*Wiltshire*—for appellants (defendants).

*Palit*—for respondent (plaintiff).

*Marriage—Hindu man and Burmese Buddhist woman—mortgage of joint property by the man invalid as against the woman.*

The plaintiff-respondents sued the defendant-appellants on a registered mortgage deed. The defendant-appellants cohabited together as husband and wife, but were not legally married. It was not proved that Ma Myit had executed the deed. It was alleged however that as Rathna Pille admitted having told Ma Myit of the mortgage he had made and she entered no protest to the plaintiff-respondents, she had acquiesced in the mortgage.

*Held*,—that mere submission to an act, when complete, is altogether different from acquiescence in an act, still in progress, and that the only

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relief to which plaintiffs were entitled was a simple money decree against Rathna Pille.

*Hartnoll, Offg. C. J.*—The respondent firm sued appellants to recover Rs. 3,050 alleged to be due on a registered mortgage dated the 16th January 1905. The deed was only signed by Rathna Pille, but it was stated that Ma Myit signed as a witness as she was unable to go to the Registration office. Rathna Pille admitted execution of the deed but pleaded that he had paid Rs. 1,500 of the principal and all interest due up to the date of payment of the principal Rs. 1,500, Ma Myit denied knowledge of the document and denied that she signed it. Rathna Pille and Ma Myit are not husband and wife but they cohabited together. The District Court found that Ma Myit did attest the document "and was aware of it physically and by the document being registered constructively." He said that though both defendants did not live in wedlock yet they considered themselves partners in life as well as business, as in the case of a Burmese family, that they worked as partners and had a joint interest in business to carry out which the money was borrowed. So he considered that the whole of the property comprised in the mortgage deed should be covered by the mortgage decree. He found the alleged payment of Rs. 1,500 not proved. He gave a mortgage decree for Rs. 3,050, costs and further interest against both defendants.

They appealed to the Divisional Court, which found that Ma Myit did not attest the mortgage deed, and that therefore it was of no use to prove a mortgage as it was not proved to be attested by two witnesses. The Divisional Judge found the alleged payment of Rs. 1,500 not proved, and also that Ma Myit has no right to say that Rathna Pille had no right to mortgage her properties as the latter admitted that he had told Ma Myit her properties were mortgaged and there was nothing to show that she had made any protest to the respondent firm. He changed the decree into a simple money decree for Rs. 3,050 plus costs in the District Court. Rathna Pille and Ma Myit now appeal to this Court.

The first ground that, the instrument being held not to be a mortgage deed, the claim should have been dismissed as barred by limitation, was abandoned at the hearing.

As regards the second ground the first point for consideration is whether it is proved Ma Myit attested the deed. Maung Shwe Tha the writer of it will not swear that she did. The copy of it in the registration office does not show her signature. The copy filed on the record shows that the copy in the registration office was not only copied from, but compared with, the original. It is certainly not proved that Ma Myit signed the deed. It cannot therefore take effect as a mortgage. Ma Myit cannot be bound by it on the ground that she signed as a witness. The ground given by the District Court for binding her namely that she and Rathna Pille should be regarded as a Burmese Buddhist husband and wife is equally untenable. The tie of marriage did not exist between them. They could separate at will and there was no binding contract between them. They did not enjoy the advantages of marriage nor were they bound by the obligations of marriage. The ground given by the Divisional Court for binding Ma Myit is also untenable. It was that she acquiesced after the deed was executed by Rathna Pille. Mere acquiescence in this manner does not create an estoppel. It is not shown that by any deed or omission of hers she intentionally caused the appellant firm to believe that she had authorized Rathna Pille to mortgage her property, and so to accept a mortgage by him of her interest in the property. There is a great difference between acquiescence in an act, which is still in progress and mere submission to it when it has been completed. In this last case acquiescence cannot change the past. It was urged that there is evidence to show that both appellants took part in the negotiations for a compromise—that they both agreed to pay Rs. 1,000. Even if this evidence were true it is not in my opinion conduct that should bind Ma Myit. She may merely have wished to save litigation for herself and Rathna Pille. In my judgment it is not shown that Ma Myit is bound by Rathna Pille's action in mortgaging her interest in the properties.

Lastly it was urged in the fifth ground of appeal that Rathna Pille has proved payment of Rs. 1,500. There are two concurrent findings of fact against Rathna Pille and having read the evidence there is no ground whatsoever for

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differing from those findings. This ground was not pressed at the hearing.

There is the fifth cross-objection that remains to be dealt with. There is no good reason for not allowing the respondent firm interest on the principal of the loan against Rathna Pille.

I would alter the decree passed by the Divisional Court and instead thereof give the respondent firm a money decree against Rathna Pille alone for Rs. 3,050 with interest on the principal Rs. 2,000 at the contract rate from the date of institution of the suit to date of decree and thereafter on the aggregate at 6 per cent. per annum to date of realization.

As regards costs appellants had one advocate in all three Courts. In the District Court I would give the respondent firm their costs. In the Divisional and this Court I would make each party pay their own costs.

*Twomey, J.*—I concur.

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*Civil Miscellaneous Appeal No. 79 of 1913.*

*January 13th, 1914.*

*Before Sir Henry Hartnoll, Offg. Chief Judge, and Mr. Justice Twomey.*

U GA ZAN *v.* HARI PRU.

*Lambert*—for appellant (defendant).

*McDonnell*—for respondent (plaintiff).

*Marriage—agreement in restraint of—Contract Act, section 26, applicable to second or subsequent marriage.*

Any agreement in restraint of marriage is void, and it does not matter whether the marriage restrained is a first or a subsequent marriage. Nor does it matter that the person whose marriage is restrained is not himself a party to the agreement.

*Hartnoll, Offg. C. J.*—Hari Pru married his niece Mi Ah Win to appellant's son Tha Do Aung. Hari Pru says that when the marriage took place it was mutually agreed as follows: "that the plaintiff would send the said Tha Do Aung either to Rangoon or Calcutta, whichever place he liked to go to, for education and for this the plaintiff would pay all necessary expenses and the defendant on his part promised to repay the plaintiff all the money that the plaintiff would spend on the education of his son the said Tha Do Aung if the latter in the

life-time of his wife the said Mi Ah Win married again any other woman."

The question to be decided in this appeal is whether, if there was such an agreement, it is not void under section 26 of the Contract Act as being an agreement in restraint of marriage.

Respondent's Counsel argues that the section should not be held to apply to a person married already. I am unable to agree. When it was enacted, the legislature knew that polygamy was practised by certain races in India, and yet the section is perfectly general in its terms. There is nothing in it to restrain its operations to the case of first marriages only.

It was then urged that there is a difference between legal and moral restraint—that in the present case Tha Do Aung did not bind himself not to marry again, and that, if he did not marry another woman owing to the expense entailed on his father by virtue of this agreement, there would only be a vague restraint on account of paternal affection.

It seems to me that the agreement, if it was made, comes within the meaning of the section. The intention was clearly to burden Maung Tha Do Aung's father with considerable expense, if he married again during Mi Ah Win's life-time, and this, if he was a dutiful son with a reasonable sense of duty and the fitness of things, would naturally exercise a restraining influence on him if he thought of marrying another woman. Not only would his own sense of what was right restrain him; but his father and relations would have an extra motive for endeavouring to prevent any other marriage. It was in my opinion clearly an agreement in restraint of marriage.

I would allow the appeal, set aside the decree of the Divisional Court and dismiss the suit, awarding appellant costs in all Courts.

*Twomey, J.*—I concur.

*Criminal Reference No. 84 of 1913, February 2nd, 1914.*

*Before Sir Henry Hartnoll, Offg. Chief Judge, and Mr. Justice Ormond.*

## SEENA M. HANIFF AND COMPANY, BY ITS MANAGING PARTNER S. C. GHOSH, *v.* LIPTONS LIMITED, BY ITS DULY AUTHORIZED AGENT W. CUFFE.

*Dawson*—for Seena M. Haniff and Company.
*McDonnell*—for Liptons, Limited.
*Eggar*—Assistant Government Advocate for King Emperor.

*Corporations—liable to criminal prosecution—doctrine of* mens rea *as applied to—interpretation of statutes—" person " Indian Penal Code, sections 482 and 486.*

The appellants prosecuted Liptons, Limited, for an offence under section 482 or 486 of the Indian Penal Code in the Court of the District Magistrate, Rangoon. The District Magistrate, holding that a corporation could not be prosecuted under either of those sections discharged the accused. Twomey J. before whom the case came on revision, whilst satisfied that a corporation was under English statutes liable to criminal prosecution, was of opinion that the use of the word " whoever " in the sections above mentioned precluded their application in India to a legal person, such as a limited Company, but in view of the importance of the point referred to a Bench, the question—

Can a body corporate be lawfully prosecuted and on conviction punished for an offence under section 482 or section 486, Indian Penal Code ?

After a consideration of the applicability of the doctrine of *mens rea* to cases in which corporations are the accused, and of the necessity for interpreting ambiguous points in statutes with reference (*a*) to the cause of the statute being made and (*b*) to that statute as a whole and to other statutes bearing on the same subject-matter, the Bench (composed of the Officiating Chief Judge and Ormond J.) differing from Twomey J. answered the question in the affirmative.

(1) Vol. 8, p. 391, Lord Halsbury's Laws of England ; see also Archbold's Criminal Pleadings, 24th Edn., p. 7 ;
(2) Archbold op. cit., p. 21 ;
(3) Maxwell's Interpretation of Statutes, 4th Edn., 153 ;
(4) *Starey* v. *The Chilworth Gunpowder Company, Limited* (1890) 24 Q. B. D., 90 ;
(5) (1900) 2 Q. B. D., 528 ;
(6) *Kirshenboim* v. *Salmon and Gluckstein, Limited* (1898) 2 Q. B. D., 19 ;
(7) *Coppen* v. *Moore* (1898) 2 Q. B. D., 306 ;
(8) Maxwell's Interpretation of Statutes, 159 ;
(9) *Christie, Manson and Wood* v. *Cooper* (1900) 2 Q. B. D., 522 ;
(10) *Pearks, Gunstone and Tee, Limited* v. *Ward* : *Hennen* v. *Southern Countries Diaries Company, Limited* (1902) 2 K. B. D., 1 at *page.* 7 ;
(11) Whitley Stokes, Anglo-Indian Code ;

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(12) *Canada Sugar Refining Company, Limited* v. *The Queen* (1898) A. C., 735 at p. 741
referred to.

The following reference was made by Mr. Justice Twomey under section 11 of the Lower Burma Courts Act.

The complaint was of an offence under section 482, Indian Penal Code (using a false trade property mark) but the Magistrate in his order of discharge refers to it as a complaint under section 486 (selling or possessing goods with a counterfeit trade or property mark). This discrepancy is however immaterial, for the same question of law arises in both cases namely whether a limited Company is liable to prosecution for the offence. The District Magistrate decided that it is not.

No Indian cases bearing on the question have been cited. But there are many English cases showing that though a corporation aggregate cannot be guilty in ordinary cases of a criminal offence it may be indicted for libel or for nuisance and wherever a duty is imposed by statute in such a way that a breach of the duty amounts to a disobedience of the law, then, if there is nothing in the statute either expressly or impliedly to the contrary, a breach of the statute is an offence for which a corporation may be indicted (1). It has also been held that it is impossible now to appiy the maxim as to *mens rea* generally to all statutes and it is necessary to look at the object and terms of each Act to see whether and how far knowledge or a particular intent is of the essence of the offence created (2). As pointed out in Maxwell's work on the Interpretation of Statutes (3) there is now a large body of Municipal law which has been framed in such terms as to make an act criminal without any *mens rea*.

Sections 482 and 486, Indian Penal Code, are based upon section 2 of the English Merchandise Marks Act, 1887, and section 486 follows closely the wording of section 2, sub-section (2). In neither case is it necessary for the prosecution to establish *mens rea* but in both cases *mens rea* is involved to the extent that the accused can rebut the charge against him by proving

(1) Vol. 8, p. 391. Lord Halsbury's Laws of England. See also Archbold's Criminal Pleading, 24th Edn., p. 7;
(2) Cases given in Archbold op. cit., p. 21;
(3) 4th Edition, page 153.

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that he acted "without intent to defraud" [section 2(1) English Statute, and section 482, Penal Code] or that he acted "innocently" [section 2(2) English Act and section 486, Penal Code]. With reference to the word "defraud" in the English Statute it has been held in *Starey v. The Chilworth Gunpowder Company, Limited* (1) that it is not used in the sense of putting off a bad article on a customer in order to get money unfairly. "The Act is directed against the abuse of trade marks and the putting off on a purchaser of, not a bad article, but of an article other than that which he intends to purchase and believes that he is purchasing". Also as regards the word "innocently" it has been decided that the innocence contemplated by the Act is merely innocence of an intention to infringe that Act of Parliament (2).

In *Starey* v. *The Chilworth Gunpowder Company, Limited* (1), the Company was held guilty of the offence of applying a false trade description to certain gunpowder supplied by them under a contract and it was held that the Company acted with intent to defraud within the meaning of section 2(1). It was not contended in that case that it would be impossible for a body corporate to prove such a defence as absence of fraudulent intent and the learned Judges (Coleridge L. C. J. and Mathew J.) apparently saw no such objection to the prosecution.

In another case *Kirshenboim* v. *Salmon and Gluckstein, Limited* (3) Salmon and Gluckstein were found guilty of an offence under section 2(2) in having sold goods under a false trade description. They sold, as "Guaranteed hand-made", cigarettes which were in fact machine-made. The Court consisting of five Judges (Lord Russell L. C. J. presiding) found that the Company had acted deliberately and not "innocently".

In the same year in the case of *Coppen* v. *Moore* (4) the construction of the Merchandise Marks Act was further considered as regards the criminal liability of a master for acts done by his servants in contravention of the Act when such acts

(1) (1890) 24 Q. B. D., 90;
(2) Per Channel J. in (1900) 2 Q. B. D., 528;
(3) (1898) 2 Q. B. D., 19;
(4) (1898) 2 Q. B. D., 306.

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were done by the servants within the scope or in the course of their employment. A Bench of six Judges (Lord Russell L. C. J. presiding) held that it was clearly the intention of the legislature to make the master criminally liable for such acts unless he was able to rebut the *prima facie* presumption of guilt by one or other of the methods pointed out in the Act. The Lord Chief Justice said: " We conceive the effect of the Act to be to make the master or principal liable criminally (as he is already by law, civilly) for the acts of his agents and servants in all cases within the sections with which we are dealing, where the conduct constituting the offence was pursued by such servants and agents within the scope or in the course of their employment, subject to this: that the master or principal may be relieved from criminal responsibility where he can prove that he acted in good faith and had done all that it was reasonably possible to do to prevent the commission by his agents and servants of offences against the Act.

Reading the judgment in *Coppen* v. *Moore* (1) with the judgment in the case of *Salmon and Gluckstein* (2) it appears to me that a limited liability Company is on the same footing as any other master or principal and can be held liable to the same extent for the acts of its agents and servant in contravention of the English Merchandise Marks Act. The decision in *Coppen* v. *Moore* (1) is based on the view that having regard to the language, scope, and objects of the Acts, the legislature intended to fix criminal responsibility upon the master for acts done by his servants in the course of their employment, although such acts were not authorized, and might have been expressly forbidden (3).

As *mens rea* a particular intent or state of mind is not of the essence of the offence there is no reason why a corporation should not be prosecuted like an individual master or principal. By way of defence, it is open to the corporation as it is to the individual master to prove good faith (*i.e.*, the exercise of due care and attention) and that all possible steps have been taken by the corporation to prevent breaches of the Act by its agents and servants.

(1) (1898) 2 Q. B. D., 306;
(2) (1898) 2 Q. B. D., 19;
(3) See Maxwell, p. 159.

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For the respondents the later English cases *Christie, Manson and Woods* v. *Cooper* (1) and *Pearks, Gunstone and Tee, Limited* v. *Ward : Hennen* v. *Southern Countries Diaries Company* (2) have also been referred to. But I can find nothing in these cases to impair the authority of *Salmon and Gluckstein's* case although Mr. Justice Channell in an *obiter dictum* in 2 K. B. D., 1902 expressed some hesitation as to the criminal liability of a body corporate under section 2 of the Merchandise Marks Act.

It is clear that a limited Company could be prosecuted and punished in England for such an offence as that charged against the respondent Company in the present case.

The respondents, however, stand on much stronger ground in urging that the Indian Law at present differs in this respect from the law of England.

In the English Statute the penal provisions run :—" Every person who " etc., " shall be guilty of an offence against this Act " and the word " person " is expressly defined in section 3 so as to include " any body of persons corporate or unincorporate ". The word is similarly defined in section 11 of the Indian Penal Code, but in the penal provisions, sections 482 and 486, and indeed in the penal clauses throughout the Code the word " person " is not to be found. Each penal clause lays down that " whoever " commits the offence in question " shall be punished with " etc., etc., and though the Code defines " person " the word " whoever " is left to be interpreted according to ordinary usage. It is equivalent to " any person who " or " whatever person "; but the person contemplated in the word " whoever " according to ordinary usage is I think a natural person, *i.e.*, an individual human being, and it does not connote a corporation which is a " person " only in an artificial, technical, juridical sense. It is by no means clear that the framers of the Code intended to exempt corporations from punishment for offences under the Code. Indeed the use of the word " person " in section 268 (Definition of Public Nuisance) seems to point the other way, for in that section I think the word " person " should be construed according to the definition in section 11.

(1) (1900) 2 Q. B. D., 522 ;
(2) (1902) 2 K. B. D., 1 at p. 7.

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Moreover the Chapter which begins with section 268 includes several offences for which corporations can be prosecuted in England (by virtue of the definition of "person" in special enactments and in the English Interpretation Act, 1899). But if the intention was to make corporations liable for offences under the Indian Penal Code, I think it has been frustrated by the use of the form "whoever" instead of "any person who" or "every person who" in the penal clauses. It is true that section 2 of the Code lays down that *every person* shall be liable to punishment. But the learned Commentators on the Code agree in thinking that "person" in this section has not the extended meaning given by section 11 (1) and this view appears to me to be correct.

It is suggested that in adopting the English Statute of 1887 to India the legislature abstained from reproducing the form "every person who" merely because the form "whoever" was already the common form in the penal sections of the Indian Penal Code. But it might be argued with equal force that the Indian legislature in avoiding the use of the word "person" in the new sections enacted in 1889, thus abandoning the English form signified their intention to exempt bodies corporate from prosecution for offences relating to Merchandise Marks. If the form "every person who" had been used, then these penal sections read with section 11 of the Code would have rendered bodies corporate liable to prosecution in India as they are in England.

I note that though the form "whoever" is used in the penal clauses throughout the Penal Code this form is not universal in special and local laws. For examples of the use of the form "any person who", reference may be made to the Sea Customs Act, 1878 (Schedule of Chapter XVI, Nos. 8, 9, etc.), Arms Act 1878, section 23, Excise Act, 1896, sections 46 to 52. By virtue of the definition of "person" in the General Clauses Act it appears that unless where a contrary intention appears expressly or impliedly, a corporation could be prosecuted for offences against special and local laws where the form of the penal provision is "Any persons who" etc., or "Every person who" etc.

(1) Whitley Stokes, Anglo-Indian Codes and Gour's Penal Law of India. Notes on section 2, Penal Code.

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My opinion is therefore that the respondent Company is not liable to prosecution for an offence under section 482 or section 486, Indian Penal Code. But as the question is one of some public importance and as the learned counsel engaged on both sides have asked me to refrain from passing final orders and to refer the question to a Bench under section 11 of the Lower Burma Courts Act I think it is expedient to take this course I refer the question whether a body corporate can lawfully be prosecuted and on conviction punished for an offence under section 482 or section 486, Indian Penal Code.

*The opinion of the Bench was as follows:—*

*Hartnoll, Offg. C. J.*—The question referred to us is whether a body corporate can lawfully be prosecuted and on conviction punished for an offence under section 482 or section 486 of the Indian Penal Code. Mr. Justice Twomey has found that in England a limited Company such as the respondent Company can be prosecuted and punished for similar offences under the English Merchandise Marks Act, 1887, and from the cases cited by him there can be no doubt as to the correctness of his finding; but on a consideration of the meaning of the word "whoever" used in sections 482 and 486 of the Indian Penal Code he has formed the opinion that in India the prosecution of a Company under those sections does not lie.

Sections 478 to 489 of the Indian Penal Code were enacted by section 3 of the Indian Merchandise Marks Act, 1889, and in enacting the penal sections amongst them the word "whoever" is used and not the words "any person who". The word "whoever" is used throughout the Penal Code in its penal sections. Section 11 of the Penal Code defines the word "person" thus: "The word 'person' includes any Company or Association or body of persons whether incorporated or not". If the words "any person who" were used in sections 482 and 486 of the Penal Code, there is no doubt that there would be much stronger ground for holding that a Company could be prosecuted under those sections; but it is argued that the word "whoever" can only refer to a definite individual or definite individuals, and cannot apply to a corporate body. It may possibly be said that the word "whoever" may be held to include a body of persons associated together in their collective capacity for the purpose

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of trade but on the other hand taking the word in its strict grammatical meaning it may be said that it cannot have any such meaning. Assuming that this is so then it appears to me that there is an ambiguity in the Penal Code. Section 11 may be said to render a Company criminally liable in certain classes of cases, whereas the use of the word "whoever" in the penal sections relating to such cases renders it impossible to punish them. To take a concrete instance section 268 of the Penal Code says: "A person is guilty of a public nuisance who does any act or is guilty of an illegal omission which causes any common injury, danger or annoyance to the public or to the people in general who dwell or occupied property in the vicinity". Taking the definition of the word person in section 11 it would certainly appear that a Company can be guilty of a public nuisance; but in the ensuing penal sections as the word "whoever" is invariably used a Company cannot be punished. If the language of the Penal Code were clear and unambiguous as to whether a Company can be prosecuted or not, it should beyond doubt be obeyed; but where there is an ambiguity or the language is not clear it is a well known principle that to ascertain the real meaning the cause or necessity of the law being made should be considered. Again it has been said that every clause of a statute should be construed with reference to the context and the other clauses of the Act, so as, so far as possible, to make a consistent enactment of the whole statute or series of statutes relating to the subject-matter (1). Now applying these principles to the present case Act No. IV of 1889 of the Indian Legislature is named "An Act to amend the law relating to fraudulent Marks on Merchandise." It clearly has the object of protecting the public in its purchases so that they be not deceived by false trade descriptions and another of its objects is clearly the protection of honest trade, for instance the prohibition of one trader using the mark of another or a similar mark with a view to selling his goods as those of such other firms. When Act No. IV of 1889 was enacted the General Clauses Act (I of 1868) was in force and "person" is defined in section 2 (3) of it as follows: "'Person' shall include any

(1) Per Lord Davey in *Canada Sugar Refining Company, Limited,* v. *The Queen* (1898), A.C., 735 at p. 741.

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Company or association or body of individuals whether incorporated or not". Act I of 1868 was repealed by the General Clauses Act, 1897, but section 4 (1) of this latter Act, applies this definition unless there is something repugnant in the subject or context to all acts of the Governor-General in Council made after the 3rd day of January 1868. It therefore applies to the Indian Merchandise Marks Act, 1889, subject to the above proviso. Section 6 of that Act says, that, if a person applies a false trade description to goods he shall subject to the provisions of the Act and unless he proves that he acted without intent to defraud be punished according to law. The section is analogous to section 482 of the Penal Code except that one deals with a false trade description and the other with a false trade or property mark. Similarly section 7 of the Indian Merchandise Marks Act makes a person punishable who sells or exposes or has in his possession for sale or any purpose of trade or manufacture any goods or things to which a false trade description is applied unless he proves certain facts. It is similar to section 486 of the Indian Penal Code except that that section refers to counterfeit trade or property marks. The facts by which an accused is allowed to prove his innocence are the same in section 486 of the Penal Code as in section 7 of the Indian Merchandise Marks Act. Now there is nothing in my opinion repugnant in the subject or context in sections 6 and 7 of the Indian Merchandise Marks Act to prevent a person including a Company. There are many Companies nowadays and it is just as important to protect the public and other traders against their dealings as to protect them from the dealings of individuals. It may be argued that as the word 'he' is used in referring to the word 'person' in sections 6 and 7 of the Indian Merchandise Marks Act, and that as under section 13 of the General Clauses Act though the word 'he' includes the word 'she' it does not include the word 'it', it is repugnant to the context to give the word 'person' in these two sections the extended meaning given to it by the General Clauses Act. But in my opinion there is no substance in such an argument. The meaning to be attached to the word 'he' in sections 6 and 7 of the Indian Merchandise Marks Act seems to be a question of grammar. Giving the word 'person' in those sections the extended meaning

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enacted for it in the General Clauses Act, in subsequently referring to it by means of a pronoun the predominating pronoun 'he' would be used and this would include 'she' and 'it'. It would not be necessary to refer to the word 'person' by the words 'he, she and it' whenever it became necessary to use a pronoun. To take an analogous sentence: "If one feels tired, he cannot work." Here the word 'one' may be either of the masculine or feminine gender, and yet in referring to it the pronoun 'he' is used not both 'he' and 'she.' For the above reasons I can see no reason why a Company cannot be prosecuted and punished under sections 6 and 7 of the Indian Merchandise Marks Act and if this is permissive, it would be very incongruous to hold that a Company is liable to punishment in respect of dealings with false descriptions, whereas it is not so liable in dealings with false trade and property marks. It seems to me that the intention of the legislature must have been to render a Company liable, or not liable, as the case may be in respect of both classes of dealings, and as it has in my opinion clearly made a Company liable with respect to one class, the intention was no doubt to render them liable in respect of the other class. It must be remembered that sections 482 and 486 of the Penal Code are enacted in section 3 of the Indian Merchandise Marks Act just before sections 6 and 7 of it and that when the Indian Merchandise Marks Act was enacted the General Clauses Act I of 1868 was in force which defined the word person as set out by me above. But learned Counsel for the respondent Company argued that sections 482 and 486 of the Penal Code were not applicable to Companies as a Company can have no *mens rea* and so is unable to prove absence of intent to defraud and those facts set out in section 486 that establish innocence. Though the argument was not expressly raised in the cases of *Starey* v. *Chilworth Gunpowder Company* (1) and *Kirshenboim* v. *Salmon and Gluckstein, Limited* (2) yet it is not mentioned by the learned and eminent Judges, who decided those cases, and, if there was any substance in it, it is not probable that it would have escaped attention. In the case of *Pearks, Gunston and Tee,*

(1) (1889) 24 Q. B. D., 90; (2) (1898) 2 Q. B. D., 19.

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*Limited* v. *Southern Countries Dairies Company* (1) Channell J. considered the same argument in respect to sections 3 and 5 of the Sale of Food and Drugs Act, 1875, and though he did not decide the question definitely, in an *obiter dictum* he said that he was inclined to think that a corporation would come under section 3 as well as under section 6. It is clear that the prosecution has no *mens rea* to prove under sections 482 and 486 of the Indian Penal Code and as the burden of proving innocence is thrown on the accused under those sections when once a *prima facie* case has been established I can see no good reason why it cannot do so by the evidence of its agents or servants or otherwise as it thinks fit.

I would answer the question referred in the affirmative.

*Ormond, J.*—Section 6 of the Indian Merchandise Marks Act and section 2 (1) (*d*) of the English Act both make the applying of a false trade description by a "person" an offence "unless he proves that he acted without intent to defraud." Both section 486, Indian Penal Code and section 2 (2) of the English Merchandise Marks Act make it an offence to sell, or to have in possession, goods to which a counterfeit (or forged) trade mark is applied " unless he proves.....that otherwise he had acted innocently "; but section 2 (2) of the English Act begins with the words "every person who," and section 486, Indian Penal Code begins with the word "whoever."

The word "whoever" means the same thing as "every person who" and shews that the provisions of the section apply to persons generally. The scope of a penal section in an act would (so far as the language is concerned), be the same whether it began with the words "every person who" or with the word "whoever", unless the word "person" is defined so as to have a more restricted or a more extended meaning than it in fact has. In law, a Corporation (which includes a Limited Company) is a person,—apart altogether from any General Clauses or Interpretation Acts; and if from the language of a section, its provisions apply to persons generally; a Limited Company being a person, would be included; unless there was something to shew that the section was not intended to apply.

(1) (1902) 2 K. B. D., 1 at p. 12.

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to such a person. Moreover there is I think a clear indication that the Indian legislature intended that the word "whoever" in sections 482 and 486, Indian Penal Code should have the same meaning and scope as the words "every person who"—for these sections were inserted in the Indian Penal Code by section 3 of the Indian Merchandise Marks Act; and section 6 of that Act, which begins with the words "If a person . . ," makes it an offence to apply a false trade description:—it would be unreasonable to suppose that by the use of the word "whoever" a more restricted scope was intended in section 3 than was intended in section 6.

As to the possible argument that the language in both the English and Indian Acts shew that a corporation was not intended to be included;—because the word "he" is used; and the fact that under the General Clauses Act and the English Interpretation Act, though "he" would include "she," the word "he" would not include "it":—in my opinion it would be correct to say:—"a male, female or artificial person *who*" . . . (not "who or which"):—and it would be correct to say:—"If a male, female or artificial person does so and so, *he* shall . . ." (not "he, she or it shall . . "). This point was not noticed—or probably was thought not worth considering, in the two cases of *Starey* v. *Chilworth Gunpowder* and *Kirshenboim* v. *Salmon and Gluckstein, Limited.* In my opinion the language in sections 482 and 486, Indian Penal Code does not exclude a Limited Company.

We come then to the question whether there is anything to shew that a Limited Company was intended to be excluded from the operation of sections 482 and 486, by reasons of the inherent nature of a Limited Company or of the object of the sections. The object of the sections is to prevent the use of a false trade mark and the selling of goods marked with a false trade mark. It is obvious that a Limited Company could do such things; and therefore it would *prima facie* come within the object of the sections. But it can act only through its agents: It is clear I think from the decision in *Coppen* v. *Moore* that upon a true construction of these sections the master was intended to be made criminally responsible for acts done by his servants in contravention of these provisions, where

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such acts are done within the scope or in the course of their employment, unless he is able to rebut the *prima facie* presumption of guilt by one or other of the methods pointed out in the sections. It is contended that a Limited Company as such could not prove an absence of *mens rea* under sections 482 and 486 inasmuch as it has no mind: But because it can act only through it agents;—if it proved that its agents acted without intent to defraud under section 482, or that its agents had fulfilled the conditions mentioned in clauses (*a*) and (*b*) or (*c*) of section 486, as the case might be, it would prove its own innocence. The two cases of *Starey* v. *Chilworth Gunpowder Company* (1889) and of *Kirshenboim* v. *Salmon and Gluckstein Limited* (7th May 1898) are instances of a Limited Company having been convicted under the English provisions which correspond to sections 482 and 486, Indian Penal Code—In the first case the Justices held that there was no false trade description within the meaning of the statute, and that there had been no intent to defraud on the part of the Company, inasmuch as the gunpowder delivered was as good as the powder contracted for.—It was held that the supplying of goods bearing a false trade description would be a "fraud" within the meaning of the statute although there was no intention to cheat,—and the case was remitted to the Justices to determine whether the Company had acted without intent to defraud or that having taken all reasonable precautions against committing an offence, they had no reason to suspect the genuineness of the trade description, or that they gave all information in their power with respect to the persons from whom they obtained the goods. I observe from the dates given in the reports that *Salmon and Gluckstein's* case was decided at a time when the case of *Coppen* v. *Moore* was pending for judgment. Lord Russell C.J. and Wright J. were two of the Judges in both cases; thus both those cases must have been present to their minds at the time. In *Kirshenboim* v. *Salmon and Gluckstein, Limited* it was held that the Company had sold goods under a false trade description; and that, because it had acted deliberately, it had not acted "innocently."

Being guided by the above English decisions, I am of opinion that Limited Companies are not excluded from the

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operation of sections 482 and 486, Indian Penal Code;—and that there is nothing inherent in the nature of a Limited Company which would prevent it from proving its innocence; either by shewing that it acted without intent to defraud under section 482, or under section 486 in any of the ways prescribed in that section. In the later case of *Pearks, etc., Limited* v. *Ward* (1902) 2 K.B.D. 1—a case under section 6 of the Sale of Food and Drugs Act—which contained an absolute and unqualified prohibition, the Company was held liable—and Lord Alverstone C. J. expressed an *obiter dictum* that different considerations might apply in cases under sections 3 and 4 of the Act—inasmuch as absence of knowledge would be a good defence to charges under those sections—He did not say that in his opinion a Limited Company could not be liable under those sections: and the above two cases against Limited Companies were not cited. Channell, J. thought that a Limited Company could be liable.

In my opinion a Limited Company can be prosecuted for offences under sections 482 and 486, Indian Penal Code.

The question of jurisdiction in this case and the question of what is the proper procedure to adopt in prosecuting a Limited Company, are not before us.

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*Before Sir Henry Hartnoll, Offg. Chief Judge and Mr. Justice Ormond.*

*Criminal Revision No. 347B of 1913.*

*February 23rd, 1914.*

KING-EMPEROR *v.* 1. A. J. COOKE, 2. G. SHEAD, 3. H. HENDERSON, 4. F. J. SNOW, 5. T. D'SILVA.

*Higinbotham*—the Assistant Government Advocate, for applicant (King-Emperor).

*McDonnell*—for respondents.

*Lottery—keeping place for drawing—responsibility of members of Club Committee—burden of proving authority—Evidence Act, section 105—Indian Penal Code, section 294A.*

The five accused were members of the Committee of the Indian Telegraph Association, which had its Club premises at 279, Dalhousie Street. It was admitted that lotteries, in which the public by application to a member of the Association were able to take part, were managed by the Association, but it was denied that the accused who were only a portion of the Committee could be held to have kept a place for the purpose of drawing a lottery within the meaning of section 294A of the Indian Penal Code.

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It was alleged that as the premises in Dalhousie Street were also used for the purposes of a Social Club, they could not be said to have been kept for the purpose of drawing a lottery and that as a matter of fact the income derived from the lottery had been assessed to income-tax by the Collector and the lottery had been authorized by Government.

*Held*,—on a reference by the District Magistrate of Rangoon under sections 451 and 307 of the Criminal Procedure Code—

(1) that it being clear from the evidence that the Committee did control the club premises and business, the Committee must be held to have "kept a place" within the meaning of section 294A,

(2) that the five accused who were all active members of the Committee were each responsible for the drawing of the lottery, which was conducted in furtherance of the common intention of all,

(3) that to bring a place within the operation of section 294A it is not necessary to prove that it was used exclusively for the purpose of a lottery,

(4) that the mere fact that the Collector, a Revenue Officer, had taxed the proceeds of the lottery, could not be taken to indicate that Government had sanctioned the lottery, that under section 105 of the Evidence Act it lay on the accused to prove that the lottery had been authorized by Government and that this they had failed to do.

*Jenks and others* v. *Turpin and another*, (1884) L. R. 13 Q. B. D., 505; *Ramanjam Chetti and 9 others*, Weir's Law of Offences and Criminal Procedure, p. 252; *Rex* v. *James*, (1902) L. R. I. K. B. D., 540 at 545; *The Apothecaries' Company* v. *Warburton*, 1. Carrington and Payne's Reports, p. 538; *Martin* v. *Benjamin*, (1907) L. R. I. K. B.D., 64 referred to.

*Hartnoll, Offg. C. J.*—This case has been referred to this Court by the District Magistrate of Rangoon under the provisions of section 307 of the Code of Criminal Procedure. The five accused, A. J. Cooke, G. Shead, H. Henderson, F. J. Snow, and T. D'Silva have been tried before the District Magistrate of Rangoon and a jury under the following charges:

*Firstly*.—That you between April 1910 and 22nd June 1913, did keep an office or place for the purpose of drawing a lottery not authorized by Government at 279, Dalhousie Street and thereby committed an offence punishable under section 294A (i) of the Indian Penal Code and within my cognizance.

*Secondly*.—That you, on or about the (1) 22nd May 1912, (2) 22nd July 1912, (3) 22nd May 1913, did publish proposals to pay sums on an event or contingency relative or applicable to the drawing of tickets in a lottery not authorized by Government by publishing lists of winners ascertained at drawings held on above dates and thereby committed an offence punishable

under section 294A (ii) of the Indian Penal Code and within my cognizance.

The jury brought in a verdict of not guilty on all the charges; but the District Magistrate differed from them.

He considers that all the accused are guilty under the first head of the charges; and that A. J. Cooke and T. D'Silva are guilty under the second head of charge. It is not denied that we have full powers to convict the accused in accordance with the opinion expressed by the District Magistrate, but it is submitted that in any case the verdict of the jury should not be interfered with. Section 307 (3) of the Code of Criminal Procedure enacts that we may exercise any of the powers which we may exercise on an appeal and that subject thereto we shall after considering the entire evidence and after giving due weight to the opinions of the Sessions Judge and the jury acquit or convict the accused of any offence of which the jury could have convicted him upon the charge framed and placed before it. In this case the words "District Magistrate" and "Sessions Judge" are synonymous—section 451 (6) of the same Code.

It is not denied that a lottery was drawn monthly from April 1910 to June 1913 at No. 279 Dalhousie Street, Rangoon. These premises were tenanted by the Indian Telegraph Association Club at first in part, but subsequently wholly. The lottery started in a very small way but assumed in the end very large proportions. The takings for June 1913 amounted to Rs. 1,82,480. All the accused were members of the Committee of the aforesaid Club; but they submit that they did not keep any office or place for the purpose of drawing the lottery. They assert that the lotteries were managed by the club through its Committee, that the premises belonged to the Club, that in any case five members out of a Committee of nineteen members cannot be held to keep the premises, that it was the Club who kept the premises, that perhaps all the members of the Club might be held to keep the premises, or all the members of the Committee but certainly not only five members out of 19. Certain cases were quoted showing that club servants or members of Club Committees could not be sued civilly for goods supplied to Clubs, and it was urged that the five accused could

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not have a suit brought against them personally for use and occupation. So it is said—how can they be held to keep the premises? Such cases do not seem to me to be of assistance in arriving at a conclusion in the present case as to whether the five accused kept the premises within the meaning of section 294A—first part—of the Indian Penal Code. They depend on whether there has been a contract according to which members of the Club or Club Committee become personally liable or not for Club debts. The circumstances must differ in each case and depend on matters, such as the actual terms of contracts—the Club rules—and so on. Even supposing that members of a Club Committee would not be personally liable for goods supplied to their Club, I consider that in certain circumstances they should be held to keep the premises within the meaning of section 294A—first part—of the Indian Penal Code; and the evidence must be examined to see whether or not the accused should he held to so keep the premises in the present case. The minute book Exhibit W shows beyond doubt that the management of this Club rested with the Committee. At a meeting of the Committee held on the 3rd March, 1912 at which Cooke, Henderson, Shead and D'Silva were present it was agreed that the lower flat of the premises alongside the Club be engaged at a rental of Rs. 40 per mensem as well as two temporary clerks on Rs. 40 each (tentatively) in order to carry out the writing of money-orders free of cost for the public with the object of gradually stopping cash sales, and encouraging the services of the post office thereby safe-guarding the interests of the sweep. At another meeting held on the 5th January 1913, at a meeting at which all the accused except Shead were present it was proposed by Henderson and seconded by D'Silva that the President enter into negotiations for a lower rental failing which the sum of Rs. 850 be given on a year's lease. This proposal was made in discussing Misquith's letter. Misquith was then the owner of 279 Dalhousie Street. The above extracts from the Committee book show that the Committee had the power of renting premises and the very premises set out in the charge in the second instance. This power must be taken to have been delegated to them by the general body of members. In Stroud's judicial dictionary it

is said: "'To keep' a place or thing involves the idea of having over it the immediate control of a character more or less permanent." The minute book and the accounts show that the Committee exercised full Control over Club matters, inclusive of the premises. I would instance item 21 of the meeting of the 6th April 1913. It was ordered that the accounts be audited every month by a Committee member. This shows that the Committee had full control over the accounts. Looking at the accounts for February 1913 it is seen a carpenter was paid for fixing wood-work at the entrance to the Club, that servants are paid and supplied with uniform. It seems needless to multiply instances. The immediate control of the premises was clearly vested in the Committee of which the five accused were members. I would therefore hold that for the purposes of section 294A of the Indian Penal Code the Committee kept the premises, and that the accused cannot be allowed to shift their responsibility on to the general body of members or to the Club, which is an abstract entity or incorporeal body. The next question for consideration is whether it is proved that the premises were kept for the purpose of drawing a lottery. They were clearly also kept for the purpose of a social club as well, and this being so it is argued that they were not kept for the purpose of drawing a lottery—that to incur liability under section 294A of the Indian Penal Code it must be shown that the premises were kept exclusively for such a purpose. In the case of *Jenks* v. *Turpin* (1) where certain persons were convicted of keeping and using premises for the purpose of unlawful gaming and assisting in the management. Hawkins J. said: "If the house had been kept open for a double purpose *viz.* as an honest social club for those who did not desire to play as well as for the purpose of gaming for those who did, it would none the less be a house opened and kept 'for the purpose of gaming'." I agree with that view and hold that in the present case it is not necessary to show that the premises were used exclusively for the purposes of drawing a lottery. The evidence shows and it is admitted that a lottery was drawn monthly. *But* it must be shown that the *Committee* kept the

(1) (1884) L.R., 13, Q.B.D., 505.

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premises for such a purpose. The accounts and minute books show this conclusively. I have already referred to the entry concerning the engaging of clerks for sweep purposes. I would quote a few more instances:

(1) Meeting of 12th March 1912 when all the accused except D'Silva were present. Sale of tickets over the counter discussed.

(2) Meeting of 31st March—Snow, Cooke, D'Silva and Henderson present—revision of task-work and cash sale earnings discussed.

(3) Meeting of 30th June 1912—all accused present—Cooke made Secretary on Rs. 400 dependent entirely on the conditions and continuance of the sweep reaching a maximum of Rs. 500.

(4) the same meeting—minute (13), with reference to certain questions raised by several members regarding the handling of sweep tickets unanimously resolved that the Commissioner of Police be approached for his opinion, also that sound legal advice be obtained in the matter.

It is needless to multiply instances. I hold that the Committee kept the premises for the purpose of drawing a lottery. *But* it is argued that on this finding the accused cannot be convicted—that they are not the Committee and are only a part of it. There seems to me to be no substance in such an argument. As is said by Mr. Mayne in his criminal law of India—Second Edition, p. 466—"Where several persons unite with a common purpose to effect any criminal object, all, who assist in the accomplishment of that object are equally guilty, though some may be at a distance from the spot where the crime is committed and ignorant of what is actually being done." The principle is that laid down in section 34 of the Indian Penal Code which enacts that when a criminal act is done by several persons in furtherance of the common intention of all each of such persons is liable for such act in the same manner as if the act were done by him alone. Here the criminal act alleged is "keeping an office or place for the purpose of drawing a lottery not authorized by Government" and, though learned Counsel lays special stress on the word "keep" and argues that if a body of men is held to keep a place, a

portion of that body cannot be said to keep it, I am unable to follow his argument. Whether the common object be the keeping of a place for the purpose of drawing a lottery not authorized by Government or the hiring of a gang of house-breakers to commit thefts, it seems to me that all, who engage in such an object, are each individually guilty and that they can be prosecuted successfully in whole or in part—jointly or severally. Here the five accused are shown to be five of a body of men who united together to draw and control a monthly lottery, and, if that common purpose is illegal, they are all equally and individually guilty.

The next contention raised was that it has not been proved by the prosecution that the lottery was not authorized by Government. The Assistant Government Advocate allows that the burden of proof lies in the first instance on the Crown to show that it was not so authorized. "Government" is defined in section 17 of the Indian Penal Code as follows: "The word 'Government' denotes the person or persons authorized by law to administer executive Government in any part of British India." The Commissioner of Police Mr. Tarleton deposed, that the sweep had not been authorized by Government and cross-examined said: "I say unauthorized as result of enquiries. I mean to my knowledge there should be some record of it either in the club or with me." From such evidence it is clear that Mr. Tarleton has not expressly authorized it and knows of no such authorization. The fact that the Local Government has sanctioned the prosecution may also in my opinion be taken into consideration as tending to show that the Local Government has never sanctioned it. It is extremely improbable that the Local Government would have sanctioned the prosecution if it had ever sanctioned the sweep, and it may be presumed that official acts are regularly performed. In my opinion it would have been an irregular act to have sanctioned this prosecution one of the essentials of the offence being that the lottery was not authorized by Government, if in fact it had been so authorized by the Local Government itself; and in the ordinary course of business on the Local Government considering whether this prosecution should be sanctioned or not it was surely its duty to satisfy itself from its papers or otherwise

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that no such sanction at any rate by itself existed. To have sanctioned the prosecution after the Local Government had itself authorized it would in my opinion have been an irregular act. I would also refer to those exhibits which display a desire for secrecy. I would especially refer to JJ 12, which is headed: "Private and confidential" and has at the foot of the note: "Note—This is a private communication and all recipients are earnestly requested not to post them up in any prominent place or public notice-board." It is a drawing list for April, 1913. There are also those exhibits that are marked: "For members only, Private and Confidential." Then again there is the minute of the Committee which I have already referred to where it was resolved to consult the Commissioner of Police and obtain sound legal opinion, and the notice of the 8th July 1913 which stops all remuneration. If this lottery had been expressly sanctioned, as it assumed such large proportions and became so widely known, surely this would have been within the knowledge of the Commissioner of Police. If there has ever been any express sanction it would be the simplest thing in the world for the accused to produce it or quote it. Considering this, I think that the prosecution made out a "*prima facie*" case that the lottery was never expressly authorized and that it is for the accused to show that it was authorized. They do not plead that it was expressly authorized, but rely on Mr. Lucas having visited their premises to settle a dispute with reference to a lottery prize and on the Collector of Rangoon assessing them to income-tax as proving authorization by Government. I should rather say that they relied on these facts at their trial for they were not strongly pressed at the hearing of this reference. As regards the first incident I am unable to say that the intervention of Mr. Lucas ever authorized the sweep. He merely went on a complaint being lodged to settle a dispute. As regards the second it would not be within the scope of the Collector's authority to sanction a lottery. He is a revenue officer. The incident is analogous to the facts of the case of *Ramanjam Chetty and others* (1). Moreover the mere act of taking income-tax from the club on

(1) Weir's Law of Offences, Vol. I, p. 252.

the profits of the lotteries would not authorize them. Although the Assistant Government Advocate allows that in the first instance the burden of proof lies on the Crown to show that the lottery was not authorized, my learned colleague for reasons given in his judgment considers that the burden of proof lies on the accused persons to show that the lottery was authorized by Government. The words in the section 'not authorized by Government' are equivalent to meaning 'unless it (the lottery) has been authorized by Government' or 'except in the case were it (the lottery) has been authorized by Government.' It is a reasonable view in my opinion to take that they are in the nature of an exception and as they appear in the section defining the offence it is reasonable to hold that section 105 of the Evidence Act applies and that the burden of proof lies on the accused persons to show that the lottery was authorized by Government. An analogous section in the Indian Penal Code would be section 325 and this is provided as an illustration to section 105 of the Evidence Act. I therefore agree in the opinion expressed by my learned colleague.

Though the burden of proof in our opinion as regards authorization was placed wrongly I am unable to see that the accused were in any way prejudiced in consequence, nor is it suggested that they were. They have no doubt brought out all facts on which they rely to prove authorization—at any rate they had full opportunity to do so.

In the result as regards the first head of charge I am of opinion that the verdict of the jury was manifestly wrong and that all five accused were proved guilty. As regards the second head of charge the cases of Cooke and D'Silva only are concerned. It was urged that the drawing lists contain no proposal within the meaning of section 294A. In my opinion they clearly do. KK5 is the first. On the first page is set out the list of the winners drawn on the 22nd May 1912. Then at the back in English and Burmese is printed amongst other matter: "The sweep for June is now open. It will close on the 20th June 1912. Settling day 23rd June 1912. All tickets must be taken in the name of a member. Your name and address is registered against the number of the ticket sent you. No books are sent out and tickets must be applied for by Postal

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Money Order addressed to a member." It is unnecessary to go further into what is written. KK5 is clearly a proposal within the meaning of section 294A. KK3 is to the same effect except that it refers to July drawings and the August lottery. OO is to the same effect except that it refers to the lottery drawn on May 22nd, 1913 as regards the winners and to the coming lottery for June 1913. The Sangu Valley Printing Press printed many thousands of these drawing lists on the standing order of Cooke and D'Silva. In May 1912 that press printed 18,000 drawing lists, in July 1912, 32,000 and in May 1913, 33,000. There is clear evidence that a durwan used to distribute the drawing lists at the entrance to the Club premises indiscriminately to those who wanted them, that drawings were witnessed by people of all nationalities and that the drawing lists were sent by post to those not being members of the club who requisitioned for them. The bills for the printing go into the accounts which are kept by D'Silva, the sweep secretary—see Exhibit H. Exhibit R, one of a thousand copies printed in June 1913, says that two of the men to whom money orders should be addressed are Cooke and D'Silva and the letter gives a description of the sweep and says that tickets can only be obtained on application to a member by name through postal money order. The letter bears at the bottom "President, I. T. A. Club" and so the intention was for Cooke to sign it as he is the president of the Club.

Exhibit AA is another form of letter saying to whom application should be made for tickets. Cooke and D'Silva are two of those mentioned. The evidence is in my opinion ample to convict Cooke and D'Silva. They were at any rate two of those who united together to publish these proposals and they clearly took a leading part in doing so. The question of sentence remains. It is urged that this is a test case, that the lottery has been allowed to run on a long time without action being taken and that everything has been fair and above-board—that certain undertakings were given in the Court of the District Magistrate with reference to the non-publication of drawing lists and not keeping a place for the purpose of drawing the lottery—that the 20 per cent. of the proceeds have been applied to benevolent purposes. I would take such argu-

ments into consideration except that I think that pending the disposal of this case the lottery should have been stopped altogether. But I am of opinion that the case is not one for a nominal sentence. The lotteries assumed enormous proportions monthly as shown by the evidence of Mr. Lucas. To take the figures for a few months showing the gross takings and the 20 per cent. held up and not distributed, but kept for other purposes:

| *Year.* | *Month.* | *Gross takings.* | *20 per cent. held up.* |
|---|---|---|---|
| | | Rs. | Rs. |
| 1912 | March | 74,000 | 14,800 |
| | August | 1,16,250 | 23,250 |
| | November | 1,43,350 | 26,870 |
| 1913 | January | 1,57,221 | 31,441 |
| | April | 1,56,350 | 31,270 |
| | June | 1,82,050 | 36,110 |

The evidence shows contributors not only in Rangoon, but in the Toungoo District and Moulmein. It is probable that many other tickets were taken from many places in Burma considering the number of drawing lists distributed. I would find Albert John Cooke, George Shead, Henry Henderson, Frank John Snow, and Thomas D'Silva guilty of the offence of keeping a place for the purpose of drawing a lottery not authorized by Government and so of an offence punishable under the first part of section 294A of the Indian Penal Code and would direct that they each pay a fine of Rs. 1,000 (one thousand) or that in default they be each rigorously imprisoned for six weeks. I would also find Alfred John Cooke and Thomas D'Silva guilty under the second head of charge namely that on or about the 22nd May 1912, 22nd July 1912 and 22nd May 1913, they did publish proposals to pay sums on an event or contingency relative or applicable to the drawing of a ticket in a lottery not authorized by Government by publishing the lists of the winners ascertained at the drawings held on the above dates—and that they thereby committed offences punishable under the second part of section 294A of the Indian Penal Code and I would direct that they do pay a fine of Rs. 5 each for each offence—one, on or about the 22nd May 1912, a second, on or about the 22nd July 1912 and a third on or about the 22nd May 1913 and that in default of payment of such

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fines the imprisonment be seven days' simple in respect of each fine.

*Ormond J.*—I agree generally with the conclusions arrived at by my learned colleague, the Officiating Chief Judge. There can be no doubt that the Club premises were kept for the purpose of drawing a lottery within the meaning of section 294A of the Indian Penal Code and the only 2 questions that then arise, relate (i) to the proof of the fact of non-authorization of the lottery by Government and (ii) to the liability of the accused who formed part only of the Committee of the Club. Although Mr. Tarleton, the Commissioner of Police, does not say that if the Government had authorized the lottery, he would have known it;—I think there was evidence to go to the jury for a finding that the Government had not authorized the lottery; and I think it would be a fair and legitimate inference to draw from the facts proved in the case, that the Government had not authorized the lottery. But we are asked to upset the verdict of a jury and I would prefer to decide the case upon points of law as far as possible. In my opinion under sections 105 and 106, Evidence Act, the onus was on the defence to show that the lottery was authorized. Section 105 of the Evidence Act lays the onus on the accused of proving 'the existence of circumstances bringing the case within any special exception or proviso contained in any law defining the offence.' Mr. McDonnell for the defence contends that this section does not apply if the proviso or exception is contained in the body of the section. He refers us to the rule of English law, which is based upon a technical difference between a proviso and an exception. The rule is stated by Lord Alverstone in *Rex* v. *James* (1), as follows:—"It is not necessary for the prosecution to negative a proviso, even though the proviso be contained in the same section creating the offence, unless the proviso is in the nature of an exception which is incorporated directly or by reference with the enacting clause, so that the enacting clause cannot be read without the qualification introduced by the exception." No reference is made in that case to the provisions contained in section 14

(1) (1902) L. R. I. K. B. D., 540 at 545.

of 11 and 12 Vict. c. 43. Apparently the rule stated above applies to trials upon indictment and not to summary proceedings before justices. It is unnecessary to decide if under the rule as above stated, the onus would be on the prosecution to prove non-authorization in this case. Section 105 of the Evidence Act must be construed without reference to any technical rule of English law; and if the words "not authorized by Government" are in effect a 'special exception or proviso contained in the law defining the offence,' the onus is on the accused to prove authorization. The words "not authorized" in section 294A, Indian Penal Code mean no more and no less than "unless authorized" or "not having been authorized" or "without authority"; and they are clearly in the nature of an exception or proviso. Section 105 of the Evidence Act which applies generally to all criminal trials, is analogous to the last part of section 14 of 11 and 12 Vict. c. 43 which applies to summary proceedings before Magistrates and which runs as follows:—"If the information or complaint in any such case shall negative any exemption, exception, proviso or condition in the statute on which the same shall be framed, it shall not be necessary for the prosecutor or complainant in that behalf to prove such negative, but the defendant may prove the affirmative thereof in his defence, if he would have advantage of the same." In prosecutions under the old game laws which made certain acts offences unless the accused had certain qualifications, it was not necessary for the prosecution to prove the absence of such qualifications. So too in an action for a penalty under 55 Geo. 3 c. 194 section 20 for practising as an apothecary without having obtained a certificate of qualifications, it was held that the onus lay on the defendant to shew that he had obtained a certificate and that it was not necessary for the plaintiff to prove the negative—*Apothecaries' Company* v. *Warburton* (1).

Illustration (*b*) to section 106 of the Evidence Act is as follows:—"A is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is on him." I see no difference in principle between that case and

(1) (1824) 1 Carrington and Payne's Report, 538.

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the present one. In my opinion the onus was on the defence to shew that the lottery had been authorized.—It is not suggested that the accused were prejudiced in their defence by the prosecution having assumed the burden of proving the absence of authority. It is contended for the defence that the lottery must be taken to have been authorized by Government, because it had been going on for so long and the profits derived by the Club for the lottery had been assessed to income-tax; but this clearly does not amount to authorization.

Then as to the liability of the accused:—the Club premises were undoubtedly "kept" for the purpose of drawing the lottery; the Committee had the control and management of the Club premises; the five accused were active members of the Committee and it was under the directions of all five that the place was kept for the purpose of drawing the lottery. The fact that others may have jointly kept the place with them would not prevent these accused from being directly liable as principals as to the act of "keeping."

In all other respects I concur with the judgment and proposed order of my learned colleague.

We were told by Mr. McDonnell that the lotteries have not been stopped; but that lists are not published and that the lotteries are not drawn in the same place more than once. Reliance apparently is placed upon the judgment in *Martin* v. *Benjamin* (1) which was a case cited by the prosecution. I do not wish it to be understood that I accept this to be good law:—that a person who habitually holds a lottery does not commit the offence of keeping a place for the purpose of drawing a lottery, simply because he has a different place on each occasion. The above case in my opinion is not an authority for such a proposition.

(1) (1907) L. R. I. K. B. D., 64.

*Before Sir Henry Hartnoll, Officiating Chief Judge, and Mr. Justice Twomey.*

*Civil Miscellaneous Appeal No. 6 of 1913.*

*Feby. 23rd, 1914.*

MAHOMED SALAY NAIKWARA *v.* 1. MULLA GOOLAM MAHOMED, 2. YUSUF ISMAIL MULLA, 3. MYNUDDEEN NAIKWARA, 4. MULLA ABDUL RAHIM, 5. MOOLLA ALI, 6. MOOLLA MAHOMED, 7. MOOLLA AHMED, 8. MOOLLA MAHOMED.

*Doctor*—for appellant.
*Chari*—for 1st and 2nd respondents.
*Vertannes*—for 3rd respondent.

*Trust for public purpose—suit relating to—sanction of Government Advocate when necessary—section 92, Civil Procedure Code.*

The first two respondents brought a suit the direct object of which was to declare a portion of a decree, relating to a public trust, void and of no effect, but the grounds on which such a declaration was asked alleged a breach of trust and they involved the taking of accounts and enquiries. In the original Court the respondents were successful.

*Held*,—on appeal that the suit came within the purview of sub-clause (*h*) of section 92 of the Civil Procedure Code and that the sanction of the Government Advocate was a necessary preliminary to its being entertained by a Court.

*Sir Dinshaw M. Petit* v. *Sir Jamsetji Jijibhai*, (1908) 11 Bom. L.R., p. 138 referred to.

*Hartnoll, Officiating C. J.*—The point for decision in this appeal is whether the consent in writing of the Government Advocate was necessary for the institution of the suit out of which this appeal arises. In Civil Regular No. 417 of 1909 the fourth to seventh respondents brought a suit against appellant and Mynuddin Naikwara that clearly came with the provisions of section 92 of the Code of Civil Procedure. One Mariam Bi Bi *alias* Ma Htay by her will gave one-third part of her property after payment of her debts and funeral expenses to charitable purposes. It was alleged that appellant, who had been the agent and attorney of the deceased Mariam Bi Bi, had been in possession of her property, had obtained probate of the will and had continued to remain in possession of the property. It was asserted that he had appropriated certain immovable properties belonging to the estate for the said charitable trust and had been managing the trust properties and realizing the rents and profits thereof and had not divided the same. Mynuddin Naikwara was made a defendant, as

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appellant alleged that he had appointed him to be a co-trustee, though the plaintiffs were not aware whether he had taken any part in the management of the said trust. It was asked that the defendants be called on to render an account, and that appellant should be removed from the office of trustee, other trustees being appointed and the trustee estate being vested in them and that a scheme be framed for the management of the trust. This suit was compromised. The defendants were discharged from their trusteeship and the fourth, fifth and eighth respondents were appointed trustees in their stead. The first two respondents then instituted the present suit. They charge that the terms contained in the petition of compromise are collusive and fraudulent inasmuch as the said compromise was made not for the benefit of the trust but for the purpose of concealing from the vigilance of the court breaches of trust and frauds committed by the appellant and Mynuddin Naikwara as trustees and that therefore the decree passed on the petition is *ipso facto* void against the plaintiffs, who were beneficiaries under the said trust. Particulars of the alleged frauds were set out. They therefore asked that so much of the decree as related to the discharge of the appellant and Mynuddin Naikwara from their liability to render accounts for all the moneys received by them since the trust properties came into their hands as trustees thereof is void and of no affect. The learned Judge on the Original Side disallowed the objection that the suit was not maintainable on the ground that the leave of the Government Advocate had not been obtained under section 92 of the Code. He found that the relief asked for did not come within any of the reliefs specified in section 92. He accordingly ordered that the matter be referred to the second Deputy Registrar to investigate the accounts and report whether there was any justification for the charge of fraud being made.

The present section 92 of the Code has considerable differences as compared with the corresponding section 539 of the repealed Code (Act XIV of 1882 as amended). There were five reliefs in the old Code and then come the words "or granting such further or other relief as the nature of the case may require." The new section has eight reliefs, the last one

"granting such further or other relief as the nature of the case may require" being made clearly a distinct form of relief as it is given a letter of the alphabet of its own. It is urged that further or other relief means relief *ejusdem generis* as the preceding reliefs. The word "other" is of wide import. As I have said, this form of relief has now been made clearly quite a separate form of relief. The principle underlying the section is that private persons shall not have unrestricted license to bring suits against trustees of trusts created for public purposes of a charitable and religious nature, but they must obtain the sanction of a Crown Officer first. The duty is obviously imposed on such an officer of seeing that a *prima facie* cause exists for bringing such a suit before he gives his consent. The present suit in any case involves the taking of an account and enquiries into the accounts. This is the fourth form of relief set out in the section. In discussing the meaning of the words "further or other relief" Beaman J. said in the case of *Sir Dinshaw M. Petit* v. *Sir Jamsetji Jijibhai* (1). "It will, of course, be at once observed that that section, (*i.e.*, section 539 of the repealed Code) after an introduction containing very general words—as, *e.g.*, "whenever the direction of the Court is deemed necessary for the administration of any such Trust,"—goes on to say that the plaintiffs may obtain a decree for five specified objects, after which come the words "or granting such further or other relief." And it is, I understand, the opinion of my learned brother that the relief we are now concerned with does not fall within any of those five objects and cannot be included under the following words. Those, it is said, must be read as *ejusdem generis*. I am not myself and never have been much in love with the *ejusdem generis* rule. It is too vague. If it means anything more than a tautologous reaffirmation of what has gone before, it must mean so very much more. What is relief of the like kind? Certainly not of a kind as to be practically identical. That would make the words mere surplusage. I should be disposed to think they meant such further or other relief as, from the nature of the introductory words and the exemplification cases, appears to the Court to be appropriate in a suit of this kind,

(1) (1908) 11 Bom. L.R., 85, at p. 138.

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As for example removing fraudulent trustees, restraining a breach of the trust and so forth."

In the present case the direct object of the suit is to declare a portion of a decree void and of no effect; but the grounds on which such a declaration is asked allege a breach of trust and they involve the taking of accounts and enquiries before a decision can be given on the prayer for relief. I am of opinion that the relief asked for should be held to come within the eighth ground of relief set out in section 92. I would therefore allow the appeal, set aside the order of the learned Judge on the Original Side and dismiss the suit. It will be open to the first and second respondents to obtain the leave of the Government Advocate, and, if they obtain it, to file a fresh suit.

In view of the petition of the 1st and 2nd respondents of the 18th November 1912 and the order of the learned judge on the Original Side passed on the 26th November 1912, each party will bear its own costs on appeal.

*Twomey J.*—I concur.

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*Civil 1st Appeal No. 162 of 1911.*

*Before Sir Henry Hartnoll, Officiating Chief Judge, and Mr. Justice Twomey.*

MANACKJEE PALLANJEE *v.* S. A. MEYAPPA CHETTY.

*Bilimoria*—for appellant.

*Clifton*—for respondent.

*Mortgage—moveable property—bonâ fide incumbrancer in possession without notice of prior claim.*

It is settled law that a *bonâ fide* incumbrancer without notice who is in possession of moveable property is to be preferred to an incumbrancer whose security is of prior date. If the latter alleges that the former had notice of his claim, he must be required strictly to prove this.

*Twomey J.*—The parties to this appeal are rival mortgagees of a steam launch called *Mahomed*. It was first mortgaged by registered document together with several other parcels of property, moveable and immovable, for Rs. 10,000 in 1901 to the respondent firm S. A., but was allowed to remain in possession of the mortgagor who continued to ply the launch in the delta. It was afterwards mortgaged by another registered

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document to the Appellant Manackjee Pallanjee for Rs. 7,000 in 1904. Manackjee sued on his mortgage in 1906 and got a decree from the Chief Court in June of that year. The Official Receiver was appointed Receiver and took possession of the launch, and an order for sale was passed on 25th October 1906 as the time allowed for payment had expired. The launch was subsequently sold and the sale-proceeds are in deposit in the Court.

The respondent firm filed their suit in the Pyapon District Court on 3rd November 1906. They joined Manackjee as co-defendant with the mortgagors alleging that when he took his mortgage in 1904 he was aware of the prior mortgage of 1901. The District Court has decided this point in favour of the respondent firm and the only question which it is necessary to decide in this appeal is the question of notice.

It is settled law that a *bona fide* incumbrancer without notice who is in possession of moveable property is to be preferred to an incumbrancer whose security is of prior date, and in this case it is not disputed that the appellant obtained possession of the launch through the Court and is now through the Court in possession of the sale-proceeds. If Manackjee had notice of the S. A. firm's earlier incumbrance, the latter is entitled to priority and not otherwise.

The burden of proof was on the plaintiff-respondent. The direct evidence consists of the statements of Arunachellem, the Manager of the S. A. firm at Pyapon at the time of the mortgage to the firm and for some years later. Arunachellem's evidence is in the words of the District Judge "somewhat corroborated" by the evidence of Mutiya, a chetty clerk of Arunachellem. Arunachellem says that he went to Wakema in 1901 and 1903 and met Manackjee and in the course of conversation with him, Manackjee asked if Syed Abdulla, the owner of the launch, had borrowed money from the S. A. firm. Arunachellem thereupon told him of the Rs. 10,000 mortgage which included the launch *Mahomed*. When he gave his evidence on 15th May 1911 Arunachellem mentioned "Mutiya" as being present at the conversation with Manackjee, but he said that Mutiya was away in Madras. The hearing was adjourned to 26th May 1911 for the issue of a commission on

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behalf of Manackjee and on the 26th May 1911, Mutiya appeared as a witness. This man's evidence shows that he was not in Madras on the 15th May. He said that he returned to Rangoon on the 17th or 18th May and I gather from his evidence that he was at Pyapon on or about the 15th May and might have been cited as a witness then. At any rate it must be said that Mutiya's admissions in cross-examination show Arunachellem's statement as to Mutiya's absence in Madras to be very disingenuous. Moreover, Mutiya's evidence as to the conversation between Arunachellem and Manackjee is extremely vague. He says it took place in 1901, 1902 or 1903. Others were present, but he does not remember who. (Arunachellem did not say that any others were present.) It is not clear why Manackjee should make enquiries about Syed Abdulla's borrowings in 1901, 1902 or 1903 for it was not till 1904 that Manackjee advanced his money to Abdulla. I think it would be unsafe to accept the evidence of the Manager Arunachellem and his clerk Mutiya as to this alleged conversation. It is also improbable that Manackjee would have advanced such a large sum if he knew the launch was already hypothecated to the chetty firm. The District Judge's remarks on this point do not seem to me to carry much weight.

When the Respondent firm's lawyers wrote to Manackjee in August 1906 (after Manackjee had obtained his decree) they made no allegation as to Manackjee's knowledge of the prior mortgage. They wrote informing him of it and asking whether Manackjee denied their clients' claim. They said nothing about Arunachellem's alleged conversation with Manackjee in 1901, 1902 or 1903.

It is a weak point in the appellant's case that he did not go into the witness box and submit himself to cross-examination. He is said to have been absent in India at the time of the hearing, but there is no proof of this on the record. As, however, the burden of proof was on the respondent firm, I think it was for them to show beyond reasonable doubt that Manackjee had notice of the prior mortgage. In my opinion the evidence produced by the respondent firm was insufficient to establish this allegation and, moreover, I think it is contrary to the probabilities of the case.

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I would therefore reverse the decree of the District Court as regards the Appellant Manackjee Pallanjee and dismiss the Plaintiff firm's suit as against him with costs in both Courts.

*Hartnoll, Offg. C. J.*—I concur.

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*Before Sir Henry Hartnoll, Officiating Chief Judge, and Mr. Justice Twomey.*

*Civil Miscellaneous Appeal No. 197 of 1913.*

*March 3rd, 1914.*

## CHAS. R. COWIE & CO. *v.* W. H. A. SKIDMORE.

*McDonnell*—for appellant.

*Bijapurka*—for respondents.

*Judgment-debtor—burden of proving cause for exemption from imprisonment—Civil Procedure Code, Order 21, Rule 40 (2) (d).*

A judgment-debtor is *primâ facie* liable to be committed to jail for failure to pay a debt, and it lies on him to prove poverty or other cause for escaping that liability.

Whether or not the decree in execution of which it is sought to imprison the judgment-debtor is payable by instalments, the Court should refuse to direct his release if it is clear that he has since the date of the decree been in a position to pay a substantial part of the amount due and has refused or neglected without cause to do so.

*Hartnoll, Offg. C. J.*—The appellants obtained a decree against the respondent on the 6th January 1913 for Rs. 2,870 and costs. Two abortive attempts were made in May and July to execute this decree by applications for the arrest and imprisonment of the judgment-debtor and on the 13th November last another application was made to the same effect. This time the judgment-debtor was arrested and brought before the learned Judge on the Original Side who passed the following order:

"The judgment-debtor states that he is and has been since the passing of the decree unable to pay the debt. McDonnell for judgment-creditor states that he could get evidence to show that the judgment-debtor has during the last 12 months been in a position to pay a portion of the decree and that he is not in a position to bring evidence to show that he was able to pay his debt in full. Under Order 26, Rule 40 (1) I order the release of the debtor as the decree was not payable by instalments."

This order is appealed against and it is urged that the

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learned Judge on the Original Side erred in ordering the respondent's release. Order 21, Rule 40 (1), is as follows: "Where a judgment-debtor . . . . . is brought before the Court after being arrested in execution of a decree for the payment of money and it appears to the Court that the judgment-debtor is unable from poverty or other sufficient cause to pay the amount of the decree or, if that amount is payable by instalments, the amount of any instalment thereof, the Court may, upon such terms (if any) as it thinks fit, make an order disallowing the application for his arrest and detention, or directing his release, as the case may be." Appellant's counsel urges that the burden of proof lay on the respondent to prove that he was unable from poverty or other sufficient cause to pay the amount of the decree and quotes an Upper Burma case *Bhaimia Ahmed Ismailjee* v. *Kadir Set and one* (1) in support of such contention. I am of opinion that he is right. The case is one that comes both under section 102 and section 106 of the Evidence Act. The law allows imprisonment to recover debt and *primâ facie* the judgment-debtor was liable to be committed. It was for him to traverse that liability by proving poverty or other sufficient cause. Moreover, such reasons would be especially within his knowledge and so section 106 is applicable.

It is further urged that the learned Judge erred in ordering the release of the judgment-debtor as the decree was not payable by instalments. Order 21, Rule 40 (2), says: "Before making an order under sub-rule (1) the Court may take into consideration any allegation of the decree-holder touching any of the following matters:

(*a*) . . . .

(*b*) . . . .

(*c*) . . . .

(*d*) refusal or neglect on the part of the judgment-debtor to pay the amount of the decree or some part thereof when he has, or since the date of the decree has had, the means of paying it;

(*e*) . . . . ".

(1) 2 U. B. R. (1897-01), 279.

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The learned Judge was apparently of opinion that as the decree was not payable by instalments and as the decree-holders could not prove that, since the date of decree, the judgment-debtor could have paid the amount of the decree *in full*, he was entitled to be released. This seems to be reading into Order 21, Rule 40 (2), when construing its meaning with reference to Order 21, Rule 40 (1), the following meaning, namely, that if the amount of the decree is not payable by instalments but payable in one lump sum, the decree-holders have to prove that since the date of the decree the judgment-debtor could have paid the *whole* amount before they can ask the Court to take his refusal or neglect to do so into consideration—that it is only in the case of a decree payable by instalments that the Court can take into consideration his refusal or neglect to pay a *portion of the decree*—the portion apparently to be the amount of the instalment due—when he has since the date of the decree had the means to do so. I do not read the sub-sections in this way. I read their meaning to be as follows: When the judgment-debtor is arrested and brought before the Court it is open to him to prove to the Court that from poverty or other sufficient cause he is unable to pay the amount of the decree or if that amount is payable by instalments the amount of the instalment due. If he can do so, the burden of proof lying on him and the decree-holders being given the opportunity of proving the contrary, the Court can order his release. *But* before doing so the Court can take into consideration any of the acts of bad faith set out in sub-rule (2) whether the decree is payable in *one lump sum* or by *instalments*. Sub-rule (2) refers to sub-rule (1) generally, and I cannot read into sub-rule (2) the meaning that portions of the words in clause (*d*) of it are only to refer to portions of words in sub-rule (1). To read such a meaning into the section would mean that, if a decree was passed against a judgment-debtor for Rs. 5,000 and the decree-holder could prove that since it was passed he had been able and was able to pay Rs. 4,950, he would not be able to get him committed as he could not prove that the judgment-debtor could pay the remaining Rs. 50. This in my opinion was never meant, and in my opinion the ordinary meaning to attach to sub-rule (2) (*d*)

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is that if the decree-holder can prove that since the passing of the decree the judgment-debtor has had the means to pay the amount of the decree, whether it is payable in one lump sum or by instalments, in whole or in part, the Court can take into consideration such fact before passing an order under sub-rule (1).

It is urged by respondent's counsel that all witnesses should have been produced by the decree-holder when the judgment-debtor was produced before the Court. That seems unreasonable, as the decree-holder is not in a position to tell when a judgment-debtor will be arrested, especially if he is trying to evade arrest, and he may not be able to collect his witnesses at a minute's notice. Order 21, Rule 40 (3), provides for such a situation as it gives the Court power while any of the matters in sub-rule (2) are being considered, to order the judgment-debtor to be detained in the civil prison, or leave him in the custody of an officer of the Court, or release him on his furnishing security to the satisfaction of the Court for his appearance when required by the Court.

The question remains as to what should be done. I would set aside the order of the learned Judge on the Original Side and direct that on application by the decree-holder he do again secure the attendance of the judgment-debtor or attempt to do so, and that, if such attendance be secured, he do proceed to dispose of the case in accordance with the procedure indicated by me in this order.

I would give the appellants their costs in this appeal, fixing their advocates fee at three Gold Mohurs.

*Twomey J.*—I agree that we should construe the words "Some part thereof" in Rule 40 (2) (*d*) in their general sense and not as referring only to the case of a decree payable by instalments. Reading sub-sections (1) and (2) together, I think the intention is clearly that even if the judgment-debtor succeeds in satisfying the Court that he is unable to pay the full amount of the decree (or instalment, as the case may be) the Court should nevertheless refuse to direct his release if the judgment-creditor shows that the debtor has been in a position to pay a *substantial* part of the decretal amount (or instalment, as the case may be) and has refused or neglected

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to do so. For such refusal or neglect is an act of bad faith only less in degree than a similar refusal or neglect in respect of the whole amount due. Sub-section (2) (*d*) in its ordinary grammatical meaning permits the Court to take into account the minor as well as the major act of bad faith, and it would in my opinion be unreasonable to interpret the clause otherwise. I therefore concur in the proposed orders.

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*Before Sir Henry Hartnoll, Officiating Chief Judge, and Mr. Justice Twomey.*

*Civil First Appeal No. 28 of* 1910.

*March 11th,* 1914.

1. HARDANDASS, 2. PALADROY, 3. GANESHNARIAN, CARRYING ON BUSINESS UNDER THE NAME OF HARDANDASS PALADROY *v.* 1. RANI MOHORI BIBI, 2. KUMAR HARI LAL BOGALA, 3. KUMAR GANGADAR BOGALA, HEIRS AND LEGAL REPRESENTATIVES OF RAJA SHEWBUX BOGALA, DECEASED, CARRYING ON BUSINESS UNDER THE FIRM OF GOOLABROY SHEWBUX AT CALCUTTA AND SHEWBUX BULLUBDASS AT RANGOON, 4. RAMBUX, HARIBUX SAGURMAL, 5. MURLIDAR, MINOR BY HIS GUARDIAN RAMBUX. BOTH CARRYING ON BUSINESS UNDER THE FIRM OF NETRAM RAMBUX.

*N. M. Cowasjee*—for appellant.

*Ormiston*—for 4th and 5th respondents.

*Contract—Negotiation by telegram—incompleteness—acceptance of offer not proved.*

A, the respondent, had 3 separate properties for sale. B, a Rangoon firm of auctioneers, wired to him "Have likely purchaser your 3 properties. Telegraph lowest price for each." A wired in reply:" Puchandaung 55,000, Ahlone 25,000, No. 9, 45,000. Reply by to-morrow." Next day B replied: " Sold house 29th Street your limit received earnest-money 5,000 forward deeds." A at once wired repudiating the transaction saying that he intended to sell 3 properties together. C to whom B had purported to sell the house on A's behalf sued A for specific performance of contract.

*Held,*—that there had been no contract of sale, as there had been no final acceptance by A.

*Harvey* v. *Facey* (1893) A.C., 552.

*Hartnoll, Offg. C. J.*—The appellants sued the respondents to enforce specific performance of an agreement to sell 5th class lots Nos. 9 and 10 in Block D 1 in the town of Rangoon together with the building thereon known as house No. 8 in 29th

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Street for a sum of Rs. 45,000. Their case is that Raja Shew Bux Bogala now deceased and whose representatives the first set of respondents are agreed on the 18th September 1907 through Messrs. Balthazar and Son to sell to them the aforesaid properties. The second set of respondents are made parties to the suit as the appellants state that they are informed and verily believe that after the institution of the suit Raja Shew Bux Bogala on the 21st August 1908 by a registered deed of sale purported to transfer the aforesaid properties to the second set of respondents for the consideration mentioned in the said sale deed.

The appellants put the second set of respondents to strict proof of their alleged purchase and assert that prior to their purchase they had notice of the purchase of the properties by them. In the alternative the appellants also asked for damages to the extent of Rs. 15,000 by way of compensation if they were not given a decree for specific performance. This was against the first set of respondents. This alternative claim was abandoned on appeal.

There is no ground for doubting that the properties were sold to the second set of respondents for Rs. 1,21,000 on the 22nd September 1907.

The first point for determination is whether there was an agreement to sell the properties to the appellants on the 18th September 1907. The Appellant Paladroy went to Messrs. Balthazar and Son and employed that firm to negotiate the sale for his firm. Shew Bux Bogala not only had the properties in dispute for sale but two others, one being in Pazundaung and the other in Ahlon. The following telegrams then passed between Balthazar and the firm of Shew Bux.

(1) From Balthazar to Shew Bux dated the 17th September 1907. "Have likely purchaser your 3 properties. Telegraph lowest price for each."

(2) From Shew Bux to Balthazar dated 17th September 1907. "Puchandung 55,000, Ahlone 25,000 No. 9 45,000. Reply by to-morrow."

(3) From Balthazar to Shew Bux dated 1st September 1907. "Sold house 29th Street your limit received earnest-money 5,000 forward deeds."

(4) From Shew Bux to Balthazar dated 1st September 1907. "Cannot sell No. 9 alone. Can sell three properties together. See our agent."

(5) From Balthazar to Shew Bux dated 19th September 1907. "Agent has no instructions. Earnest-money with us. Forward deeds."

(6) From Shew Bux to Balthazar dated 20th September 1907. "Received wire nineteenth. Strange you have accepted earnest-money without authority. Can't confirm sale. Letter follows."

The telegrams passed between Rangoon and Calcutta.

On the authority of the case of *Harvey* v. *Facey* (1) the learned Judge on the Original Side has held that these telegrams do not amount to an agreement to sell the house and land in 29th Street and it is urged that he is wrong. I am unable to see that he was and the circumstances of the present case seem to me to be even stronger than the circumstances in the case of *Harvey* v. *Facey* for holding that there was no completed contract for sale. The first telegram does not ask specifically whether Shew Bux will sell. It merely says "Have likely purchaser your three properties." It then goes on "telegraph lowest price for each." Shew Bux did so and then says: "Reply by to-morrow." It is urged that there is special virtue in the words: "Reply by to-morrow" and that Shew Bux's telegram is a firm offer to sell limited to time. I am unable to see that it was such an offer. It was a reply to Balthazar's telegram asking for telegraphic information as to the lowest price for each property. The words "reply by to-morrow" clearly mean that Shew Bux wished to know by the morrow whether Balthazar's likely purchaser decided to buy. Then, if the reply was in the affirmative, it would be for Shew Bux to finally decide whether he would sell or not. In the words of their Lordships who decided the case of *Harvey* v. *Facey* I cannot treat the telegram from Shew Bux giving the lowest price for each property as binding him in any respect except to the extent it does by its terms, *viz.*, the lowest price. Everything else is left open and the reply telegram from Balthazar

(1) (1893) A.C., 552.

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cannot be treated as an acceptance of an offer to sell to them; it is an offer that required to be accepted by Shew Bux. The mere statement of the lowest price at which the vendor would sell contains no implied contract to sell at that price to the persons making the enquiry. Again in the present case when Balthazar telegraphed that he had sold the house in 29th Street and had received earnest-money Shew Bux promptly replied that he could not sell the house alone but only the three properties together. Evidence is led to show why he desired to sell the three properties together, *viz.*, that he was closing his business in Rangoon. It seems very likely that he had no intention of selling the properties singly. The first telegram says: "Have likely purchaser your three properties." Even supposing that Shew Bux's first telegram was an offer to sell (and I have already held that it was not) the further consideration would arise whether it was an offer to sell the properties collectively or singly. Having in view the words of the first telegram I would hold that the appellants have not proved it was an offer to sell only one of the properties, supposing it was an offer at all.

It is urged that Shew Bux's telegram giving the lowest prices for each and asking for a reply constituted Balthazar his agent to sell—that Balthazar became the broker for both parties; but it was admitted that Shew Bux's telegram only constituted Balthazar his agent if it was an offer to sell. I have already held that it was not, and so the contention cannot prevail. The appeal must therefore in my opinion fail, and it is unnecessary to consider whether the second set of respondents had notice of the contents of the telegrams that passed between Balthazar and Shew Bux which I have set out.

I would dismiss the appeal with costs to the second set of respondents.

*Before Sir Henry Hartnoll, Officiating Chief Judge, and Mr. Justice Twomey.*

*Civil 1st Appeal No. 29 of 1913.*

*March 12th, 1914.*

## SAVURIAMMAL *v.* SANTIAGO.

*Robertson*—for appellant.

*S. N. Sen*—for respondent.

*Indian Divorce Act (IV of 1869), sections 7 and 45—meaning of rights and principles—procedure governed by Civil Procedure Code, section 99—burden of proof.*

The plaintiff-respondent sued his wife (the defendant-appellant) and obtained a decree for the restitution of conjugal rights. The wife admitted having gone through a form of marriage in Church but alleged that she had done so under coercion. The Judge on the Original Side called on the wife to begin. It was urged on appeal that under section 7 of the Indian Divorce Act the proper principles to follow in this matter were those of English law.

*Held*,—that the present matter was one of procedure and as such governed by section 45 of the Indian Divorce Act and section 99 of the Code of Civil Procedure, and that even if appellant ought not to have been called upon to begin, as she had not been prejudiced by being so called upon, she could not have decree upset on that account.

*Held*,—further that as appellant admitted having gone through a form of marriage, it lay on her to prove the marriage invalid.

*Held*,—further that absence of demand was no ground for dismissing the suit.

A. v. B. (1898) I.L.R. 22 Bom., 612 followed.

*Burroughs* v. *Burroughs*, (1862) 2 S. & T., 544 referred to.

*Hartnoll, Offg. C. J.*—The respondent sued the appellant for a decree for restitution of conjugal rights and has obtained a decree for the relief asked for. Respondent's case is that he and appellant were married according to Christian rites on the 28th July 1902 and since then cohabited together, but that since the month of July 1910 appellant without any lawful cause has withdrawn herself and still does withdraw herself from bed board and mutual cohabitation with him and has refused and still does refuse to render to him conjugal rights although requested by him to do so. Appellant's defence is that at no time was there celebrated a valid or legal marriage between her and the respondent, that the marriage alleged by the respondent was brought about by force and intimidation. She at the same time does not deny that a marriage ceremony took place between them at a Roman Catholic Church. She alleges that after the said marriage respondent forcibly took her away to Danidaw and kept her in a house under confinement for a

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fortnight and that in or about the month of August 1902 as he found that she was unwilling to cohabit with him he allowed her to go to her mother's residence at Pazundaung at which place she resided till the suit was brought. She submits that she was never legally married to respondent and that such marriage was null and void and of no effect. She also says that since August 1902 till the institution of the suit respondent has never called on her to return to him and render him marital duties.

The first ground of appeal is that the learned Judge on the Original Side erred in ruling that the appellant had to begin the case as such ruling prejudiced her in substantiating her defence. The learned Judge seems to have called on appellant to begin and at the hearing of this appeal her learned Counsel allowed that he never objected to her beginning. So the learned Judge does not seem to have been asked to rule on who should begin. Section 99 of the Civil Procedure Code lays down that no decree is to be reversed or substantially varied nor shall any case be remanded in appeal on account of any error or irregularity in any proceedings in the suit not affecting the merits of the case, and section 45 of the Indian Divorce Act enacts: "Subject to the provisions herein contained, all proceedings under this Act between party and party shall be regulated by the Code of Civil Procedure." Section 7 of the same Act enacts: "Subject to the provisions contained in this Act the High Courts and District Courts shall, in all suits and proceedings hereunder, act and give relief on principles and rules which, in the opinion of the said Courts, are as nearly as may be conformable to the principles and rules on which the Court for Divorce and Matrimonial Causes in England for the time being acts and gives relief." Reliance is placed on the case of *Burroughs* v. *Burroughs* (1), where in a case of the present nature the Judge ordinarily ruled that the petitioner had the right to begin though the substantive issue may be raised on the husband's—(in the case) respondent's—answer. The first ground of appeal is based on a point which is purely one of procedure and in my

(1) (1862) 2 S. & T., 544.

opinion the words 'principles and rules' used in section 7 of the Indian Divorce Act should not be held to include such a point of procedure. The meaning to be attached to such words was considered in the case of *A.* v. *B.* (2) when Farran, C.J., said: "The principles and rules here referred to—*i.e.*, in section 7 of the Indian Divorce Act—are not, we think, mere rules of procedure including rules which regulate appeals which are laid down in the subsequent sections (45 and 55) of the Act but are the rules and principles which determine the cases in which the Court will grant relief to the petitioner appearing before it or refuse that relief—rules of *quasi*-substantive rather than mere adjective law." I think that that view is right. Even, therefore, if it was for the respondent to have begun, I think that section 99 of the Civil Procedure Code must be considered in determining whether the decree of the learned Judge on the Original Side should be interfered with and taking that section into consideration I am of opinion that even if it was for the respondent to have begun, the appellant has not been prejudiced thereby. She admits that the marriage ceremony took place and that she signed the register; but she pleads that she was forced and coerced into a marriage against her will. It was for her to prove this affirmatively, and it seems to me that, this being the case, it was immaterial to her who began. *But* I consider that she was the right party to begin. Holding as I do that the words "principles and rules" in section 7 of the Indian Divorce Act do not include mere rules of procedure and having regard to section 45 of the same Act and Order 18, Rule 1 of the Code of the Civil Procedure I think that it was for appellant to begin. She admits the ceremony but pleads coercion and non-consent. Unless she can prove such, the marriage was valid and binding on her.

The next ground of appeal is that appellant did not consent to the marriage with the respondent and that there was no marriage between them legally enforceable. She has most certainly not proved her allegations. Three children have been born to her, one before the marriage and two after it, one in 1903 and the other in 1906. The father of each of them was

(2) (1898) I.L.R. 22 Bom., 612.

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registered as Santiago Servai. The child born in 1906 was born some four years after the marriage. She endeavours to make out that another Santiago Servai, which is respondent's name, is the father; but there is no evidence of any worth that such is the case. If she was forced and coerced as she says, surely she should have taken proceedings at the time. There is no good evidence to show that she was forced and coerced. The ground must in my opinion fail.

The next ground is that respondent has failed to prove his case. Appellant having admitted the marriage ceremony and having failed to prove her case, this ground has no substance in it. The fourth ground I have already dealt with. I have no doubt that respondent was father of her children

The fifth ground is that the suit should have been dismissed as there was no demand as required by law before the institution of the suit. This ground refers to an English rule of procedure which is dealt with in the case of *Field* v. *Field* (1). Being a mere rule of procedure I do not think that it is included in the words " principles and rules " as used in section 7 of the Indian Divorce Act. Moreover, having regard to the words of section 33 of the Indian Divorce Act and the beginning words of section 7, absence of notice cannot be pleaded as a defence to an action of this nature. Appellant does not wish to return to her husband and asks that his suit be dismissed. She in her evidence says that her father asked her to return to respondent and she refused.

The sixth ground was not argued.

As regards the seventh ground it would appear that the parties have been separated for some years. During these years the respondent has taken no action. He says that he does so now as his wife is intimate with another man. It does not appear that she is possessed of any means. I think the ground should be allowed.

In the result I would confirm the decree of the learned Judge on the Original Side except that I would order that each party do pay their own costs.

*Twomey, J.*—I agree.

(1) (1888) 14 P.D., 26.

*Before Sir Henry Hartnoll, Offg. Chief Judge and Mr. Justice Ormond.*

Criminal Reference No. 3 of 1914.

May 8th, 1914

## ZAW TA *v.* KING-EMPEROR.

*Maintenance—Period of imprisonment in default of payment—Criminal Procedure Code, section 488 (3).*

The maximum sentence which may be imposed on any one occasion under section 488 (*3*) of the Criminal Procedure Code is one month.

*Q. E.* v. *Narair*, (1897) I.L.R. 9, All., 240; *Ma Mè Ma* v. *Mra Tha Tun*, P.J.L.B., 316 followed.

*Maung Po* v. *Ma Myit*, 1 U.B.R. (1902-03), Criminal Procedure, 3 referred to.

*Allapichai Ravuthar* v. *Mohidin Bibi*, (1896) I.L.R. 20 Mad. 3; *Bhiku Khan* v. *Zahuran*, (1897) I.L.R. 25 Cal., 291 dissented from.

Criminal Revision No. 16B 1914.

am 29th

The following reference was made to a Bench by Mr. Justice Parlett under section 11 of the Lower Burma Courts Act.

On the 2nd April 1912, Nga Zaw Ta was ordered to pay Nan Ma Yin Rs. 5 a month as maintenance for her child. Nothing was paid up to the 30th August 1912 when she applied to enforce the order and on the 20th September arrears for 5 months were recovered. Nothing further was paid before the 29th April 1913, when she again applied to enforce payment of arrears for 7 months. Nga Zaw Ta's attendance before the Magistrate was not procured till the 27th November and orders were not passed till the 11th December when he was sentenced to one year's rigorous imprisonment for neglecting to pay arrears of maintenance for 13 months. On the 17th January 1914, the Sessions Judge directed Nga Zaw Ta to be released and has referred the case for orders as he considers the Magistrate's order bad on the ground, among others, that on the authority of *Ma Me Ma* v. *Mra Tha Tun* (1) if a warrant is issued for an accumulation of arrears for several months, the Magistrate has no power to give a greater sentence than if the warrant related to only one breach. That ruling followed the Allahabad case of *Q. E.* v. *Narain* (2) which was however dissented from by the Madras High Court in *Allapichai Ravuthar* v. *Mohidin Bibi* (3). Though the point was not actually decided in *Maung Po* v. *Ma Myit*, (4) the learned Judicial Commissioner of Upper Burma there indicated that

(1) P. J. L. B., 316. (2) (1897) I. L. R. 9 All., 240.
(3) (1896) I. L. R. 20 Mad., 3.
(4) 1 U. B. R., 1902-03, Criminal Procedure, 3.

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he held the opinion that the law provides for the levy of arrears which may be for several months, with the consequential penalty, in the event of their not being realized, of imprisonment for several months. In view of the divergent views of the High Courts on the point I think it desirable that the matter should be reconsidered by this Court, and accordingly refer to a Bench the question whether when a Magistrate issues a warrant for arrears of maintenance for more than one month and when the allowance for more than one month remains unpaid after execution of the warrant he is competent to pass a sentence of imprisonment exceeding one month.

*The opinion of the Bench was as follows*:—

*Hartnoll, Offg. C. J.*—The question referred to us relates to Section 488 (*3*) of the Code of Criminal Procedure and is "whether when a Magistrate issues a warrant for arrears of maintenance for more than one month and when the allowance for more than one month remains unpaid after execution of the warrant he is competent to pass a sentence of imprisonment exceeding one month." The sub-section is as follows: "If any person so ordered wilfully neglects to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in manner hereinbefore provided for levying fines, and may sentence such person, for the whole or any part of each month's allowance remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made." Then follows a proviso which it is not necessary to set out. The part of the sub-section I have set out agrees with the corresponding sub-section of the Code of Criminal Procedure (Act X of 1882) which preceded the Code now in force except that the words "or until payment if sooner made" are new. The meaning of the words in the sub-section of Act X of 1882 has been considered in the following cases: *Q. E.* v. *Narain* (2), *Ailapichai Ravuthar* v. *Mohidin Bibi* (3), *Bhiku Khan* v. *Zahuran* (5), *Ma Me Ma* v. *Mra Tha Tun* (1), and *Maung Po* v. *Ma Myit* (4).

(2) (1897) I. L. R. 9 All., 240.
(3) (1896) I. L. R. 20 Mad., 3.
(5) (1897) I. L. R., 25 Cal., 291.
(1) P. J. L. B., 316.
(4) 1 U. B. R., 1902-03, Criminal Procedure, 3.

The Allahabad Court found that where a claim for accumulated arrears of maintenance for several months arising under several breaches of an order for maintenance is dealt with in one proceeding and arrears levied under a single warrant, the Magistrate acting under section 488 has no power to pass a heavier sentence in default than one month's imprisonment as if the warrant related to a single breach of the order. This view was followed in the Burma case of *Ma Me Ma* v. *Mra Tha Tun*; but it was dissented from in the Madras and Calcutta cases which I have quoted. In the Madras case it was held that the imprisonment provided by section 488 in default of payment of maintenance is not limited to one month and that the maximum imprisonment that can be imposed is one month for each month's arrears and if there is a balance representing the arrears for a portion of a month, a further term of a month's imprisonment may be imposed for such arrear. In this case an earlier case of the Madras High Court was considered and it was pointed out that the wording of the Criminal Procedure Code which was in force when it was decided (Act XXV of 1861) in the section of it corresponding to section 488 of Act X of 1882 differed from the wording of the latter section. As I have remarked the Calcutta case follows the Madras case. The Upper Burma case does not seem to be one in which any definite conclusion was arrived at.

My own view is that the meaning of the words of the section is not too clear. At first I was inclined to hold the view taken by the Madras and Calcutta High Courts, as the words "may sentence such person, for the whole or any part of each month's allowance remaining unpaid after the execution of the warrant to imprisonment for a term which may extend to one month" at first sight would seem to mean that a month's imprisonment can be inflicted in respect of each month's arrear remaining unpaid or in respect of any portion of a month's arrear remaining unpaid. But I can see that another view can be taken as to the meaning of the words. Looking at the meaning of the word "each" I see that the Century Dictionary gives it as "each, every one, any one—being either or any unit of a numerical aggregate consisting of two or more indefinitely." Without saying that each has a plural meaning, it clearly may when used

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in a sentence refer to more than one. For instance when we say: "Each part of the engine is in order," this is equivalent to saying: "All parts of the engine are in order." The words in the sub-section "for the whole or any part of each month's allowance remaining unpaid" may therefore be read as meaning possibly "for the whole or any part of every month's; *or*, all months', allowance remaining unpaid" where the arrears remaining unpaid are for a period exceeding a month. Reading the words in this way it may be that the legislature intended that the term of imprisonment to be awarded should extend to a period of one month only in respect of all arrears due after the execution of the warrant, whether they amount to several months, or portions of several months', allowance remaining unpaid or to a portion of a single month's allowance remaining unpaid. As I consider the words doubtful and not clear, the benefit of the doubt must be given in favour of the subject and I would answer the question as follows:—

"When a Magistrate issues a warrant for arrears of maintenance for more than one month and when the allowance for more than one month remains unpaid after execution of the warrant, he is not competent to pass a sentence of imprisonment exceeding one month."

*Ormond, J.*—The maximum sentence which may be imposed on any one occasion under section 488, Criminal Procedure Code, is in my opinion one month. One warrant only should be issued for levying the amount of arrears due at the time of the application for the warrant. The section means I think, that for successive defaults under one order for monthly payments of maintenance the defaulter (if able to pay) may on successive occasions be sentenced to imprisonment for a term not exceeding one month, whenever a warrant is applied for and issued and the arrears then due are not realized:—Whether the amount remaining unpaid on each occasion is as much as one month's maintenance or not. The defaulter could be imprisoned for one month although only a portion of a month's allowances remained unpaid under one warrant; and he could be imprisoned again for one month under a subsequent warrant although a portion only of another month's allowance remained unpaid. But there is nothing to shew that more than one

warrant should issue on one occasion for the recovery of several months' arrears:—On the contrary, "The Magistrate may, for every breach of the order, issue a warrant for levying the amount due;" *i.e.* the Magistrate may issue one warrant for levying the amount due, under the order, to the applicant at the time of the application. The section seems to comtemplate application being made for a warrant upon each occasion of default, without delay, so that not more than one month's maintenance would be in arrear; though the applicant is not debarred from applying for a warrant for the recovery of all arrears up to date. I can find nothing to support the conclusion that the section authorizes one month's imprisonment for every month's arrears, when one warrant is issued for the recovery of several months' arrears:—To arrive at such conclusion, the words, "for the whole or any part of each month's allowance remaining unpaid after the execution of the warrant," must be read as if they were :—" for each whole month's allowance remaining unpaid after the execution of the warrant *and* (not 'or') for any part of *a* (not 'each') month's allowance as remaining unpaid." It could then be said that the words "for each month's allowance," contemplated a case where the amount remaining unpaid is equivalent to several months' allowance, and show that in such a case, a proportionate sentence of imprisonment exceeding one month may be imposed. If the words are read as being:—"For each whole month's allowance and for any part of each month's allowance remaining unpaid after the execution of the warrant"; the words "any part of each month's allowance" would shew that if the words of the section referred to the case of several whole months' allowance remaining unpaid after the execution of the warrant, they must also refer to the case where portions of several months' allowance remained unpaid after the execution of the warrant:—which could not be; for the warrant is issued to recover the amount due, and though the amount remaining unpaid might very well represent several whole months' allowance, the balance left over unpaid could not be more than one *portion* of a month's allowance. I read the above passage as meaning :—"for the whole amount or any part of a month's

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allowance, remaining unpaid on each occasion after the execution of a warrant."

Under section 316 of the Code of 1861 the maximum sentence on each occasion after the issuing of a warrant was one month's imprisonment; and there is no indication in section 488 of the present Code that the maximum sentence was intended to be increased:—beyond expressly allowing one month's imprisonment if the amount remaining unpaid is less than a whole month's allowance.

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*Before Mr. Justice Hartnoll and Mr. Justice Ormond.*

*Civil Reference No. 5 of 1914.*

CATHERINE THADDEUS . . . . . (PETITIONER.)

(IN THE MATTER OF THE ESTATE OF GREGORY CATCHICK THADDEUS, DECEASED.)

*June 18th, 1914.*

*D. Dorabjee*—for petitioner.

*Eggar*—Assistant Government Advocate, for Government.

*Probate—Court-fees payable on—calculated on net value—Court Fees Act, section 19 I.*

The rate at which the amount payable as Court-fees on probate of a will is to be assessed must be calculated on the net value of the estate according to the scale laid down in Article 11 of the first schedule to the Court Fees Act.

*In the goods of Harriett Teviot Kerr*, (1913) 18 C.W.N., 121 followed.

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

*Civil Miscellaneous No. 17 of 1914.*

*March 16th, 1914.*

This is an application for probate and question arises as to the amount of Court fees to be paid. It has been hitherto the practice of this Court to assess the duty on the net value of the estate at the rate applicable to the gross value of the estate. The same practice seems to have been followed in Calcutta, but the question as to its propriety was recently raised there in the case *In the goods of Harriett Teviot Kerr, deceased* (1) and referred by the Chief Justice for decision to Mookerjee, J., who after full argument decided that the duty should be calculated at the rate applicable to the net value. As this decision raises some doubt in my mind as to the correctness of this Court's practice, I refer the question as to whether the rate should be

(1) (1913) 18 C.W.N., 121.

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calculated on the gross or net value to be decided by a full Bench or Bench of this Court as the Chief Judge may determine.

*The opinion of the Bench was as follows*:—

*Hartnoll, J.*—The question for decision is as to the amount of duty to be paid on probate of the will of Gregory Catchick Thaddeus, deceased. It has hitherto been the practice of this Court to assess the duty on the net value of the estate at the rate applicable to the gross value of the estate; but in view of the decision in the case of *In the goods of Harriett Teviot Kerr, deceased* (1) the learned Judge on the original side has referred the question to a Bench. Section 19-I of the Court Fees Act enacts as follows: "(1) No order entitling the petitioner to the grant of probate or letters of administration shall be made upon an application for such grant until the petitioner has filed in the Court a valuation of the property in the form set forth in the third schedule and the Court is satisfied that the fee mentioned in No. 11 of the first schedule has been paid on such valuation." This section was enacted by Act XI of 1899. Schedule III is a form of valuation. Annexure A of it deals with all the property of the deceased and its value. Annexure B deals with the amount of debts, funeral expenses, mortgage encumbrances property held in trust not beneficially or with general power to confer a beneficial interest and other property not subject to duty. The total shown by Annexure B *which is stated as not subject to duty* is then deducted from the total shown in Annexure A and is described as the net total. It is clear therefore that the duty is leviable on this net total. Article 11 of Schedule I lays down a sliding scale and begins "when the amount or value of the property in respect of which the grant of probate or letters is made exceeds Rs. 1,000 but does not exceed Rs. 10,000 . . . 2 per centum *on such amount or value*" and proceeds "When such amount or value exceeds Rs. 10,000 but does not exceed Rs. 50,000 . . . 2½ per centum *on such amount or value.* When such amount or value exceeds Rs. 50,000 . . . . 3 per centum *on such amount or value.*" The entries in columns 2—3 of the Article were enacted by Act VII of 1910. The difficulty arises

(1) (1913) 18 C. W. N., 121.

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in construing the words "amount or value of the property in respect of which the grant of probate or letters is made," as probate or letters are granted on the gross value of the estate; but according to section 19-I the fee is only to be paid on the net value. Article 11 makes the duty payable on the gross value; but section 19-I says that it is only to be paid on the net value. The meaning of the legislature seems to me to be not clear, and where this is so, the doubt must in my opinion be given in favour of the subject. For the reasons given by Mookerjee, J. in the case above quoted, I am inclined to think that the intention was for the scale laid down in Article 11 to be calculated on the net value shown in Schedule III. The provisions of section 19-B of the Court Fees Act seem to me to lend support to such a view. I would therefore hold that the rate should be calculated on the net value of the estate according to the scale laid down in Article 11 of the First schedule. In the present case the net value is said to be Rs. 6,232-9-7. Duty should therefore be paid on this amount at the rate of 2 per cent.

*Ormond, J.*—I concur. Schedule III of the Court Fees Act shews that the value of an estate is the net value for the purposes of taxation. I think that the words in the 2nd column of the First Schedule Article 11 "Value of the property in respect of which the grant of probate or letters is made:" are also intended to mean the net value of the estate:—or, in other words, the actual or market value as a whole, of the estate which is to be administered; which would be the value of the assets less the amount of liabilities.

Only the net value is taxed; and presumably all estates of the same net value are intended to pay the same tax. But if the above words in Article 11 are taken to mean the gross value; *i.e.* the value of all the property that will come into the hands of the Executor or Administrator, without taking into consideration the amount that must be paid out to creditors; an estate of the gross value of Rs. 51,000 but with liabilities to the extent of Rs. 42,000 and therefore of the net value of Rs. 9,000, would pay a tax of 3 per cent. on Rs. 9,000, *i.e.* Rs. 270; whereas an estate of the value of Rs. 9,000 without liabilities would pay only 2 per cent, *i.e.* Rs. 180.

*Before Mr. Justice Hartnoll and Mr. Justice Ormond.*

1. CHIN AH YAING, 2. AH AYE, PETITIONERS.

( IN THE MATTER OF THE ESTATE OF CHIN CHENG SOON, DECEASED).

*Civil Reference No. 6 of 1914.*

*June 18th, 1914.*

*Harvey*—for petitioners.

*Eggar*—Assistant Government Advocate, for King-Emperor.

*Probate—no fess payable when net value not above Rs. 1,000—Court Fees Act, section 19 (viii).*

No Court fee can be levied for probate or letters of administration when the net value of the estate does not exceed Rs. 1,000.

*Harriett Teviot Kerr*,—(1913) 18 C. W. N., 121 followed.

*Collector of Maldah* v. *Niroda Kamini Dassy*, (1912) 17 C. W. N., 21 referred to.

*Civil Miscellaneous No. 50 of 1914.*

*March 16th, 1914.*

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

This is an application for probate in respect of an estate of which the gross value is Rs. 16,000 and the net value is Rs. 540 and the question is whether any, and, if so, what duty is payable. Schedule 1, Article 11 of the Court Fees Act, provides that if the amount or value of the property in respect of which the grant of probate or letters is issued exceeds Rs. 1,000 but does not exceed Rs. 10,000, the proper fee shall be 2 per cent. on such amount or value; and 2½ per cent. if it is over Rs. 10,000 and so forth on a sliding scale.

Section 19 VIII provides that no duty is payable where the amount or value of the property in respect of which the probate or letters shall be granted does not exceed Rs. 1,000. Heretofore the practice of the Court has been to construe the words "the amount or value of the estate" in Article 11 as being what has been called the gross value of the estate, and therefore to calculate the rate of duty on such "gross value" but only to make it payable on such part of the property as was liable to duty. The Calcutta High Court, following certain decisions of the Allahabad and Bombay Courts in the recent case of *Harriett Teviot Kerr* (1), decided on the 27th August 1913, now proposes to construe value in Article 11 as meaning market value. If this construction is adopted and the term "gross value" seems somewhat artificial in itself and also to make the word "amount" tautologous, the value of an estate will be

(1) (1913) 18 C. W. N., 121.

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1. CHIN AH YAING, 2. AH AYE, PETITIONERS. (IN THE MATTER OF THE ESTATE OF CHIN CHENG SOON, DECEASED.)

diminished by the debts payable out of it and in the present case the value of the estate instead of being 16,000 will be Rs. 540 and consequently exempt from duty under section 19 VIII. The practice both of this Court and the Calcutta Court has hitherto been otherwise *vide Collector of Maldah* v. *Niroda Kamini Dassy* (2).

The learned Judge who decided the case of *Harriett Teviot Kerr* which was specially referred under section 5 and fully argued stated that though the point decided in the Collector of Maldah did not arise in that case, it might when it arose again require re-examination and further consideration. The same remarks seem to me applicable to our own practice and to this case in which the point is directly raised, and I would therefore refer for the opinion of a Bench or Full Bench of this Court as the Chief Judge may direct the question whether, when by reason of its debts, the value of an estate does not exceed Rs. 1,000, any Court Fee is payable before probate or letters can issue.

*The opinion of the Bench was as follows :—*

*Hartnoll, J.*—The question for decision in this case is what, if any, duty is leviable under Article 11 of the First Schedule of the Court Fees Act on an estate the gross value of which is Rs. 16,000 and the net value Rs. 540. The meaning and effect of Article 11 and section 19-I of the Court Fees Act has just been considered by me in Civil Reference No. 5 of 1914. The present case in addition involves the consideration of the meaning of section 19 (viii) of the same Act which is: "Nothing contained in this Act shall render the following documents chargeable with any fee:— . . . . . (viii) Probate of a will, letters of administration . . . . . where the amount or value of the property in respect of which the probate or letters or certificate shall be granted does not exceed one thousand rupees." Probate or letters are granted on the whole of the estate and so the amount or value on which they are granted would be the gross value of the estate. If therefore the gross value of the estate exceeds Rs. 1,000, it may be argued that there is no freedom from liability to duty by virtue of section 19 (viii). But as

(2) (1912) 17 C. W. N., 21.

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pointed out in the former reference, it may be that the intention was that the scale laid down in Article 11 should be calculated on the net value shown in Schedule III or in other words that the words "the amount or value of the property in respect of which the grant of probate or letters is made" in Article 11 should refer to the net value. If they are given that meaning in Article 11, it would seem to be consistent to give them the same meaning in section 19 (viii). The matter seems to me to be again doubtful and I would give the doubt in favour of the subject. Where therefore the net value of a property in respect of which probate or letters is granted does not exceed Rs. 1,000, I would hold that the probate or letters are not chargeable with any fee.

In the present case therefore I would hold that no fee is chargeable.

*Ormond, J.*—Exactly the same arguments apply in this case as in Civil Reference No. 5 of 1914. Having held in that case that the words in Article 11 of the First Schedule of the Court Fees Act:—"Value of the property in respect of which the grant of probate or letters is made", mean the net value of the estate, the same construction must be placed upon those words in section 19 (viii) of the same Act.

In my opinion, therefore, section 19 (viii) states that probate of a will or letters are not chargeable with any fee under the Court Fees Act where the value of the assets less the amount of liabilities is Rs. 1,000 or less.

Moreover there is no provision under the Court Fees Act which renders such probate or letters chargeable with any fee; for under our decision in Civil Reference No. 5 of 1914, Article 11 would not apply in a case where the value of the assets less the amount of liabilities is Rs. 1,000 or less.

*Civil Miscellaneous Appeal No. 26 of 1913.*

*August 22nd, 1913.*

*Before Sir Henry Hartnoll, Officiating Chief Judge and Mr. Justice Young.*

## CHIT MAUNG *v.* 1. MA YAIT. 2. MA NOO.

*Giles*—for appellant.

*N. M. Cowasjee*—for 1st respondent.

*A. B. Banurjee*—for 2nd respondent.

*Administration—estates of persons of mixed Hindu Indian and Burmese descent—Indian Succession Act not applicable—Probate and Administration Act, sections 23 and 41.*

As the powers of an administrator are different under the two Acts, a Court granting letters of administration should be careful to state whether letters are granted under the Probate and Administration Act or the Indian Succession Act. The term "Hindu" in section 331 of the Indian Succession Act is denominative of a religion and not of a race. A person who had a Hindu father and Burmese Buddhist mother and who although he worshipped at Buddhist pagodas and observed Buddhist fasts and festivals is admitted to have professed the Hindu religion is for the purposes of the Succession law a Hindu, and the Act applicable to the administration of his estate is the Probate and Administration Act.

Letters of administration to the estate of such a person would normally be given to his eldest son, but circumstances may justify a Court in preferring some other person interested under section 41, Probate and Administration Act.

*Dagree* v. *Pacotti San Jao*, (1895) I. L. R. 19 Bom., 783 followed.

*Hartnoll, Offg. C. J.*—Ma Yait has been given letters of administration to the estate of her deceased husband, Maung Ohn Ghine. Her son, Maung Chit Maung, disputes her right to have them.

It has not been settled whether letters should issue under the provisions of the Indian Succession Act, 1865, or under the provisions of the Probate and Administration Act, 1881, as it has not been decided whether Maung Ohn Gaine was a Hindu within the meaning of section 331 of the Indian Succession Act.

As a matter of fact the record shows that letters have been issued in the form provided for the Probate and Administration Act. Maung Chit Maung contends that his father was a Hindu, that letters should be issued under the Probate and Administration Act in which case he would have first claim to them, a claim that should not be passed over in favour of another without adequate cause. Ma Yait contends on the other hand that her deceased husband was not a Hindu within the meaning of

section 331 of the Indian Succession Act and therefore that that Act applies to his estate.

Maung Ohn Ghine is described by Ma Yait as being a member of the community of mixed Hindu and Burmese descent known as *Kales* professing the Hindu religion. She described *Kales* as the descendants of Hindu settlers by Burmese women and says that U Ohn Ghine and all the members of the community also worshipped at the pagoda, fed the pongyis and observed Buddhist fasts and festivals.

I think that it must be definitely decided as to which Act is applicable. If Maung Ohn Ghine was a Hindu, section 150 of the Probate and Administration Act renders it imperative that that Act should be applied to the administration of his estate. If he was not, section 2 read with section 331 of the Indian Succession Act equally renders it imperative that this latter Act should be applied to the administration of his estate. The powers of an administrator are different under the two Acts. The rules as to succession are different according to Hindu law and according to the Succession Act. If the administrator has letters under the Indian Succession Act, the estate must be divided according to the rules laid down in it; if the letters are under the Probate and Administration Act, the distribution must be in the present case according to the rule of Hindu law. No authorities were quoted at the hearing as to which Act was applicable in this case; but it was contended by respondent's counsel that Maung Ohn Ghine cannot be held to be a Hindu within the meaning of the two Acts inasmuch as he was not a pure Hindu by birth—that as his paternal ancestor, who was a Hindu, cohabited with a Burman Buddhist, the issue of that union and their descendants ceased to be Hindus—that persons can profess to be Hindus and yet be outside the pale of Hinduism. The subject was discussed in the case of *Dagree* v. *Pacotti San Jao* (1) and I can see no good reason for differing from the reasoning followed in that case. I would follow it and in that it is admitted by Ma Yait that Maung Ohn Ghine professed the Hindu religion, I would rule, that the Probate and Administration Act (V of 1881)

(1) (1895) I. L. R. 19 Bom., 783.

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applies to his estate and that the letters issued to administer it must be held to be issued under the provisions of that Act.

The next point to be considered is whether in view of this decision, Maung Chit Maung should not be preferred to his mother, Ma Yait. According to section 23 of the Probate and Administration Act the ordinary rule is that letters should issue to any person who according to the rules for the administration of the estate of an intestate applicable in the case of such deceased would be entitled to the whole or any part of such deceased's estate; but section 41 of the Act allows an exception to be made. In the ordinary course Maung Chit Maung should be given the letters; but Ma Yait objects to his having them on the ground that he forfeited Maung Ohn Ghine's confidence and that he has been foolish and extravagant. He on the other hand urges that his mother should not have them as she is trustee under a settlement that was made by Maung Ohn Ghine which is invalid according to Hindu law, and that if she is administratrix, she will not take measures to have it set aside. It is a fact that he was not appointed a trustee of the settlement by his father and this goes to support Ma Yait's allegations against him. The other two adult sons, Maung Maung and Maung Aye Maung, wish their mother and sister to administer the estate and not Maung Chit Maung. Statements made by them in England have been filed to this effect. The learned Judge on the Original Side has noted that Ma Yait is supported by all the members of the family except Maung Chit Maung. Under the circumstances therefore I see no good reason for withdrawing the letters from Ma Yait.

I would therefore dismiss the appeal, but in doing so would expressly rule that the letters are granted under the provisions of the Probate and Administration Act and that that Act will govern the administration of the estate.

I would also order that the costs of both parties to this appeal shall come out of the estate. I would allow to each party a counsel's fee of two gold mohurs.

*Young, J.*—This is an appeal from a decision of the learned Judge on the Original Side granting letters of Administration of the estate of the late Maung Ohn Ghine to one Ma Yait, his widow.

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The main grounds of appeal are that the learned Judge should have decided whether the application for letters were to be dealt with under the Indian Succession Act or under the Probate and Administration Act, and should have decided that he was a Hindu and that the administration of his estate was governed by Hindu Law and the Probate and Administration Act, and should have held that the appellant who is the intestate's eldest son had the best right to administer the estate. The respondent urged that the deceased was not a Hindu in the strict sense, that the Succession Act applied and that under it the widow had the preferential claim. The respondent's contention that Maung Ohn Ghine was not a Hindu in the strict sense has to be considered in the light of her own affidavit, which states that he professed the Hindu religion. Section 331 of the Succession Act provides that that Act shall not apply to the property of any Hindu, Mahomedan or Buddhist, and it has been repeatedly held both in Bombay and Madras that the term Hindu as there used is denominative of a religion and not of a race. *Vide Dagree* v. *Pacotti* and cases there cited. Section 2 of the Probate and Administration Act provides that Chapters 2—13 of that Act shall apply to all Hindus, Mahomedans and Buddhists dying after April 1st, 1881. The term "Hindu" must obviously be given the same construction in each Act and therefore on respondent's own affidavit, I would hold that the Probate and Administration Act applied and not the Succession Act. If this Act applies letters under section 23 may be given to any person who according to the rules for the distribution of the estate of an intestate applicable in the case of such deceased would be entitled to the whole or any part of such deceased's estate, and when several such apply it is in the discretion of the Court to grant it to any one or more such persons. The applicants were the widow and a daughter of the deceased on the one hand and the eldest son on the other. In my opinion according to the ordinary principles of Hindu Law a widow where there are sons is entitled to maintenance during her life and a daughter under the same circumstances to maintenance till her marriage out of the estate, but neither can, I think, be said to be entitled to the estate or any part of it within the meaning of section 23.

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The widow states that her husband was of mixed Burmese and Hindu descent and was a member of a community called *Kales*, which according to her has heretofore not followed any fixed law of inheritance but in which the children divide the property (which in other cases has been small) as they think best. Succession amongst Hindus is intimately connected with religion, but it may be that a custom at variance with the ordinary rules of succession might be proved. Even if it were proved however, it seems that under it she as widow has to depend on the childrens' sense of duty and is not entitled as widow to a share of the estate so as to enable the Court to exercise a discretion in her favour under section 23, which apparently refers only to persons entitled to share. Section 41 however provides that the person who would ordinarily be entitled may be superseded where such a course appears to the Court to be convenient and I cannot shut my eyes to the facts that the intestate in his life-time made a settlement of his property which was not only large in itself but was large in proportion to the rest of his property, and that he selected his wife and daughter to be the trustees to manage such settlement, but not his eldest son, and that all the other members of the family desire that she, and not he, should administer the residue. Her affidavit in respect of his unfitness is not so specific as it should be, but he is very young and there certainly seems reason to question his fitness and capacity. The section in question is wider than the analogous section of the English Probate Act of 1857, and on the whole I see no reason to set aside the order of the lower Court though for the reasons already stated I consider that letters should issue expressly under the Probate and Administration Act. I also concur in the order as regards costs.

*Before Mr. Justice Hartnoll, Offg. Chief Judge and Mr. Justice Twomey.*

*Civil First Appeal No. 157 of 1913.*

*December 10th, 1913.*

1. PALANEAPPA CHETTY, 2. KUMARAPPA CHETTY, 3. CHOKALINGAM CHETTY, 4. ALLAGAPPA CHETTY, minor by his next friend the 1st appellant. All carrying on business under the name and style of P. L. P. FIRM *v.* 1. M. S. SOMASUNDRAM CHETTY, 2. V. E. N K. R. M. A. FIRM by their duly constituted agent MAYAPPA CHETTY, 3. P.L.P. SUBRAMANIAN CHETTY, 4. SAMINATHEN CHETTY *alias* PALANIAPPA CHETTY,

*N. S. Aiyer*—for appellants.

*Execution proceedings—satisfaction of decree out of Court—failure of judgment-debtor to apply to Court executing decree to record satisfaction.—Section 47, Civil Procedure Code.*

The 2nd respondent obtained a decree for Rs. 8,890 in the District Court of Ramnad against the plaintiff-appellants' firm and having got the decree transferred to the District Court of Pegu was getting it executed in the latter Court. The plaintiff-appellants allege that the decree had been adjusted out of Court by the payment of Rs. 6,600 and sued in the District Court of Pegu for a declaration that the decree passed in the Ramnad Court had been satisfied and could no longer be executed. The District Court rejected the plaint.

*Held*,—on appeal that the relief claimed obviously fell within the terms of section 47 of the Civil Procedure Code and the plaint was rightly rejected.

*Azizan* v. *Matuk Lal Sahu*, (1893) I. L. R., 21 Cal., 437; *Laldas Narandas* v. *Kishordas Devidas and others*, (1896) I. L. R. 22 Bom., 463; *Bairagulu and another* v. *Bapanna*, (1892), I. L. R., 15 Mad., 302; *Maung Myaing* v. *Maung Shwe Hmon*, P. J. L. B., 621 followed.

*Hartnoll, Offg. C. J.*—Plaintiff-appellants sue respondents under the following circumstances. They state that they and the 3rd and 4th respondents are partners in the firm of P. L. P. carrying on business at Pegu, that on the 29th September 1911 the firm of V. E. N. K. R. M. A. (2nd respondent) obtained a decree for Rs. 8,890-2-5 against the P. L. P. firm in a suit filed in the Ramnad Court at Madura, that the decree was subsequently adjusted by a payment of Rs. 6,600 in consequence of an arrangement made between M. A. R. R. M. Annamalai Chetty, the 3rd respondent, and the V.E.N.K.R.M.A. partners, the payment being made by 1st respondent as agent

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of the M. A. R. R. M. firm to the V. E. N. K. R. M. A. firm on the 31st January 1912, that the 3rd respondent has repaid the Rs. 6,600 to the M. A. R. R. M. firm out of monies belonging to the P. L. P. firm, that the V. E. N. K. R. M. A. firm has not certified the adjustment of the decree passed at Ramnad to that Court, that as the result of misunderstandings between appellants and respondents three and four the third respondent in collusion with the V. E. N. K. R. M. A. firm and M. A. R. R. M. Annamalai Chetty got the Ramnad decree fraudulently transferred by the V.E.N.K.R.M.A. firm to the first respondent, the agent of the M. A. R. R. M. firm, and that the first respondent applied to the Ramnad Court to be recognized as the assignee of the decree and for a transfer to the Pegu District Court, and is now proceeding with the execution in the latter Court. The appellants pray for a declaration that the decree passed in the Ramnad Court has been satisfied and can no longer be executed. The District Court rejected the plaint and so this appeal has been laid. Order XXI, Rule 2, deals with payments out of Court in satisfaction of a decree. It lays on decree holders the obligation of certifying such payments to the Court and allows the judgment-debtor to apply for the recording as certified of such payments. The rule then lays down that such a payment which has not been certified or recorded as certified shall not be recognized by any Court executing the decree. Section 47 of the Code says: "All questions arising between the parties to the suit in which the decree was passed or their representatives and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit." The present suit most certainly deals with a matter relating to the satisfaction of the Ramnad decree, for the appellants rely on an alleged uncertified payment of Rs. 6,600 which they say satisfied it. The relief asked for is a declaration that the decree has been satisfied and can no longer be executed. This relief is one that comes directly within the terms of section 47 which expressly enacts that it must not be determined by separate suit but in the execution proceedings.

The law has been discussed in many cases and the view I hold has been followed in the following cases *Azizan* v. *Matuk*

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*Lal Sāhu* (1), *Laldas Narandas* v. *Kishordas Devidas and others* (2), *Bairagulu and another* v. Bapanna (3). In the case of *Maung Myaing* v. *Maung Shwe Hmon* (4), it was held that the proper remedy in a case like this was by a separate suit for damages and the decision does not conflict with the Calcutta case quoted above. This is not a suit for damages but one to restrain the decree from being executed.

It was then urged that in any case the plaint should not have been rejected. There was in my opinion no other course open to the Judge. The suit was barred by section 47 of the Civil Procedure Code.

I would dismiss the appeal.

*Twomey, J.*—I concur.

(1) (1893) I. L. R. 21 Cal., 437.
(2) (1896) I. L. R. 22 Bom., 463.
(3) (1892) I. L. R. 15 Mad., 302.
(4) P. J. L. B., 621.

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