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BEING THE

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DURING

1917-18.

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LOWER BURMA RULINGS.

FULL BENCH.

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

Civil Reference No. 6 of 1915.

December 20th, 1915.

MÀ HNYA *v.* MA ON BWIN.

Ginwala—for appellant.

May Oung—for respondent.

Buddhist Law: Inheritance—Widow and illegitimate child—Kilitha.

On the following two questions being referred under section 11 of the Lower Burma Courts Act to a Full Bench—

(1) A Burmese Buddhist man dies leaving a widow and an illegitimate child. Is the illegitimate child entitled to any share in the estate left by the man? If so, to what share, if the child is a daughter?

(2) In the above case, can an illegitimate daughter if entitled to a share in her deceased father's estate, claim and obtain such share in the life-time of her father's widow?

Held (*Parlett, J., dissenting*),—that a "*kilitha*" child, *i.e.* a child begotten in pleasure whose parents do not live openly as man and wife, cannot share with his or her father's widow in the father's estate.

Held, by Parlett, J.,—that both questions should be answered in the affirmative and that the daughter is entitled to three-fourths of the property taken by her father to the marriage with the surviving widow and to one-sixth of the joint property acquired during that marriage.

Ma Shwe Zi v. *Ma Kyin Thaw*, (1910) 3 Bur. L.T., 147; *Ma Sein Hla* v. *Maung Sein Hnan*, (1903) 2 L.B.R., 54; *Ma Le* v. *Ma Pauk Pin*, (1883) S.J.L.B., 225; *Mi Lan* v. *Maung Shwe Daing*, 2 U.B.R. (1892-96), 121 at 134; *Ma Shwe Ma* v. *Ma Hlaing*, 2 U.B.R. (1892-96), 145; *Ma Hlaing* v. *Ma Shwe Ma*, 2 U.B.R. (1892-96), 153 at 157; *Maung Twe* v. *Maung Aung*, 2 U.B.R. (1897-01), 176; and *Ma Hnin Bwin* v. *U Shwe Gôn*, 8 L.B.R., 1—referred to.

The following reference was made by the Chief Judge to a Full Bench under section 11 of the Lower Burma Courts Act:—

Special Civil Second Appeal No. 253 of 1914.

July 20th, 1915.

One Saya Thi's first wife was Ma Le, by whom he had a daughter Ma Mya. Ma Le and Ma Mya predeceased him. He had another daughter, the plaintiff Ma On Bwin, by Ma Kha, but it has been found by both Courts that Ma Kha was not his wife. About three months before his death Saya Thi married the defendant Ma Hnya.

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The illegitimate daughter brought the suit against the widow claiming three-fourths of Saya Thi's estate. The Divisional Court has passed a decree in favour of the plaintiff awarding her a half-share in the estate. The defendant appeals against such decree. The arguments in support of the appeal are threefold, namely :—

(1) That an illegitimate child is only entitled to a share in his or her parent's estate when the parent has left no heir, and that Saya Thi having left an heir in the person of his widow, the defendant Ma Hnya, the plaintiff is not entitled to any share in his estate.

(2) That even if she is held to be entitled to a share in the estate, it is not as much as a half-share.

(3) That even if she is entitled to a share, such share is not claimable during the life-time of the defendant widow. All of these grounds can scarcely be said to be included in the grounds of appeal to this Court, but Mr. May Oung has waived objection to all being considered in view of the desirability of obtaining a final decision on the rights of the parties in cases similar to the present.

In Special Civil 2nd Appeal No. 80 of 1909, *Ma Shwe Zi* v. *Ma Kyin Thaw* (1), which was a case similar to the present, it was not argued that the plaintiff illegitimate daughter was not entitled to demand her full share in the life-time of the widow : it was said that if this argument had been put forward it might have been necessary to decide whether it was open to her to do so in view of certain rulings of the Court mentioned in the judgment. In the present case the argument is put forward.

One sentence in Sir Herbert Thirkell White, Chief Judge's judgment in *Ma Sein Hla* v. *Maung Sein Hnan* (2), *viz.* " If therefore Po Hlut had died leaving no legitimate offspring, I think there is no doubt that the respondent Maung Sein Hnan (an illegitimate son of Po Hlut) would have been entitled to share with Ma Min Tun (Po Hlut's widow) in the inheritance of his estate," would apply to the present case, but it is argued that the dictum was unnecessary for the decision of that case, and that it should be regarded as an obiter dictum.

(1) (1910) 3 Bur. L.T., 147. (2) (1903) 2 L.B.R., 54.

It appears to me that the present case affords an opportunity of obtaining a final decision on the rights in the estate of a man who dies leaving a widow and an illegitimate child.

Under section 11 of the Lower Burma Courts Act, I refer for the decision of a Bench of the Court the following questions :—

1. A Burmese Buddhist man dies leaving a widow and an illegitimate child. Is the illegitimate child entitled to any share in the estate left by the man? If so, to what share, if the child is a daughter?

2. In the above case, can an illegitimate daughter, if entitled to a share in her deceased father's estate, claim and obtain such share in the life-time of her father's widow?

The opinion of the Full Bench was as follows :—

Fox, C.J.—After the full discussion which the subject has now received it appears to me that there are no texts in any *Dhammathat* which clearly and without doubt indicate that the answers to the questions referred should be in the affirmative. If there were such texts I would be inclined to follow the course suggested by Jardine, J.C., in *Ma Le* v. *Ma Pauk Pin* (1), namely, try to ascertain the present customs of the people before imposing on them a rule followed in a primitive age but possibly wholly repugnant to the feelings and ideas of the people in the present age.

The *Dhammathats*, the rulings of our Courts, and Burmese society accord high dignity and great rights to a head wife not only during her married life but also when she becomes a widow whether with children or not. If the position of a widow without children of her own is to be adversely affected by the fact that a *kilitha* child of her husband survives him, and she becomes on that account entitled to smaller rights than those she would have had if one of her own children had survived her husband, the position of a childless widow would be not merely anomalous, it would be intolerable. I understood the learned counsel who argued in favour of affirmative

(1) (1883) S.J.L.B., 225.

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answers (but who of course did not state that in his opinion affirmative answers would be correct) to contend that if the analogy of a step-child were applied the second question should be answered in the affirmative. Application of the analogy would mean putting the indignity upon the widow of having to recognize as a step-child and sharer with her in her husband's estate the child of a woman whose association with her husband had been devoid of what is at the root of the idea of marriage amongst Burmese as well as other races, namely, the continuous living together of a man and woman as mutual helpmates. The widow would have to recognize a woman as her husband's wife who had in fact never been his wife, and who had no enforceable claim on him on her own account.

I should require to be shown very clear and explicit texts before coming to the conclusion that even in archaic times the child of a man by chance intercourse with a woman not his wife was entitled to demand a share in the man's property from his widow. Section 53 of the 10th Book of *Manukyè* negatives this right in the case of a *kilitha* child for whom compensation has been paid and who may thus be said to have been acknowledged by the father. It would be very strange if although an acknowledged child had no rights in its father's estate when a widow survived an unacknowledged *kilitha* child could claim a share against the widow.

Some of the passages on page 305 and following passages of Richardson's translation appear to me to be amongst the most confused and unintelligible parts of the *Manukyè*: some are inapplicable to and impossible to carry out under the present conditions of Burmese society whatever their meaning may be. A right of a *kilitha* child to a share in its mother's property when she died leaving a husband but no child by him may have been recognized, but it does not follow that the right of such a child to share in the father's estate with his widow was also recognized. There is no express rule to that effect in the *Dhammathats*, and we are not at liberty to deduce a rule when express rules are not invariably based on obvious logic or on obviously clear principles.

Taking the questions to relate to *kilitha* children, that is to "children begotten in pleasure whose parents do not live

openly together," I would answer both the questions referred in the negative.

Ormond, J.—The general rule is that a *kilitha* child, *i.e.* "a child, male or female, begotten by a man and woman in pleasure, by mutual consent, but who shall not live openly together," is not entitled to inherit: stated in the chapter at the end of Book X of the *Manukyè*—(1st Edition, Richardson, at page 306).

Sections 51, 52 and 53 of Book X are the exceptions to the rule:—"A *kilitha* child can in certain circumstances inherit the property of his parents which is in their actual possession. He cannot inherit from the parents or relations of his parents and he has no right to his parent's undivided share of inherited property. Even if his parents subsequently become man and wife, his position is not altered. His right of inheritance is barred, if his parent leaves a wife (or husband) or legitimate descendants. If his father dies when living with his parents, the child's right to inherit from his father is barred. If his father dies when living with other relations, those relations take half."

Section 51 states the case where the parents subsequently become man and wife. Section 52 deals with the case where the mother takes the child and lives with her parents and dies there: the child takes its mother's separate property, subject to the grand-parents' right to retake gifts made by them to their daughter. Section 53 deals with the case of the father: the child takes his father's actual property, only if the father leaves no heirs, wife, legitimate child or grand-child. If the father was living with his parent, they inherit all his property; if the father was living with other relations, they take one-half and the child takes the other half of his separate property: in this last case it seems to be implied that the child was also living with its father's relations and had "become one of the family."

Sections 52 and 53 no doubt expressly refer to the *kilitha* child as one in respect of whom compensation has been paid by the father. But that I think only means that the sections refer to cases where the parents of the child have not subsequently become man and wife. Section 26 of Book VI of the *Manukyè* shows that the *Dhammathats* contemplate that the father of a

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bastard child either marries the woman or pays compensation.

Section 50 is not an exception to the general rule first stated—for children born to a couple who have eloped would not be illegitimate. They would be the children of a couple who lived openly as man and wife. If other children are born to the couple after the couple had received the consent of their parents to the marriage: the former children have the right to inherit their parents' and grand-parents' property, but they are in the position of younger children.

There are passages in the chapter at the end of Book X which, according to Richardson's translation and the translation given in the *Kinwun Mingyi's* Digest, would show that a *kilitha* child whose mother subsequently marries a husband given her by her parents and dies, has certain rights of inheritance; even though there are legitimate children of this subsequent marriage. The child is virtually given the status of a legitimate step-child; but it is not entitled to any share in the inheritance which comes to the mother from her relations, "because he is of the class of children that are like the offspring of animals." Richardson speaks of this child as "chance child" and as the "child of an unknown father"; in the translation in the Digest he is called a bastard. Mr. Justice Parlett shows that a more correct translation would be:—"the child whose mother had a husband who was not a permanent husband." "Chance child," "child of an unknown father," and "bastard," are mistranslations—the child throughout the passage is referred to as "the child of the former husband." In Richardson's translation the words "if his mother has no legitimate children" must mean legitimate children of a previous marriage having a better status than the step-child in question; because the very case which is then being dealt with is the case of the mother leaving at her death legitimate children 'by the husband given her by her parents,' *i.e.*, the second man. The passage begins by saying:—'of children whose mother had a husband who was not her permanent husband, there are those who are entitled to inherit and those who are not.' Now, if any child is debarred from inheriting because its father was not a permanent husband of its mother,

the *kilitha* child must be one of those that are not entitled to inherit: *i.e.* in the manner thereinafter stated. The passage must, I think, refer to a child conceived or born in some sort of wedlock; *e.g.* a child born to a couple who had eloped and lived openly together as man and wife but whose marriage has been terminated by the parents of the girl. In such a case the marriage would be good until it is terminated (*see* sections 21 and 22 of Book VI).

If the step-child referred to may be a *kilitha*, a *kilitha* is entitled to inherit along with legitimate children—a proposition that has never been put forward. It would also lead to this anomalous position: under section 51, a *kilitha* cannot inherit if his parents subsequently marry and leave legitimate children; *i.e.* he cannot share in the inheritance with his full blood brothers and sisters; but under the passage above referred to, he is entitled to share with his half blood brothers and sisters: he is entitled to inherit, if his mother leaves legitimate children by another man, but not if she leaves legitimate children by his own father.

But even if the step-child referred to may be a *kilitha* and may therefore inherit a share of his mother's property though the mother may leave a husband and even legitimate children, there is nothing to show that a *kilitha* may inherit a share of his father's property if the father leaves a wife. On the contrary there is the express provision in section 53 to show that the wife precludes him from doing so.

Section 55 implies that a child of a couple regularly given in marriage by their parents but who separate after the child is begotten, cannot inherit from his father if his father leaves a wife, child or grand-child. *See* also the passage from the *Dayajja* given at page 366 of the Digest. Yet the status of such a child is higher than that of a *kilitha*.

For the above reasons I would hold that a child begotten in pleasure whose parents do not live openly as man and wife, cannot share with his or her father's widow in his father's estate.

Twomey, J.—For the purposes of this case the expression "illegitimate child" may be taken to mean the kind of child designated *kilitha* in the *Manukyè* (p. 306), *viz.* a child begot-

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ten in pleasure, whose parents do not live openly together. This is the kind of child contemplated in the various rulings of the Court dealing with the position of "illegitimate" children. For the sake of brevity the term "casually begotten" may be used.

It is established that a *kilitha* may succeed to property left by his parents in the absence of any children of the superior classes. As to whether such a child can claim against the mother's surviving husband, some confusion has been caused by Richardson's incorrect translation of the passage of *Manukyè*, Book 10, beginning on page 310 (1st Edition) with the words "O King! of children whose father is unknown." The opening words in the Burmese refer to the son of a non-permanent husband (*lin-te-ma-shi*) and not to the son of an unknown father. Such a son is not necessarily a *kilitha*. The *kilitha* being one of the classes which as a general rule do not inherit, the opening words ("of children of a woman by a non-permanent husband there are those entitled to inherit and those not so entitled") presumably indicate that the rules which follow do not apply to *kilitha* children.

The first rule deals with the case of a woman who after having a child by one man takes another "permanent" husband but dies without having any issue by him. It is laid down that the son can claim a share of her original property and of the joint property from the surviving husband, but only if the son and the surviving step-father have been living together.

The next two paragraphs refer, I think, to the same son's position with regard to ancestral undivided property, laying down that the son gets none of it unless his late mother's co-heirs choose to give him a share out of affection.

Then follows a paragraph dealing with the same son's position when his mother has left children by her permanent husband. The son of the mother's previous union nevertheless shares with the surviving step-father in this case. In this paragraph the words "child of an unknown father" in the translation should be "son of another (or former) husband."

The next paragraph deals with the position of the same son when both his mother and his step-father have died leaving issue. The son of the mother's previous union (incorrectly

described in Richardson's translation as a "chance" child) is allowed to share with his mother's surviving children. But the paragraph winds up with a caution that the foregoing applies only to children of a permanent husband and not to casually begotten children. It appears to me that this caution should be read as governing all the foregoing rules beginning with the passage "O King! etc." on page 310.

Next following this cautionary passage there is a paragraph declaring that when there are no "good" children (*sc.* children of the inheriting classes) "bad" children (*sc.* children of the non-inheriting classes) are to inherit and to pay the debts. This is the substantive rule under which a *kilitha* child can come in, and I think it must be construed as applying only to cases where not only the mother but her surviving husband if any has died.

Finally, there is a short paragraph declaring that the son of another husband (*ta-lin-tha*) cannot demand his deceased mother's property from her relations. The concluding part of this paragraph compares the son under consideration to a brute, but the passage probably applies only to ancestral undivided property and is a mere repetition of the general rule which confines the right of inheritance in such property to the children of unions sanctioned by parental consent.

It does not appear to me that the passages summarized above furnish any support for the view that a *kilitha* child can claim a share of his mother's property from her surviving husband. But even assuming that such a rule can be deduced from *Manukyè*, Chapter X, page 310 *et seq.*, I am unable to concur in the proposition that "the same principle should apply in the converse case when the parent who married is the father and not the mother of the illegitimate child." There is not an inkling in any of the *Dhammathats* that such a rule is applicable to the case of a father, and I think we must assume that the distinction between the case of a mother and the case of a father was intentional. The reason for it, as suggested by Mr. May Oung, probably lies in the difficulty of solving questions of disputed paternity. There is never any doubt as to a child's mother, but in the case of a casually begotten child the paternity is often very doubtful and it would give rise to much liti-

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gation and confusion and would make the position of a widow intolerable if she were liable to claims of persons setting themselves up as casually begotten children of her late husband. It may be noted that when the *Dhammathats* lay down a rule of partition on the death of a wife or husband they do not usually leave the converse to be arrived at by the process of inference. For example, Book 10, section 66, provides for partition among the children of a man's three successive wives, but in section 67 the compiler is at pains to lay down the corresponding rules for partition among the children of a woman's three successive husbands. I think we should not be justified in applying the rule for mother and child by analogy but should regard the silence of the *Dhammathats* as negativing any claim by a casually begotten child against his father's widow.

As regards *Manukyè*, section 53, I doubt whether the reference to payment of a fine has the meaning assigned to it by Mr. Justice Parlett, namely that the father of the casually begotten child having paid a lump sum as compensation the father has disclaimed all further responsibility for the child and therefore the child has no claim to any of his father's property as against his father's widow, though the child would have such a claim as against collaterals. If such were the intention the rule would doubtless have been framed so as to exclude in all cases the casually begotten child for whom a fine has been paid, *i.e.* it would exclude such a child whether the father leaves a widow or not. For if the child's mother has already received in a lump sum all she is entitled to, why should the child be preferred to the father's collaterals any more than to the widow?

The reference to payment of fine in my opinion only shows that the child contemplated in section 53 is one whose paternity is not a matter of dispute. If the deceased paid compensation it may be taken that he admitted his fatherhood. Section 53 in my opinion will not allow a casually begotten child whose paternity has not been recognized to succeed even against collaterals. And I think the rule must be construed as shutting out such a child altogether (even one whose paternity was recognized) where there is a regular wife surviving the child's father.

The general rule—husband dies, wife succeeds; wife dies, husband succeeds—must prevail unless where there is an exception based on clear authority. The words of Mr. Burgess on this point may be recalled:—"Marriage is a most important part of Buddhist Law, and it is necessary to take the greatest care that the mutual rights of husband and wife are not curtailed in any respect unless it is clearly and satisfactorily established that the restriction in question has been introduced by law or custom having the force of law"(1). It is true that the *Dhammathats* allow children of the classes who do not inherit including *kilitha* children to come in when there are no children of the classes entitled to inherit. But the limitations of this privilege are shown by section 53, Chapter X, *Manukyè*, withholding the privilege from the casually begotten child of a man who has died leaving a regular wife surviving him.

I would dissent from the opinion expressed in *Ma Sein Hla* v. *Maung Sein Hnan* (2) that (i) as illegitimate children are entitled to inherit in the absence of legitimate children and (ii) as step-children inherit from step-parents to the exclusion of collaterals, it follows that in the absence of legitimate step-children illegitimate step-children are entitled to share with the widow of their deceased father in the inheritance of his estate. Mr. Burgess held in *Ma Shwe Ma* v. *Ma Hlaing* (3) that even the son of an *apyaung* or free concubine, one of the classes of sons entitled to inherit, cannot share as a step-child with his father's widow, and that the rules regarding partition between a step-son and step-mother apply only to the son of a regular union (*see* Chapter IX of the Digest). If the son of an *apyaung* cannot claim against the widow, much less can a casually begotten child. I think the combination of the principles (i) and (ii) above is not permissible. If a child other than the child of a previous regular union were entitled to claim under the rules in Chapter IX as a regular step-child against his father's widow or his mother's surviving husband, it may be asked why is special provision made in the *Dhammathats* for the child of a non-permanent union claiming against his mother's surviving husband. It will be noticed that these special

(1) *Mi Lan* v. *Maung Shwe Daing*, 2 U.B.R. (1892-96), 121, at 134.

(2) (1903) 2 L.B.R., 54.

(3) 2 U.B.R. (1892-96) 145.

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provisions exclude children of an inferior class from any share in the mother's ancestral undivided property, though there is no such restriction in the case of step-children properly so called. Following the ruling in *Ma Shwe Ma* v. *Ma Hlaing* (1), I would hold that a casually begotten child can in no circumstances rank as a regular step-son.

I would answer the reference by saying that an illegitimate child (*sc.* a casually begotten child) cannot share with his or her father's widow in the father's estate.

Parlett, J.—The questions referred to are:—

(1) A Burmese Buddhist man dies leaving a widow and an illegitimate child. Is the illegitimate child entitled to any share in the estate left by the man? If so, to what share, if the child is a daughter?

(2) In the above case, can an illegitimate daughter, if entitled to a share in her deceased father's estate, claim and obtain such share in the life-time of her father's widow?

I think some preliminary definitions of terms are desirable. As was remarked by Burgess, J.C., in *Ma Hlaing* v. *Ma Shwe Ma* (2), "illegitimacy is an ambiguous and inconvenient word to employ in regard to Buddhist Law. It does not appear in the original Burmese. What is meant by the term is incompetency to inherit under certain conditions, or inferiority and postponement of claims to inherit to those of others."

In *Ma Le* v. *Ma Pauk Pin and others* (3), the learned Judicial Commissioner of Lower Burma, referring to Major Sparks' Code, wrote: "He went the length of excluding from inheritance all illegitimate children, provided there were legitimate offspring. He indicated certain connections as illegal, but he never defined legitimacy; and he left concubinage unmentioned in his Code." In the Upper Burma case referred to above, it was pointed out that the concubine and the lesser wife are both spoken of as *maya* or wife in Burmese, and the exact distinction between them, if any, intended by the *Dhammathats* is obscure. Among the sons enumerated at pages 305 and 310 of the *Manukyè* as entitled to inherit are included those of a concubine who is openly cohabited with when there is a chief and a lesser wife,

(1) 2 U.B.R. (1892-96), 145. (2) 2 U.B.R. (1892-96), 153 at 157.
(3) S.J.L.B., 225.

and those of a slave to whom a separate chamber is given with the knowledge of the wife and of the neighbourhood. In *Maung Twe and one* v. *Maung Aung* (1), Shaw, J.C., points out that such a slave concubine is styled, apparently quite indifferently, in the various *Dhammathats* as slave, slave-concubine or slave-wife.

At the hearing of this case, however, the illegitimate child to which the reference applied was taken to be the offspring of a man and woman to whom no status of wife, however inferior, was accorded, and belonging to the class referred to in the *Manukyè Dhammathat* as ordinarily not entitled to inherit and described as "begotten by a man and woman in pleasure, by mutual consent, but who do not live openly together, called *kilitha*," and as "begotten in sport and wantonness, not by a regular and ostensible husband."

I find the following passages in Volume 10 of the *Manukyè* bearing upon the rights of such children. Section 50 provides that children of an eloping couple born before they have obtained their parents' consent to their union must be postponed in partition of their parents' estate to children born after the consent of the parents has been obtained.

Section 51 provides that a child begotten in wantonness whose parents die leaving no other son succeeds to his parents' separate property to the exclusion of their relatives (*sc.* brothers and sisters) but that the latter exclude him from sharing in the grand-parents' property.

Section 52 lays down that if a child is born after clandestine intercourse and the man instead of marrying the woman pays compensation and she and her child live with her parents, then upon her death the child takes her separate property. If however she dies after her parents but without getting possession of their property, her child obtains no share of that property.

Section 53 I would render as follows: "Let the son for whom compensation has been paid get the actual property of the father who begot him, if that father has no lawful wife and no son, daughter or grand-child of his own to inherit. This applies to separate property acquired while the father has lived as he wished without settting up a household (or without marrying)."

(1) 2 U.B.R. (1897-01), 176.

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The Burmese word (ရင်း), literally original, used here to qualify each of the words wife, son, daughter and grand-child, means, I think, when applied to a wife 'legally married' or 'recognized,' and when applied to the child of a couple that he is their joint offspring as opposed to a step-child or adopted child, and I have translated it accordingly. The section continues, "A further rule is, if the father has lived with his parents and relatives and has acquired property in common and also has separate property, let his parents alone enjoy the whole. If he lives with relations let the relations with whom he lives take half of the separate property and let the son for whom compensation was paid take the remaining half and let him discharge the debts in the same proportion. Why is this? Because he has entered the same class as a son."

The first paragraph of this section is relied upon as showing that where the illegitimate child's father has left a widow, she entirely excludes the child from sharing in his father's estate, and in view of the ruling in *Ma Hnin Bwin* v. *U Shwe Gôn* (1) as to the authority to be attached to the *Manukyè* when clear and unambiguous it is contended that this rule must be followed unless other passages in the same *Dhammathat* appear to qualify the rule or introduce some ambiguity. But this paragraph by no means refers to all children whom we should call illegitimate but merely to a child for whom the father has paid compensation, that is to say where the father having got a child by a woman without marrying her, instead of marrying her or assuming the care of the child, has paid a lump sum to her or her parents and so to speak has washed his hands of the responsibility for the child's upbringing. In such a case it is not unnatural that the child should have no claim to inherit any more from his father if he has left a wife or a child who would ordinarily be his heir. In the present case the illegitimate child does not appear to have been one for whom the father had provided in her infancy intending to have no more to do with her; on the contrary, there is evidence that she lived at any rate intermittently with her father until she was almost of marriageable age. In my opinion, therefore, section 53 cannot be held to govern the present case.

(1) 8 L.B.R., 1.

The only other references I can find to illegitimate children are in the concluding portion of Volume 10 commencing at page 305 of Richardson's translation. It begins at pages 305 and 306 with a list, reproduced in an abridged and slightly modified form at pages 309 and 310, of twelve classes of children, the first six of whom are entitled to inherit and the last six are not. On page 307 the maxim "when there is no good son let the bad inherit" is further explained as follows: "If there are no honourable and good sons entitled to inherit, then even a son born by chance intercourse must take the property and pay the debts, in consonance with the laws applicable, according to the various rules for partition of inheritance set out above."

I venture to think that this division of children into good and bad is not synonymous with legitimate and illegitimate, but that it refers to their division into two main classes, one of which is, and the other *primâ facie* is not, entitled to inherit. A reference to the list of children in the second class shows that at any rate to the first two and the last no stigma could justly attach, and that there is no apparent reason why they should not inherit in the absence of children with a better right to do so. I think therefore that what the explanation of the maxim given in the text means is, that where no children falling in the first class exist then a child in the other class is allowed to inherit, even if he be merely one begotten in chance intercourse. At pages 310 and 312 are to be found the following provisions relating to children of an unknown father. The Burmese refers to the father by the word used for husband, but this euphemism is still employed to denote any man with whom a woman has connection without marriage, and throughout this passage such expressions as 'son of the former husband' refer to a child begotten out of wedlock by a man whose identity is concealed. I think, moreover, the comparison of such a child to an animal is not a term of degradation but rather a reference to his not knowing his own father. I would render the passage *in extenso* as follows: "Among children whose mother has no permanent (or regular) husband, there are two cases: one in which they ought to inherit and one in which they ought not; as to these two cases, a child is begotten by one man (literally husband) and the mother lives with a subsequent husband permanently by whom she has no children; if before she took

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the subsequent lesser husband, she has acquired property or incurred debts, if there is no son born of her by the subsequent husband and the son and the step-father be living together at her death, let her property brought in at the time of marriage be divided into four shares and let the son of the former husband have three shares of debts and assets and the step-father one. If there be property acquired by the mother and step-father when living together, let it be divided into six shares and let the son of the former husband have one share of debts and assets and let the step-father have five. If the step-father brought in property at the time of marriage let the son of the former husband have a one-fourth share of debts and assets. This is said when the couple has no children" (the negative is omitted in the Burmese version of Richardson).

"As to the ancestral property of the wife, should she die in reach of the inheritance, if the new husband was taken with the knowledge of her parents and relations, he alone shall succeed to it: the son shall not say 'I am her son,' because he is the son of another man. When living together with them the old son is entitled to enjoy the separate property of his mother and the property of his step-father, as mud comes from water and water comes from mud. On the other hand, if his uncles and aunts say 'though his father be unknown he is the son of our relation (*sc.* sister) and is attached to us and is our nephew,' let the son by another husband get what they give him: the step-father shall have no right to demand a share. Why is this? Because it is a gift of affection. If the son demands the property of his mother from his relations on the ground of being her son, as he is not entitled to it unless they choose to give it to him, he only earns disgrace."

"If the mother has children by the husband given her by her parents with the knowledge and consent of her relations and she has separate property at the time of her death, the law of partition with the step-father is, let it be divided into four parts, of which let the other child have three; if there are no children entitled to inherit, but of the joint property let him have one-eighth."

"If the step-father dies after the mother he has a right to the whole of the property brought in by her at the time of

marriage and of her separate property, and if the child of the former husband has not demanded his share from the step-father let the sons born of the mother by the step-father have one half and let the other half be divided between them and the children of the former husband according to their ages. Of the property acquired by the mother and step-father let their children have one half and let the other half be divided between them and the children of the former husband according to their ages and let them pay the debts in the same proportion."

"Of the inheritance which comes to the mother from her relations, the child of the other man shall have no share, because he is of the class of children that are like animals. Let the children of the pair have all the hereditary property they may be in reach of and let the debts be paid in the same way."

"If the parents and step-parents be both dead, let the property brought in at the time of marriage be divided into three shares; let the children of the first family have two and those of the last one share, and of the property acquired during the marriage let the children of the last family have two shares and those of the first one. This is only said of the children of a regular husband; the children begotten inconsiderately like animals shall have no shares. The separate property of the mother, the property obtained by her and a lesser husband, and the separate property of the father and the property obtained by him and a lesser wife, if there be no good children ' (*i.e.* in the six superior classes) ' let the bad ' (*i.e.* the inferior classes) ' inherit and pay the debts. If the children by another man, their mother having no good children, demand her property from her relations there is no law that they should get it, nor even if it be demanded from the mother in her life-time. They are in the class of animals."

These are all the provisions I can find in the *Manukyè* bearing upon the subject; nor do I find anything substantially different in the texts collected from other *Dhammathats* in sections 220, 231, and 300 to 304 of the *Kinwun Mingyi's* Digest, Volume I.

It will be seen that the illegitimate child referred to in the above quotation is one whose father has never acknowledged

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his paternity and who has been brought up by the mother as the child of an unknown father. Even such a child, if his mother marries but dies leaving no legitimate children, has a right to claim from the step-father a share both of the separate property which the mother took to the marriage and of the property acquired during the marriage. There appears to be no rule, and I can see no strong reason for holding, that an illegitimate child whose father is known and has openly acknowledged the relationship should be in a worse position, nor for holding that the same principle should not apply in the converse case, where the parent who married is the father and not the mother of the illegitimate child. That principle appears to be to give to the step-child, though illegitimate, a right of partition against the surviving step-parent when there are no legitimate children. In this case there are none. Though the texts quoted speak of the illegitimate child as a son they must be understood as referring to a child of either sex, for where a distinction is intended to be made between the sexes the *Dhammathats* always make it plain.

I would accordingly answer both questions referred in the affirmative, and on the first question I would say that the daughter is entitled to three-fourths of the property taken by her father to the marriage with the surviving widow and to one-sixth of the joint property acquired during that marriage.

Special Civil Second Appeal No. 82 *of* 1915.

January 18*th*, 1916.

Before Mr. Justice Maung Kin.

PO TUN *v.* E KHA.

Ba U—for appellant.

Wiltshire—for respondent.

Transfer of Property Act, sections 76 (1) *and* 84—*Mortgage—Offer to redeem.*

A transferred land to **B** by way of usufructuary mortgage but himself remained in possession as tenant of **B**. **A** made an offer to redeem, without actually producing the money which was rejected by **B** on the ground that the transfer was by way of an outright sale. **A** then sued **B** and, eleven months after, obtained a redemption decree. **B** then sued **A** for rent for the period.

Held,—that production of money is not necessary to validate an offer of redemption; that the rights of **B** under the mortgage ceased from the date of the offer of redemption and that he was not entitled to rent after that date.

On the 12th April 1913 the appellant instituted a suit against the respondent for the redemption of a piece of land alleging

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that he had mortgaged it to the respondent. It is now common ground between the parties that the mortgage was an usufructuary mortgage and that the appellant, the mortgagor, became and was, when the suit was instituted, tenant upon the land.

The respondent's defence was that he had bought the property.

On the 8th April 1914 the suit was decided in appellant's favour by a redemption decree being passed. The time occupied by the suit coincided with the season of 1913-14 and during that season the appellant worked the land as before.

In the present suit the respondent sued the appellant for rent of the land for the season of 1913-14. The appellant replied that before he instituted his suit for redemption, he offered to redeem the property and that the respondent refused to allow redemption saying that he had bought it outright. The appellant contended that the respondent ceased to have any further rights as mortgagee from the date of his refusal to allow redemption, inasmuch as where a proper offer to redeem has been made, the mortgagee becomes, under section 76 (i) of the Transfer of Property Act, accountable for his gross receipts if he is in possession and also, subject to the last paragraph of section 84 of the same Act, loses his claim to further interest. It was stated in argument that, though these sections of the Transfer of Property Act are not applicable to the case, the principles enunciated by them do apply. The learned counsel for the respondent admitted that if there was a legal tender, the principles of the sections would apply. And he argued that there was no legal tender inasmuch as no money was produced when the appellant asked to be allowed to redeem and quoted cases to show that in cases of simple debts the offer to repay must be accompanied by a production of the exact amount due. But I do not think that those cases go to show that under all circumstances money must be produced in order that there be a legal tender. On this subject Dr. Ghose (1) has said: "The old cases, we find, insisted rigorously on the actual production of the money for the quaint reason that, though the creditor might at first refuse, the sight of the money might tempt him to take it. But it is no longer necessary to place any such

(1) Ghose's Law of Mortgage in India (4th Edition), pp. 232, 233.

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temptation in the creditor's way or even to shake the money in a bag or pocket, 'so that he may hear the money jingle'; for if the creditor by his conduct dispenses with the production of the money, he cannot afterwards object that there was no valid tender." In their commentaries on the Transfer of Property Act, Shephard and Brown state the law on the subject to the same effect in the following passage:—"There must, as a general rule, be an actual production of the money unless there is a waiver on the part of the creditor. When by express words or by conduct he shows his determination not to accept the money offered and the production of it is thus shown to be useless, it has been held that the creditor dispenses with the production" (1).

In my opinion the passages above quoted are justified by authority.

In the present case, the appellant went to the respondent and asked to be allowed to redeem, and the request was rejected on the ground that there was no mortgage but a sale. The respondent in effect told the appellant to go to law for his remedy. Under these circumstances the appellant has done all he could and should. A production of the money would not have tempted the respondent to change his mind. The respondent's subsequent conduct in contesting the appellant's suit for redemption up to this Court also shows that he meant seriously by his refusal and that he did not so refuse, because he did not see the money. I would, for the above reasons, hold that there was a sufficient offer to redeem the property. Moreover, the suit for redemption is nothing more or less than an offer to redeem and when the defendant in the suit contests it and it is after due enquiry found that his case is not true, should he not be ordered to account for what he has received after the institution of the suit? In my judgment the principles of sections 76 (i) and 84 of the Transfer of Property Act would seem to justify the view that he should.

For the above reasons I set aside the decree of the District Court and restore that of the Township Court. The respondent will pay costs throughout.

(1) Shephard and Brown's Transfer of Property Act, 7th Edition, p. 353.

Before Mr. Justice Maung Kin.

Criminal Revision No. 258B of 1915.

January 28th, 1916.

BA BA KHAN *v.* BA NAING.

Israil Khan—for applicant

Workman's Breach of Contract Act, section 2—Definition of workman, artificer or labourer.

A contractor is not *primâ facie* a workman, artificer or labourer. In cases where a contractor works personally it is necessary to decide in each case whether the performance of such work deprives him of his status as a contractor.

Asgar Ali v. *Swami*, 1 U.B.R. (1902-03), Workman's Breach of Contract, p. 3; *Gilby* v. *Subbu Pillai*, (1883) I.L.R. 7 Mad., 100; *Caluram* v. *Chengappa*, (1889) I.L.R. 13 Mad., 351, and *In re Chinto Vinayak Kulkarni*, (1900) 2 Bom. L.R., 801—referred to.

The respondent lodged a complaint against the applicant under section 2 of the Workman's Breach of Contract Act, 1859, before the 1st Additional Magistrate of Rangoon.

In his petition to the Magistrate the respondent stated that on the 26th October 1914 the applicant signed an agreement in writing whereby he promised to make bricks for the respondent; that in pursuance thereof he took Rs. 200 by way of advance; that the applicant had failed to fulfil his promise; and that he had not returned the advance of Rs. 200.

By the agreement the applicant agreed to make 10 lakhs of raw bricks at the rate of Rs. 35 per 10,000 bricks during a period of one year from *Nadaw Lazan*. The agreement further has it that in consideration of the undertaking by the applicant the respondent handed over, and the applicant received, Rs. 200 by way of advance.

The applicant denied having signed the agreement or having taken the advance as alleged.

The Magistrate found that the applicant executed the agreement and took the advance and, with the consent of the respondent, the order was made for the return of the Rs. 200 to the respondent within seven days.

The learned Magistrate appears to have taken it for granted that the case would come within the purview of section 2 of the Act, if the respondent's allegations of facts were proved. He has not classed the applicant under one or the other of the three categories, that is to say, whether he was an artificer, labourer or workman. In my judgment it is the duty of the

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Magistrate to attend to the legal aspect of the case, though the applicant had only pleaded to the facts alleged.

At the hearing of this application, the learned advocate for the applicant contended that his client was not an artificer, labourer or workman within the meaning of the Act and that the agreement itself shows that the man was a contractor, and relied upon the Upper Burma case of *Asgar Ali* v. *Swami* (1). In that case the accused was described as a cooly *gaung*, and it appeared that he undertook to provide coolies to do earthwork for which he received an advance of Rs. 75, and it was admitted that the accused was not a labourer but a provider of labourers. It was held by the Judicial Commissioner (Mr. Copleston) that the accused was not an artificer, workman or labourer, and that the Act did not apply. The case of *Gilby* v. *Subbu Pillai* (2) was referred to as being very similar.

In the latter case, the learned Judges of the Madras High Court said, "The object of the Act was to provide a remedy for fraudulent breaches of contract by workmen, artificers or labourers, who have received advances of money for work they have undertaken to perform or get performed, such persons, being for want of means, ordinarily unable to make compensation, when sued for damages. As the Act applies to cases in which the workman has undertaken to get work performed, as well as to cases in which he undertakes personally to perform it, there may be cases in which a contractor is liable to proceedings under the Act but . . . . . the contractor must be himself a workman."

Later, in 1889, there was another case before the Madras High Court, namely, the case of *Caluram* v. *Chengappa* (3), in which the accused was a boat-owner who plied his boat upon a canal. He took an advance from the complainant after engaging to carry salt but afterwards broke the contract. The Lower Courts held that he was a labourer within the scope of the Act. The learned Judges of that High Court held that there was nothing to show that he was himself to render personal labour and that the parties to the contract were not an

(1) U.B.R. (1902-03), Workman's Breach of Contract, p. 3.

(2) (1883) I.L.R. 7 Mad., 100.

(3) (1889) I.L.R. 13 Mad., 351.

employer of labour and a labourer respectively and that consequently the Act did not apply.

In a Bombay case—*In re Chinto Vinayak Kulkarni* (1)—it was held that a person undertaking to do work as a contractor or a commission agent does not make himself amenable to the penal provisions of the Act and that it makes no difference that he was seen, on occasions, taking part in the work contracted to be done. The learned Judges remarked, "The work undertaken was manifestly one requiring the labour of many persons, and some outlay on carts or other means of conveyance. The fact that the petitioner may from time to time have lent a helping hand, would not render him a member of the class to which alone the Act is applicable, his ordinary *status* excluding him from that class."

The wording of the Act seems to be quite clear also. It is against the artificer, workman or labourer that the Act is directed. The person who agrees to perform the work must himself be a person falling under one or the other of the three categories. The same is the case when he promises to get work performed. So that a contractor who is not himself a workman, skilled or otherwise, would not come within the operation of the Act.

In the present case the applicant has undertaken to perform a rather extensive contract, to carry out which he would require skilled and other labourers. I do not think that the Court can conclude that the applicant undertook actually to make bricks because the literal meaning of the word (ထုပေး) as used in the agreement is to make. If you ask Ford to make you a motor car, he will undertake to make you one on condition you pay him his price. Yet Ford does not thereby become an artificer or workman or labourer. So if a contractor undertakes to make (ထုပေး) you a large quantity of bricks, so large that it would be necessary for him to employ a number of labourers, you cannot, without proper materials before you, say whether he comes within the purview of the Act or not. You would, in my opinion, have to ascertain whether he is really a contractor. When you are satisfied that he is such a person,

(1) (1900) 2 Bom. L.R., 801.

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you would further ascertain whether he would in the ordinary course of his business do the work that he has undertaken to do or to have done, and if he would so do the work, you would further ascertain whether he would do it to such an extent as deprives him of the *status* of a contractor. In this case all these points must be determined in the interests of justice. There is so far no evidence on any of these points.

I would therefore order the Magistrate to take evidence and return findings on the points above mentioned.

Special Civil Second Appeal No. 149 *of* 1915.

February 24th, 1916.

Before Mr. Justice Maung Kin.

1. GUM SOME, 2. MA ME, 3. L. TA SHWE *v.* CASSIM DALLA.

Wiltshire—for appellants.

Dantra—for respondent.

Right of way—Easement—Creation of—Transfer of—Transfer of Property Act, sections 54 *and* 6 (c).

A right of way can be created by a verbal agreement and is transferred with the dominant heritage.

Bhagwan Sahai v. *Narsingh Sahai*, (1909) I.L.R. 31 All., 612, followed.

Krishna v. *Ra'yappa Shanbhaga*, (1868) 4 Mad. H.C.R., 98, referred to.

The appellants were plaintiffs and the respondent defendant in the Court of first instance.

The facts of the case as culled from the judgment of the District Court in appeal are as follows :—

"Plaintiffs sued for a decree for an injunction to restrain defendant from interfering with their enjoyment of the right of way over certain land. Their case is this. They are the owners of the rice and saw mill at Kanhla Tagale. Defendant is the owner of the land north of theirs. Plaintiffs' land originally belonged to Ah Lyaung and U Yan and defendant's land was originally owned by Maung Po Thin. Maung Po Thin had a rice mill on his land and has caused a railway siding to be constructed thereon for conveying goods to and from his mill. An agreement was made between Ah Lyaung and U Yan on the one part and Maung Po Thin on the other part that in consideration of a sum of Rs. 1,500 paid by the former to the latter the former would have the full and free use in perpetuity

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of that portion of the railway line passing through the latter's land and a permanent right of way over the same. Plaintiffs assert that the agreement is in full force and binding on defendant who is a subsequent purchaser of Maung Po Thin's land. It is alleged that defendant has endangered the running of the railway and has interfered with the proper use of the line by cutting away earth from the railway embankment passing through his land, by planting wooden posts and by putting up a notice board prohibiting all persons passing over this land.

Defendant admits having put up a notice as alleged by plaintiffs, but states that he did nothing beyond his rights. He contests plaintiffs' right to the right of way claimed."

The Court of first instance found for the plaintiffs and passed a decree as prayed for.

The District Court held that the right of way in dispute in the case was in the nature of immoveable property and as such the sale of it could not be made without a registered instrument in accordance with the provisions of section 54 of the Transfer of Property Act, and that the plaintiffs had therefore no right of way as claimed.

According to the Allahabad High Court in *Bhagwan Sahai* v. *Narsingh Sahai* (1) the view of the District Court is wrong.

In that case there was an unregistered document creating a right to discharge water on to a neighbour's premises. It was contended that section 54 of the Transfer of Property Act did not apply and that the document had a binding effect. Tudball, J., observed:—"The argument is that the document now in question evidences not the transfer of an easement, but the creation of that right: that prior to the passing of Acts IV and V of 1882, the law did not require the express imposition of an easement to be evidenced by writing at all; vide *Krishna* v. *Ra'yappa Shanbhaga* (2): that Act V of 1882 made no change in the law in this respect: that section 54, Act IV of 1882, related to the transfer of an easement, and not to the creation thereof. Attention is called to section 6, clause (*c*), of that Act, which shows that an easement cannot be transferred apart from the dominant heritage and that the Act contemplates the transfer of a pre-existing easement and not to the creation of a new one.

(1) (1909) I.L.R. 31 All., 612. (2) (1868) 4 Mad. H.C.R., 98.

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In my opinion, these arguments are well founded." The learned Judge further observed:—" It seems clear to me that the creation of a right of easement by grant is not such a transfer of ownership as is contemplated by section 54 of the Act. Where under that section an easement is transferred, it must be so transferred along with the dominant heritage. There is no other way of transferring it and this arises by reason of the nature of the right. It exists only for the benefit of the heritage and to supply its wants. There is nothing in law which necessitates the creation of an easement being evidenced by writing."

Banerji, J., who took part in the decision, remarked with reference to section 54 of the Transfer of Property Act as follows:—" That section contemplates the existence of a subsisting right of ownership in immoveable property and provides for the transfer of such right. It cannot apply to the creation of a right. By the document referred to above, no existing right of easement was transferred, but a new easement was imposed on the property of the grantor. Section 54 has, therefore, no application."

In my opinion, nothing can be said against the arguments of the learned Judges of the Allahabad High Court. I would therefore hold that a right of way can be created by a verbal agreement.

As to the question whether there was such an agreement, Maung Po Thin and Ah Lyaung have given evidence on the point and there is nothing to contradict them.

Mr. Dantra for the defendant argued that his client had no notice of the agreement. I think the argument is hardly sound. The rails must have been staring, as it were, in the face of the defendant when he inspected the property before buying it from Maung Po Thin.

For the reasons stated above, I allow the appeal setting aside the judgment and decree of the District Court and restoring the judgment and decree of the Court of first instance.

The respondents will bear costs throughout.

Before Mr. Justice Maung Kin.

SHWE YAT AUNG *v.* DA LI.

Special Civil Second Appeal No. 278 of 1914.

March 3rd, 1916.

Connell with *Rahman*—for appellant.

Maung Pu—for respondent.

Evidence Act, section 18.

A, a landowner, filed a suit for ejectment against B, a tenant. B alleged he was a permanent tenant at a fixed rent under an agreement with the original owner of the land, who was dead, and put in evidence statements made by the original owner after he had transferred his interest.

Held,—that the burden of proving the allegation of permanent tenancy was upon B.

Held, also,—that the statements were inadmissible.

Nibratan Mandal v. *Ismail Khan Mahomed*, (1905) I.L.R. 32 Cal., 51, followed.

In a number of suits the plaintiff-appellant sued the cultivators of land included in the Indawgyi Grant, known as the Kyaukpyu Waste Land Grant, to eject them from the land in their occupation and to obtain mesne profits during the period of their wrongful occupation of the same.

In the Lower Courts the plaintiff and the defendants in all the cases agreed to abide by the decision of the Courts in the suit out of which this appeal has arisen. Here in this Court also, the other appeals, being Nos. 279 to 290 both inclusive, have been heard together with this. One judgment will therefore cover all the appeals.

The plaintiff's case is that the defendant wrongfully entered upon and worked without a lease under section 12 of the Waste Land Grant Rules a piece of land (of which the boundaries are given in the plaint) being part of the plaintiff's grant land and that on 14th waxing, *Thadingyut* 1273, defendant was served with a notice either to take out a lease or to quit the land as required by section 12 of the aforesaid rules, but the defendant has not complied with the said notice.

The defendants say that they refused to take out leases as they feared that the plaintiff would raise the rent from Rs. 1-10-0 per acre only, which rate they and their predecessors in title had hitherto paid. They further allege that the original grantee, Maung Bu, had induced them and their predecessors in title to take up portions of the grant land on the understanding that the rent would not be raised so long as the

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Government did not raise the rate of revenue on the grant land and that they were to have heritable and transferable rights in them.

The Township Court gave a decree to the plaintiff in each of the cases. But I must say that the learned Judge did not apply his mind to the real points in the case.

The District Court on appeal set aside the decrees of the Lower Court and directed each of the defendants to take out a bond for the amount of rent mentioned in the bill of demand.

I may in passing say that it is rather difficult to understand why the defendants did not take out bonds as required by the plaintiff, because in the notice of demand was mentioned the rate they had been paying and the notice in itself did not indicate that the landlord was likely to increase the rate. They only surmised that the rate might be increased, as in four other cases there had been an increase demanded. So it is clear they were quite wrong in not taking the bond as required, for if demand was afterwards made for an increased rate they would then have the right to put forward their case. But these observations will not dispose of the case. Whatever may be said of their refusal to take out a bond, the suit filed is an ejectment suit, and if they set up a case of permanent tenancy with a fixed rent the Court would have to go into the question whether their case is true.

The grant was made in two portions, one on the 1st of September 1865 and the other on the 11th December 1865 to one Maung Bu, and the whole consists of 451·66 acres. Maung Bu built a bund to keep the sea water out and put down tenants upon the land who worked their allotted portions at an annual rental of Rs. 1-10-0 per acre. It appears Maung Bu never raised the rate during the time the land was in his possession. On the 29th June 1889 he sold the grant land to Shwe Baw Aung. On the latter's death, it devolved upon his heirs, who sold it to Pu Lôn and Po Yin on the 8th August 1899. On the 24th July 1902 Po Yin bought up Pu Lôn's half share in it at a Court sale held in execution of a decree against Pu Lôn and thus became the sole owner of the whole of the grant land. On the 27th March 1906 Po Yin sold it to the plaintiff Maung I Tha. It may here be explained that Maung Shwe Yat Aung whose

name appears in the Lower Appellate Court's proceedings as respondent is the agent of Maung I Tha.

The burden of proving that the defendants have a heritable and transferable right in the land in their occupation was upon them—see *Nilratan Mandal* v. *Ismail Khan Mahomed* (1). If they succeed in establishing that there was an agreement between Maung Bu and they or their predecessors in title as alleged, there may or may not be other questions to decide such as whether the plaintiff had notice of the agreement or whether it was binding upon the plaintiff as a condition running with the land in which case there would be no question of notice. But first and foremost they must prove their allegation, and if they failed in doing so, there is nothing further to do but to decree the suit as prayed.

Regarding this point the defendants depend upon the evidence of Maung Bu given in several cases which cropped up after he sold the grant land to Shwe Baw Aung and before it got into the hands of the plaintiff. Maung Bu himself could not be called, because he had been dead some years.

This evidence of Maung Bu has been strongly relied on by the District Judge. But it is not clear upon what authority the evidence was held admissible. The only section which may be resorted to for the contention that the evidence is admissible is section 18 of the Indian Evidence Act.

The part which may be relied on is as follows :—

" The statements made by—

* * * * * *

(2) Persons from whom the parties to the suit have derived their interest in the subject-matter of the suit, are admissions, if they are made during the continuance of the interest of the persons making the statements."

The question, then, is whether the evidence of Maung Bu is admissible as an admission by a person within the meaning of the part above quoted of section 18 of the Evidence Act.

Woodroffe says upon this as follows :—

" Statements whether made by parties interested, or by persons from whom the parties to the suit have derived their interest, are admissions only if they are made during the

(1) (1905) I.L.R. 32 Cal., 51.

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continuance of the interest of the persons making the statement. It would be manifestly unjust that a person, who has parted with his interest in property, should be empowered to divest the right of another claiming under him, by any statement which he may choose to make * * * * ."

"A statement relating to property, made by a person when in possession of that property, may be evidence against himself and all persons deriving the property from him after the statement; but a statement made by a former owner that he had conveyed to a particular person could not possibly be evidence against third persons. If it were so, A might sell and convey to B, and afterwards declare that he had sold and conveyed to C, and C might use the statement as evidence in a suit brought by him to turn B out of possession. If such evidence were admissible no man's property would be safe" (1).

Maung Bu gave the evidence in question long after he had sold the grant land to Shwe Baw Aung. It is, therefore, not admissible as an admission binding upon his successors in title.

In my judgment there is no way of admitting this evidence.

I notice in the judgment of the District Court an observation that Irwin, J., who decided one of the previous cases in connection with some portions of the same grant land would have come to a different conclusion, had he had before him a full history of the land. We are not concerned with the history of the land concerning litigation had in connection with certain portions of it. Decisions in previous cases have nothing whatsoever to do with the present cases which must be adjudged only upon admissible evidence. It is clear to me that cases which formerly occurred in which other tenants were parties are irrelevant.

Irwin, J.'s judgment on the file could be referred to only as a ruling on the point whether the plaintiff in this case has the right of suit, owing to the refusal on the part of the tenants to take out bonds under Rule 12 of the Waste Land Rules. It cannot be cited for the purpose of establishing any proposition of fact.

(1) Woodroffe's Evidence Act (6th Edition), pp. 239 and 240.

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Besides the statement of Maung Bu which I have held to be inadmissible, there is nothing else on the record to prove the point under consideration. The evidence of Pu Lôn and Pye Aung is obviously worthless, for it does not have any bearing on the point at all.

I think the defendants have entirely failed to discharge the burden which was upon them.

The result is the plaintiff must succeed.

This appeal is allowed; the judgment and decree of the District Court are set aside and the judgment and decree of the Township Court are restored.

The respondent will bear costs throughout.

Before Mr. Justice Twomey.

ABDUL MAJID v. KING-EMPEROR.

Criminal Appeal No. 356 of 1916.

August 1st, 1916.

B. Cowasjee—for appellant.

McDonnell—for respondent.

Indian Penal Code, sections 480, 482—*False trade marks—Fraudulent intention—Merchandise Marks Act, section* 15—*Limitation.*

A trader who marks his goods with a mark which is reasonably calculated to pass by the same name as that by which another trader's goods are known in the market uses a false trade mark within the meaning of section 480 of the Indian Penal Code. The fact that a design was used innocently as a trade mark on one class of goods does not absolve an accused person from proving that he used it without intent to defraud on another class.

Mahomed Jewa Motalla v. *H. S. Wilson*, 4 Bur. L.T., 83; *Seixo* v. *Provezende*, (1866) L.R. 1 Ch. Appeals, 192; *Eno* v. *Dunn*, (1890) L.R. 15 A.C., 252—followed.

The appellant, Abdul Majid, has been convicted under section 482, Indian Penal Code, of using a false trade mark and has been sentenced to pay a fine of Rs. 150. He is a shirt-maker and has been selling his shirts with tabs bearing a device of balls and a bird, two geographical hemispheres with a spread eagle above them. The Buckingham Mills Co., Madras, have for many years past been manufacturing twill and selling it with a trade mark of one geographical hemisphere with a sailing ship upon it. Their twill is known in the Burmese market as "bawlôn taseik" or ball-mark twill. The case brought against the appellant by Messrs. Steel Bros., who are agents of the Buckingham Mills Co., is that the use of the two hemispheres on Abdul Majid's shirt tabs has caused his shirts to be known

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as ball-mark shirts and purchasers have been misled by these tabs into thinking that they are buying shirts made of the ball-mark twill manufactured by the Buckingham Mills Co. The District Magistrate, Rangoon, who tried the case found on the evidence produced by the complainants that shirts of material which was not ball-mark twill but with the accused's trade mark on them were being sold as "bawlôn taseik" or ball-mark shirts, that is to say, that the appellant adopted a mark which caused his goods to be known by the same name in the market as shirts of Buckingham Mills twill. The District Magistrate also found that the appellant had failed to discharge the burden of proving under section 482 that he acted without intent to defraud.

It was contended by the accused that the prosecution was barred by limitation under section 15, Merchandise Marks Act, 1889. It appears that shirt tabs similar to those used by the accused had been used by another trader of the same name in 1914. Complainants objected and the trader thereupon undertook to alter his mark by cutting out the two hemispheres leaving the figure only of the spread eagle. What the complainants allege in the present prosecution is a fresh infringement by a different person, and I can see nothing in section 15 to prevent such prosecution provided that the infringement alleged against the accused was in point of time within the period limited in the section. It clearly does fall within it, for the accused began to use the offending tabs only five or six months before the prosecution. I adhere to the opinion expressed in *Mahomed Jewa Motalla* v. *H. S. Wilson* (1) that the owner of a trade mark cannot stand by for several years while his trade mark is being infringed continuously and then bring a criminal complaint in respect of some recent instance in which there has been an infringement. But that is not the case here. Several Indian shirt-sellers called for the defence gave evidence that the offending mark has been used by them for from one year to 2½ years without protest from Steel Bros. But these witnesses are all men in the same way of business as the accused and are therefore to some extent interested in the result of the prosecution. There is no reason to doubt that the

(1) 4 Bur. L.T., 83.

offending mark has been in use for several years on various articles such as boots and shoes and different kinds of cloth. But I think the evidence falls short of establishing the open use of this mark on shirts. The steps taken by Messrs. Steel Bros. in 1914 show that they objected to the mark then, and their employees, who appear as witnesses in this case, have sworn that they had no information that any one was using the mark on shirts again until they discovered the use of it by the accused. I am therefore satisfied that the prosecution was not barred by limitation.

Evidence was given for the prosecution of several purchases of shirts of the accused's manufacture not only in Rangoon but also in up-country bazaars. The witnesses asked for ball shirts or ball-mark shirts and what they got was shirts not of ball-mark twill but shirts of other material with the accused's tabs on them. This evidence is all open to the objection that the witnesses went to the various shops for the express purpose of getting evidence for this case, but there is no reason to suppose that any of it is deliberately false evidence and it is sufficient in my opinion to establish, *primâ facie* at any rate, that if you went into a shirt shop and asked for a ball-mark shirt you would as likely as not be sold a shirt which was not of the Buckingham Mills twill but which had the accused's tabs on it. There is also the evidence of several shirt traders who state that they sell the accused's shirts as ball-mark shirts and find it profitable to offer for sale as ball-mark shirts these shirts of the accused and not shirts made of the complainants' twill. The shirt dealers called for the defence on the other hand say that the accused's mark is known not as the *ball* mark but as the *bird* mark. They also say that if a purchaser wants one of Steel's shirts he will not look at the tabs but will look for the ball and ship stamp which is to be found on every yard of the Buckingham Mills twill. It is significant, however, that when Maung To, the only Burmese shirt-seller who was called for the defence (8th D.W.), was shown a shirt with a ship and ball tab on the neck band (*i.e.* a tab reproducing the design of the complainants' mark) he said, "I infer that it is a 'bawlôn' shirt. If the 'bawlôn' mark is put on the worst twill in the market it becomes a 'bawlôn' shirt." This would indicate that

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purchasers generally are content to look at the tab on the neck band of the shirt and if they find a ball on the tab do not require further evidence that the shirt is a " bawlôn " shirt. I think it unlikely that the defence witnesses are speaking the truth when they say that the accused's mark was known as the bird mark. The evidence for the prosecution on this point appears to be more probable. The complainants' mark is not known as the *ship* mark but as the *ball* mark. In the accused's mark also the more conspicuous feature consists of the two hemispheres and not the bird surmounting them. I think there can be no reasonable doubt that the shirts with the accused's mark on them were being bought and sold as " bawlôn taseik " or ball-mark shirts.

The complainants admittedly have an exclusive right to their mark of a ball and ship as a trade mark for their twill and it is also beyond dispute that twill marked in this way is known in the market as " bawlôn taseik " or ball-mark twill. The English case *Seixo* v. *Provezende* (1) is sufficient authority for the proposition that if the goods of a manufacturer have from the mark he has used become known in the market by a particular name the adoption by a rival trader of any mark which would cause his goods to bear the same name in the market may be as much a violation of the rights of that rival as an actual copy of his device. In such cases the dissimilarity of the rival marks cannot be relied upon as a complete defence. It follows, I think, that a trader who marks his goods with a mark which is reasonably calculated to pass by the same name as that by which another trader's goods are known in the market uses a false trade mark within the meaning of section 480, Indian Penal Code, for he thereby causes it to be believed that the goods so marked are the manufacture of the other trader ; in other words, he deceives purchasers as to the source of the goods.

Nor can I attach any weight to the argument that there is no infringement in this case because a length of twill is a different kind of commodity from a shirt. Every one knows that twill is used largely as a material for shirts. It does not cease to be twill because it is cut up into lengths and stitched together to form a shirt. On this point it is sufficient to refer

(1) (1866) L.R. 1 Ch. Appeals, 192.

to the case of *Eno* v. *Dunn* (1) in which the plaintiff was the proprietor of the well-known medicine Eno's Fruit Salt and the defendant was a manufacturer of baking powder. The defendant was prohibited from using the words "Fruit Salt" in connection with his baking powder. The present case is very much stronger, for an effervescing aperient medicine is not usually regarded as a possible ingredient of baking powder, but twill is one of the commonest materials for shirts.

I am satisfied that the accused has infringed the complainants' rights by selling shirts with the bird and balls tab, and it is probable that a Civil Court would grant an injunction on the evidence produced in this case. But it has further to be decided whether the accused acted without intent to defraud. In connection with this part of the case it is to be observed that the prosecution was instituted by the complainant against Abdul Majid in the belief that he was the person who used these same tabs in 1914 and who, when Steel Bros. protested, gave an undertaking not to use the tabs any longer. If the case had been against that Abdul Majid there could hardly be room for doubt as to his intent to defraud. It was only after this case had begun that the complainants discovered that the Abdul Majid whom they were prosecuting was a different man who apparently has no connection with the Abdul Majid of 1914. The complainants, however, persisted in the prosecution. They gave the accused no opportunity such as they gave the other Abdul Majid in 1914 of avoiding prosecution by abandoning the use of the ball mark tabs. But they were not bound in law to give him this opportunity. They had warned one man in 1914 and there is reference in the evidence to an earlier infringement by another man in 1908 which also ceased when Steel Bros. took steps against the offender. They might reasonably argue that they cannot be expected to keep on warning one shirt-maker after another and that they considered it necessary for the protection of their interests to take the drastic course of a criminal prosecution. The complainants knew that these tabs were not the invention of the accused. They knew that the bird and ball mark belonged originally to Suleiman Cassim Mall. They had learnt this in 1914 and they seem to have been somewhat remiss in

(1) (1890) L.R. 15 A.C., 252

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making no enquiries from Suleiman Cassim Mall and in not warning him against supplying these tabs to shirt-makers. It appears that these tabs had been imported from Germany for the first time in 1913 and had been sold to many traders besides the accused, and not only to shirt-makers but to dealers in boots and shoes and cloth of various kinds. There can be no doubt that this mark was in common use though it cannot be held established that it was used for shirts in 1916 by anyone but the accused. The history of its introduction does not suggest that there was originally any intention of using it to steal the complainants' twill trade. The witness Ebrahim Hussain Mulla stated that he copied the design of two hemispheres and a spread eagle from an Insurance calendar of a German firm. He could not produce the calendar in the District Magistrate's Court and his story was not believed. But an insurance policy of the German firm, J. Hemken, was produced at the hearing of the appeal, and at the head of this insurance policy is the very design referred to. There is no reason, therefore, to disbelieve the witness's evidence as to how he came by the design. But, though the design was apparently not introduced into Burma for fraudulent purposes, this is not sufficient to absolve the accused under section 482. When the mark came into actual use in Burma it acquired the name of the ball mark, and the head and front of the accused shirt-maker's offending is that he attached to his shirts these tabs which had come to be known as ball mark although as a shirt-maker he must have been aware that the complainant's twill was widely known as ball mark by reason of the stamp of a ship and ball impressed on it. He cannot have been ignorant of the fact that the ball-mark tabs were selling his shirts for him on the strength of the reputation which had long ago been acquired by the complainants' twill as ball-mark twill. I think the District Magistrate was justified in finding that the accused had failed to prove that he acted innocently. The appeal is, therefore, dismissed.

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

Civil Reference No. 5 of 1916.

August 7th, 1916.

In re 1. BA THAUNG, 2. MA THUNSA, 3. SEIN BEIK, 4. MA THAUNG KIN, 5. MA PWA ME (HEIRS AND LEGAL REPRESENTATIVES OF U ZO, DECEASED, v. 1. MA SHIN MIN, 2. MA KYIN YU, 3. SEIN GAUNG.

Doctor—for appellants.

May Oung—for respondents.

Civil Procedure Code, V of 1908, *1st Schedule, Order* 2, *Rule* 2 (3)—*Cause of action—Specific Relief Act, I of* 1877, *section* 42—*Declaratory suit—Possession—Civil Procedure Code, Order* 7, *Rule* 11.

A plaintiff whose suit for a declaration of title to land has been dismissed on the ground that he was not in possession at the time of filing the suit is not debarred by Order 2, Rule 2 (3), of the Code of Civil Procedure from bringing a subsequent suit on the same title for recovery of possession of the same land.

Before admitting a plaint for a mere declaratory decree a Court should take particular care to see that the plaint contains the allegations which must be proved before such a decree can be given.

Ram Sewak Singh v. *Nakched Singh*, (1882) I.L.R. 4 All., 261; *Maung Shwe Tun* v. *Ma Me*, Civil 2nd Appeal No. 224 of 1903; *Jibunti Nath Khan* v. *Shib Nath Chuckerbutty*, (1882) I.L.R. 8 Cal., 819; *Nonoo Singh Monda* v. *Anand Singh Monda*, (1886) I.L.R. 12 Cal., 291; *Ambu* v. *Ketlilamma*, (1891) I.L.R. 14 Mad., 23; *Mohan Lal* v. *Bilaso*, (1892) I.L.R. 14 All., 512; *Nathu Pa'ndu* v. *Budhu Bhika*, (1894) I.L.R. 18 Bom., 537; *Bande Ali* v. *Gokul Misir*, (1912) I.L.R. 34 All., 172; *Sayed Siliman Saib* v. *Bontala Hasson*, (1915) I.L.R. 38 Mad., 247; *Read* v. *Crown*, (1888) L.R. 22 Q.B.D., 128—referred to.

The following reference was made by Mr. Justice Parlett to a Bench, under section 11, Lower Burma Courts Act:—

Special Civil Second Appeal No. 269 of 1915.

June 2nd, 1916.

In Civil Regular Suit No. 54 of 1912 U Zo sued his wife, his daughter and his son-in-law for a declaration that he was the owner of a piece of paddy land and of a house and its site, which his wife had sold to his daughter and son-in-law by registered deed on the 29th June 1910. He admitted that he had been turned out of the house three years before the suit by his daughter, who a few months before the suit had also taken possession of the paddy land. He was granted a declaration, but upon appeal his suit was on the 27th October 1913 dismissed under the proviso to section 42 of the Specific Relief Act, because he omitted to sue for possession. On the 9th January 1914 he filed the present suit against the same defendants to eject them from the paddy land and house and site. One of the defences raised was that the suit was barred by Order 2, Rule 2, of the

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Civil Procedure Code, but the Subdivisional Judge held that it was not barred on the authority of *Ram Sewak Singh* v. *Nakched Singh* (1), remarking that the defendant could not show any Burma ruling on the point, notwithstanding that he produced a certified copy of the judgment of this Court in *Maung Shwe Tun* v. *Ma Me and others* (2), which is to the contrary effect. On appeal the Divisional Judge held the suit to be barred under Order 2, Rule 2, but he gave no reasons and quoted no authority. The plaintiff's representatives have appealed against that decision.

There appear to be authorities that such a suit is not barred. In *Jibunti Nath Khan* v. *Shib Nath Chuckerbutty* (3), where a previous suit for a declaration of title and confirmation of possession of land had been dismissed on the ground that the plaintiff was not in possession at the time of filing the suit, a subsequent suit on the same title for recovery of possession was held not to be barred under section 43 of the Code of 1882 corresponding to Order 2, Rule 2, of the present Code. The decision rested upon the principle that the causes of action in the two suits were not the same, as is set out in the following passage :—" In deciding the question whether this suit is barred by the former suit, we must see if the cause of action is the same in both suits. A cause of action consists of the circumstances and facts, which are alleged by the plaintiff to exist and which, if proved, will entitle him to the relief, or to some part of the relief, prayed for, and is to be sought for within the four corners of the plaint. The allegations in the plaint in the former suit were the death of Promotho Nath, the alleged heirship of the plaintiff to his estate, the possession by the plaintiff of that estate, and the proceedings under the Criminal Code and in the Registration Court which threatened to result in a disturbance by the defendants of the rights enjoyed by the plaintiff. These constituted the cause of action in that suit and the relief asked for was a decree declaring the plaintiff's title as heir, the effect of which would have been to quiet him in the possession of his estate. Upon such a cause of action a declaratory decree was the only remedy he could sue for. How then can it be said

(1) (1882) I.L.R. 4 All., 261. (2) Civil 2nd Appeal No. 224 of 1903.
(3) (1882) I.L.R. 8 Cal., 819.

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that he omitted to sue for any remedy in respect of that cause of action when he was entitled to no other?" In the case now under consideration there was no allegation in the plaint in the earlier suit that the plaintiff was in possession of the property: admittedly he was not, and it appears to me that plaintiff having been dispossessed, the cause of action in the second suit had already arisen when the first suit was filed, and that the cause of action in the two suits was the same.

The Allahabad case referred to above (1) also proceeded upon the lines that the causes of action in the two suits were not the same and that when the first suit was brought the plaintiff was not entitled to the remedy asked for in the second suit. At page 267 occurs the following passage:—"It only remains to be seen whether section 43 was rightly held by the lower Court to bar the claim. Now it is to be observed that the basis upon which the appellants rested their former prayer for relief was the execution of the deed of gift of the 10th December 1878, by which they declared their rights had been interfered with. They made no claim for possession of their share, because at that time no act had been done by the respondent amounting to the assertion of a possession adverse to their title; and, indeed, as will be seen from their plaint, they plainly intimated that, as regards one of the villages in which they claimed a share, it was in the possession of the respondent under a lease to which they took no objection, and as to the other, that they were in joint possession with him. It is obvious, therefore, that while at the time of the institution of the former litigation their cause of action was the deed of gift, when the present suit was brought something more had accrued by reason of the obstruction offered by the respondent to their exercising the right of proprietorship over their shares. In the one case, no possession having been asserted by the respondent, the appellants were not entitled to sue him for possession; in the other case an additional cause of action had arisen, which gave them the right to the further remedy. Under these circumstances it does not appear to me that the appellants have laid themselves under the prohibition of the third paragraph of section 43 of the Civil Procedure Code." This shows that the circumstances were different from those of the present case. As regards the

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remedy open to the plaintiff in the first suit, the reasons of the learned Judge for his view are to be found at pages 269 to 271, and amount, so far as I can understand, to this—section 42 of the Specific Relief Act empowers a Court to grant a mere declaratory decree, only when that is the sole relief to which the plaintiff is entitled. If the plaintiff is able to seek further relief than a mere declaration of title and omits to do so, he is not entitled to a bare declaration. If, therefore, he sues for a mere declaration when he is able to seek further relief, he is not entitled to the relief of a declaration. But Order 2, Rule 2 (3), applies only where, there being identity of causes of action in the two suits, the plaintiff is entitled in the first suit to more than one relief, and it has no application to a case where in the first suit he is entitled to no relief at all. I find it difficult to hold that, in a case like the present, the plaintiff is not entitled at all to the relief of a declaration of his title to the property. It appears to me that if his case was true he was entitled to that relief, but he was only allowed to obtain it in a suit in which he asked also for the further relief of possession to which his cause of action also entitled him. It is significant that the word "relief" has been substituted in Order 2, Rule 2 (3), for the word "remedy" which appeared in section 43 of the Civil Procedure Code of 1882 thereby assimilating the wording more nearly to that of the proviso to section 42 of the Specific Relief Act. *Nonoo Singh Monda* v. *Anand Singh Monda* (1) also proceeded on the ground that the causes of action in the two suits were dissimilar. In *Ambu* v. *Ketlilamma* (2) a plaintiff was held not to be debarred from filing a second suit on grounds of action of the occurrence of which the plaintiff was ignorant when the first suit was filed. This does not apply to the present case, where the plaintiff was fully aware of his dispossession when he filed his first suit.

Mohan Lal v. *Bilaso* (3) merely followed the earlier Calcutta case. *Nathu Paindu* v. *Budhu Bhika* (4) was also decided on the ground that the second suit was on a different cause of action from the first.

(1) (1886) I.L.R. 12 Cal., 291.
(2) (1891) I.L.R. 14 Mad., 23.
(3) (1892) I.L.R. 14 All., 512.
(4) (1894) I.L.R. 18 Bom., 537.

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Bande Ali v. *Gokul Misir and another* (1) followed the earlier Calcutta and Allahabad cases.

No reported decision from Burma has been quoted, but the ruling in *Civil 2nd Appeal No.* 224 *of* 1903 of this Court seems to be applicable to the present case. The point is important, and I think it is desirable that it should be authoritatively decided in this province. I therefore refer to a Bench the question whether a plaintiff whose suit for a declaration of title to land has been dismissed on the ground that he was not in possession at the time of filing the suit, is debarred by Order 2, Rule 2 (3), of the Code of Civil Procedure from bringing a subsequent suit on the same title for recovery of possession of the same land?

The opinion of the Bench was as follows :—

Fox, C.J.—The question referred is elaborately discussed in the judgment of Karamat Husain, J., in *Bande Ali* v. *Gokul Misser* (2). He held that a plaintiff who had sued for a permanent injunction restraining the defendants from cutting down the trees in a grove, and whose suit had been dismissed on the ground that he had failed to prove his possession of the grove, could not subsequently sue for possession of the property. He founded his decision on the principle of section 43 of the Civil Procedure Code, 1882, which is repeated in Rule 2 of Order 2 in the 1st Schedule of the present Code. The Appellate Bench, however, reversed the decision in view of that Court and other High Courts having for a long time accepted the view that the dismissal of a suit for a declaratory decree on the ground that the plaintiff is not or has not proved that he is in possession is no bar to a subsequent suit by him for possession. In *Sayed Siliman Saib* v. *Bontala Hasson* (3) a Bench of the Madras High Court has recently adopted the same view.

The case of *Jibunti Nath Khan* v. *Shib Nath Chuckerbutty*(4) is a prominent case in which it was held that a similar section in the Civil Procedure Code of 1877 did not bar a subsequent suit for possession. It is to be noted that in that case the plaintiff in his first suit for a declaratory decree alleged that he was in possession of the property. That suit was dismissed

(1) (1912) I.L.R. 34 All., 172.
(2) (1912) I.L.R. 34 All., 172.
(3) (1915) I.L.R. 38 Mad., 247.
(4) (1882) I.L.R. 8 Cal., 819.

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on the ground that the plaintiff was not in possession and consequently was not entitled to a declaratory decree. If he could have proved his possession a declaratory decree was all he need have asked for, so on the allegations in his plaint he did not omit to sue for any relief that he was entitled to. It is difficult to resist the reasons given for holding that in such a case the principle of Rule 2 of Order 2 does not preclude a plaintiff from bringing a suit for possession. In order to obtain a mere declaratory decree under section 42 of the Specific Relief Act a plaintiff must allege and prove that he is in possession of the property in respect of which he seeks the declaration he asks, for if he does not do so the proviso to the section precludes the Court from making the declaration, it being manifest that if he is not in possession it is open to him to seek the further relief of a decree for possession.

White, J.'s remarks upon the difficulty in some cases of proving possession are cogent, and it certainly might work hardship to a party entitled to property who believed himself to be in possession of it if by reason of an adverse decision on the question of possession only he were debarred from taking any further action to assert his title to the property.

It seems that in most of the cases in the Indian Courts the plaintiffs in their suits for declaratory decree alleged that they were in possession.

In the case before this Court the plaint in the suit for a declaratory decree contains no allegation as to the plaintiff being in possession. In the course of his evidence he made admissions which showed that he was not in possession, and the suit had necessarily to be dismissed. The question is whether in such a case the plaintiff is debarred from bringing a suit for possession.

It would be anomalous if he could bring such a suit after making an untrue allegation about being in possession, but could not do so because he had said nothing at all about the possession of the property. His first suit for a declaratory decree was in fact defective, and should have been rejected under Rule 11 of Order 7, because without an allegation that he was in possession it did not disclose a sufficient cause of action entitling him to the relief he claimed. The rejection of

the plaint would not have precluded him from presenting a fresh plaint containing the necessary allegation that he was in possession of the property. The suit on such a plaint would have had to be dismissed at the hearing because he could not prove possession, but according to the rulings of the Indian High Courts, it would have been open to him to have brought a subsequent suit for possession.

Under the circumstances I would hold that the plaintiff was not debarred from bringing the subsequent suit for possession by reason of his not having made any allegation as to possession in his suit for a declaratory decree, and I would answer the question referred in the negative.

Before admitting a plaint for a mere declaratory decree a Court should take particular care to see that the plaint contains the allegations which must be proved before such a decree can be given. As above stated it is necessary for a plaint for a mere declaratory decree as to any right to property to contain an allegation that the plaintiff is in possession of the property.

The costs on this reference will follow the result of the suit —3 gold mohurs allowed as Advocate's fee.

Twomey, J.—The answer to the question referred turns on the meaning of the term " cause of action " in Order 2, Rule 2. It is only if the cause of action in the two suits is the same that the rule bars the second suit.

In England the term has been defined authoritatively as "every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court " (1). The wide definition given by White, J., in the Calcutta case, *Jibunti Nath Khan* v. *Shib Nath Chuckerbutty* (2), is in conformity with the above....." A cause of action consists of the circumstances and facts which are alleged by the plaintiff to exist and which, if proved, will entitle him to the relief or to some part of the relief prayed for, and is to be sought for within the four corners of the plaint. " The opinion that the cause of action is to be sought for within the four corners of the plaint has been generally followed by the Courts in India.

(1) *Read* v. *Brown*, (1888) L.R. 22 Q.B.D., 128.
(2) (1832) I.L.R. 8 Cal., 819.

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It would appear therefore that Order 2, Rule 2, bars a second suit only where the essential allegations in the two plaints are identical. If in one suit in respect of land the plaint is silent as to possession, or if it states that the plaintiff is in possession, while in the other suit the defendant is alleged to be in possession, the two suits are to that extent based upon different causes of action. Such is the case as regards the two suits which Parlett, J., had before him and I am unable to concur in his view that the cause of action in the two suits was the same.

I agree with the learned Chief Judge in answering the question in the negative.

Criminal Revision No. 718 of 1916.

September 7th, 1916.

Before Mr. Justice Ormond.

THEIN ME *v.* PO GYWE.

Sutherland—for applicant.
Ginwala—for respondent.

Criminal Procedure Code (1898), *section* 488—*Maintenance—Burmese Buddhist Law—Dissolution of marriage.*

A Burmese Buddhist husband cannot meet an application for maintenance under the Criminal Procedure Code by the mere declaration that his marriage has been dissolved by reason of his wife's absence from him. A wife who has been driven away from her husband by his cruelty cannot be said to have "left the house not having affection for the husband," within the meaning of the *Dhammathats*.

The applicant Ma Thein Me applied under section 488 of the Criminal Procedure Code for maintenance against her husband. The application was dismissed on the ground that the wife had left her husband and lived separately from him for more than 4½ years and that the husband by opposing this application had shown his election, which he had, of treating the marriage as dissolved.

The parties were married in November 1906. In February 1912 the wife left her husband; in July 1912 the husband took a lesser wife; in July 1913 the wife applied for maintenance for herself and her son; maintenance for herself was refused because she delayed the progress of the case, without prejudice to her right to bring another application. In August 1913 the husband sued for restitution of conjugal rights and in December 1913 his suit was dismissed on the ground of cruelty.

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In July 1915 the wife made this application for maintenance. There is no doubt that after a husband's suit for restitution of conjugal rights has been dismissed the husband is liable to maintain his wife; but it is contended for the husband that the wife had deserted her husband for more than a year since the decree in that suit, and that it is clear by the husband's opposition to this application for maintenance that he has elected to treat the marriage as being dissolved under Burmese Buddhist Law. The *Dhammathats* (Richardson, Vol. V, section 17) say, "If the wife, not having affection for the husband, shall leave the house where they were living together, and if during one year he does not give her one leaf of vegetables or one stick of firewood, let each have the right of taking another husband and wife. They shall not claim each other as husband and wife. Let them have the right to separate and marry again." In my opinion that passage refers to the voluntary desertion by the wife without the consent of the husband. And the wife who is driven away from her husband by his cruelty cannot be said to have 'left the house not having affection for the husband.' A wife who refuses to rejoin her husband without sufficient reason or who is living apart from her husband by mutual consent is not entitled to maintenance; and I doubt if a husband under Burmese Buddhist Law, who is bound to maintain his wife, can evade that liability by declaring that the marriage has been dissolved by reason of the wife's absence from him. The order of the Magistrate is therefore set aside. Maintenance of Rs. 15 a month has been granted for the son and an order will be made for maintenance of the applicant at Rs. 30 a month.

Before Sir Charles Fox, Chief Judge.

Criminal Revision No. 307B of 1916.

October 7th, 1916.

V. S. M. MOIDEEN BROTHERS *v.* ENG THAUNG AND COMPANY.

Dawson—for applicant.
Clifton—for respondent.

Criminal Procedure Code, section 96—Information necessary before issue of search warrant—Terms of search warrant.

A preferred a complaint that B had committed offences under sections 482 and 486, Indian Penal Code, and applied for a search warrant of B's

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premises for the production 'of all letter books, letters, bills and books of accounts.' The warrant was issued and executed.

Held,—that the issue of the warrant was illegal; that a search warrant can only be issued for the production of definite documents believed to exist, that such documents must be specified in the warrant, that such warrants can only be issued when the Magistrate has before him some information or evidence that the document is necessary or desirable for the purposes of the enquiry before him.

Complaint was laid by a partner of Eng Thaung and Company against the applicants in this revision case asking for process against them for offences punishable under sections 482 and 486 of the Indian Penal Code for using a false trade mark, and for selling or having in their possession for sale oil in tins bearing a trade mark which is a counterfeit of the complainants' trade-mark.

The complainants also asked for a search warrant for the search of the applicants' premises and godowns in China Street and for the seizure of all tins bearing a representation of the complainants' mark, together with "all letter books, letters, bills and books of account."

A search warrant was issued, and under it the police seized and brought to the Court a large number of articles, most of which are of one or other of the above descriptions.

The applicants applied for the return of these: the application was opposed by the complainants, and it was refused by the Magistrate.

The applicants apply for revision of this order on the ground that the issue of a search warrant for all letter books, etc., was *ultra vires*, or at least it was an improper exercise of judicial discretion in that the Magistrate had no evidence before him that any of the letter books, etc., contained any entry relevant to the subject-matter of the charges, or that there was anything in them connected with such subject-matter.

They complain that the illegal use by the Magistrate of the power to issue a search warrant has brought their business, which is a general business, to a standstill.

In refusing to return the documents the Magistrate appears to have been chiefly moved to do so by the fact that in two previous cases before one of his predecessors a search warrant in similar terms had been issued.

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If it has become the practice in the Rangoon Magistrates' Courts to issue search warrants in such terms I will say at once that the practice must be abandoned.

The power of issuing a search warrant is not intended to be used for the purpose of giving complainants an opportunity of fishing for evidence. The warrant is intended for use in respect of definite documents believed to exist which must be clearly specified in the warrant, and before issuing it the Magistrate must have before him some information or evidence that the document is necessary or desirable for the purposes of the inquiry before him.

To issue a search warrant for the search of a man's house and for the production of all papers and books in it for the purpose of an inquiry as to whether he had used or sold articles with a counterfeit trade-mark is a gross perversion of the law.

The application for a search warrant in the terms in which the application was made I cannot but regard as an abuse of the process of the Court. All the Rangoon Magistrates have a very large amount of work to do, and the haste in which the Magistrate issued the warrant in this case may excuse his action, but it is to be hoped that in future Magistrates will not issue search-warrants without due consideration of the rulings on the sections dealing with them, and without due consideration of the form of warrant which they have to sign. All the letter books, letters, bills and books of account seized and produced before the Magistrate under the warrant must be at once returned to the applicants.

Before Mr. Justice Ormond.

Special Civil Second Appeal No. 161 *of* 1916.

November 16*th*, 1916.

1. RAHMAN CHETTY, 2. CHINNA KURAPAN CHETTY, 3. RAMAN CHETTY *v.* MA HME.

McDonnell—for appellants.

J. E. Lambert—for respondent.

Provincial Insolvency Act, section 16—*Suit for declaration—Plaintiff's interest in subject-matter of suit.*

A plaintiff cannot sue for a declaration in respect of another person's property unless he has an interest in the property. If he is a judgment-creditor he can bring a suit for declaration that the property belonged to his judgment-debtor—only because he has the right to attach it. After his judgment-debtor has become an insolvent he no longer has the right to

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attach his judgment-debtor's property and therefore has no right to sue for a declaration in respect of his judgment-debtor's property.

This was put down as an application for an order to withhold payment of money out of Court: but by consent of parties the appeal has been heard. The plaintiff Chetty obtained a decree against one Maung Po Te and attached in July 1915 a house and land. The defendant applied for the removal of the attachment and succeeded. The plaintiff then filed a suit for a declaration that the house and land was the property of his judgment-debtor, Po Te, at the time of the attachment, and he succeeded in the Subdivisional Court. On appeal to the Divisional Court the defendant raised the point that under section 16 of the Provincial Insolvency Act this suit would not lie because the judgment-debtor had become an insolvent on the 5th June 1915, on which date his property vested in the Court or the Receiver; and without the leave of the Court the creditor could not take any remedies against the judgment-debtor's property.

It is contended for the plaintiff-appellant that, in a suit against a third party for a declaration that the property was the property of the judgment-debtor, he is not taking any remedy against the judgment-debtor's property. On the face of it that is true; but the defendant is entitled to show that even if the property belonged to the judgment-debtor the plaintiff has no *locus standi* to bring the suit. A plaintiff cannot sue for a declaration in respect of another person's property unless he has an interest in the property. If he is a judgment-creditor he can bring a suit for a declaration that the property belonged to his judgment-debtor; only because he has the right to attach it. After his judgment-debtor has become an insolvent, he no longer has the right to attach his judgment-debtor's property and therefore he has no right to sue for a declaration in respect of his judgment-debtor's property. He cannot sue on behalf of the whole body of creditors without the leave of the Court. The plaintiff-appellant was given an opportunity in the Divisional Court of obtaining leave from the District Court to proceed against the property of the judgment-debtor, but that was refused. This appeal is, therefore, dismissed with costs.

Before Sir Charles Fox, Chief Judge.

Criminal Revision Nos. 287B & 292B of 1916.

November 20th, 1916

A. THUMBUSWAMY PILLAY *v.* 1. MA LONE, 2. DEWADASON.

MA LONE *v.* THUMBUSWAMY PILLAY.

Wiltshire—for applicant.

Mya Bu—for respondent.

Criminal Procedure Code, sections 488, 489—*Enforcement of order for maintenance of a child.*

A obtained an order against B for the payment of Rs. 42 a month for the maintenance of herself and her child under section 488, Criminal Procedure Code. After the child became able to maintain itself A applied for enforcement of the order. The Magistrate enforced it as regards Rs. 25 a month only.

Held,—that as the original order made no allotment between the wife and the child it became of no effect when the child became able to maintain itself; that the order could not be partially enforced in favour of the wife; that the wife should make a fresh application for maintenance for herself alone.

Shah Abu Ilyas v. *Ulfat Bibi*, (1896) I.L.R. 19 All., 50; *A. Krishnasawmi Aiyar* v. *Chandravadana*, (1913) 25 Mad. L.J., 349—referred to.

The respondent Ma Lone applied to the Magistrate to enforce an order made under section 488 of the Code of Criminal Procedure by one of his predecessors. That order was that the petitioner A. T. Pillay should make a monthly allowance of Rs. 42 for the maintenance of Ma Lone and her son by him Dewadason. Nothing was said as to what portion was to be for the wife and what portion was to be for the son.

Ma Lone's application was for seven months' arrears at the above rate less what had been paid.

At the time she applied the son was over 19 years of age, and had been in employment and earning sufficient for him to live on. He had however been out of work during the seven months for which the allowance was claimed. A. T. Pillay in objecting to enforcement of the order relied on no allowance being claimable on account of the son in consequence of the son being no longer "a child unable to maintain itself."

The Magistrate considered that he could not go into this objection because no application had been made to revise or set aside his predecessor's order, and consequently he was bound to enforce that order so far as concerned the past. He however altered the monthly allowance payable for the future,

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and made it Rs. 25 for the maintenance of the wife only. She objects that the amount is insufficient.

The Magistrate's view that he could not enter into the question of whether the order should not be enforced in consequence of the son not having been for the period in question a child unable to maintain itself appears to me to have been wrong.

If a husband can, in objecting to the enforcement of an order, rely on his having divorced his wife as was held in *Shah Abu Ilyas* v. *Ulfat Bibi* (1), there appears to be no reason why a father should not be entitled to raise objection that the child for whose maintenance he was ordered to make an allowance had become able to maintain itself.

It appears to me to be unnecessary to deal with the question of whether the son ceased to be a child within the purview of the section after he reached the age of 18 years. I hesitate to adopt the view of Sankaran Nair, J., in *A. Krishnasawmi Aiyar* v. *Chandravadana* (2) without further argument, for it appears to me that the Legislature may have intended to make a father liable for the maintenance of his child throughout its life if, owing to some mental or corporal defect, it is unable to maintain itself.

In the present case there can be no question as to the son being able to maintain himself if he obtains employment.

The foundation of the order was taken away when he became able to maintain himself, and so far as he was concerned the order became spent, and was not enforceable.

Then arises the question whether it could be enforced in part for the benefit of the wife. The Magistrate who made the order not having allotted any particular portion for the wife, I do not think it was open to the Magistrate who was asked to enforce the order to do this either as regards arrears or future maintenance. In my opinion the order of the Magistrate was unjustified both as regards the order for payment of arrears, and as regards the payment of allowance for the future. It is set aside.

The order of the 23rd September 1909 must be regarded as no longer in force.

(1) (1896) I.L.R. 19 All., 50. (2) (1913) 25 Mad. L.J., 349.

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Ma Lone should make another application under section 488 for an allowance for herself alone, and at the hearing of that application the question of what will be a proper amount can be fully gone into, having regard to the circumstances of her husband, and what a husband of his means should allow his wife for her maintenance.

Before Mr. Justice Rigg.

Civil Revision No. 43 of 1916.

December 8th, 1916.

PO MYAING *v.* MA PAN MYAING.

Robertson—for applicant.
Ba U—for respondent.

Provincial Small Cause Courts Act, section 15, second schedule, clause 38—Enforcement of agreement to maintain.

A suit for enforcement of an agreement to maintain is a suit for maintenance and is not cognizable by a Court of Small Causes.

Bhagvantra'o v. *Ganpatra'o*, (1891) I.L.R. 16 Bom., 267, and *Saminatha Ayyan* v. *Mangalathammal*, (1896) I.L.R. 20 Mad., 29—followed.

The only question argued in this application for revision is whether the Small Cause Court had jurisdiction to entertain the suit, which was one for the recovery of a sum of money due under an agreement to pay for the maintenance of a child. Mr. Robertson contends that the suit was barred by clause 38, Schedule 2 of Act IX of 1887, which exempts from the cognizance of a Court of Small Causes suits relating to maintenance. Both the Bombay and Madras High Courts have held that suits such as the present one are suits relating to maintenance and are not cognizable by a Provincial Court of Small Causes, and I venture to concur with the opinions expressed by those Courts [*Bhagvantra'o* v. *Ganpatra'o*, (1) and *Saminatha Ayyan* v. *Mangalathammal* (2)]. The decree passed by the Small Cause Court was without jurisdiction and is set aside with costs. The plaint will be returned to be presented to the proper Court.

(1) (1891) I.L.R. 1 Bom., 267. (2) (1896) I.L.R. 20 Mad., 29.

Criminal Appeal No. 1082 *of* 1916.

January 3*rd*, 1917.

Before Mr. Justice Parlett.

KING-EMPEROR *v.* 1. NGA HNIN, 2. NGA SHWE DI.

Maung Kin, the Assistant Government Advocate—for the King-Emperor.

Ko Ko Gyi—for the respondents.

Indian Penal Code, sections 161/116.

A person who offers a public servant a gratification which is taken by the public servant merely for the purpose of having evidence of the transaction, and not in order to its acceptance, commits an offence punishable under sections 161/116, Indian Penal Code.

Queen-Empress v. *Ma Ka*, 1 U.B.R. (1892-96), 158 at 163; *Raghudatt Singh* v. *Queen-Empress*, 1 U.B.R. (1892-96), 154—followed.

The evidence shows that a Magistrate had pending before him a theft case in which one Nga Kyaung was accused and on the day fixed for hearing the 1st respondent, Maung Hnin, a village headman, visited the Magistrate in his house and dropped a hint which I take to mean that, if discretion was exercised, there was money to be made. The Magistrate made no reply but left the house. Maung Hnin then told the Magistrate's father, who remained in the house, that he wished to give money to the Magistrate in Maung Kyaung's case, and asked him to speak to his son. His father was angry, but asked him if he had the money with him; Maung Hnin said he had not, and left the house. The father wrote a note to his son about the matter, and on his return told him all about it. Meanwhile Maung Kyaung was charged and a date was fixed for his defence. On 31st May both respondents came to the Magistrate's house. The son-in-law of the 2nd respondent, Maung Shwe Di, is a brother of Maung Kyaung. Shwe Di left the room for a time and Maung Hnin then told the Magistrate he wished to give him Rs. 100 if he would release Maung Kyaung on bail and ultimately acquit him. The Magistrate asked where the money was, whereupon Shwe Di re-entered, and handed currency notes and coin to Maung Hnin, who placed it on the table. Witnesses were called in, the respondents were detained and subsequently prosecuted. They were convicted under sections 161/116, Indian Penal Code, and sentenced to three months' rigorous imprisonment each on 17th July 1916. Both appealed, on the ground of the severity of the sentence, and Maung Shwe Di also on the ground that his conviction was not warranted on the evidence.

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The learned Sessions Judge acquitted them both on the ground that no offence was committed. He held that the Magistrate's silence and conduct on 29th May induced the accused to offer him the bribe: that he, by his conduct, instigated them to do so, and therefore they could not be considered guilty of instigating the Magistrate to receive a bribe. A reference is made to section 1139 of Dr. Gour's Penal Law of India, and the passage seems to be similar to that referred to in *Queen-Empress* v. *Ma Ka* (1). As is there pointed out, the Legislature appears not to have adopted the recommendations of the Commissioners: and in any case the question as to what the law enacted is can be answered only by a reference to the law itself as it stands in the Penal Code. It is an offence under section 161 for a public servant to accept an illegal gratification in respect of an official act. By section 107 a person may abet the doing of a thing, not merely by instigating a person to do it but by intentionally aiding by any act the doing of it. It appears to me that, leaving out of consideration any question of extortion since none arises here, if a public servant solicits a bribe, and the person solicited complies with the demand, and hands him money, he intentionally aids by his act, and therefore abets, the taking of the bribe by the public servant; and that the fact that the bribe was solicited at most renders the abetment less culpable than it would otherwise be. The whole question was exhaustively discussed in the Upper Burma case referred to above, and the conclusions appear to me to be entirely sound.

In the present case, however, I cannot hold that there was anything to warrant the inference that the Magistrate instigated the respondents to bribe him, or even gave either of them to understand that he was willing to accept a bribe. The first suggestion of bribery certainly came from Maung Hnin, and the Magistrate clearly had nothing to do with instigating it. As to his conduct, he did allow the gratification to be delivered not in order to its acceptance, but in order to have evidence of the transaction, but that seems to make no difference in the character of the respondent's offence—see *Raghudatt Singh* v. *Queen-Empress* (2). The defence of the accused was that the

(1) 1 U.B.R. (1892-96), p. 158 at p. 163. (2) 1 U.B.R. (1892-96), p. 154.

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Magistrate misunderstood their request, which was merely to offer cash security for Maung Kyaung's release from custody. It could not be substantiated and was not relied on in their appeals nor in this Court.

As to Maung Hnin's part in the affair there is no doubt. It is urged that Maung Shwe Di had no knowledge of Maung Hnin's intention and arrangement to offer the bribe. It is impossible to believe this. The person interested in Maung Kyaung's acquittal was his kinsman, Maung Shwe Di. He produced the money, and there is no doubt that it was he who got Maung Hnin to sound the Magistrate on 29th May. Indeed it appears to me that it must have been he, and not Maung Hnin, who first entertained the project.

I consider both respondents were rightly convicted by the Magistrate. Maung Hnin is a village headman and deserves exemplary punishment. Maung Shwe Di is however an old man of 62 years of age, and as the loss of the money will probably fall upon him, I do not consider it necessary to order his rearrest and imprisonment.

The acquittals are reversed, and both respondents are convicted under sections 161/116, Indian Penal Code. Maung Hnin is sentenced to three months' rigorous imprisonment, to take effect from 17th July 1916, and Maung Shwe Di is sentenced to the term of imprisonment he had already undergone when released on bail. The order confiscating the money is restored.

Civil Revision No. 112 of 1916.

December 7th, 1916.

Before Mr. Justice Rigg.

MA MYAING *v.* MAUNG SHWE THE.

Hay—for Applicant.

Hla Baw—for Respondent.

Damage caused by cattle—liability of owner.

A cattle owner is responsible for the acts of his cattle while in charge of his servant. He is not responsible for the acts of cattle while in charge of a bailee.

Zeya v. *Mi On Kra Zan*, 2 L.B.R., 333 at 340; *Milligan* v. *Wedge*, (1840) 12 A. and E., 737; 113 E.R., 993, referred to.

The defence set up in Ma Myaing's written statement has been abandoned, and the facts in the case are not now in dispute. Ma Myaing owns two buffaloes and made them over to Maung Ne Dun to tend on payment of eight baskets of paddy.

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One of these animals was vicious and was known to be vicious both by her and Ne Dun. Whilst the buffaloes were in charge of a small boy named Maung Thin, son of Ne Dun, they gored to death one of Maung Shwe The's buffaloes. Maung Shwe The sued Ma Myaing and Maung Thin for damages: the Township Judge held that Ma Myaing was not liable and dismissed the suit against her, but the Appellate Court reversed this decision. The District Judge based his judgment on the negligence of Ma Myaing in not seeing that her buffaloes' horns were cut, and in not taking care that a mere boy was not left in charge of them. The real point in issue was whether Ma Myaing, having made over her buffaloes to Ne Dun's charge, was any longer responsible for any damage they might cause. Ne Dun accepted the charge of the animals with knowledge of their nature. The Appellate Court did not consider the real issue in the case at all, and in failing to do so, acted with illegality according to the ruling in *Zeya* v. *Mi On Kra Zan* (1). The answer to the question as to whose the responsibility is in a case such as the present must, I think, depend on whether Ne Dun after taking charge of the buffaloes for hire was Ma Myaing's servant. Ne Dun was an agister who received Ma Myaing's buffaloes to tend on hire: He was exercising an independent calling at the time the goring took place and was not under orders from Ma Myaing. He seems to me to have been in the position of a bailee and not of a servant. In *Milligan* v. *Wedge* (2) the facts were that the owner of a bullock employed a drover to drive it from Smithfield where he had bought it. The drover employed a boy, through whose careless driving mischief was caused. It was held that the owner of the bullock was not liable. Coleridge J. said "the true test is to ascertain the relation between the party charged and the party actually doing the injury. Unless the relation of master and servant exist between them, the act of the one creates no liability in the other." The negligence in the present case was that of Ne Dun, who left his young son to look after 14 buffaloes. The decree of the District Court is set aside and that of the Township Court is restored. Maung Shwe The will pay Ma Myaing's costs throughout.

(1) 2 L.B.R., 333 at 340. (2) (1840) 12 A. and E., 737; 113 E.R., 993.

Privy Council Appeal No. 38 of 1916.

PRIVY COUNCIL.

ON APPEAL FROM THE CHIEF COURT OF LOWER BURMA.

Before Lord Chancellor, Lord Shaw, Lord Wrenbury and Mr. Ameer Ali.

TUN THA *v.* MA THIT AND OTHERS.

Buddhist Law : Inheritance—Auratha *son, the nature of his right —Limitation Act, 1st Schedule, Article* 123.

An *auratha* son may claim his right to a one-fourth share of the joint property of his parents on the death of his father within any period that is not outside the period prescribed by Article 123, Schedule I, of the Limitation Act.

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

The following judgment of the Chief Court of Lower Burma was delivered on the 31st March 1915.

Civil 1st Appeal No. 15 of 1914.

March 31st, 1915.

Before Mr. Justice Ormond and Mr. Justice Twomey.

The plaintiff was the eldest son of Ma Thit and U Tu. U Tu died in December 1906. The plaintiff instituted this suit in June 1913 for one-fourth share of the joint estate of his parents as at the death of his father. At the time of the father's death, there were 6 children including the plaintiff. The plaintiff made no demand from his mother in respect of his one-fourth share until 6½ years after his father's death ; but, on the other hand, he collected the rents of the property for his mother as being her property.

The question in this appeal is whether an eldest son must act with reasonable promptitude in exercising his option of taking one-fourth of his parents' joint property on the death of his father or whether he has 12 years within which he can exercise that option under Article 123 of the Limitation Act. We are referred to the case of *Maung Po Min* v. *U Shwe Lu* (1), where it is held that the period of limitation for the recovery of one-fourth share by an eldest son is 12 years from the date of the parents' death, under Article 123. The facts of that case are not given in the report : but we must assume that the eldest son's option had not lapsed owing to delay in exercising it.

(1) 2 L.B.R., 110.

The effect of undue delay on the part of the eldest son was not considered and no question was raised on that point. The case can only be regarded as an authority for applying Article 123 and reckoning the period of limitation from the date of the parents' death when as a matter of fact the eldest son has acted promptly. In the present case we are not concerned with the period of limitation. If the plaintiff had demanded his one-fourth share promptly after his father's death and had been refused he would no doubt have 12 years from the date of his father's death to sue for the share. But though he was a married man with a family of his own and living apart from his mother when his father died he did nothing for 6½ years and the question we have to decide is whether he should not therefore be deemed to have abandoned his claim to partition and elected to wait for his mother's death and then share with his brothers and sisters. It is not expressly provided in the *Dhammathats* that the eldest son must decide promptly which course he will take. But from the nature of the option it is necessary in the interests of the family that it should be exercised without delay. According as it is exercised or not the mode of managing the property must vary and the prospects of the other heirs would also vary. It can hardly be intended that a widow should be compelled to keep one-fourth of the estate tied up indefinitely on the chance that at any time within 12 years the eldest son may demand his one-fourth share. Such a restriction would materially affect the widow's management of the estate. If such a course were admissible the eldest son might conceivably wait till three-fourths of the estate has through some misfortune been lost and then claim the whole of the remaining one-fourth to the entire exclusion of his brothers and sisters although they may have counted for years on coming in when their mother dies and sharing equally with the eldest son.

We think that the right given to the eldest son (Manukye, Bk. X, Section 5) of claiming a one-fourth share of the joint estate on his father's death must be exercised as soon as possible after that event and that if the option is not exercised without unreasonable delay it lapses altogether.

The appeal is allowed. The decree of the Lower Court is set aside and the suit is dismissed with costs in both Courts.

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The appellants will have their costs of the commission issued in the suit.

The judgment of their Lordships of the Privy Council was delivered on the 13th November 1916.

Lord Chancellor.—The appellant in this case is the plaintiff in certain proceedings which were instituted in the District Court at Thatôn, by which he claimed to have one-fourth share of the estate of his father determined and allotted to him. The claim is stated quite clearly, and with commendable brevity, in the plaint, which sets out allegations which are no longer in dispute, namely, that the plaintiff was the eldest son of his father; that his father died on the 19th December 1906, intestate, and left a widow and certain other sons and daughters him surviving.

The ground upon which that claim was resisted depended in the main upon an allegation that the plaintiff had behaved in an unfilial and illegal way, and, consequently, had forfeited his rights. That defence was disposed of by the learned Judge who heard the cause, who although he appears to have been greatly embarrassed by the untrustworthiness of the evidence before him, decided that the defendant had not established this allegation.

The only other matter left for decision was one which, according to the defendants' contention, arose upon paragraph 5 of their defence. That paragraph suggested that the plaintiff had not in fact any share in the estate, but that, on the death of his father, he had obtained a right to elect whether he would have that share or no, and that, in the absence of election within a reasonable time, the claim could not now be brought forward. That view was supported by the Chief Court, and from their decision this appeal has been brought.

The whole of that contention depends, as Mr. Coltman very fairly stated, upon considering the two different rules of the *Dhammathat* which are applicable to this case. They are Rule 5 and Rule 14. The first relates to the partition of an estate upon the death of the father, and it is under that rule, and, as their Lordships understand it, under that rule alone, that the right of the plaintiff in this case arises. It is in these words: "When the father has died the two laws for the partition of the

inheritance between the mother and the sons are these: Let the eldest son have the riding horse" and certain ornaments, and it then proceeds: "Let the residue be divided into four parts, of which let the eldest son have one, and the mother and the younger children three."

It is said that Rule 14, which deals with the division of the estate on the death of the mother, shows that, if the one-fourth had not been segregated, and paid over to the eldest son after the father's death, and before the mother died, there would be a different method of distribution, one that might be more favourable, or that might be more unfavourable, to the eldest son, but which, certainly, would not be the same as that to which he was entitled under Rule 5.

Their Lordships do not think that it is desirable to express an opinion upon the true construction of Rule 14. It is a matter that may arise for determination hereafter, and its determination is not relevant to the present question because, even assuming in favour of the respondents, that the rights of the eldest son would change in the event of his not having segregated his one-fourth before his mother's death, it by no means follows that the right which he got under Rule 5 was merely the right to elect within a certain limited period of time whether he would take the property or no. Their Lordships can find no ground whatever for the suggestion that he got anything under Rule 5 excepting a definite one-fourth part of the estate, a right which he was at liberty to assert within any period that was not outside the period fixed by article 123, of the Indian Limitation Act as the period within which a claim must be made for a share of property on the death of an intestate.

The respondents have certainly urged before their Lordships all that could be urged in support of their view, but their Lordships find themselves quite unable to accept their arguments or to agree with the view which was formed by the Chief Court in this matter.

Their Lordships will humbly advise His Majesty that this appeal should be allowed, the decree of the Chief Court set aside with costs, and the decree of the District Court restored.

The respondents will pay the costs of the appeal.

Criminal Revision No. 42B of 1917.

March 13th, 1917.

FULL BENCH.

Before Mr. Justice Ormond, Offg. Chief Judge, Mr. Justice Robinson, Mr. Justice Parlett and Mr. Justice Maung Kin.

THEIN MYIN *v.* KING-EMPEROR.

Dawson with Kyaw Htoon—for Applicant.

Higinbotham—the Government Advocate for the King-Emperor.

Trial by Jury—Retrial of accused—Review by Bench under section 12, Lower Burma Courts Act—Letters Patent, section 26—Criminal Procedure Code, sections 423, 439 and 537—Evidence Act, section 167.

Under section 12, Lower Burma Courts Act, the Chief Court has power to order a retrial of a case decided by a Judge of the Court exercising the jurisdiction of the Court as the principal Criminal Court of Original Jurisdiction in Rangoon Town.

Hla Gyi v. *King-Emperor*, 5 L.B.R., 75 and 87; *Subrahmania Ayyar* v. *King-Emperor* (1901), I.L.R. 25 Mad., 61; *J. S. Briscoe Birch* v. *King-Emperor*, 5 L.B.R., 149—referred to.

Ormond, Offg. C.J.—This is an application under section 12 of the Lower Burma Courts Act upon the certificate of the Government Advocate to review the case of *King-Emperor* v. the *Petitioner Nga Thein Myin* which was tried at the last Sessions of this Court, upon the ground of misdirection.

The petitioner was found guilty by a unanimous verdict, of committing mischief by fire, an offence under section 436, Indian Penal Code. There was evidence to shew that the petitioner was seen in the room where the fire originated when the fire was first discovered. In his examination before the Magistrate, the petitioner said "After that at about 11 o'clock upon coming back to my house I learnt of the fire in the house and of the people of the quarter having combined and put it out." The statement was wrongly translated by the Court Translator as follows:—"Then at about 11 P.M. I came home and found the house burning and the local people trying to put out the fire." This statement was read out to the Jury as the statement of the accused and the learned Judge commented to the Jury on the fact that the accused admitted that he was present at the fire and saw the people putting it out.

The Judge by mistake put to the Jury, as being a statement made by the accused to the Magistrate, a statement which the accused did not make. It was clearly a case of misdirection which might possibly have had a material effect upon the minds of the Jury when forming their verdict;—seeing that the case rested upon the identification of the accused.

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Mr. Dawson for the petitioner contends that having found there was a misdirection, the only course open to this Court is to set aside the conviction and sentence. He contends that this Court cannot now go into the facts with a view either of convicting or acquitting the accused :—because that would be usurping the functions of a Jury ;—and that this Court cannot order a retrial :—because that power is not expressly mentioned in section 12 and that it is not the practice of this Court to do so.

Section 12 of the Lower Burma Courts Act is very similar to Article 26 of the Letters Patent; and the provisions of section 537 of the Code and of section 167 of the Evidence Act apply to proceedings under section 12.

Counsel for the Crown contends that both these sections apply to the present case and that under section 167 this Court must go into the facts and see whether the evidence that should have been before the Jury, justifies the decision. Strictly speaking there has been no improper admission or rejection of evidence and I doubt if section 167 of the Evidence Act applies. But even if it does, I think the effect of both these sections, when dealing with the verdict of a Jury, is the same. This Court has to consider what effect the improper admission or rejection of evidence or the irregularity or misdirection, might have had upon the decision of the Jury. It is the duty of this Court to go sufficiently into the facts to determine whether there is a reasonable possibility that upon a proper trial a jury might come to a finding different to the finding that would commend itself to this Court or not. If there is no such reasonable possibility, then it is the duty of this Court to confirm or alter the judgment in accordance with the finding come to by this Court. But if in the opinion of this Court there is a reasonable possibility that a jury might either acquit or convict; it would be a proper case for a retrial :—for in such a case this Court would not be satisfied that "independently of the evidence wrongly admitted a jury would consider that there was sufficient evidence to justify the previous decision ; or that if the rejected evidence had been received, the jury would not have varied the decision." And the accused being entitled to have the verdict of a jury, a failure of justice might be

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occasioned if the finding of this Court on the facts were to prevail in a case where there is a reasonable possibility of a jury coming to a different finding.

In this view, the provisions of section 167 of the Evidence Act and section 537 of the Code would be fully complied with: and the right of the accused to be convicted solely upon the verdict of a jury would be preserved.

Section 12 authorizes this Court to alter the judgment, order or sentence and to pass such judgment, order or sentence as it thinks right. Thus the widest powers are given in express terms. The only limitation that has been placed upon these wide powers is, that they do not authorize the Court to assume the functions of a jury. It has never been held that these powers do not include the power to order a retrial:—and in my opinion we have that power.

In *Hla Gyi v. King-Emperor* (1) it was held that an order of commitment was satisfied after conviction and sentence although such conviction and sentence were subsequently set aside in proceedings under section 12. But the conviction and sentence having been set aside, were not final; and with great respect I doubt if the commitment was satisfied. In any case section 12 authorizes this Court to pass such orders as it thinks right. I think the right order to pass in this case is to set aside the conviction and sentence and to order the petitioner to be retried upon the same commitment and in the meantime to be detained in custody as an undertrial prisoner.

Robinson, J.—As the Judge who presided at the trial I think it right to record what occurred. The case was one of arson and it is admitted that arson was committed by some person but it was denied that the evidence of the witnesses for the prosecution was reliable and that the prisoner at the Bar was the man who set fire to the house or was the person whom the witnesses had seen. In summing up the evidence to the jury I dealt with the evidence of the eye-witnesses and the question whether they had seen the prisoner as they stated. I reminded the jury of the statement of the prisoner to the committing Magistrate which was evidence and I pointed that he himself had stated that he was in the house while the fire was still

(1) 3 L.B.R., 87.

burning. The statement of the prisoner was recorded in Burmese and I read to the jury the official translation of this part of it.

It now appears that that translation is incorrect and that the prisoner had stated that when he returned he found that there had been a fire which had been put out by the neighbours.

I therefore had inadvertently put to the jury as a statement of the prisoner something that he had never stated and I did so as a statement which might be considered together with the evidence of the eye-witnesses in deciding whether the prisoner was the man whom the witnesses had seen.

This was clearly a misdirection. It is clearly not a misdirection amounting to an illegality as for instance the failure to comply with some express provisions of the law or a breach of some express prohibition of the law such as was before the Lordships of the Privy Council in *Subrahmannia Aiyer's* case (2). It is therefore necessary to consider the provisions of section 537 of the Code of Criminal Procedure.

I am prepared to agree that this may have influenced the decision of the jury and that on a fact vital to the correct decision of the case. I would however record my opinion that in order to arrive at such a decision it is open to this Bench to go into the evidence.

We must therefore set aside the conviction and sentence. This brings us to the question whether having done so this Bench can pass any other judgment, order or sentence. Can we go into the whole case and decide on the evidence, including the prisoner's statement, whether he is guilty or not guilty or can we order a retrial.

This Bench takes cognizance of the case on a certificate granted by the Government Advocate as required by section 12 of the Lower Burma Courts Act. This section is very similar to Clause 26 of the Letters Patent of the High Courts and is practically in identical terms with section 434 of the Code of Criminal Procedure. The powers given by this section have been considered in two cases by this Court and I will deal with those cases.

(2) (1901) I.L.R., 25 Mad., 61.

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In *Hla Gyi* v. *K. E.* (1) the charge was one of murder and the Bench held that there had been misdirection in the charge to the jury and illegality in dealing with the verdict. The final order was that the conviction and sentence be set aside and the accused released from custody.

In considering whether any further order could be passed Sir Harvey Adamson gives four reasons for not ordering a retrial. With great respect I find myself unable to agree with any of those reasons. The first is because he could not find any instance in which a High Court in India has ordered a retrial of a case tried by itself and it has never been done under section 26 of the Letters Patent. The fact that there is no reported case in which this was done does not show it has never been done and further it has never been held that the Court had not the power to do so.

The next reason is that the language of section 12 is not nearly so wide as that of section 423 read with section 439 of the Code which it is said to include all the powers mentioned in section 12 and include also by special mention the power of ordering a retrial.

The powers given by section 12 are (1) to review the case or such part of it as may be necessary and (2) to finally determine the question that is, the question referred. The section then proceeds :—" and may thereupon alter the judgment, order or sentence passed by the Judge, and pass such judgment, order or sentence as it thinks right."

Sections 423 and 439 specify the powers given to the Court in detail and this limits the Court's powers to those specified. Section 12 gives the Court power to pass " such judgment, order or sentence as it thinks right." I cannot think that this gives less wide powers. It appears to me to give the widest powers. It might have given specially mentioned powers or it might have given the powers given by section 423 or 439 or both ; the language used however does nothing of this kind but instead is couched in the widest terms. When a matter comes upon the certificate of the Government Advocate it may often happen that the order must be to set aside the conviction and sentence and it might well be that there will be many cases in

(1) 3 L.B.R., 75.

which an order for retrial would be obviously the most appropriate order. The Legislature must have been aware of this. It was held to be the most appropriate order in *Hla Gyi's* case. Had it been intended that such an appropriate power should be withheld it appears to me the section would have been differently worded.

The third reason is that that order was not passed in *Subrahmannia Aiyer's* case. Mr. Justice Irwin's judgment gives reasons why it may not have been passed in that case and beyond these it must be remembered that the order to be passed must depend on the facts and circumstances of each particular case. The fact that an order of retrial is not passed in a particular case cannot mean that the Court has not that power.

The last reason relates to two Calcutta cases in which the Advocate- General entered a *nolle prosequi* and I cannot agree that the course adopted in them leads to any inference as to the power of ordering a retrial.

Sir Charles Fox held it was in that case unnecessary to decide whether the Bench had power to order a retrial.

Mr. Justice Irwin held an order for retrial might be made.

In the second *Birch's* case (1) Sir Charles Fox did not deal with the question of a retrial. I agreed with him that in that particular case we should merely set aside the conviction and sentence but I expressed the opinion that in an appropriate case the Bench has the power to order a retrial. Mr Justice Ormond held "There being no precedent for ordering a new trial in such a case, I think the order should be that the conviction and sentence be set aside."

I am of opinion that having regard to the wide language used and to the fact that the Bench is given power to pass any order it thinks right it has the power to order a retrial.

As to whether it can review the evidence and decide the guilt or innocence of the prisoner I am of opinion that it has that power in certain circumstances. If the misdirection amounts to an illegality the trial is void and of no effect and that being so the Bench could not deal with the evidence. If, however, the misdirection is not of that character but is a wrong

(1) 5 L.B.R., 149.

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admission of evidence or an error such as occurred in this case the trial is not void and this Bench can go into the evidence. This power is however limited by the principle recognized in *Subrahmannia Aiyer's* case. Where however the guilt or innocence depends on evidence consisting of several separate and distinct parts and where the part tainted by the misdirection can be separated from the rest and it is clear that the misdirection has not affected in any way the finding of the jury on the remainder of the evidence it appears to me that the Bench can and should consider whether the finding is justified if the objectionable evidence is left entirely out of consideration. If it is justified I can see no reason why the matter should be left uncertain. The section gives the Bench the widest powers. The Bench would not be usurping the functions of the jury but merely reviewing and checking their finding. The prisoner would not be left with the anxiety of a possible fresh trial hanging over him and the question of his guilt would be decided on evidence given when the facts were fresh in the memory of the witnesses.

In the present case the misdirection affected the one central point in the case and involved evidence essential to a right decision. I am of opinion therefore that we should not consider the evidence because the verdict might possibly have been other than it was.

At the same time there is a good *primâ facie* case to go to a jury. Of this I think there can be no question and therefore I would order a retrial.

Parlett, J.—This case comes before this court on a certificate from the Government Advocate that the question should be further considered whether there was a misdirection to the jury in Sessions Trial No. 38 of 1917. Nga Thein Myin was tried for and by a unanimous verdict found guilty of setting fire to a dwelling house and was sentenced to five years' rigorous imprisonment. There was evidence to show that he was seen in the house while the fire was still burning. His defence is that he left the house several hours before the fire occurred and did not return to it until after it had been put out, and he made a statement to this effect before the Committing Magistrate. He offered evidence of his movements on the night in

question. Owing to a mistranslation his statement as read to the jury at the trial was to the effect that he returned to the house while the fire was still burning, and it was thus at variance with the defence he set up. The result was that his real defence was never fully before the jury at all. There was clearly a material misdirection and the verdict cannot be allowed to stand. I agree that the judgment and sentence should be set aside.

The next question is what further order, if any, should be passed. Manifestly the most appropriate order is that the accused should be retried upon the former commitment. Section 12 of the Lower Burma Courts Act appears to me to be worded sufficiently widely to allow of such an order being made, and had the matter been *res integra* I think it should have been made without hesitation. But in the two earlier cases of this Court (1) where an order for retrial seemed the appropriate order it was not passed, though in each of them one of the three Judges held that there was power to pass it, and none of the other judges held that there was no such power. I entirely agree with the views of Mr. Justice Irwin on this point, as expressed in the earlier case. I have referred to all the cases I can trace of reviews under section 26 of the Letters Patent, but have found none in which an order of retrial seemed to be called for. The absence of any reported case in which such an order has been passed does not therefore show that there is no power to pass it, still less that no such power is conferred by the wider wording of section 12 of the Lower Burma Courts Act.

It is possible that some remarks in *Hla Gyi* v. *K. E.* (2) may be read as expressing a doubt (clearly not shared by Mr. Justice Irwin), as to the High Court's power to order a retrial. But the point was not necessary for that case which was decided upon section 403 of the Criminal Procedure Code. For that reason I consider it was unnecessary in that case to decide whether a commitment order is exhausted by a completed trial following upon it, and with great respect I must say that I find the reasons for this view unconvincing. It appears to me that it is more consonant with the provisions of the

(1) 3 L.B.R., 75, and 5 L.B.R., 149. (2) 3 L.B.R., 87.

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code and with the spirit of Indian Criminal Law, which aims at substantial justice with a minimum of technicality, that where a judgment and sentence have been set aside merely for misdirection the order of commitment should subsist. In my opinion therefore the views expressed in *Hla Gyi* v. *K. E.* should be dissented from, and the accused should be retried upon the former order of commitment and in the meantime should be detained in custody as an undertrial prisoner.

Maung Kin, J.—The facts showing how this application comes before this Bench have been fully stated in the judgments of my learned colleagues and it is not necessary for me to repeat them.

The statement read to the jury flatly contradicts the defence put forward by the accused and deposed to by his witnesses. It must therefore have appeared to the jury that the evidence adduced for the defence was, on the accused's own showing, false and unworthy of any consideration. That statement did not represent what the accused said, owing to a mistranslation. If a correct translation of his statement was placed before the jury, it would appear to them that it was quite consistant with the evidence he adduced and that it was for them to consider that evidence and see whether it was worthy of belief. I am therefore of opinion that there was a misdirection in that what was put to the jury was something which was not evidence in the case. I also think that so far as the accused was concerned, the misdirection was upon a vital point in his defence, a point which, if decided in his favour, would be of material assistance to him. For this reason I think this Bench should set aside the conviction and sentence without going into the evidence in order to see whether or not the conviction and sentence are justified on the merits.

The next question is whether we should go further and also pass an order we consider right. In my judgment an order for a retrial on the former commitment is the most suitable order for all concerned and we should pass that order, if we have power to do so. I think we have that power. I am unable to agree with the learned counsel for accused that section 12 of the Lower Burma Courts Acts does not give this Bench that power. In that section the words " and pass such judgment

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order or sentence as it thinks right" follow immediately the words which give this Bench the power to set aside the conviction and sentence. So that after setting aside the conviction and sentence it is open to this Bench to consider further whether it will pass any other order also and if so, what order. Whether we decide to pass an additional order or no, our action must be such as is most agreeable to convenience, reason, justice and legal principles.

Let us now consider what will happen, if we pass no further order.

The case is one which the Crown is not likely to drop. There will therefore be the re-arrest of the accused and probably other proceedings taken against him before he is again placed before a Judge and jury in this Court. We can imagine what all these will entail, the amount of public time and labour bestowed upon these proceedings, the inconvenience and injustice to the accused who will have far more arduous work before him, and incur far more expense in his defence than if he is ordered by this Bench to be retried on the same commitment. Again, how unjust it would be to allow such a serious criminal charge hanging over his head for longer than is really necessary. These considerations have led me to hold that an order for a retrial would be one which would be in consonance with reason, justice and mercy. It is also in accordance with legal principles, for a retrial in a proper case is allowed in appeal or revision under sections 423 and 439 respectively of the Code of Criminal Procedure.

I therefore agree with my learned colleagues in ordering that the accused be retried on the former commitment.

Civil Misc. Appeal No. 187 *of* 1916

April 30*th*, 1917.

Before Mr. Justice Ormond, Offg. Chief Judge and Mr. Justice Parlett.

WOR LEE LONE & CO. *v.* A. RAHMAN.

May Oung—for Appellant.

Lentaigne—for Respondent.

Civil Procedure Code, 1908, *Section* 15, *First Schedule*, *Order* 37, *Provincial Small Cause Courts Acts*, *section* 16.

Rule 2, Order 37, First Schedule, Civil Procedure Code, does not confer on the Chief Court jurisdiction to try a suit cognizable by the Court of Small Causes.

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Doulatram Valabdas v. *Halo Kanya*, (1911), 13 I.C., 244, followed.

The plaintiff presented a plaint on the original side of this Court whereby he claimed Rs. 824 on a pronote and stated that he desired to proceed under Order the 37 of the Code. The plaint was returned to be presented to proper Court, *i.e.*, the Small Cause Court. The plaintiff now appeals from that order rejecting his plaint. He contends that because Rule 2 of Order 37 refers to *all* suits upon bills of exchange, hundis or promissory notes, and because Order 37 does not apply to the Small Cause Court, he is therefore entitled to institute his suit in the Chief Court.

Section 15 of the Code says, " Every suit shall be instituted in the Court of the lowest grade competent to try it," and section 16 of the Provincial Small Cause Court Act says, " A suit cognizable by a Court of Small Causes shall not be tried by any other Court having jurisdiction within the local limits of the jurisdiction of the Court of Small Causes."

The suit was one on a promissory note for Rs. 824 and was cognizable by the Court of Small Causes and that Court was competent to try the suit. Order 37 lays down certain rules of procedure which are applicable only to the Chief Court, and such rules of procedure can only be applied after the plaint has been admitted. The rules do not in any way alter the nature of the suit, nor the jurisdiction of the Court.

The Chief Court had no jurisdiction to entertain the plaint and it was rightly rejected. This view was adopted in the case of *Doulatram Valabdas* v. *Halo Kanya* (1). The appeal is dismissed with 2 gold mohurs costs.

(1) (1911) 13 I.C., 244.

Before Mr. Justice Maung Kin.

C. KALIYAPARAMA PADIYACHI *v.* C. V. A. R. CHETTY FIRM.

Civil Revision No. 20 of 1916.

February 15th, 1917.

Mya Bu—for applicant.

A. B. Banurji—for respondent.

Civil Procedure Code, V of 1908, section 115—Powers of High Court in revision—Limitation Act, section 3.

A Court, which admits an application, which is barred by limitation under section 3, Limitation Act, without any application being made under section 5, exercises a jurisdiction not vested in it by law and its order may be set aside by the High Court in revision.

Vasudeva v. *Chinnasami*, (1884) I.L.R. 7 Mad., 584; *Sundar Singh* v. *Doru Shankar*, (1897) I.L.R. 20 All., 78; *Ramgopal Jhoonjhoonwalla* v. *Joharmall Khemka*, (1912) I.L.R. 39 Cal., 473; *Anunda Lall Addy* v. *Debendra Lall Addy*, (1898) 2 C.W.N., cccxxxiv—distinguished.

Har Prasad v. *Jafar Ali*, (1885) I.L.R. 7 All., 345; *Amir Hassan Khan* v. *Sheo Baksh Singh*, (1884) I.L.R. 11 Cal., 6; *Kailash Chandra Haldar* v. *Bissonath Paramanic*, (1896) 1 C.W.N., 67; *Balaram* v. *Mangta Dass*, (1907) I.L.R. 34 Cal., 941—followed.

Dayaram Jagjivan v. *Govardhandas Dayaram*, (1904) I.L.R. 28 Bom., 458, referred to.

The respondent was plaintiff in a case in the Township Court of Kyauktan fixed for hearing on the 12th October 1915. He went to Kyauktan for the case but as he heard that there was a criminal warrant out against him in Rangoon he returned to Rangoon leaving a clerk behind to inform the Court of what had happened. The clerk went to the Court but the Judge held that as he had no power of attorney from the plaintiff he could not legally put in an appearance for his master. The suit was therefore dismissed for default. There was no appearance on the part of the defendant either.

On the 12th of November 1915, the plaintiff applied to have the order of dismissal set aside, saying that he had to go back to Rangoon suddenly, owing to a criminal warrant being out against him there and that the clerk he had sent to the Court did not inform him of the dismissal order until "now." Apparently the Court did not notice that the application was out of time by one day and no objection was taken by the defendant on the ground of limitation. The Court set aside the dismissal order finding that the plaintiff had sufficient excuse for not being present on the 12th October.

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The defendant invoked the revisional powers of this Court under section 115 of the Code of Civil Procedure on two grounds, namely (1) that the Township Court should not have entertained the application of the plaintiff, as it was time-barred on the face of it, and (2) that that Court erred in holding that the plaintiff had sufficient excuse for not appearing on the date fixed. At the hearing the second ground was given up by the learned Counsel for the defendant.

He, however, very strongly pressed the first ground. He contended that the provisions of section 3 of the Limitation Act are mandatory, and in view of the stringent requirements of the section which casts upon the Judges the duty of applying the rules of limitation, even when they are not pleaded, the Township Court failed to exercise a jurisdiction vested in it by law.

The learned Advocate for the plaintiff urged that section 115 of the Code gives discretionary power to the High Court to interfere or not and that the Court is not bound to act in every case. When the plea, he contended, is one of limitation raised for the first time in revision the Court should not interfere. He read out passages in the notes to section 115 of the Code by Woodroffe in support of his argument and I may now deal with the cases upon which I gather he laid especial stress. In passing I may say that in this case there is no question of the Township Court having exercised its discretion under section 5 of the Limitation Act, for there was no application under that section before him.

Vasudeva v. *Chinnasami* (1).—In this case, the District Court admitted an appeal presented out of time on certain grounds. It was held that the High Court could not interfere on revision, Turner, C.J., saying, "we cannot interfere on revision with an exercise of discretion."

Sunder Singh v. *Doru Shankar* (2).—The head-note which correctly represents the ruling is that the fact that a Court, having power to decide whether or not a certain matter was barred by limitation, wrongly decided that it was not barred and proceeded to deal with it affords no ground for revision under section 622 (now 115) of the Code of Civil Procedure.

(1) (1884) I.L.R. 7 Mad., 584. (2) (1897) I.L.R. 20 All., 78.

The third case is *Ramgopal Jhoonjhoonwalla* v. *Joharmall Khemka* (3). There it was held that an error by the Small Cause Court on the question of limitation does not justify the interference of the High Court under section 115 of the Code.

The fourth and last case which may be noticed is *Anunda Lall Addy* v. *Debendra Lall Addy* (4), where it was held that a wrong decision on a question of limitation is not open to revision by the High Court.

These cases are distinguishable from the case before me, inasmuch as it is one in which there has been no decision on the question of limitation at all. It is a case in which the learned Judge of the Township Court has failed to discharge his duty in that he did not look into the question, whether the application was within time or not.

Mr. Mya Bu for the defendant cited *Har Prasad* v. *Jafar Ali* (5), where it was held that a Court, which admits an application to set aside a decree *ex parte* after the true period of limitation, acts in the exercise of its jurisdiction illegally and with material irregularity within the meaning of section 622 of the Code of 1882 and such action may therefore be made the subject of revision by the High Court. Mahmood, J.'s observations in that case are especially instructive. The term "jurisdiction" as used by their Lordships of the Privy Council in *Amir Hassan Khan* v. *Sheo Baksh Singh* (6), he said, "in its broad legal sense may be taken to mean the power of administering justice according to the means which the law has provided, and subject to the limitations imposed by that law upon the judicial authority."

In *Kailash Chandra Haldar* v. *Bissonath Paramanic* (7), it was held that where the Lower Courts have entertained an application which is on the face of it barred by limitation without adverting to the question of limitation the High Court can interfere in revision. Petheran, C.J., observed :—"The period of limitation which is fixed for making this application is 30 days, so that the time had long expired on the 18th September, and the only way in which the matter could then be brought

(3) (1912) I.L.R. 39 Cal., 473.
(4) (1898) 2 C.W.N., cccxxxiv.
(5) (1885) I.L.R. 7 All., 345.
(6) (1884) I.L.R. 11 Cal., 6.
(7) (1896) 1 C.W.N., 67.

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within the period of limitation was by the operation of section 18 of the Limitation Act. Section 18 of the Limitation Act has not been dealt with by the District Judge in his judgment, and unless he could come to the conclusion that he could deal with it in that way and as it appears on the face of this record that the matter was barred, unless it could be brought within that section, it appears to us that he had no jurisdiction to deal with the matter and therefore we have jurisdiction to interfere under section 622, Civil Procedure Code."

The two last cases cited above clearly show that where the lower Court has not applied its mind, as in this case, to the question of limitation the High Court has the right to interfere in revision.

On the question whether the provisions of section 3 of the Limitation Act are mandatory the last word has been said by the Special Bench of seven Judges of the Calcutta High Court in *Balaram* v. *Mangta Dass* (8), where six of the Judges held that the provisions of a similar section of the old Limitation Act are mandatory, where the bar appears to be on the face of the plaint and there are no questions of fact involved.

There is one more argument of Mr. Banurji which I might deal with. That is that assuming that the Lower Court acted improperly and with material irregularity in admitting the application which was on the face of it out of time, the High Court should not interfere, as the defendant did not raise the plea of limitation, for the effect of the interference by this Court would be to prevent the plaintiff from bringing his suit owing to its being now time-barred and thus cause an injustice to him. This contention was based upon *Dayaram Jagjivan* v. *Govardhandas Dayaram* (9), and it is a sound one as a proposition of law. But the difficulty in this case is that the facts do not fit in with it. The suit was upon a pro-note dated 1st of September 1914 and it would not be barred by limitation until the 1st of September 1917, so that the plaintiff has quite a long time left in which he may bring a fresh suit.

I hold that the present application should be allowed on the ground that the original application to set aside the dismissal order was out of time and it is accordingly allowed with costs.

(8) (1907) I.L.R., 34 Cal., 941. (9) (1904) I.L.R. 28 Bom., 458.

Before Mr. Justice Maung Kin.

Special Civil 1st Appeal No. 81 of 1916.

February 19th, 1917.

1. BA TU, 2. U ZIYA v. 1. BAMAN KHAN, 2. GAYA SINGH.

Ba Dun—for appellants.

I. Khan—for 1st respondent.

A. C. Dhar—for 2nd respondent.

Civil Procedure Code, V of 1908, *section* 20 (*c*)—*Place of suing.*

A settlement of accounts, in respect of work done under a contract, was made at A, which was the place for performance and payment under the contract. An independent promise by the defendant to pay at B does not authorize the plaintiff to bring his suit at B: because such promise was without consideration.

Luckmee Chund v. *Zorawur Mull*, (1860) 8 M.I.A., 291; *Kankani* v. *Maung Po Yin*, (1902) 8 Bur. L.R., 101; *Seshagiri Row* v. *Nawab Askur Jung Aftal Dowlah Mushral Mulk*, (1907) I.L.R. 30 Mad., 438—referred to.

In the Small Cause Court, Rangoon, the plaintiff sues for the recovery of Rs. 1,631-8-0 the balance found due at a settlement of accounts made between him and the 1st and 2nd defendants at Twante. The transaction to which the settlement related was an agreement entered into at Twante between them for the plaintiff to manufacture *kutcha* bricks at Twante at a certain rate. The 3rd defendant is sued as having guaranteed payment. The 4th defendant was added as a party defendant after the institution of the suit in consequence of his claim to have a share in the subject-matter of the suit. All the defendants reside at Twante.

The plaintiff, however, claims to be entitled to sue in Rangoon by reason of an alleged promise of the defendants made at the settlement of accounts to pay the amount found due to the plaintiff at his house in Rangoon on a later date.

The 1st and 2nd defendants plead among other things to the jurisdiction of the Court.

The Lower Court held that the said promise to pay at Rangoon gave it jurisdiction to entertain the suit and, after hearing the case on the merits, passed a decree for a certain sum against the 1st, 2nd and 3rd defendants.

The 1st and 3rd defendants now object that the Lower Court had no jurisdiction.

After carefully considering the law on the subject I have come to the conclusion that the objection must be upheld.

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It is clear that without the promise to pay at Rangoon the suit must be filed at Twante, being the place where the original contract was entered into and was to be performed or where the balance was struck and the amount became due and payable. In my judgment what gave rise to the cause of action was the original contract which was made or was to be performed at Twante or the settlement of accounts which was made at the same place: See *Luckmee Chund* v. *Zorawur Mull* (1). The promise in question was no part of the settlement and it is at best a promise to pay what the defendants were already under an obligation to pay either under the original contract or under the settlement of accounts, and as it is a promise without any consideration, it can give rise to no cause of action. If it was part of the original contract as indicating the place of performance, then there can be no doubt it will give the Rangoon Court jurisdiction. But that was not the case. I am unable to see how it can form part of the settlement of accounts, as on the balance being struck the amount found due became payable without any promise on the part of the defendants to pay.

My view is supported by authority.

As to the nature of the promise, there is the case of *Kankani* v. *Maung Po Yin* (2), where it was held that a naked promise to pay what the promisor is already under an obligation to pay gives rise to no cause of action.

In *Seshagiri Row* v. *Nawab Askur Jung Aftal Dowlah Mushral Mulk* (3) the plaintiff sued the defendant at Madras for services rendered at Hyderabad, where also the contract was made, alleging a promise, after the work had been done, to pay at Madras. It was held that as there was no allegation of any consideration for the promise and as it was not a promise falling under section 25 (2) of the Indian Contract Act, there was no contract in law to pay at Madras, which would give the Madras Courts jurisdiction.

There is no difference between this case and the case before me. The real thing to pay attention to is that the promise of the defendants was separate and, apart from the settlement

(1) (1860) 8 M.I.A., 291. (2) (1902) 8 Bur. L.R., 101.
(3) (1907) I.L.R. 30 Mad., 438.

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of accounts, which, without any promise on their part to pay the amount found due, would have given rise to a cause of action. Therefore any separate promise made to pay the amount at any particular place must be supported by a consideration, before it can give rise to legal consequences. It was rightly conceded before me that if, after a contract of loan has been made, the debtor makes a promise to repay the loan at a certain place for the sake of the creditor's convenience, the promise cannot entitle the creditor to sue at that place solely by reason of it, unless it is supported by a consideration.

For the above reasons I am bound to hold that the Lower Court had no jurisdiction to entertain the suit. I allow the appeal with costs and direct that the plaint be returned to the plaintiff for presentation to the proper Court.

Before Mr. Justice Maung Kin.

Criminal Appeal No. 109 *of* 1917.

March 19*th*, 1917.

PO SO *v.* KING-EMPEROR.

Ginwala—the Assistant Government Advocate for the King-Emperor.

Indian Penal Code, section 75—*Previous conviction.*

A was convicted in 1917 of the offence of robbery under section 392, Indian Penal Code, the offence having been committed in 1907. He had been convicted of offences under Chapter XII, Indian Penal Code, of offences punishable with imprisonment for a term of three years or upwards in 1909, 1910 and 1911.

Held,—these convictions did not render A liable to enhanced punishment under section 75, Indian Penal Code.

Reg v. *Sakya*, (1868) 5 Bom. H.C.R., 36; *Empress* v. *Megha*, (1878) I.L.R. 1 All., 637—referred to.

I am satisfied that the evidence establishes the guilt of the accused and that the offence he committed is robbery. The learned District Magistrate has awarded him seven years' transportation, owing to there being three previous convictions against him. The use of section 75 of the Indian Penal Code in this case is illegal, because the previous convictions are not such as come within the purview of that section. The offence of which the accused was convicted in this case was committed in April 1907, the previous convictions were in November 1909 May 1910 and November 1911, so that they are " previous " only in the sense that they were had before the conviction in the present case and they are *subsequent* to the *commission* of the offence

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of which the accused is now *convicted*. The meaning of the section is very clear. It provides that any person, *having been convicted* of any offence punishable under Chapters XII or XVII of the Indian Penal Code, shall be guilty of any offence punishable under either of those parts of the same Code, he shall for *every such subsequent offence* be liable to the penalties therein declared. The words italicized indicate that the offence for which enhanced punishment is awardable must be one *committed* after the convictions by reason of which it is claimed that the accused is liable to enhanced punishment. In other words, the accused renders himself liable to enhanced punishment by reason of there having been previous convictions against him before he *committed* the present offence. The other convictions should not, therefore, have been taken into account. The point appears to me to be quite simple, but if authorities are required, the following may be cited:—*Reg* v. *Sakya* (1) and *Empress* v. *Megha* (2). The conviction under section 392 of the Indian Penal Code is hereby confirmed, but the sentence under sections 392 and 75 of the Indian Penal Code is hereby quashed.

In considering what measure of punishment should be meted out to the accused, I shall not allow myself to be influenced by the fact of there having been other convictions previous to this conviction. I shall treat this offence, as the accused is entitled to have it treated, as if before the commission of it he had a clean sheet. The sentence is altered to one of two years' rigorous imprisonment.

Special Civil 1st Appeal No. 176 *of* 1916.

May 4th, 1917.

Before Mr. Justice Maung Kin.

YAGAPPA CHETTY *v.* 1. K. Y. MAHOMED, 2. SIMILA BI BI, 3. AMINA BI BI, MINOR, BY HER GUARDIAN *ad litem* K. P. MOHAMED, 4. MAHOMED, HEIRS AND LEGAL REPRESENTATIVES OF K. Y. CASSIM, DECEASED.

Khastigir—for appellant.
J. R. Dass—for 2nd respondent.
1st, 3rd and 4th respondents, Absent.

Limitation Act, section 21 (1)—*Agent duly authorised—Mahomedan Law—Guardian of property of minor.*

(1) (1868) 5 Bom. H.C.R., 36. (2) (1878) I.L.R. 1 All., 637.

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A guardian of the person of a minor is not an agent duly authorised to pay interest on a debt due by the estate of the minor. The elder brother of the deceased father of a Mahomedan minor is not a natural guardian of the property of the minor.

Arjun Ram Pal v. *Rohima Banu*, (1912) 14 I.C., 128, referred to.

Majmundar Hiralal Ichhalal v. *Desai Narsilal Chaturbhujdas*, (1913) I.L.R., 37 Bom., 326 at 338 and 339, followed.

This appeal arises out of a suit in which the defendants-respondents were sued on a pro-note in their representative capacity. The pro-note was executed by K. Y. Cassim, since deceased. Defendant 1 is elder brother, and defendants 2 and 3 are daughters of the deceased. Defendant 4 is the deceased's nephew. Defendant 3 is a minor and appeared by her guardian *ad litem* even in this Court. She was eleven years old when the suit was filed. Of the defendants the first three only are the heirs of the deceased, the fourth (defendant Mahomed) not being an heir at all.

The plaintiffs claim that the suit is not barred by limitation on the ground that the defendant 1 made two part-payment which save limitation as against all the defendants. Defendant 1 did not appear to contest the suit. I have to take it that the alleged part-payments have been proved as the suit has been decreed as against defendants 1 and 4. The finding has not been assailed here either.

Now it has been held in *Arjun Ram Pal* v. *Rohima Banu* (1) that the payment of interest by one of his heirs on a debt due by a deceased person does not save limitation against the other heirs.

But it is alleged that defendant 1 made the part-payments on his own behalf as well as on behalf of the second and third defendants as their duly authorized agent, inasmuch as he was then the manager and head of a joint family of which defendants 2 and 3 were members. This the latter defendants deny. And there is not a scrap of evidence to show that defendant 1 was such a head. Moreover, although the case-laid shows that the head of a joint Hindu family might have the necessary authority, it does not appear that the same rule prevails among the Mahomedans.

The learned Judge below observed in his judgment that it is not alleged that defendant 1 was the natural guardian of

(1) (1912) 14 I.C., 128.

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either of the defendants 2 and 3. But it has been argued before me that defendant 1 was the lawful guardian of defendant 3 and as such was a person who falls within the meaning of the words "agent duly authorized in this behalf" in sections 19 and 20 of the Limitation Act, as defined by section 21 (1) of the same Act. Sections 107 and 109 of Wilson's Digest of Anglo-Mahomedan Law show that failing all the female relatives mentioned in section 107 the custody of a minor girl under the age of puberty belongs to the father, and failing him to the nearest male paternal relative within the prohibited degrees reckoning proximity in the same order as for inheritance. In Mahomedan law puberty is presumed on the completion of the fifteenth year in the case of both males and females, unless there is evidence to show that puberty in the particular case was attained earlier. Defendant 3 was only eleven years old at the date of the institution of the suit, and as the part-payments were made nearly three years before, she must have been about eight years old then. Defendant 1 was therefore the natural guardian of the person of the minor defendant, which means, according to the books, that the guardianship is for custody and education. I find also that even if the minor defendant had attained puberty defendant 1 would be the guardian of her person, failing father, executor of father's will and father's father, provided the minor is unmarried. *See* section 111 of Wilson's book. But this is not in my opinion sufficient for the purposes of section 21 (1) of the Limitation Act. I think defendant 1 should be the guardian of the minor's property as well, because the act in question of his is sought to be made binding on the minor's estate.

Section 112 of Wilson's book gives a list of the natural guardians of the property of a minor indicating the order of priority among them. The father's brother is not included in that list and the section goes on to say that failing all of these it is for the Court to appoint a guardian or guardians. I hold therefore that defendant 1 was not "a person duly authorised" within the meaning of section 21 (1) of the Limitation Act. The result is that the payments made by defendant 1 cannot bind defendants 2 and 3. The appeal is therefore dismissed as against defendants 2 and 3 with costs.

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Defendants 1 and 4 have not appeared before this Court and as against them the plaintiffs ask for interest at 6 per cent. per annum from the date of the institution of the suit till realization. They say that they ask for that in their plaint and the learned Judge below failed to deal with their prayer.

Section 34 (2) provides that where a decree is silent with respect to the payment of further interest from the date of the decree to the date of payment, the Court shall be deemed to have refused such interest, and a separate suit therefor shall not lie. The matter must therefore be treated as if the Lower Court had exercised its discretion and refused to give interest, unless perhaps the plaintiff can show that the silence of that Court upon the point was due to an oversight or mistake, but there is nothing to show this. That being the case, the proper course is to follow the case of *Majmundar Hiralal Ichhalal* v. *Desai Narsilal Chaturbhujdas* (1), of which the facts were similar to those in this case, and which decided that the High Court was right in declining to allow the prayer. The appeal is dismissed as against the 2nd and 3rd respondents with costs, the costs in this Court being confined to one advocate's costs, as at the hearing Mr. Das appeared for both and Mr. Judge though set down as an advocate for the 3rd respondent did not appear. The appeal against the 1st and 4th respondents as regards the interest asked for is dismissed. The Lower Court's decree against them will stand. There will be no order as to costs in their favour, as Mr. A. C. Dhar, who the list shows was appearing for 1st respondent, did not appear and the 4th defendant was absent.

FULL BENCH.

Criminal Reference No. 70 of 1916.

May 22nd 1917.

Before Mr. Justice Ormond, Officiating Chief Judge, Mr. Justice Parlett and Mr. Justice Young.

SHIN GYI v. KING-EMPEROR.

Kyaw Htoon—for applicant.

Shaw, the Assistant Government Advocate for the King-Emperor.

Excise Act, section 50—Responsibility of licensee for omission by his servant.

(1) (1913) I.L.R. 37 Bom., 326, 338 and 339.

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The licensee of a liquor shop whose servant or agent permits drunkenness is punishable under the provisions of section 50 of the Excise Act, 1896.

Ah Shein v. *Queen-Empress*, (1886) S.J.L.B., 373; *Ah Sin* v. *Queen-Empress*, (1898) P.J.L.B,, 489; *Ishur Chunder Shaha*, (1873) 19 W.R. Criml., 34; *Kalu Mal Khetri*, (1902) I.L.R. 29 Cal., 606; *Queen* v. *Sristidhur Shaha*, (1876) 25 W.R. Criml., 42; *Seena M. Haniff & Co.* v. *Liptons Ltd.*, (1914) 7 L.B.R., 306; *Coppen* v. *Moore*, (1898) 2 Q. B.D., 306; *Bond* v. *Evans*, (1888) 21 Q. B. D., 249; *Queen-Empress* v. *Tyab Alli*, (1900) I.L.R. 24 Bom., 423; *Emperor* v. *Babu Lal*, (1912) I.L.R. 34 All., 319; *Chundi Churn Mookerjee* v. *The Empress*, (1883) I.L.R. 9 Cal., 849; *Mullins* v. *Collins*, (1874) 9 Q.B., 292; *Redgate* v. *Haynes*, (1876) 1 Q.B.D., 89; *Commissioners of Police* v. *Cartman*, (1896) 1 Q.B.D., 655; *Emary* v. *Nolloth*, (1903) 2 K.B.D,, 264 at 269—referred to.

Criminal Revision No. 246B *of* 1916.

September 4th, 1916.

The following reference was made to a Full Bench by Mr. Justice Twomey under section 11 of the Lower Burma Courts Act:—

The applicant A Kyi *alias* Shin Gyi, a Chinese licensed vendor of *kazawye* at Twante, was convicted and fined Rs. 25 under section 50, Excise Act. The section makes it an offence for "any person licensed to sell fermented liquor etc." to "permit drunkenness in his shop."

The Sessions Judge recommends that the conviction should be set aside because the prosecution was instituted without complaint or report of the Collector or of an Excise Officer, and secondly because the accused was absent from his shop at the time and knew nothing about the drunkenness till afterwards. The conviction is supported by the Assistant Government Advocate on behalf of the Crown.

The first ground for interference suggested by the Sessions Judge is untenable because section 50 is not one of the sections mentioned in section 57 among those in respect of which a report or complaint of the Collector or an Excise Officer is necessary.

As regards the second ground, there is a ruling of the Special Court, *Ah Shein* v. *Queen-Empress* (1), which lays down that a master cannot be convicted under section 42 (now 52), Excise Act, for breach of a condition of his license when his servant without the master's knowledge sells liquor in contravention of those conditions, and this ruling was followed by the Judicial Commissioner in *Ah Sin* v. *Queen-Empress* (2), which

(1) (1886) S.J.L.B., 373. (2) (1898) P.J.L.B. 489.

was a case of a licensee's servant selling liquor in excess of the quantity allowed by the license. The Special Court considered according to the ordinary rule in interpreting penal enactments that if it had been the intention of the Legislature to hold the master criminally responsible for offences committed without his knowledge by his servant this would have been plainly laid down in the Act.

It is noteworthy that in passing the new Excise Act of 1896, the Legislature did not introduce into section 50 or other penal clauses words rendering the licensee expressly liable for the default of his employees though such words were introduced in certain sections of the Bengal Act VII of 1878 (*see* section 59). From this it might be argued that the Legislature acquiesced in the ruling of the Special Court in 1885.

As regards the servant, the Special Court found that he was criminally responsible and that his plea that he was not the person actually licensed could not prevail. The Court in taking this view followed the principles stated by Couch, C.J., in the case *Ishur Chunder Shaha* (3). From a later case in the Calcutta High Court—vide *Kalu Mal Khetri* (4)—it seems doubtful whether a servant would now be held liable criminally for a breach of a condition of his master's license.

But no later ruling has been brought to my notice throwing doubt on the correctness of the Special Court's decision restricting the licensee's criminal responsibility to acts and omissions within his knowledge. The learned Assistant Government Advocate can only refer to an earlier Bengal case of 1876 in which a different view was taken (*Queen* v. *Sristidhur Shaha* (5). The learned Judges in that Bengal case thought it right to hold a licensee responsible for the criminal offences of his servant on the general principle that " if he is obliged to carry on his business by means of servants he must be held responsible for their obedience to the law."

This case was apparently not considered by the Special Court. It raises much the same question as has been raised in cases under the Merchandize Marks Act—vide *Seena M. Haniff & Co.* v. *Liptons Ltd.* (6)—as to the criminal

(3) (1873) 19 W.R. Criml., p. 34.
(4) (1902) I.L.R. 29 Cal., 606.
(5) (1876) 25 W.R. Criml., 42.
(6) (1914) 7 L.B.R., 306.

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liability of a master for acts done by his servants within the scope of their employment. It might perhaps be argued with reference to the Excise Act as under the Merchandize Marks Act that "the effect of the Act is to make the master or principal liable criminally for the acts of his agents and servants in all cases 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" (*per* Russell, L.C.J., in *Coppen* v. *Moore* (7). As in that case, the question would be whether having regard to the language, scope and object of the Excise Act 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.

This aspect of the matter was not considered by the Special Court, and it is one of some importance to the Excise Administration. For, if it is held (following the Special Court ruling) that a licensee is not liable for what happens at his shop in his absence, and (according to the Calcutta decisions) that a licensee's servant cannot be punished for breaches of his master's license, the Excise authorities will be in a serious dilemma and the provisions of section 50 and other penal sections of the Excise Act will be rendered almost nugatory.

I therefore refer to a Bench the question whether a liquor licensee under the Excise Act can be held responsible under section 50 of the Act for the default of his servants in permitting drunkenness in his shop without his knowledge.

The opinion of the Full Bench was as follows :—

Ormond, Offg. C.J.—The petitioner, a licensed vendor of fermented liquor, left his shop in charge of a servant who permitted drunkenness on the premises. The question before us is whether he is liable for the act of his servant and

(7) (1898) 2 Q.B.D., 306.

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therefore guilty of the offence of permitting drunkenness in his shop, under section 50 of the Excise Act.

From the order of reference we must take it that it was within the scope of the servant's authority to prevent drunkenness in the shop; and that the servant knew of the drunkenness and permitted it.

The question whether the licensee is liable for the act of his servant in such circumstances, depends upon the object and scope of the enactment. The object of section 50 was to prevent drunkenness on licensed premises; and clearly that object would be frustrated if the licensee could escape liability by absenting himself and leaving the shop in the charge of a servant. The responsibility is thrown on the licensee to take all proper precautions to prevent drunkenness on the premises; and if he absents himself and leaves the shop in the charge of a servant who permits drunkenness, he is liable. See *Bond* v. *Evans* (1).

In *Queen-Empress* v. *Tyab Alli* (2) a licensee was held to have been rightly convicted under section 22 of the Indian Arms Act (XI of 1878) for the wrongful sale by his manager although the goods were not sold with his knowledge or consent. So in *Emperor* v. *Babu Lal* (3) a licensee was held to have been rightly convicted under section 9 of the Opium Act for the wrongful sale by his servant although he may not have been aware of the sale. In *Chundi Churn Mookerjee* v. *The Empress* (4) a contractor was held to be not guilty of an offence under section 22 of the Indian Ports Act (XII of 1875) of throwing ballast into the river, the act being done by his servants without his knowledge or consent. In that case the learned Judges stated that unless a master's liability for the acts of his servant is specifically declared by statute, the master is not liable. The opinion is no doubt expressed in general terms, but it must be taken to be limited to the facts of the case. The decision in that case was based upon the wording of that particular Act; and it was not the case of a licensee. Under the Excise Act the licensee is taken to be the person who sells the liquor and he is the person responsible for preventing

(1) (1888) 21 Q.B.D. 249.
(2) (1900) I.L.R. 24 Bom., 423.
(3) (1912) I.L.R. 34 All., 319.
(4) (1883) I.L.R. 9 Cal., 849.

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drunkenness on the premises, although it must have been contemplated from the nature of the business that he would frequently employ servants to sell the liquor for him and to be in charge of the shop. If the licensee does so, the acts of his servants are taken to be his acts; and if his servants permit drunkenness on the licensed premises, he (the licensee) has committed the offence under section 50 of the Excise Act. To sum up the licensee's position:—he must do his best to prevent drunkenness on the licensed premises, *e.g.* he must not leave the shop open without a competent person in charge: and he is responsible for the acts for his servants, *e.g.* if he leaves a competent person in charge and that person permits drunkenness, the licensee is responsible. I would answer the question referred in the affirmative.

Parlett, J.—Section 50 of the Excise Act of 1896 renders liable to punishment any person licensed to sell retail fermented liquor who permits drunkenness in his shop. The question referred is whether a licensee can be held responsible under section 50 for the default of his servant in permitting drunkenness in his shop without his knowledge. The object and terms of the Act should be looked at to see whether and how far knowledge is of the essence of the offence created. In *Mullins* v. *Collins* (1) a licensed victualler was held liable to be convicted under 35 and 36 Victoria, chap. 94, section 16, sub-section 2, although he had not knowledge of the act of his servant. The sub-section in question rendered liable to a penalty any licensed person who supplied liquor to any constable on duty unless by authority of some superior officer of such constable. It was pointed out that if the licensed victualler was held not liable for the act of his servant the enactment would be rendered inoperative.

In *Redgate* v. *Haynes* (2) a conviction was sustained against a licensee of a hotel under section 17 of the same Act, which runs: "if any licensed person suffers any gaming to be carried on his premises, he shall be liable to a penalty." The facts found were that the licensee had gone to bed leaving a porter in charge of the hotel and the porter connived at the gaming. It was held that the licensee was still answerable for the conduct

(1) (1874 9 Q.B., 292. (2) (1876) 1 Q.B.D., 89.

of those whom she left in charge of the hotel when she went to bed, and if those persons connived at the gaming she was responsible. The decision was affirmed in *Bond* v. *Evans* (3) a prosecution under the same section. Both the wording and the object and scope of the section are very similar to those of the part of section 50 of the Excise Act now under consideration and these two cases appear to me to be strong authorities on the point.

In *Commissioners of Police* v. *Cartman* (4) the respondent, a licensed person, gave orders to his servants that no drunken persons were to be served. During his absence one of his servants sold intoxicating liquor to a drunken person. The Licensing Act, 1872, section 13, makes it an offence for any licensed person to sell any intoxicating liquor to any drunken person. It was held that the respondent was guilty of an offence under the section; for he was liable for the act of his servant, that act having been done by the servant within the general scope of his employment although contrary to the orders of his master.

In *Emary* v. *Nolloth* (5) the Lord Chief Justice, referring to the class of cases in which the licensee is charged with permitting or suffering an offence to be committed, deduced from the decisions the principle that if the licensee delegates his authority to some one else, thereby delegating "his own power to prevent," and the person left in charge commits the offence the licensee is responsible for permitting it, and he remarked that this was a reasonable and logical view to take and necessary in order to prevent the Act from being defeated.

I am of opinion that this principle should govern the case now under reference and that the licensee having left his servant in charge of his shop is responsible if the servant in his absence permits drunkenness in the shop.

I would answer the question referred in the affirmative.

Young, J.—I agree that the question referred should be answered in the affirmative for the reasons given by Ormond, Officiating Chief Judge, and Parlett, J.

(3) (1888) 21 Q.B.D., 249. (4) (1896) 1 Q.B.D., 655.
(5) (1903) 2 K.B.D., 264 at 269.

Criminal Appeal No. 315 of 1916.

May 29th, 1916.

Before Mr. Justice Twomey and Mr. Justice Parlett.

DEYA *v.* KING-EMPEROR.

P. D. Patel—for the appellant.

Evidence—Witnesses of tender years—Judicial oath or affirmation—Oaths Act, X of 1873, *sections* 6, 13*—Omission to take evidence on oath or affirmation.*

Section 6 of the Oaths Act (X of 1873) imperatively requires that no person shall testify as a witness except on oath or affirmation, and notwithstanding section 13 of the same Act, the evidence of a child is inadmissible if it has advisedly been recorded without any oath or affirmation.

Queen v. *Sewa Bhogta*, (1874) 14 Ben. L. R., 294; *Queen-Empress* v. *Shava*, (1891) I.L.R. 16 Bom., 359—dissented from.

Queen-Empress v. *Viraperumal*, (1892) I.L.R. 16 Mad., 105, referred to.

Queen-Empress v. *Maru*, (1888) I.L.R. 10 All., 207; *Queen-Empress* v. *Lal Sahai*, (1888) I.L.R. 11 All., 183; *Nundo Lal Bose* v. *Nisturini Dassi*, (1900) I.L.R. 27 Cal., 428 at 440—followed.

Pwa Nyun v. *King-Emperor*, 2 L.B.R., 322, overruled.

Parlett, J.—The appellant Deya was tried before the Sessions Judge with assessors on charges of having murdered her mother-in-law and of having attempted to murder her sister-in-law by pushing them both into a well. The Assessors considered neither charge proved, but the Sessions Judge disagreeing with them convicted her of murder and sentenced her to transportation for life, but stayed the trial of the other charge under section 240 of the Criminal Procedure Code.

One of the grounds of appeal is that the Sessions Judge erred in visiting the scene of crime after the Assessors had given their opinion and without notice to and in the absence of accused and her Counsel. The hearing of the case was concluded and the Assessors' opinions were taken on 21st March 1916. In his judgment delivered on the 23rd March the Sessions Judge states that on the 22nd he visited the locality alone with the record of the case and the plans filed in it but without notice to any one. One of the witnesses in the case happened to be there and pointed out one of several wells there as the one in which the deceased's body was found, and from the plans and the evidence the Judge was satisfied that it was the one. He made certain observations on the conditions of the sides of the well, its surroundings and the vegetation growing there, and drew conclusions therefrom adverse to some of the evidence for the defence. In the first place there

are admittedly many wells in the neighbourhood and there is no proof that the well which the Sessions Judge inspected is in fact the one in which the deceased's body was found. In the next place, the tragedy occurred on the 11th December 1915, after recent rain when the condition of the ground and vegetation would be very different from that on the 22nd March after several months' drought. Finally it was not competent to the Sessions Judge to take into account any observations of the locality made by him alone after the Assessors had given their opinions. If at an earlier stage he thought that the Assessors should view the place, he should have made an order under section 293 of the Criminal Procedure Code and he might himself have accompanied them. But once they gave their opinions it only remained for the Judge to give judgment under section 309, sub-section (2). He had no power to do anything further. In my opinion, therefore, that part of the judgment dealing with the Sessions Judge's visit to the spot and his conclusions from what he saw there must be entirely eliminated, and the case must be considered solely on the admissible evidence on the record.

Another ground of appeal is that the Sessions Judge refused to allow appellant's Counsel to put leading questions in cross-examination to one of the witnesses. The refusal to allow a question to be put in cross-examination merely because it was in form a leading question would be improper, as the Judge cannot abrogate section 143 of the Evidence Act. But there is no allegation before us that any such question was in fact disallowed, or what that question was. If that had occurred Counsel doubtless would have asked for his question and the order disallowing it to be recorded, but this was not done. All that appears in the record is a note by the Judge at the end of the deposition of this witness, a little girl of eight or nine years of age, in which he says, "It has been a matter of great time and patience to question her in such a way as not to suggest the answer she might be expected to give and to be sure that she understood the question and meant to say what her answer implied. So far as I am aware no question which might suggest the answer has been put, and on the whole I am of opinion that the girl understood the questions and at the time

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when she gave the answers meant to say what she is recorded as having said." An answer is usually of far less evidentiary value if given in reply to a leading question and the Judge was clearly anxious to avoid any suggestive questions being put to her even in examination-in-chief. She was cross-examined at great length on two days, and in the absence of any record of a question being disallowed and any specific allegation of that having been done, there appears to me to be no ground for supposing that the cross-examination of this witness was hampered by the Court.

The remaining grounds of appeal deal with the evidence in the case, and the chief matter for consideration is the statement of the little girl Sadiya, the only eye-witness of the occurrence. She is a Hindu about eight or nine years of age, and at the conclusion of her examination the Judge noted as follows: "She was not put on oath as I am of opinion that she is not of an age to understand the nature of an oath." Being a Hindu section 6 of the Oaths Act forbade her being put upon oath at all, and the Judge can only have meant that she made no affirmation. The printed heading of her statement shews the word "sworn" crossed out and the word "affirmed" left. This was evidently done by a clerk before she was examined by the Judge, and in view of the Judge's subsequent note I have no doubt that the girl made no affirmation. The Judge quotes section 13 of the Oaths Act as making her statement admissible in evidence. The point is mentioned in the grounds of appeal, and though it was not argued at the hearing, I think it must be considered. In *Queen* v. *Sewa Bhogta* (1) four out of five Judges held that the word "omission" in section 13 of Act X of 1873 includes any omission and is not limited to accidental or negligent omissions. This was followed in *Queen-Empress* v. *Shava* (2) by one of two Judges, the other deciding the case without expressing an opinion on that point. In *Queen-Empress* v. *Viraperumal* (3) the two Judges composing the Bench disagreed on the point. There are two Allahabad cases to the contrary effect, *Queen-Empress* v. *Maru and another* (4), the decision of a single Judge,

(1) (1874) 14 Ben. L.R., 294.
(2) (1891) I.L.R. 16 Bom., 359.
(3) (1892) I.L.R. 16 Mad., 105.
(4) (1888) I.L.R. 10 All., 207.

and *Queen-Empress* v. *Lal Sahai* (5), by Bench of two Judges. In Burma I can only find one decision on the point; *Pwa Nyun* v. *King-Emperor* (6), in which a statement made designedly without oath or affirmation was held to be admissible. I find considerable difficulty in following the reasoning in that judgment. In the first place the head-note is misleading, as it shows *Queen-Empress* v. *Sewa Bhogta* (1) and *Queen-Empress* v. *Shava* (2), as dissented from, whereas they are in fact followed. Next the learned Judge refers to the latter ruling as dissenting from the former, whereas the one Judge who decided the question expressly concurred with the Calcutta case and differed from the Allahabad case (see page 366). Again the learned Judge of this Court expresses his concurrence with a passage from the Bombay case which, if read alone, would imply that the deliberate omission to administer an oath or affirmation to a witness is not curable by section 13 of the Oaths Act. Moreover the point is expressly said not to be very material, as there was other reliable evidence of undoubted admissibility sufficient for a decision in the case. Under these circumstances it appears to me that Pwa Nyun's case cannot be regarded as a very weighty authority. In my opinion the reasons given in the Allahabad rulings and by the Chief Justice Sir Arthur Collins in the Madras ruling for not extending section 13 to cases where the omission of the oath or affirmation was intentional are sound and that the view of the dissenting Judge in *Queen* v. *Sewa Bhogta* (1) is correct. If the decision of the majority of that Bench were carried to its logical conclusion, it would give rise to a proposition which a Full Bench of the same High Court has more recently described as "at once novel and startling," *Nunda Lal Bose* v. *Nistarini Dassi* (7).

I am of opinion that the statement of Sadiya recorded at the Sessions trial is not admissible in evidence and it is necessary that her evidence in the case should be taken under section 428 of the Criminal Procedure Code, and I would direct the Sessions Judge to summon her before him and after causing her to make an affirmation under section 6 of the Oaths Act to

(5) (1888) I.L.R. 11 All., 183. (6) 2 L.B.R., 322.
(7) (1900) I.L.R. 27 Cal., 428 at 440.

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take her evidence in the presence of appellant's Counsel. It is desirable that she should be asked to describe as exactly as possible the relative positions and the attitude of herself, her mother and the accused before and at the time of the acts which she alleges against the accused, and also to describe the precise manner in which the accused did those acts and the order in which she did them.

Twomey, J.—I concur.

Before Mr. Justice Robinson.

Criminal Revision No.209B of 1916.

November 3rd, 1916.

HNIN YIN (KING-EMPEROR) *v.* THAN PE.

Maung Kin, the Assistant Government Advocate—for the applicant.

J. A. Maung Gyi—for the respondent.

Criminal Procedure Code, section 350—De novo *trial—Failure to examine witnesses afresh, to examine the accused and to frame a fresh charge.*

In a *de novo* trial under section 350, Criminal Procedure Code, the witnesses for the prosecution and the accused must be examined afresh and a fresh charge must be framed.

King-Emperor v. *Nga Pe*, 2 L.B.R., 17; *Sobh Nath Singh* v. *King-Emperor*, (1907) 12 C.W.N., 138; *Gomer Sirda* v. *Queen-Empress*, (1898) I.L.R. 25 Cal., 863—referred to.

This case has been referred by the District Magistrate. The evidence was heard and a charge framed and all but one witness for the defence were examined by Maung Shin. He was then transferred and Mr. . . . . took up the case. The accused exercised his right to have all the witnesses resummoned and reheard. They were resummoned but they were not reheard. Their statements were merely read over to them and they were then further cross-examined. No fresh charge was framed nor was the accused examined by Mr. . . . .

This is clearly no compliance with the law. The right is given to an accused person in order that he may have the very great benefit of the Magistrate having the witnesses examined and cross-examined in his presence so that he may see and note their demeanour and manner of giving evidence. When the right is so claimed the Magistrate must recommence the trial [*King-Emperor* v. *Nga Pe* (1)].

In *Sobh Nath Singh* v. *King-Emperor* (2) the facts were the same as in the present case and it was held that the provisions

(1) 2 L.B.R., 17. (2) (1907) 12 C.W.N., 138.

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of section 350 Criminal Procedure Code, were not duly complied with and further that it was impossible to say that the accused had not been materially prejudiced. A retrial was ordered.

With this I entirely agree.

It is urged that the accused has been very lightly sentenced to fines only and that if a retrial is ordered he may be convicted again and sentenced to imprisonment and that if so he would be materially prejudiced. I cannot assume that he would be convicted nor that if he is he would be imprisoned and the mere fact that he may be has nothing to do with the matter before me. A direct contravention of an express provision of law has been committed and is an illegality. This being so section 537 cannot cure the defect [*Gomer Sirda* v. *Queen-Empress* (3)].

The convictions and sentences are set aside and a new trial is ordered.

FULL BENCH.

Before Mr. Justice Ormond, Officiating Chief Judge, Mr. Justice Parlett, Mr. Justice Young, and Mr. Justice Maung Kin.

Civil Reference No. 3 of 1917.

HOWA v. 1. SIT SHEIN, 2. MA SHWE HMEIN.

May 31st, 1917.

Ba Kya—for applicant.

Palit—for Respondents.

Paupers—Suits by—Civil Procedure Code, 1st Schedule, Order 33, Rules 2, 5, 7 and 15—Rejection of application to sue—Bar to subsequent application.

Held—The rejection under Rule 5 (*a*), Order XXXIII of an application to sue as a pauper because it is not framed and presented in the manner prescribed by Rules 2 and 3, after the opposite party has appeared under notice issued under Rule 6, is not a bar under Rule 15 to a subsequnt application of a like nature in respect of the same right to sue.

Kali Kumar Sen v. *N. N. Burjorjee*, 7 L.B.R., 60; *Nassiah* v. *Vythalingam Thingandar*, 6 L.B.R., 117; *Ranchod Morār* v. *Bezanji Edulji*, (1894) I.L.R., 20 Bom., 86; *Atul Chandra Sen* v. *Raja Peary Mohan Mookerjee*, (1915) 20 C.W.N., 669—referred to.

Civil Revision No. 54 of 1916.

The following reference was made to a Full Bench by Mr. Justice Ormond and Mr. Justice Parlett under section 11 of the Lower Burma Courts Act:—

March 5th, 1917.

Parlett, J.—The petitioner filed an application on the 28th of July 1915 for permission to sue the two respondents as a

(3) (1898) I.L.R., 25 Cal., 863.

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pauper. Notice was served upon the respondents who on the 7th December filed through an advocate a Written Statement setting out, among other things, that the application for leave to sue as a pauper was not framed according to law. The District Judge found that the schedule of the property belonging to the applicant annexed to her application was not verified, nor was it referred to in the application itself, which was verified. He therefore rejected the application under Order 33, Rule 5 (*a*) as not being framed in the manner prescribed by Rule 2. On the 22nd January 1916 the petitioner filed another application for leave to sue as a pauper and notice was issued to the respondents, who filed a Written Statement pleading, among other things, that the refusal of the former application constituted a bar to the entertainment of the present one, and on the 23rd March 1916 the District Judge so held and dismissed the application under Order 33, Rule 15. The petitioner now applies for revision of the District Judge's order on the ground that the order of rejection under Rule 5 (*a*) does not amount to an order of refusal under Rule 7 so as to constitute a bar to the further application under Rule 15. If this be so, the District Court in refusing to consider the second application on its merits failed to exercise jurisdiction vested in it, and so the matter is open to revision.

The District Judge relied upon *Kali Kumar Sen* v. *N. N. Burjorjee* (1). In that case the applicant filed a petition for permission to sue as a pauper upon which notice was issued under Order 33, Rule 6. Subsequently an amended petition was filed adding the names of several new defendants to whom notice was also issued. The application was rejected by the District Judge for want of verification in proper form, and revision of that order was sought. A Bench of this Court decided that though the verification might perhaps be held to comply substantially with the rule the petitioner was bound to fail for want of a schedule of the property belonging to the applicant, so there was no ground for interference with the District Judge's order. It was however further laid down that that order was clearly passed under Rule 7 and should have been a refusal to allow to sue as a pauper. The reason for this view

(1) 7 L.B.R., 60.

is not stated but it would appear to be that the petition was not rejected *in limine* under Rule 5 but after the opposite party had appeared in response to a notice issued under Rule 6. But the point does not appear to have been necessary for the decision of the case nor even to have arisen in it. I think the same may be said of the remark in the judgment that the absence of a schedule of the property rendered the applicant subject to the prohibition specified in Order 33, Rule 5 (*a*).

In *Nassiah and 2* v. *Vythalingam Thingandar and others* (2) where an application to sue as a pauper had been rejected for want of a proper verification after, as the record shows, notice had been issued to the opposite party under Rule 6, a Bench of this Court expressly refrained from recording an opinion as to whether a subsequent application would be barred under Rule 15.

In *Ranchod Morār* v. *Bezanji Edulji* (3) an application to sue *in formâ pauperis* was rejected as the applicant did not wish to proceed with it, and it was held that this order amounted to a refusal under section 409 and was a bar to a further application under section 413 of the Code of 1882 corresponding to Rules 7 and 15 of Order 33. It was remarked that an order of rejection under section 407, corresponding to Rule 5 (*a*), can only be made on preliminary grounds before notice is issued and before any enquiry is held into the applicant's pauperism, whereas in the case then being dealt with such an enquiry had commenced.

In *Atul Chandra Sen and others* v. *Raja Peary Mohan Mookerjee and others* (4) a second application was held to be barred under Rule 15 where the former application was ostensibly rejected under Rule 2 for failure to furnish the particulars required in regard to the plaint, but in reality after evidence had been taken on both sides and it had been found that the applicant had made a false statement as to the property he owned; I think the dictum that there is no distinction between rejection under Rule 5 and an order of refusal under Rule 7 was intended to apply to a case like that under consideration, where evidence had been given on both sides.

(2) 6 L.B.R., 117. (3) (1894) I.L.R., 20 Bom., 86.
(4) (1915) 20 C.W.N., 669.

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It appears to me therefore that there is no strong authority for holding that when an application to sue as a pauper which is not framed and presented in the manner prescribed by Rules 2 and 3 is rejected only after the opposite party has appeared in answer to a notice, such rejection is an order refusing to allow the applicant to sue as a pauper, which under Rule 15 bars a subsequent application. On general principles such a view would not appear to be right. Rules 4, 5 and 6 imply that it is the Court's duty to scrutinize the application to see whether it complies with the conditions laid down as to both form and substance, and to reject it forthwith if it, on the face, fails to satisfy any one of those conditions. The applicant can then present another application. If the Court neglects its duty in this respect and issues notice upon an application which is not in proper form, and thereafter rejects it on that ground, it would be unjust that the applicant should be put in a worse position by reason merely of the Court having failed to do its duty.

Turning to the Rules themselves, Rule 5 lays down that an application to sue as a pauper must be rejected unless it conforms to each of five conditions. Briefly it must be rejected (*a*) where it is improperly framed and presented, (*b*) where the applicant is not a pauper, (*c*) where he has within two months fraudulently disposed of any property in order to be able to apply for permission to sue as a pauper, (*d*) where his allegations do not show a cause of action and (*e*) where he has entered into a champertous agreement with reference to the subject-matter of the proposed suit. Of these conditions it would be obvious on the face of the application whether (*a*) and usually whether (*d*) was fulfilled or not. The decision as to the others could only be arrived at on enquiry and after taking evidence, so if (*a*) and on the face of it (*d*) are complied with a notice should issue under Rule 6. When the opposite party appears, the conditions (*b*) to (*e*) may be gone into, but if the Court has done its duty no question as to (*a*) ought to arise at this stage, and the decision to which the Court is required to come under Rule 7 should on the face of it have no reference to clause (*a*) of Rule 5. Clause (2) of Rule 7 runs: "The Court shall also hear any argument which the parties may desire to

offer on the question whether, on the face of the application and of the evidence (if any) taken by the Court as herein provided, the applicant is or is not subject to any of the prohibitions specified in Rule 5." The language is somewhat unusual but the word prohibition appears to me to refer to some status of the applicant or to some conduct on his part which disqualifies him from being allowed to sue as a pauper, and not to any formal defect in his application. The fact that he is not a pauper disqualifies him, so would a fraudulent disposal of his property or an agreement such as are referred to in clauses (*c*) and (*e*) and these three disqualifications are clearly prohibitions. Usually I think failure to show a cause of action would not be, but however that may be, I am clearly of opinion that a merely formal defect in the frame of the application cannot be said to render the applicant subject to a prohibition.

It is significant that section 405 of the Code of 1882 required the application to be rejected if not framed and presented in the prescribed manner, thus corresponding to clause (*a*) of Rule 5, while section 407 enjoined rejection for the reasons now appearing in clauses (*b*) to (*e*) of Rule 5, and section 409, corresponding to Rule 7, provided for the application being allowed or refused after considering whether the applicant was or was not subject to any of the prohibitions specified in section 407. It is clear therefore that under the old Code a formal defect in the application was not regarded as a prohibition to which the applicant was subject and I cannot see that it becomes one merely because all the grounds on which the application must be rejected are now grouped together in one rule. From all points of view it appears to me that the District Court's order of 7th of December 1915 in the present case should not have been held a bar to the application of 20th January 1916.

I think the question should be further considered whether the rejection of an application to sue as a pauper because it is not framed and presented in the manner prescribed by Rules 2 and 3 of Order 33 is a bar under Rule 15 to a subsequent application of a like nature in respect of the same right to sue merely because the order of rejection is assed after the

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opposite party has appeared in response to a notice issued under Rule 6.

Ormond, J.—I agree that the question suggested should be referred to a Full Bench in view of the decision in 7 L.B.R., 60.

The opinion of the Full Bench was as follows :—

Ormond, Offg. C.J.—The question we have to determine is whether the rejection of an application to sue as a pauper, because it is not framed and presented in the manner prescribed by Rules 2 and 3 of Order 33,—is a bar under Rule 15 to a subsequent application of a like nature in respect of the same right to sue:—such order of rejection having been passed after the opposite party has appeared under notice issued under Rule 6.

It is contended for the applicant that under the rules an order of rejection and an order of refusal are in effect the same and amount to a final dismissal of the pauper application; and that the word "prohibitions" in Rule 7 includes clause (*a*) of Rule 5.

If this contention is correct, a pauper who through ignorance presents his application through a pleader is altogether debarred from having his application heard.

Rule 15 implies that if the application has been rejected, such rejection would not of itself be a bar to the subsequent presentation of the application.

Rules 4 and 5 shew that it is the duty of the Court when the application is presented, to see that it is in proper form and duly presented. The Court need not at that stage examine the applicant and consider the merits. But it may do so;—and if it does and is satisfied upon the admissions made by the applicant, that he is not a pauper:—according to Rule 5 the application must be rejected and no notice can issue under Rule 6. But if the Court without going into the merits, issues notice under Rule 6 and then finds that the applicant is not a pauper:—according to Rule 7 the application must be refused. It is clear that such order of rejection under Rule 5 must have the same effect as the order of refusal under Order 7 and that it operates as a final dismissal of the application:—for both orders are made upon the finding that the applicant is not a pauper. It is unreasonable to suppose that the legislature

intended that when the Court has come to a finding that the applicant is not a pauper, the application should not be finally dismissed:—or to suppose that a finding based upon the admission of the applicant was intended to be of less effect than a finding based upon the evidence of the opposite party.

In my opinion an order of rejection under Rule 5, which is based upon a finding that the applicant is subject to any of the prohibitions referred to in Rule 7, must by necessary implication have the effect of a final refusal of the application.

The question then is:—Does the word "prohibitions" in Rule 7 include clause (*a*) of Rule 5? The word appears in the corresponding section of the Code of 1882 (section 409) and if in Rule 7 it is used in the same sense as in the old section 409; it would not include clause (*a*) of Rule 5. Again:—clause (*a*) of Rule 5 refers to irregularities in the framing and presentation of the application; and I do not think such a clause could be said to contain a prohibition in the ordinary sense of the word.

In my opinion clause (*a*) of Rule 5 is not one of the prohibitions referred to in Rule 7; and an order of rejection under Rule 5, on the ground that the applicant has not complied with the provisions of clause (*a*), does not operate as a bar to a subsequent presentation of the application in proper form.

The last clause of Rule 7:—"The Court shall then either allow or refuse to allow the applicant to sue as a pauper"—does not mean that if the application should have been rejected under clause (*a*) of Rule 5, it is too late for the Court to do so after notice has issued to the opposite party. That clause merely states what order is to be made when the Court has decided whether the applicant is or is not subject to any of the prohibitions; and it has no applicability to the question of an order of rejection under clause (*a*) of Rule 5.

In my opinion an order of rejection under clause (*a*) of Rule 5 can be made after a notice has been issued under Rule 6.

For the above reasons I would answer the question referred in the negative.

Rules 5, 7 and 15 are no doubt ambiguous. I think the ambiguity arises from the word "reject" appearing in section 407 of the old Code:—which must be a mistake for the word "refuse":—Section 408 begins: "if the Court sees no reason to

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refuse the application on any of the grounds stated in section 407" :—and that mistake has been overlooked when these rules were framed.

Parlett, J.—I set out my views fully in the order of reference and none of the arguments adduced at the hearing have led me to modify them in any respect. Briefly they are as follows :—The enactment of Rule 15 of Order XXXIII shows clearly that every unsuccessful application for leave to sue as a pauper is not necessarily a bar to a subsequent similar application. An application which has been refused under Rule 7 (3) is such a bar. An application is refused under that rule when the applicant is subject to one or more of the prohibitions specified in Rule 5. In my opinion the failure to frame and present the application in the manner prescribed by Rules 2 and 3 is not one of those prohibitions, and is not a ground for an order of refusal under Rule 7 (3). The appropriate order whenever such failure comes to the notice of the Court, is one rejecting the application, and an order of rejection on such ground is not a bar under Rule 15 to a subsequent application. The question whether an order of rejection passed under Rule 5 on other grounds may be such a bar was not referred or argued, and I express no opinion upon it. The question referred I would answer in the negative.

Young, J.—The question referred is whether the rejection of an application to sue as a pauper because it is not framed and presented in the manner prescribed by Rules 2 and 3 of Order 33 is a bar under Rule 15 to a subsequent application of a like nature in respect of the same right to sue merely because the order of rejection is passed after the opposite party has appeared in response to a notice issued under Rule 6.

Order 33, Rule 15, is quite plain and enacts as follows :—An order refusing to allow the applicant to sue as a pauper shall be a bar to any subsequent application of the like nature by him in respect of the same right to sue. It goes on to provide that in such a case the applicant may still sue in the ordinary way. The words " an order refusing to allow an applicant to sue as a pauper " throw us back on to Rule 7, and we see that for the same defects (set out in Rule 5) the Court is bound either to reject an application for leave to sue as a pauper or to refuse

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to allow a person so to sue. Which order is to be passed depends on the time and method of detection (Rule 6). If the Court detects the defect unaided, it passes an order of rejection under Rule 5: if it fails to do so, and it is pointed out by the opposite side, an order of refusal under Rule 7 is the necessary consequence.

In ordinary language rejection and refusal are practically synonymous: but the Legislature does not lightly use different words in the same sense in the same Act: an order of rejection and an order of refusal are clearly different orders verbally at any rate, and when we see that under Rule 15 the bar to making a second application is confined to an order of refusal one is inclined to doubt whether the same consequence follows an order of rejection.

The rest of the Code I think confirms these doubts. Section 141 enacts that the procedure provided for suits shall be followed in all proceedings in a Court of Civil Jurisdiction and Order 7, Rule 13, provides that when a plaint is rejected another may be brought.

An application for leave to sue is clearly not an application in a suit, it is equally clearly a proceeding in a Court of Civil Jurisdiction, and the result in my opinion is that the word rejection is not only different from the word refusal but each has different results attached to it by the Legislature.

In other words an order of rejection under Rule 5 does not prevent, but an order of refusal under Rule 7 does prevent a similar application of the like nature by the same person in respect of the same right.

It is a curious result making as it does the consequence depend not upon the nature of the fault but upon the time and method of its detection. It is however a construction which so far as Rule 5 is concerned is in favour of the subject and in my opinion it is the true construction.

This however is a case under Rule 7. The applicant has committed a purely formal mistake, which unfortunately was not detected by the Court under Rule 5 but under Rule 7, and the question is whether we can see our way to allow him to correct this formal error in a subsequent application.

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Rule 7 is very clear and gives the Court no option but to pass an order of refusal. Rule 15 is equally clear as to the result that follows. The only method by which we can give relief lies so far as I can see in clauses 2 and 3 of Rule 7 which direct that the Court shall see whether the applicant is subject to any of the prohibitions specified in Rule 5, if he is the Court is bound to refuse the application. It cannot reject it. Rule 5 deals with the circumstances and causes for which a Court is to reject an application. They are five in number and are briefly speaking as follows :—

(1) Where the application is not properly framed and presented.

(2) Where the applicant is not a pauper.

(3) Where his application is fraudulent.

(4) Where it does not disclose a right to sue.

(5) Where it is champertous.

So far as I can see these are all prohibitions: the applicant is prohibited from applying in a wrong manner—he is also prohibited from applying if he is not a pauper, or if he has been fraudulent or champertous or if his application shews he has no right to sue. They are all prohibitions the results of which differ according to the method and time of detection of the errors committed.

Under the former Code the first ground was treated separately and an applicant who made these trivial formal errors only had his application rejected.

The Legislature, however, deliberately removed these formal errors from the special section and incorporated them in Rule 5.

Whether it intended the result that in my opinion follows may perhaps be doubted, but it is not for a Court to speculate on what the Legislature intended, but to construe what it has enacted.

In my opinion an applicant is as much prohibited from presenting an application in a wrong manner as he is from presenting it fraudulently.

I should have expected the Legislature to have provided different results but the Legislature has chosen to enact otherwise in plain and unmistakeable language and I see no room for

interference. I would therefore answer the question referred in the affirmative—the Courts can however in future mitigate the results of the commission of these formal defects by rejecting in such cases the applications under Rule 5 of their own motion and should therefore peruse the applications carefully.

Maung Kin, J.—In my judgment the answer to the question referred should be in the negative. I do not think that the failure to frame and present an application to sue *in formâ pauperis* in the manner prescribed by Rules 2 and 3 is a prohibition within the meaning of the word "prohibitions" as used in Rule 7.

Before Mr. Justice Ormond, Officiating Chief Judge, and Mr. Justice Parlett.

Civil 1st Appeal No. 124 of 1915.

August 9th, 1917.

S. P. S. CHOKKAPPA CHETTY BY HIS AGENT SAMINATHA PILLAY *v.* 1. S. P. S. R. M. RAMAN CHETTY, 2. NARAYANAN CHETTY, 3. KURPEN CHETTY, 4. LUTCHANAN CHETTY, 5. PALANIAPPA —MINOR BY HIS GUARDIAN AD LITEM ALAMELU ACHY.

J. R. Das—for Appellant.

Lentaigne with Chari—for 1st to 3rd Respondents.

Civil Procedure Code, V of 1908, *sections* 11, 13, 14,— *Res judicata—Foreign judgment.*

A decision of a foreign Court is not 'res judicata' in a subsequent suit in British India if the foreign Court was not competent to try the subsequent suit.

Prithisingji Devisingji v. *Umedsingji Sangaji*, (1903) 6 Bom. L.R., 98; *Musammat Maqbul Fatima* v. *Amir Hasan Khan*, (1916) 20 C. W. N., 1213—referred to.

Ormond, Offg. C.J.—The plaintiffs sued in the District Court of Pegu for partition of a money-lending business which their father, the 1st defendant, carried on in that district:— as being joint family property. The father claims it as his own business. The 2nd defendant is a son of the 1st defendant and the 3rd defendant is a grandson. The parties are therefore the sons and grandsons of the 1st defendant. The District Judge gave the plaintiffs a decree and the father now appeals.

The parties have their domicile in Konapet in the Pudukkottai State, and previous to this suit the plaintiffs had obtained a decree in the Chief Court of Pudukkottai declaring that these parties formed a joint Hindu family; a decree for partition of

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the properties in Pudukkottai and a declaration that this money-lending business in Pegu was also joint family property, and that the plaintiffs were entitled to partition of this business ;— but the Pudukkottai Court held that it had no jurisdiction to make the partition of property in Pegu. The District Court held that the finding of the Pudukkottai Court that the family was a joint Hindu family and the finding that there was joint family property in Pudukkottai was *res judicata,* but that the finding that this business was a family business was not *res judicata.* The District Court found as a fact that this money-lending business was part of the joint family property. The father was precluded from giving evidence to show that the family was not a joint family.

Funds for this money-lending business were obtained from an " Oor " account, which means literally ' big house ' and probably means ' Home account ' and funds from the business were also remitted to that account. The funds of that account, according to the Pudukkottai decision, formed part of the joint family property. If the finding of that Court as to this is *res judicata* in the present case, there can be no doubt that this money-lending business also forms part of the joint family property. The question therefore is whether the finding of the foreign Court is *res judicata* in the present suit. Section 11 of the Code which deals with *res judicata* says that the first Court the decision of which is sought to be *res judicata* in a subsequent suit, must be a Court competent to try such subsequent suit. The judgment of the Pudukkottai Court is a foreign judgment. Section 13 of the Code, which deals with the conclusiveness of a foreign judgment, says " A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title, " except in certain specified circumstances. The case of *Prithisingji Devisingji* v. *Umedsingji Sangaji* (1) shows that a foreign judgment is subject to the same conditions as to *res judicata* as a judgment of a Court of British India, and therefore must be the judgment of a Court which is competent to try the subsequent suit. In the case of *Musammat Maqbul Fatima* v. *Amir Hasan Khan* (2)

(1) (1903) 6 Bom. L.R., 98. (2) (1916) 20 C.W.N., 1213.

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this question was raised under the new Code. In that case the Judges of the High Court of Allahabad held that the decision of a Court to be *res judicata* in a subsequent suit, must be the decision of a Court that was competent to try the subsequent suit; and that the question of the effect of a foreign judgment can only properly be raised in proceedings based upon the foreign judgment, *i.e.*, that section 13 applied only to such proceedings. Upon appeal to the Privy Council Their Lordships did not see their way to reverse the decision and dismissed the appeal without giving reasons.

The Pudukkottai Court was not competent to try the present suit which related to property in Pegu. In my opinion section 13 of the new Code has not altered the law. The words, "a foreign judgment shall be conclusive," mean that a foreign judgment shall be taken to be a final and conclusive judgment, *i.e.*, the findings shall not be called in question in any other proceedings as not having been properly made in the foreign suit.

It is a final and conclusive judgment for all purposes:—whether for bringing a suit upon the foreign judgment or for the purposes of *res judicata*—but the word "conclusive" does not render a foreign judgment of greater effect than a final and conclusive judgment of a Court in British India.

I would set aside the decree and remand the case to be retried:—the evidence already taken, to be evidence in the case and award 10 gold mohurs to the Appellant to abide the result.

Parlett, J.—Section 13 of the Civil Procedure Code enacts that a foreign judgment shall be conclusive as to any matter thereby adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except—where it has not been pronounced by a Court of competent jurisdiction; or where it exhibits certain other defects which do not concern the present case. Reading section 13 with section 14, I have no doubt that the expression "judgment pronounced by a Court of competent jurisdiction," means a judgment pronounced by a Court competent to pronounce it. Where a suit is brought in a Court in British India on a foreign judgment the meaning and effect of section 13 are clear, *viz.* that the decision of the foreign Court can only be impugned upon certain specified grounds, among them being

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that the Court which pronounced it had not jurisdiction to do so. Were section 13 applicable to such suits alone no difficulty would arise. It is not however expressly so limited but is framed in general terms. If, therefore, it is to be applied to cases where it is sought to make a foreign judgment *res judicata* of a matter which it decides, it would at first sight appear to attach to the judgments of foreign Courts of whatever grade, greater authority and finality than to those of Courts in British India. Upon careful consideration however I have come to the conclusion that the language of section 13 may be so construed as not to create any such anomaly, if the word " conclusive " be understood as equivalent to the expression " finally decided " in section 11, and if the conditions of that section as a whole be applied to a foreign judgment for the purpose of determining whether it constitutes a *res judicata*. The Court in British India cannot question the finality of the decision of a competent foreign Court properly arrived at as to any matter, but that decision would only bind the Court in British India if the foreign Court is competent to try the suit in which such matter has been subsequently raised. I, therefore, concur in the above order.

Civil First Appeal No. 105 *of* 1917.

August 14*th*, 1917.

Before Sir Daniel Twomey, Chief Judge, and Mr. Justice Parlett.

THE FIRM OF A. C. KUNDU BY THEIR MANAGING PARTNER, U. N. KUNDU, *v.* BABU H. ROOKMANAND.

J. R. Das—for appellant.

Leach—for respondent.

Transfer of Property Act 1882, *section* 69,—*Mortgage—Power of sale—Section* 58—*Mortgage-money*.

Held,—that the definition of ' mortgage money ' as the principal money and interest of which payment is secured does not limit the term to principal and interest in combination ; and that default of payment of the mortgage money includes default of payment of interest.

Vencatavarada Iyengar v. *Venkata Luchmamal*, (1875) 23 W.R., 91, referred to.

Twomey, C.J.—The parties carried on business in Moulmein, one of the Towns to which section 69 of the Transfer of Property Act expressly extends, and on 19th December 1913 the plaintiff firm mortgaged certain immoveable property to the defendant for Rs. 25,000 advanced and such further sums as might be advanced up to Rs. 75,000 in all. The mortgage-instru-

ment allows redemption on payment of principal with interest on 31st December 1919. It stipulates that interest shall be paid monthly. It also gives the mortgagee a power of sale to be exercised "at any time" and provides that if the power is exercised the sale proceeds after meeting the incidental expenses shall be applied "to pay and satisfy the monies which shall then be owing upon the security of the mortgage," any surplus being paid to the mortgagor. To the power of sale is annexed a proviso that "the power of sale shall not be exercised unless a default shall be made in payment of the said principal sum or the interest thereof."

As the interest was not paid monthly and was heavily in arrear, the defendant (mortgagee) threatened in February 1917 to exercise his power of sale. The plaintiff firm (mortgagor) then brought this suit for an injunction to restrain the defendant from exercising the power of sale. The District Court has dismissed the suit and the plaintiff firm now appeals to this Court.

Their main contention is that in India a power of sale under the mortgage must conform with the provisions of Section 69 of the Transfer of Property Act and that the power contemplated in that Section is not exerciseable unless there has been a default in payment of the principal money, which cannot occur until the period allowed for redemption has expired. I think the first part of this contention is correct but not the rest. The section clearly contemplates the exercise of the power of sale when interest amounting to Rs. 500 at least is in arrear and unpaid for three months after becoming due. "Default of payment of the mortgage money" in the first paragraph of the section would include default of payment of interest, for the term "mortgage money" is defined in section 58 as the principal money and interest of which payment is secured, and thus it appears that interest is "mortgage-money" just as much as principal is. The use of the conjunction "and" does not imply that the term "mortgage-money" is applicable only to principal and interest in combination. In my opinion it cannot be held that there is anything in the section inconsistent with the exercise of the power of sale prior to the expiration of the period allowed for redemption. We have been referred to the

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ruling of the Privy Council in *Vencatavarada Iyengar* v. *Venkata Luchmamal* (1). The mortgage instrument in that case had a clause giving a power of sale which was exerciseable if any "obstruction" was caused by the mortgagor in respect of the conditions in the mortgage and it was provided that in the event of such obstruction the mortgagee could sell the property before the expiry of 12 years the period of redemption and could pay himself from the sale proceeds the full amount of principal and interest, not merely the interest then due but interest also for the unexpired portion of the term of 12 years. It was held that this clause was in the nature of a penalty and could not be enforced ; but that is a different thing from saying where the deed gives a power of sale on default of payment of interest that the mortgagee cannot exercise it to the extent of recovering the full amount of principal and the interest due up to the time of the suit unless the period allowed for redemption has expired. In the Privy Council case the clause was held to be in the nature of a penalty only because it provided for the recovery of interest for the period which had still to run. If the Privy Council ruling gave rise to any doubt on the subject it has been set at rest by section 69 of the Transfer of Property Act which as noted above clearly contemplates the exercise of the power of sale even if there has as yet been no default in respect of payment of the principal money.

We have however to consider whether the mortgage instrument in this suit does in fact provide for the power of sale on default of payment of interest alone and for the recovery of the full amount of principal and interest up to date in the event of such default. The power of sale is to be exercised according to the instrument "at any time" on default of payment of "principal or interest." The provision in the deed as to the disposal of the sale proceeds shows that when the power of sale is exercised not only the interest which is in arrear but also the principal amount secured is to be recoverable from the sale proceeds. The mortgagee is to take the monies which shall then be "owing on the security of the mortgage." Although the principal money could not in ordinary circumstances be demanded till 31st December 1919, still it is a debt

(1) (1875) 23 W.R., 91.

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and is *owing* to the mortgagee from the time when the money was actually advanced to the mortgagor.

It is true that the exercise of the power of sale before 31st December 1919 has the effect of defeating the express provision for reconveyence on payment of principal and interest on that date. But the document must be taken as a whole and it appears to me that the parties clearly intended the right of redemption on 31st December 1919 to be dependent on punctual payment of the monthly interest as it fell due in the meantime. I can see no reason why the Courts should not give effect to this intention. I would therefore dismiss the appeal with costs.

Parlett, J.—I concur.

Before Mr. Justice Ormand.

TAMBI *alias* ABDUL RAHMAN *v.* KING-EMPEROR.

Criminal Revision No. 266B of 1917.

November 2nd 1917.

G. B. Dawson—for applicant.

Sutherland—for responden.

Criminal Procedure Code section 208—Enquiry preliminary to comitment—Witnesses for the prosecution—Cross examination—Reservation of—Section 208.

In an enquiry under Chapter XVIII Code of Criminal Procedure the accused has no right to reserve his cross-examination of the witnesses for the prosecution until they have all been examined-in-chief.

Po Win v. *Crown*, 1 L. B. R. 311; *Durga Dutt* v. *Emperor*, 15 I.C., 75; *King-Emperor* v. *Channing Arnold*, 6 L.B.R., 129 at 132; *Jogendra Nath Mooherjee* v. *Mati Lal Chuherbutty*, (1912) I.L.R., 39 Cal., 885—referred to.

In re Mohamed Kasim, 22 I.C., 173 followed.

Fazarali v. *Mazaharulla*, (1911) 16 Cal. L. J., 45 dissented from.

The petitioner was being prosecuted for an offence of abetment of attempt to murder and the enquiry was being held under Chapter XVIII of the Code by the 2nd Additional Magistrate, Kyaikto. 11 prosecution witnesses were examined-in-chief and the diary shows that the cross-examination was reserved until the Sessions. Then the doctor was examined as the 12th prosecution witness and the pleader for the accused wished to cross-examine him but the Magistrate refused to allow it then, as the cross-examination of the previous witnesses had been postponed. This order was clearly wrong. Two other witnesses were then examined-in-chief and the diary shows that the cross-examination was reserved till the Sessions. Mr. Dawson then appeared for the

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accused and a discussion took place as to whether the cross-examination of the witnesses had been postponed till the Sessions or until the witnesses for the prosecution had all been examined-in-chief; and he obtained leave to recall the witnesses for cross-examination, after the remaining witnesses had been examined. Mr. Sutherland who appeared for the complainant then applied *exparte* to the District Magistrate to set aside the order of the Additional Magistrate and his application was granted. The petitioner now applied in revision against that order of the District Magistrate. It is clear that the District Magistrate had no power to cancel the order of the Additional Magistrate. He had power to call for the record and to submit the proceedings to this Court. But Mr. Sutherland contends upon the authority of *Po Win* v. *Crown* (1) that if the order that was made by the District Magistrate without jurisdiction would be a proper order for this Court to pass, it is the duty of this Court to go into the case and to pass such an order. The first question therefore is :—was the order of the Additional Magistrate allowing an accused to recall witnesses for the prosecution for the purposes of cross-examination a proper order or not. The proper time for cross-examination is no doubt immediately after the examination-in-chief—section 138, Evidence Act :—and an order by a Magistrate allowing an accused without any special reason, to postpone cross-examining the prosecution witnesses until they had been all examined-in-chief, is a procedure not contemplated by the Code. The following authorities bear out this view :—in re *Mohamed Kasim* (2) *Durga Dutt* v. *Emperor* (3) and *K.E.* v. *Channing Arnold* (4). On the other hand Mr. Dawson refers me to the case of *Fazarali* v. *Mazaharulla* (5) where it was held that the accused has the right to recall the prosecution witnesses for cross-examination so long as the prosecution case is not closed ; and to the case of *Jogendra Nath Mookerjee* v. *Mati Lal Chuckerbutty* (6) where it was held that it was open to the Magistrate under section 213 (sub-clause 2) of the Code to recall witnesses for the prosecution if required by the defence

(1) 1 L.B.R., 311.
(2) 22 I.C., 173.
(3) 15 I.C., 75.
(4) 6 L.B.R., 129 at 132.
(5) (1911) 16 Cal. L.J., 45.
(6) (1912) I.L.R., 39 Cal., 885.

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for cross-examination. Upon the balance of authorities I am of opinion that the accused has no right to postpone his cross-examination of the witnesses for the prosecution until they have been all examined-in-chief. But this is far from saying that the Magistrate would not be right in recalling witnesses for further cross-examination if the circumstances of the case called for it. The Manual of this Court in paragraph 123 expressly lays down that it is the proper course, if the accused wishes it, for all the witnesses for the prosecution after having been examined-in-chief to be recalled for cross-examination. That direction has not the force of a judicial decision:—though the Magistrate can hardly be blamed for acting under it; and as pointed out above it is not I think in accordance with the practice contemplated by the Code.

Now assuming that the order of the Additional Magistrate was not a proper order, what order should this Court pass? By prohibiting the accused from cross-examining the prosecution witnesses this Court would be prejudicing the accused's right in consequence of the accused having acted according to the direction of the Magistrate who acted under the direction of this Court's Manual. The utmost this Court could order would be to put the parties so far as is possible in *statu quo*; which would be to allow the cross-examination to take place now. There are still 10 witnesses to be examined for the prosecution. The order of the District Magistrate is set aside as having been made without jurisdiction and the Additional Magistrate is directed to allow the accused to recall all or such of the 14 witnesses already examined as he may wish to cross-examine. They will be cross-examined and re-examined if necessary, after which the remaining 10 witnesses will be examined and cross-examined and the cross-examination of each witness will follow immediately after the examination-in-chief.

The case was sent up on the 10th April and evidence was not taken until the 23rd August which seems to be an unnecessary long time and the Magistrate is directed to proceed with the case without delay.

Note:—The second sentence of paragraph 123 (1) Lower Burma Courts Manual, Volume 1, has now been cancelled.

Criminal Revision No 267A of 1917.

November 24th, 1917.

Before Mr. Justice Rigg.

KING-EMPEROR v. U GYAW.

Gaunt—the Assistant Government Advocate for the King-Emperor.

Burma Forest Act, Rule 22—License to fell, etc., timber—Breach of condition—Responsibility of licensee for acts of his servants.

A licensee or other person permitted to fell timber in accordance with certain conditions under rules framed under the Forest Act is liable to be punished under those rules for the acts of his servants, whether authorised by him or not, and even if the acts are in contravention of his instructions, provided that those servants were acting within the scope of their master's authority, and unless the master can show that he acted in good faith and did all that could be reasonably expected of him to prevent the breach of the conditions under which he is permitted to fell the timber.

Shin Gyi v. *King-Emperor*, 9 L.B.R., 81; *Commissioners of Police* v. *Cartman*, (1896) 1 Q.B.D., 655; *Strutt and another* v. *Clift*, (1910) 27 T.L.R., 14—referred to.

U Gyaw has been convicted under rule 98, read with rule 22 of the Burma Forest Act for having felled undersized kamaung trees in contravention of a license issued in the joint names of U Mra Tha Tun and himself. The case was tried summarily, and the facts are not as clearly stated as is desirable. They have not however been challenged, and the only point argued is whether on the Magistrate's finding, the accused is liable to be convicted of any offence. The Magistrate found that three undersized kamaung logs were cut by coolies employed by the accused; that the accused did not remove the logs (possibly because he had already been fined for a similar offence) and that in any case, whether the cutting was authorised by the accused or not, he was responsible and liable to the punishment prescribed by rule 98.

Rule 22 is as follows:—

"No person shall fell, cut, girdle, mark, lop, tap or injure by fire or otherwise ..... any teak tree or any other tree of the kinds specified in the First Appendix and within the areas therein specified ... save under and in accordance with the conditions of a special agreement with Government or a license &c ...

"This rule is framed under the powers conferred on the Local Government by section 31 of the Act. Section 31 is in Chapter III, which is headed "General Protection of Forests and Forest Produce." The object of the Forest Act is to enable the Local Government to control the administration of forest areas by declaring some areas to be reserved forest, by

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regulating the felling of trees and the extraction of forest produce, and by imposing duty to be paid for privileges granted to individuals to trade and work within areas under forest. To secure this control, rules have been framed, and licenses are issued. It is well known that licensees seldom fell trees themselves and employ coolies for such work. The accused probably held a license under form III, the 8th condition of which is that any breach of the conditions of the license will render him liable to lose his license and to the punishment prescribed in the Act or the rules made thereunder. In *Shin Gyi* v. *K. E.* (1) a Full Bench of this Court held that a licensee of a liquor shop whose agent or servant permits drunkenness is punishable under the provisions of section 50 of the Excise Act. The principle on which the decision in that case proceeded is that the object of the Excise Act would be defeated if a licensee was permitted to excuse himself on the ground that his servants had disobeyed his orders, provided that the servants were acting within the scope of their authority. This principle is very clearly stated in the *Commissioners of Police* v. *Cartman* (2) by Lord Russell, C. J. in the following passage "How do they (the licensees) carry on their business? From the nature of the case it must be largely carried on by others; it is true that sometimes the licensee keeps in his own hands the direct control over his own business, but in the great majority of cases it is not so, the actual direct control being deputed to others: are the licensees in these cases to be liable for the acts of others? In my opinion they are, subject to this qualification, that the acts of the servant must be within the scope of his employment ... It makes no difference for the purposes of this section that the licensee has given private orders to his manager not to sell to drunken persons; were it otherwise, the object of the section would be defeated." A similar principle was applied in *Strutt* & 1 v. *Clift* (3) which was a case under the Customs & Inland Revenue Act, 1888, in which case the appellant was held liable for the unauthorised act of his bailiff in bringing back his family from the station in a milk cart and using the milk cart thus without a license. It seems to me that having regard to the objects of the Forest

(1) 9 L.B.R., (2) 1896) 1 Q.B.D., 655. (3) (1910) 27 T.L.R., 14.

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Act a similar responsibility must be attached to persons felling timber by coolies, otherwise the provisions of that Act would be rendered nugatory. The correct rule seems to be as follows:—"A licensee or other person permitted to fell timber in accordance with certain conditions under rules framed under the Forest Act is liable to be punished under those rules for the acts of his servants, whether authorised by him or not, and even if the acts are in contravention of his instructions, provided that those servants were acting within the scope of their master's authority, and unless the master can show that he acted in good faith and did all that could be reasonably expected of him to prevent the breach of the conditions under which he is permitted to fell the timber."

There is no reason for interference with the conviction in the present case, and the proceedings are returned.

PRIVY COUNCIL.

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

Before Lord Dunedin, Lord Shaw, Lord Sumner, Sir John Edge and Mr. Ameer Ali.

MAUNG KYIN, SINCE DECEASED (NOW REPRESENTED BY MAUNG KYAW), AND ANOTHER—APPELLANTS *v.* MA SHWE LA, SINCE DECEASED, AND OTHERS—RESPONDENTS.

Evidence Act, I of 1872, *section* 92—*Evidence of conduct varying terms of written contract—Evidence of rights of third party.*

A the owner, mortgaged his land to B by way of an outright sale. B transferred the mortgage, also by way of an outright sale to C.—A, B and C all intended that C should take a transfer of B's mortgage in the form of an outright sale. A then conveyed his equity of redemption to B. C sued B for possession and the question arose whether the evidence of the acts and conduct of the parties was admissible to show that the transaction between B and C was not a sale, but the transfer of a mortgage.

Held,—that evidence was admissible to show that C purchased with notice that the transfer by A to B was a mortgage. C therefore took subject to the mortgagor's rights.

Held, also,—that though under section 92 of the Evidence Act, oral evidence is not admissible for the purpose of ascertaining the intention of parties to a written document "as between parties to such written instrument or their representatives in interest," wherever evidence is tendered as to a transaction with a third party, the ordinary rules of equity and good conscience come into play unhampered by the statutory restrictions of that section.

Baksu Lakshman v. *Govinda Kanji*, (1880) I.L.R. 4 Bom., 594, which followed *Lincoln* v. *Wright*, (1859) 4 DeG. & J., 16; *Hem Chunder Soor* v. *Kallay Churn Das*, (1883) I.L.R. 9 Cal., 528; *Rakken* v. *Alagappudayan*, (1892) I.L.R. 16 Mad., 80; *Preonath Shaha* v. *Madhu Sudan Bhuiya*, (1898) I.L.R. 25 Cal., 603; *Khankar Abdur Rahman* v. *Ali Hafez*, (1900) I.L.R. 28 Cal., 256; *Mahomed Ali Hossein* v. *Nazar Ali*, (1901) I.L.R. 28 Cal., 289—referred to and held to have been overruled by *Balkishen Das* v. *Legge*, (1899) 27 I.A., 58.

Achutaramaraju v. *Subbaraju*, (1901) I.L.R. 25 Mad., 7; *Maung Bin* v. *Ma Hlaing*, (1905) 3 L.B.R., 100; *Dattoo valad Totaram* v. *Ramchandra Totaram*, (1905) I.L.R. 30 Bom., 119—approved.

This case had previously gone up to the Privy Council upon the same question and was remanded. The Judgment remanding the case is printed at page 138 of this report.

The following are the judgments upon the remand and sufficiently disclose the facts:—

JUDGMENT OF THE ORIGINAL SIDE OF THE CHIEF COURT.

Civil Regular No. 350 *of* 1905.

June 17th, 1912.

Robinson, J.—The facts of this case are set out in the judgments of their Lordships of the Privy Council delivered on the 11th July 1911(1). The defendants proposed to offer evidence of the acts and conduct of the parties. Their Lordships after pointing this out state that this may give rise to important and difficult questions under section 92 of the Evidence Act. They then state that the case had been argued before them as though the questions in dispute turned entirely on the construction of that section as applied to the deeds of the 4th March 1913 under which the plaintiffs claim. The judgment then continues:—"Their Lordships, however, are of opinion that the case for the appellants '(Defendants)' disclosed a charge of fraud against the respondents '(plaintiffs)' in relation to matters antecedent to those deeds, on which much of the evidence tendered would certainly be material. Thus it is said that the respondents, or the persons under whom they claim, took absolute conveyances of property from the appellants with notice that they in fact belonged to a third person, namely, the alleged mortgagor, Ko Shwe Myaing. If this be so, section 92 of the Indian Evidence Act, even if construed according to the respondent's contention, will not avail them. It is applicable to an instrument 'as between the parties to any such instrument or their representatives in interest,' but it does not prevent proof of a fraudulent dealing with a third person's property, or proof of notice that the property purporting to be

(1) 9 L.B.R., 138.

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absolutely conveyed in fact belonged to a third person who was not a party to the conveyance. The evidence of Ko Shwe Myaing is of course material and necessary on this point. . . . . They then express their opinion that "the rejected evidence should be heard, subject to any objection the respondents may be advised to take. The Court will then be in a position to deal hereafter (if it should become necessary) with the admissibility of the evidence in relation not only to the deeds of the 4th March 1903, but also in relation to the questions that may arise in connection with the alleged knowledge or conduct of the parties antecedent to the execution of those deeds and upon which their validity may possibly depend."

Thus, in my opinion their Lordships have directed the evidence to be recorded subject to plaintiff's right to object to its admissibility. They have further held that defendants' allegations have disclosed a charge of fraud in relation to matters antecedent to the deeds of the 4th March 1903. Further that as to this charge much of the evidence tendered would certainly be material: that the evidence of Ko Shwe Myaing is material and necessary on this point and that much if not all the evidence may be admissible with reference to the deeds of the 4th March 1903 notwithstanding the provisions of section 92.

Mr. Das for plaintiffs has objected to the admissibility of all the evidence with reference to the deeds of 4th March 1903 relying on the interpretation of section 92 by the Full Bench of this Court in *Maung Bin* v. *Ma Hlaing* (1). This ruling is binding on this Court and so far as this portion of the case is concerned I am of course compelled to follow it.

He denies its admissibility even on the charge of fraud though how this can be argued in the face of the decision of their Lordships I cannot quite understand. He argues that the documents Exhibits C and D which are the transfer to defendant by U Myaing and the certificate of sale granted to defendant when he purchased at the execution sale are out and out conveyances and that it is not open to defendant to lead evidence to show that they are or were intended to be

(1) 3 L.B.R., 100.

mortgages. In other words he argues as it seems to me that no fraud was alleged and none could be alleged by defendant as he could not be heard to plead that his title was anything but that of a full owner. This is merely arguing in a circle and moreover overlooks the question whether plaintiff's predecessor, Ko Shwe Pe, had knowledge of the real transaction between Ko Kyin and U Myaing.

I will now deal with the evidence. There are four parcels which I will refer to as A, B, C and D.

Exhibit 1 is an early mortgage by U Myaing to one Gilbert of C.

Exhibit 2 is a reconveyance of C by Gilbert to U Myaing and is dated 21st May 1895.

Exhibit 3 is a mortgage by U Myaing to Morrison at also 21st May 1895.

Exhibit C is what purports to be an out and out sale of C and D by U Myaing to defendants for Rs. 8,500 and is dated 30th November 1901.

Exhibit D is a Certificate granted after a Court sale of A and B to defendants and is dated 13th February 1902.

Exhibit A is what purports to be an out and out sale of A and B by defendants to U Shwe Pe and is dated 4th March 1903.

Exhibit B is the same as to C and D and of the same date.

Exhibit 4 is a release of his mortgage on C by Morrison to defendants, dated 20th May 1905.

Exhibit 5 is a transfer of the lands by defendants to a trustee to hold them for benefit of defendants and his heirs and to keep them free of encumbrances and is dated 18th November 1905.

Exhibit 6 is the sale of the equity of redemption in respect of A, B, C and D by U Myaing to defendant one, dated 20th November 1905. It recites that the property had been sold first to a chetty, then by him to defendant's son and lastly by the son to defendant.

Defendants allege that the result of these documents that was contemplated by the parties to them was that parcels C and D should be mortgaged to defendants by Exhibit C and A and B by the agreement made which was that defendants

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should pay up the amount of the decree then being executed and hold them on mortgage. Defendants bought parcels A and B at a Court sale and so nominally became full owners as they nominally did by the execution of Exhibit C as to parcels C and D. Mr. Das argues that defendants cannot now urge that these documents were mortgages and not sales and that being so plaintiffs were justified in treating them as such. But if plaintiffs or rather U Shwe Pe knew at the time Exhibits A and B were executed or when negotiations prior to execution were being carried on that they were not meant to be and had never been treated as sales then there was a fraud on U Myaing. If U Myaing consented to sales or if defendants colluded with U Shwe Pe nothing more could be said.

The question then is had U Shwe Pe notice of the facts.

Maung Kyin's evidence is not at all clear. He was I think confused and it is urged that the value of the land having gone up greatly he now seeks to get hold of it by pleading the sale to him was really a mortgage. However that may be he clearly states the facts as to these two documents. He declares he merely advanced money as a loan and the documents look these forms to prevent U Myaing encumbering the lands further. His evidence is supported by the statements of U Myaing and his daughter Ma Pwa O given in Civil Regular 16 of 1904 which I admitted under section 33 of the Evidence Act. U Myaing there states, "I have not sold this property to anyone but I have mortgaged it. I have never executed any sale deeds but only mortgages." And again "I have not mortgaged these lands which are mortgaged to Morrison to others. I have not yet sold the lands which I have mortgaged to Morrison." Again "I don't remember if I borrowed from Maung Kyin three years ago as I used to borrow from various places and pay off. I borrowed from U Shwe Pe to pay off Maung Kyin."

Ma Pwa O says the same. On being shown Exhibit C she says: "This land was mortgaged to Maung Kyin." And later —"The lands were mortgaged to Maung Kyin at 1½ per cent. per mensem. The interest being high we transferred the mortgage on to U Shwe Pe at one per cent. Maung Kyin's mortgage lasted for about five months only." There is also

other evidence. It was only a short time after defendants had acquired these lands if they did buy them that they passed them on to U Shwe Pe. They had paid Rs. 8,500 and Rs. 11,565-12-0 for them. They then sell them for Rs. 5,000 and Rs. 11,000. The Receipts, Exhibits 10 and 11, give the exact figures, Rs. 10,000 and Rs. 6,120. There is nothing to show the price of land had gone down and Maung Kyin was a rich man, so there seems no reason why he should part at a loss so soon. The figures suggest, moreover, that accounts had been made up and it is far more likely that something had been paid.

I think it must be held on this evidence that whatever the legal result may be U Myaing and Maung Kyin meant to act as debtor and creditor and not as vendor and vendee. Interest was fixed at 1½ per cent. per mensem. There is only oral proof of this it is true, but taking all the evidence there is and the probabilities as evidenced by their conduct, I am satisfied that they intended the transactions covered by Exhibits C and D should be mortgages and not sales.

That this is so is made clearer when we come to consider the evidence as to Exhibits A and B. The evidence I have referred to shows that U Myaing only contemplated a transfer of the mortgage from Ko Kyin to U Shwe Pe at a lower rate of interest. U Shwe Pe was related to U Myaing and was a rich man. Defendant did not particularly desire to keep the mortgage and it was after some negotiation settled that accounts should be made up and the mortgage transferred. The evidence is contradictory. For plaintiff Myat Tha Dun gives evidence. It is wholly unreliable. He had given evidence in the previous case and then said he had been present on four occasions at which negotiations took place and each time he had turned up by accident. The Court disbelieved so many accidents. Now he swears to one meeting only at which the proposal was made and accepted. This is obviously untrue. This was the only oral testimony and beyond it the statements of U Shwe Pe and On Gaing in Civil Regular No. 16 of 1904 only were tendered. I admitted them under section 33, Evidence Act. U Shwe Pe says: "This transaction was a sale and not a mortgage. I swear I did not advance the

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money on mortgage at one per cent., I have not received any interest. I never lend money so low as one per cent." The deed was executed about a year after negotiations were completed and as to this he said: "It was about a year after I had paid the money. Ko Kyin used to put me off from time to time. His wife would be ill or I would be busy and when we first went to the Registration his wife did not accompany us. That is how there was so much delay in getting a registered 'document.' He further says he heard Ko Kyin wanted to sell and he approached him. Rs. 16,000 was fixed and Rs.120 for expenses. Maung On Gaing gives brief evidence; he wrote the receipts and says the transaction was a sale and that Ko Kyin used not to get interest. There is besides this some evidence of tenants who say they paid rent to U Myaing until the 1905 deeds and after that they paid to Ko Kyin. For two months they paid U Shwe Pe's son the rent. The rents were very small and I do not think much reliance can be placed on this evidence either way.

On this evidence the balance of reliability seems to me to rest in favour of defendants and there is certain further documentary evidence which tells still further in 'defendants' favour. Exhibit 7 is a letter from U Myaing to defendant and informs him that as he would not make any reduction in the interest he had made arrangements with U Shwe Pe for interest at one per cent. and asks him to go and take his principal and interest and "have it transferred." Exhibit 8 is a letter from U Shwe Pe to defendant. In it he states that U Myaing's son-in-law had been to him and said that certain property had been made over to defendant for Rs. 3,600 who "will be able to give such assistance for three months only." That he (Shwe Pe) was asked to take over the properties outright "by paying the sum given out by U Kyin bearing interest at 1½ per cent. so that their position might be kept up." The letter goes on "As their is connexion in some way or other I intend taking them over as a temporary measure." He asks defendant if he can hand over the property and says: "If you can do this I think I would assist them by making a temporary loan." This letter speaks it is true of Ko Kyin as an absolute owner and asks whether he can make an outright transfer,

but read as a whole it is clearly an offer to take over a mortgage.

Exhibit 9 is a letter and its reply. It also bears out the above view.

I have referred to the sale if it was a sale by defendant being at a loss. Mr. Shircore has given evidence as to the value of these properties. Exhibits C and D show the price defendant paid was Rs. 20,065. Mr. Shircore says their value was Rs. 30,500. This makes it most improbable that defendant, who was a money-lender and a large landholder in Kemmendine and who therefore was almost certain to know the value of lands, would part with a bargain in the way he did if these transactions were sales.

There is lastly the fact that Shwe Pe did not get possession. The deeds, Exhibits A and B, were not executed for a year after the bargain was struck and even then Shwe Pe did not get possession. This does not look as if they were sales.

U Myaing was an old man, nearly 90. That he knew in what form the documents were drawn is unlikely. The evidence in my opinion taken as a whole coupled with the conduct of the parties shows that U Myaing and defendant meant their dealings resulting in Exhibits C and D to be mortgages. It is clear that U Myaing's object in the negotiations which resulted in Exhibits A and B was to transfer defendant's mortgage to his relative U Shwe Pe at a lower rate of interest and U Shwe Pe's letters show he knew this and agreed to take over a mortgage. If he deliberately got deeds of sale executed it was a gross fraud on U Myaing and the evidence is admissible to show this. He now endeavours to profit by his fraud or has since determined to try and get the property by taking advantage of the old Burmese custom of taking a sale deed where a mortgage only was contemplated. He cannot profit by this fraud.

I therefore hold that defendants were mortgagees only and that U Shwe Pe had notice of the fact. That Exhibits A and B were intended merely to effect a transfer of the mortgages and were treated as such. That oral evidence is not admissible under section 92 but is material as regards the fraud of which plaintiffs have been guilty. That plaintiffs are not therefore

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entitled to possession and the suit fails. It is dismissed with costs. Plaintiffs must also pay the costs of the previous hearings in this and in the Appellate Court.

JUDGMENT OF THE APPELLATE SIDE OF THE CHIEF COURT.

Civil 1st Appeal No. 92 of 1912.

August 3rd, 1914.

Ormond, J.—The documents, Exhibits A and B, purport to be deeds of sale of certain lands and are executed by the defendants in favour of U Shwe Pe (deceased) and his wife. The plaintiffs are the widow and the legal representatives of U Shwe Pe. The question in this appeal is whether the plaintiffs are entitled to the lands comprised in Exhibits A and B as owners, or whether they merely have a mortgage on those lands. The defendant's case is that, at the time of the execution of Exhibits A and B, they (the defendants) were merely mortgagees from one U Myaing the owner, although their documents of title, Exhibits C and D, were in the form of absolute sales: that Exhibits A and B were intended merely to transfer to U Shwe Pe and his wife the defendants' mortgages, and that all the parties concerned have in fact treated the transaction as such. Subsequently to the execution of Exhibits A and B the defendants have acquired the equity of redemption in these lands from U Myaing.

The case came before the Original Side of this Court on a former occasion when it was held that the defendants were precluded under a Full Bench decision of this Court (*Maung Bin* v. *Ma Hlaing*) (1) from shewing that these documents (Exhibits A and B) were not absolute conveyances. That decision was upheld in this Court on appeal; and on appeal to the Privy Council, Their Lordships remanded the case back to this Court for the question to be retried; and they directed that the rejected evidence should be heard subject to any objections that might be taken (2). Their Lordships refrained from expressing any opinion on the construction or application of section 92 of the Indian Evidence Act in relation to these documents, but they were of opinion that the case for the defendants disclosed a charge of fraud against the plaintiffs in relation to matters antecedent to these documents, *i.e.*, that the plaintiffs took absolute conveyances of property from the defendants with

(1) 3 L.B.R., 100.
(2) 9 L.B.R., 138.

notice that they in fact belonged to a third person, namely, the defendants' mortgagor. Their Lordships point out that section 92 does not prevent proof of a fraudulent dealing with a third person's property, or proof of notice that the property purporting to be absolutely conveyed, in fact belonged to a third person who was not a party to the conveyance. The matter has been retried, and the learned Judge on the Original Side has found, (i) that at the time when these documents, Exhibits A and B, were executed, the defendants to the knowledge of U Shwe Pe and his wife, were merely mortgagees; (ii) that it was intended by the parties, *i.e.* by U Shwe Pe, the defendants and U Myaing, that the mortgages held by the defendants should be transferred to U Shwe Pe and his wife; (iii) that it was unlikely that U Myaing knew in what form the mortgages were so transferred and that if U Shwe Pe deliberately got deeds of sale executed, it was a fraud on U Myaing. And the learned Judge held that the plaintiffs are mortgagees only. The defendants now appeal.

Apparently the learned Judge found that U Shwe Pe perpetrated a fraud upon U Myaing at the time of the execution of the documents, Exhibits A and B, and that U Myaing did not know the nature or contents of those documents. I do not think such finding is justified by the evidence, for Maung Kyin the defendant himself says: "I transferred the land to U Shwe Pe with the full knowledge and consent of Shwe Myaing and at his request, because to U Shwe Pe he had to pay less interest. It was only a transfer from my name to U Shwe Pe's name at U Myaing's request. Interest was not specified on that document. U Shwe Myaing knew that the document by which I was transferring the lands to U Shwe Pe was a deed of sale" and he says that the transfer was made in the presence of U Myaing. In my opinion it would be only natural for U Myaing, who had given mortgages to Maung Kyin in the form of sales, to have the transfer of these mortgages also effected in the form of sales. The defendant's case as I understand it, is not that U Shwe Pe fraudulently caused the transaction to be effected in the form of a sale or that any fraud was intended against U Myaing at the time of the transaction, but that U Shwe Pe having taken a transfer of a mortgage in the form of a sale with the concurrence of

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U Myaing (the owner and mortgagor) and of the defendants (the transferors), and U Shwe Pe having treated the transaction as a mortgage, it is fraudulent now on the part of his widow and representatives to come to Court and assert that the transaction was a sale. The fraud would be subsequent to the document.

Now, inasmuch as the defendants do not allege fraud or mistake, etc., at the time of the execution of Exhibits A and B, evidence as to the fact of their not being the owners of the property at that time, would be tendered in order to show that it was not intended to sell the property to U Shwe Pe : and such evidence would be inadmissible under the Full Bench ruling.

And it would not be sufficient for the defendants to shew that at the time of the execution of these documents they were only mortgagees ; for they have since acquired the equity of redemption from their mortgagor. The doctrine enunciated in section 43 of the Transfer of Property Act would apply ; and U Shwe Pe would be deemed to have acquired the full proprietary interest in the property under those documents, unless the defendants are allowed to shew (apart from fraud, mistake etc.,) that it was not so intended. Mr. Coltman for the defendants, contends that their Lordships of the Privy Council hold that because the defendants were not the owners at the time of the execution of Exhibits A and B, they are at liberty to shew (apart from fraud, mistake, etc.) that a different transaction was intended than what is expressed in those documents. But Their Lordships do not discuss the correctness of the Full Bench rulings ; and under that ruling, if the defendants had been the owners of the property, they would have been precluded from shewing (apart from fraud, mistake, etc., at the time of the excution of the documents) that a different transaction was intended. If the Privy Council judgment is to be read in this manner, different rules as to the admissibility of evidence would be applicable to a defendant who executes a conveyance, according as he had a good or bad title at the time of such conveyance.

According to the decisions as they now stand, I think the defendants in this case are precluded from shewing that the transaction was other than a sale.

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In view however of the directions given by their Lordships I will deal with the first two findings of the learned Judge upon the assumption that evidence relevant to such findings was admissible. The findings are:—that when the documents, Exhibits A and B, were executed, the defendants, to the knowledge of U Shwe Pe and his wife, were merely mortgagees and that it was intended by all the parties concerned that the defendant's mortgages only should be transferred to U Shwe Pe and his wife. Putting aside the evidence which has been admitted under section 33 of the Evidence Act, and which in my opinion is inadmissible, I think these findings are correct. There is the defendant's evidence referred to above; his evidence also shews that it was because U Shwe Pe was willing to take interest at Re. 1 per mensem from U Myaing, whereas he, the defendant, was taking interest at the rate of Rs. 1-8-0 per mensem, that the transfer was made and this is corroborated by Exhibit 7, U Myaing's letter to defendant. U Myaing remained in possession of most of the property until he transferred the equity of redemption to the defendant. The amount paid by defendant (in November 1901) in respect of the land, *viz.* Rs. 20,065-12-0, is said to be less than its then value, and the amount paid by U Shwe Pe in February and March 1902, *viz.* Rs. 16,120, was still less and there is no evidence that there was any fall in the value of land during those three months. Defendant says that Rs. 3,500 had been paid off by U Myaing.

U Shwe Pe's two letters to defendant, Exhibits 8 and 9, and defendant's letter to U Shwe Pe (which does not seem to be marked as an Exhibit but is next to Exhibit 9 in the record) shew I think clearly that both parties treated the land as U Myaing's and that U Shwe Pe was merely taking over defendant's mortgages in the land, when he took the two receipts, Exhibits 10 and 11.

The evidence which has been admitted under section 33 of the Evidence Act are the depositions in a former suit of U Myaing (who died four or five years ago) and of his daughter Ma Pwa O which were put in by Mr. Giles for the defendants but objected to by Mr. Das; and the deposition of U Shwe Pe in the same suit which was put in by Mr. Das for the purpose of contradicting the other two depositions. The former suit was

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brought by Munnee on 5th February 1904 against U Myaing, Morrison, U Shwe Pe and others, for specific performance of a contract made by Morrison (U Myaing's Attorney and Mortgagee) with Munnee for the sale of land which comprised some of the land in this suit. Defendant was not a party to that suit. U Myaing alleged that the transactions evidenced by the documents Exhibits A, B, C and D were in fact mortgages and U Shwe Pe alleged that they were sales. An issue was raised as to whether they were mortgages or sales, and it was decided that they were mortgages. On appeal it was held that the contract was not binding on U Myaing and that the above issue was therefore superfluous. It is unnecessary I think to decide whether the words "questions in issue" in section 33 would include a question raised in a wholly superfluous or irrelevant issue. But it was the common case of U Shwe Pe and U Myaing that U Shwe Pe acquired the defendant's title as at the time of the execution of Exhibits A and B and no more; it was an issue therefore between the defendant's predecessor in title and the defendant's successor in title and both may equally be said to be the representative of defendant in interest. The same question was raised in both suits, *viz.* what was the interest in the land which defendant acquired under Exhibits C and D from U Myaing and transferred to U Shwe Pe under Exhibits A and B? U Myaing in the previous suit set up the same case against U Shwe Pe that the defendant does in this suit, but that would not make U Myaing the defendant's representative in interest. The defendant having transferred his interest to U Shwe Pe admittedly had no interest in the land at the time of the previous suit, and so far as the present suit is concerned, he has not acquired any interest in the land since. The fact that he has subsequently acquired the equity of redemption from U Myaing forms no part either of the plaintiff's or defendant's case. The plaintiff rests his case upon the documents, Exhibits A and B, and if the defendant is allowed to adduce evidence to shew, and succeeds in shewing, that those documents were intended to effect a transfer of mortgages only, section 43 of the Transfer of Property Act would not avail the plaintiff. The plaintiff brings this suit against the defendant simply because the defendant happens to

be in possession of the greater portion of these lands. The issue between U Myaing and U Shwe Pe in the former suit must therefore be taken to be an issue either between two representatives in interest of the defendant or an issue between persons neither of whom represented any interest of defendants. And section 33 of the Evidence Act does not apply.

Mr. Coltman for the defendant urged before us that there was evidence on the record to shew that U Shwe Pe subsequently, in execution of a decree against U Myaing, attached a portion of the land which had been conveyed to him under Exhibit B. This evidence is to be found in the deposition of U Shwe Pe in Munnee's case in which he denies having attached land which he had already bought, but reference is made to a plot of land marked E in the plan marked P in that suit as the land attached, and Mr. Coltman refers us to the execution proceedings under which that attachment was made. Those execution proceedings were not put in evidence in that case, though they were referred to by the Judge in his notes of the evidence as (Civil Regular No. 78 of 1902—Civil Execution No. 64 of 1903) and they have not been put in evidence in this case. At the hearing, the fact that U Shwe Pe attached part of the land which he alleges he had previously bought, formed no part of the defendant's case. In my opinion there is no evidence of that fact even if U Shwe Pe's deposition was rightly admitted in evidence. And we should not be justified at this stage to refer to those execution proceedings in order to ascertain the boundaries of the land which was attached.

My view of the case then, is shortly this:—The defendants do not allege any fraud on the part of U Shwe Pe at the time of or antecedent to the execution of Exhibits A and B, either against U Myaing or against the defendants. That being so, the defendants are precluded by the Full Bench ruling from shewing that the transaction evidenced by Exhibits A and B was a transfer of mortgages and not outright sales. And they are precluded from shewing that at the time of these documents they (the defendants) were in fact only mortgagees, because such evidence would be relevant only for the purpose of shewing that at the time of the execution of Exhibits A and B, it was intended that the transaction should be a transfer of the

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defendant's mortgages. If however evidence is admissible for the purpose of shewing what was the real transaction, the facts (apart from the evidence which has been admitted under section 33 of the Evidence Act), would clearly shew that the parties concerned, *viz.* U Myaing, defendant Maung Kyin and U Shwe Pe, all intended that U Shwe Pe and his wife should take a transfer of the defendant's mortgages in the form of outright sales.

I would therefore allow this appeal and decree the plaintiff's claim for possession and mesne profits which should be ascertained in the ordinary way. The plaintiffs-appellants should have their costs in all the proceedings in this Court both on the Original and Appellate Sides.

Hartnoll, J.—As ordered by Their Lordships of the Privy Council (1) evidence has now been recorded as to what happened prior to the execution of the deeds, Exhibits A and B, and with the same object certain evidence taken in Civil Regular No. 4 of 1904 of this Court has been admitted under the provisions of section 33 of the Evidence Act. It has been objected that evidence of the latter class has been wrongly admitted. In that suit an issue was fixed as to whether the conveyances of the 30th November 1901 and the 4th March 1903 were merely by way of mortgage, and evidence was recorded on the point. U Myaing in that suit asserted that they were only intended to operate as mortgages while it was U Shwe Pe's and Ma Shwe La's case that they were intended to be outright sales. On appeal it was held that the issue was superfluous. Maung Kyin was not a party to that suit. The first point is whether the earlier proceeding was between the same parties or their representatives in interest as the parties in the present suit. The issue was between U Myaing on the one side and Maung Shwe Pe and Ma Shwe La on the other; in this suit the same issue is raised between Maung Kyin on the one side and Ma Shwe La and the legal representatives of Maung Shwe Pe on the other. For the purpose of section 33 of the Evidence Act, should it be held that U Myaing was a representative in interest of Maung Kyin in the earlier suit? U Myaing at the time of the former suit was the owner of the lands. Maung Kyin became their owner in U Myaing's place on the 20th November 1905.

(1) 9 L.B.R., 138.

as by Exhibit 6 which has been admitted in evidence he then purchased the equity of redemption. In such circumstances as U Myaing was his predecessor in title I think it is reasonable to hold that he was his representative in interest for the purpose of section 33 of the Evidence Act. It was also objected that the words "questions in issue" in the third proviso to section 33 of the Evidence Act do not include a superfluous issue. The words themselves do not say so, and having regard to the principle underlying section 33, I would not uphold the objection. I would hold therefore that the evidence admitted under the provisions of section 33 was rightly admitted. Looking at the evidence as a whole I see no reason to differ from the conclusions arrived at by my learned colleague who is hearing this appeal with me and by the learned Judge on the Original Side that the conveyances of the 30th November 1901 and 4th March 1903 and the sale certificate Exhibit D, were intended to operate as mortgages. It is unnecessary for me to go into the evidence again in detail. I would however mention that in Exhibit 10 the receipt given by U Kyin to Maung Shwe Pe, the pucca building and its site is stated as belonging to U Myaing. If the sale certificate was not meant to operate as a mortgage, why were these words put in? I would also say that the witness, Shircore's evidence, seems to me to be to the effect that the properties in dispute were not worth more in his opinion than the sums entered in Exhibits C and D. The correct area of the garden land seems to be 2·57 acres and not 4 acres 1 anna. Some of the garden land seems to have been taken by the railway. He however says that there was no deterioration in the value of land between November 1901 and 1903, and if so it is difficult to understand why what was bought by Maung Kyin in November 1901 for Rs. 8,500 should have been sold by him a few months later for Rs. 5,000. The difference in the consideration between that stated in Exhibits C and B strongly supports Maung Kyin's case. Again there is the fact that Maung Shwe Pe and his representatives did not have possession of the lands except as to one parcel between about February 1902 when the transaction took place and December 1905 when this suit was brought and in the interim took no steps to enforce possession. It must be remembered that according to Shircore the boom

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began in 1904, and it may be that it was the enhancement in the price of the lands led to this claim. The earlier suit was launched in February 1904 and Shircore says that Courts have held that the boom began in 1903. The boom may have led to the line of defence taken by Maung Shwe Pe and Ma Shwe La in the earlier suit.

As regards the contention that Maung Shwe Pe attached a portion of the land he claims to have purchased, I am unable to find this proved from his deposition and the execution proceedings in which it was attached not having been put into evidence cannot in my opinion be referred to.

The next point for consideration is whether there has been proved to have been any fraudulent dealings by Maung Shwe Pe and Ma Shwe La antecedent to the execution of the conveyances of the 4th March 1903. The burden of proof lies on Maung Kyin to prove such, and I am unable to see that he has done so. If it could be proved, that without Maung Myaing's knowledge and in order to cause him loss the conveyances were made in the form of outright sales instead of in the form of mortgages then it might be held that a fraud was perpetrated on Maung Myaing but Maung Kyin's own evidence does not support such a conclusion. His story is that conveyances were taken in the form of sales so that Maung Myaing could not mortgage the lands to others, and that the transfers were made to Maung Shwe Pe as he was satisfied with a lesser rate of interest. At page 15 of his evidence he says that U Myaing knew that the document by which he was transferring the lands to U Shwe Pe was a deed of sale and he says the same thing again at page 19 of his evidence. U Myaing had agreed to the same procedure before when he transferred the lands to Maung Kyin. Again at page 18 of his evidence U Kyin says that, when he agreed with U Shwe Myaing and U Shwe Pe to take his money and transfer the property to U Shwe Pe, the understanding was that the document was to be of the same nature as his document. It is true that at page 19 of his evidence he endeavours to make out U Shwe Myaing did not know what form the document took: but it is clear that on a full consideration of U Kyin's evidence that Maung Myaing agreed to the conveyances to Maung Shwe Pe being in the

form of sales and the reason seems to have been in order to prevent him mortgaging the lands to others. It cannot therefore be said that the conveyances were drawn as absolute sales without his concurrence and knowledge, and behind his back. The only way in which it could be said that Maung Shwe Pe and Ma Shwe La had a fraudulent intention would be if it could be held to be proved that they had it in their minds at the time they took the conveyances to misuse them and to use them to support a fraudulent claim in due course. If they had a dishonest mind at the time, U Myaing and Maung Kyin could not possibly know that they had, if they kept their thoughts and intentions to themselves. But bearing in mind that the burden of proof lies on Maung Kyin, can it be inferred from the evidence that Maung Shwe Pe and Ma Shwe La had such a wrongful intention when they took the conveyances? Maung Kyin explains how they could have taken without any such dishonest and concealed intention at the time. The reason was that U Myaing should not be able to mortgage the lands to others. The intention to misuse the conveyances may have come to their minds long after execution and may have been due to the boom in land that occurred. I am therefore unable to hold proved that there was any fraudulent intention on the part of Maung Shwe Pe and Ma Shwe La at the time of, or prior to, the execution of the conveyances, Exhibits A and B.

Therefore according to the provisions of section 92 of the Evidence Act as interpreted by the decision of this court in the Full Bench ruling of *Maung Bin* v. *Ma Hlaing* (1) oral evidence is not admissible to vary their contents. Their Lordships have expressly not considered as yet the correctness or otherwise of this ruling.

With regard to the claim of Maung Kyin that redemption should not be allowed without first paying the sum due on the mortgage of the 21st May 1895, Maung Kyin allows that when he conveyed the lands to Maung Shwe Pe and Ma Shwe La he knew of the mortgage to Morrison. It is true that in portions of his evidence U Kyin endeavours to make out that the land mortgaged to Morrison was other than that mortgaged to him:

(1) 3 L.B.R., 100.

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but looking at his evidence as a whole it is proved to my mind that he knew that the land mortgaged to Morrison was a portion of that mortgaged to him before his transactions with U Shwe Pe. I would especially refer to pages 17 and 18 of his evidence. The principle enunciated in section 43 of the Transfer of Property Act therefore comes into operation.

I therefore concur in the order proposed by my learned colleague.

Privy Council Appeal No. 126 *of* 1915.

July 26th, 1917.

THE JUDGMENT OF THEIR LORDSHIPS OF THE PRIVY COUNCIL DELIVERED ON THE 26TH JULY 1917.

Lord Shaw.—This is an appeal originally brought by the defendants Maung Kyin, since deceased, and Maung Kyaw, from a judgment and decree of the Chief Court of Lower Burma in its Civil Appellate Jurisdiction, dated the 3rd August 1914, reversing the judgment and decree of the Chief Court in its Civil Original Jurisdiction, dated the 17th June 1912. The matters in suit between the parties have, on a former occasion, formed the subject of an appeal to this Board. The judgment upon that appeal was pronounced on the 11th July 1911, and is reported in 38 Indian Appeals, p. 146 (1). The meaning and effect of that judgment will be presently referred to.

The property which is the subject of the appeal consists of four different parcels of land situated in Kemmendine, a suburb of Rangoon. The facts of the case may be briefly stated thus: The owner of these plots of land was one Ko Shwe Myaing. On the 30th November 1901, Myaing having borrowed from Maung Kyin and Ma Ngwe Zan, his wife, 8,500 rupees, to bear interest at Re. 1-8 per cent. per month, granted an out-and-out conveyance of two of these properties, which may be called (*a*) and (*b*), in favour of Kyin and his wife. No possession passed; interest was paid by Myaing and repayment of the loan to the extent of 3,500 rupees was also made. This left an unpaid balance of 5,000 rupees. On the 4th March 1903, Kyin and his wife obtained payment of this sum from U Shwe Pe and his wife, and conveyed the properties (*a*) and (*b*) to the latter.

There were two other plots of land, which may be called (*c*) and (*d*). Kyin and his wife on the 13th February 1902, having advanced 11,565 rupees, purchased these properties

(1) 9 L.B.R., 138.

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which then also belonged to Myaing, by public auction. No possession passed. On the 4th March 1903, Kyin and his wife transferred these properties to Shwe Pe and his wife in consideration of a payment of 11,000 rupees, 565 rupees having in the meantime been paid by Myaing. The state of matters accordingly was that, on the date last mentioned, namely, the 4th March 1903, U Shwe Pe and his wife became by *ex facie* absolute conveyances from Kyin and his wife vested in all the properties in suit.

Myaing was no party to these later transactions, but there is some correspondence showing that his part in the transaction was that he was desirous of having, and he obtained the benefit of, a reduction in the rate of interest from Re. 1-8 per cent. per month to Re. 1 per cent.

Then, on the 20th November 1905, Myaing conveyed to the Kyins his equity of redemption. The footing upon which this deed was granted was manifestly that Myaing, notwithstanding the absolute conveyances, still considered himself as only having granted mortgages over his property, and having therefore an equity of redemption thereon, which he was free to dispose of.

U Shwe Pe having died, his widow and children brought this suit for possession of the lands, it being directed against Kyin and his wife. They resist possession being given, and maintain in substance that, although the conveyances to U Shwe Pe and his wife bear to be absolute in form, it was well known to them that the true nature of the transaction was one of mortgage upon the security of the properties. In particular, it is maintained that Shwe Pe and his wife knew that Kyin and his wife, who purported to grant the conveyance in absolute terms, were not in fact the owners of the property, but themselves only lenders thereon. This is an important consideration, as will afterwards appear, because it amounts to this: that the transfer, although *ex facie* of the deeds absolute in form, was in truth and to the knowledge of both parties a transfer *a non domino*. The dominus was Myaing, who was not a grantor. In short, the Kyins were purporting to sell and the Shwe Pes purporting to buy what both the nominal sellers and buyers knew to belong to somebody else.

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When the matters in dispute were before this Board upon a former occasion, it was decided that evidence upon the topics above mentioned could be received, but no final judgment was given as to the effect to be given to such evidence after its reception.

The proof having been taken, Their Lordships are now in possession of the facts and of concurrent findings upon the most important of these. It may be well to note how this stands. The learned Judge of the Chief Court (Original Civil Jurisdiction) puts the matter thus :—

"The evidence in my opinion taken as a whole, coupled with the conduct of the parties, shows that U Myaing and defendant meant their dealings resulting in Exhibits C and D to be mortgages. It is clear that U Myaing's object in the negotiations, which resulted in Exhibits A and B, was to transfer defendant's mortgage to his relative U Shwe Pe at a lower rate of interest, and U Shwe Pe's letters show he knew this and agreed to take over a mortgage. If he deliberately got deeds of sale executed, it was a gross fraud on U Myaing, and the evidence is admissible to show this. He now endeavours to profit by his fraud or has since determined to try and get the property by taking advantage of the old Burmese custom of taking a sale deed where a mortgage only was contemplated. He cannot profit by this fraud.

"I therefore hold that defendants were mortgagees only and that U Shwe Pe had notice of the fact."

Upon appeal in the Chief Court (Civil Appeal) the learned Judges held:

"If, however, evidence is admissible for the purpose of showing what was the real transaction; the facts (apart from the evidence which has been admitted under section 33 of the Evidence Act) would clearly show that the parties concerned, *viz.* U Myaing, defendant Maung Kyin and U Shwe Pe, all intended that U Shwe Pe and his wife should take a transfer of the defendant's mortgages in the form of outright sales."

Upon the non-admissibility of the evidence reliance is placed by the respondents upon section 92 of the Indian Evidence Act of 1872. It provides that when the terms of a contract, grant, or disposition are reduced to writing "no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to or subtracting from its terms." The first proviso is to the effect that "any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto; such as fraud . . . ., want of failure of consideration, or mistake in fact or law."

Founding upon this section, the respondents maintain that the whole of the evidence led must be rejected. On the contrary, the appellants maintain that, notwithstanding the terms of the section, they are entitled to set up and prove the acts and conduct of the parties as inconsistent with the transfer of property and only consistent with the true nature of the transaction having been one of mortgage or transfer of mortgage. They found upon a considerable body of authority to that effect, the cases cited being *Baksu Lakshman* v. *Govinda Kanji and another* (1), *Hem Chunder Soor* v. *Kally Churn Das* (2), *Rakken and another* v. *Alagappudayan* (3), *Preonath Shaha* v. *Madhu Sudan Bhuiya* (4), *Khankar Abdur Rahman* v. *Ali Hafez and others* (5), *Mahomed Ali Hoosein* v. *Nazar Ali and others* (6). The judgment of Mr. Justice Melville in the first of these cases is repeatedly founded upon in the course of the series, in which that learned Judge expressly followed the English equity doctrine as expressed in *Lincoln* v. *Wright* (7) by Lord Justice Turner thus :—

"The principle of the Court is that the Statute of Frauds was not made to cover fraud. If the real agreement in this case was that as between plaintiff and Wright, the transaction should be a mortgage transaction, it is, in the eye of this Court, fraud to insist on the conveyance as being absolute, and parole evidence must be admissible to prove the fraud."

In the opinion of Their Lordships, this series of cases definitely ceased to be of binding authority after the judgment of this Board pronounced by Lord Davey in the case of *Balkishen Das and others* v. *Legge* (8). It was there held that oral evidence was not admissible for the purpose of ascertaining the intention of parties to written documents. Lord Davey cites section 92 of the Indian Evidence Act, and adds :—

"The cases in the English Court of Chancery which were referred to by the learned Judges in the High Court have not, in the opinion of Their Lordships, any application to the Law of India as laid down in the Acts of the Indian Legislature. The case must therefore be decided on a consideration of the contents of the documents themselves, with such extrinsic evidence of surrounding circumstances as may be required to show in what manner the language of the document is related to existing facts."

Notwithstanding the decision of this Board, however, a certain conflict of authority on the subject still remains in

(1) (1880) I.L.R. 4 Bom., 594,
(2) (1883) I.L.R. 9 Cal., 528.
(3) (1892) I.L.R. 16 Mad., 80.
(4) (1898) I.L.R. 25 Cal., 603.
(5) (1900) I.L.R. 28 Cal., 256.
(6) (1901) I.L.R. 28 Cal., 289.
(7) (1859) 4 DeG. & J., 16.
(8) (1899) 27 I.A., 58.

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India. But the respondents rightly refer to *Achutaramaraju and another* v. *Subbaraju* (9), *Maung Bin* v. *Ma Hlaing* (10), and *Dattovalad Totaram* v. *Ramchandra Totaram and another* (11), and in particular to the judgment of Chief Justice Jenkins in the last case. In these the judgment of the Board, as pronounced by Lord Davey, has been rightly followed and applied.

The principles of equity which are universal forbid a person to deal with an estate which he knows that he holds in security as if he held it in property. But, to apply the principles, you must be placed in possession of the facts, and facts must be proved according to the law of evidence prevailing in the particular jurisdiction. In England the laws of evidence, for the reasons set forth in *Lincoln* v. *Wright* and other cases, permit such facts to be established by a proof at large, the general view being that, unless this were done, the Statute of Frauds would be used as a protection or vehicle for frauds. But in India the matter of evidence is regulated by section 92 of the Indian Evidence Act, and it accordingly remains to be asked, What is the evidence which under that statute may be competently adduced? The language of the section in terms applies and applies alone "as between the parties to any such instrument or their representatives in interest." Wherever accordingly evidence is tendered as to a transaction with a third party, it is not governed by the section or by the rule of evidence which it contains, and in such a case accordingly the ordinary rules of equity and good conscience come into play unhampered by the statutory restrictions.

Their Lordships view the case accordingly as having been dealt with on that footing by their predecessors at the Board. Thus, while in the course of the judgment of Lord Robson reference was made to evidence which might be taken "relating to the acts and conduct of the parties as distinguished from oral evidence and conversations constituting in themselves some agreement between them," nothing was decided upon that head, except that it would give rise to important and difficult questions under the Indian Evidence Act. That question

(9) (1901) I.L.R. 25 Mad., 7. (10) (1905) 3 L.B.R., 100.
(11) (1905) I.L.R. 30 Bom., 119.

has now been settled by their Lordships, adversely to the reception of the evidence.

But the later passage of the judgment of Lord Robson is upon a topic much more crucial to the situation which the facts proved in the case admittedly disclose:—

"Their Lordships," said he, "however, are of opinion that the case for the appellants disclosed a charge of fraud against the respondents in relation to matters antecedent to those deeds, on which much of the evidence tendered would certainly be material. Thus it is said that the respondents, or the persons under whom they claim, took absolute conveyances of property from the appellants with notice that they in fact belonged to a third person, namely, the alleged mortgagor, Ko Shwe Myaing. If this be so, section 92 of the Indian Evidence Act, even if construed according to the respondents' contention, will not avail them. It is applicable to an instrument 'as between the parties to any such instrument or their representatives in interest,' but it does not prevent proof of a fraudulent dealing with a third person's property, or proof of notice that the property purporting to be absolutely conveyed in fact belonged to a third person who was not a party to the conveyance."

Upon the facts it now turns out quite plainly, and it was, indeed, admitted in argument that, when Shwe Pe took the conveyance from the Kyins, he knew that it was a conveyance of property which belonged to Myaing, and that accordingly the grant proceeded *a non domino*. If section 92 applied, proviso 1 would seem to be in point, because it would be a fraud to insist upon a claim to property arising under such a transaction, the claimant knowing that the true owner had never parted with it. But, in the opinion of their Lordships, section 92 does not apply, because the evidence, the admissibility of which is in question, is evidence going to show what were the rights of a third person, namely Myaing in the property, and there are concurrent findings to the effect that the property, was in that owner and not in the Kyins, who to the knowledge of Shwe Pe never purported to dispose of it as theirs. If a purchaser for onerous consideration and without notice had been the grantee under a deed of absolute conveyance, a totally different set of considerations would have arisen. In the present case, however, both grantor and grantee were dealing with the property of an owner who was a third person, who was not in the language of the statute either a party to the instrument or a representative in interest of a party to the instrument. The evidence led as to that third party's rights is admissible, and, if admissible, is most relevant. Their Lord-

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ships do not hold any doubt upon the subject of fact, in that respect entirely agreeing with all the Courts below. It is true that the Court of Appeal felt precluded by the terms of section 92 of the Evidence Act from agreeing with the Judge of the Chief Court, but in the opinion of the Board the section is, in the important particular last dealt with, no bar to the admission of the light on the true situation of the case.

Their Lordships will accordingly humbly advise His Majesty that the appeal be allowed, the decree of the Chief Court in its appellate jurisdiction, dated the 3rd August 1914, set aside with costs, and the decree of the Chief Court in its original jurisdiction restored.

The respondents will pay the costs of the appeal.

JUDGMENT OF THEIR LORDSHIPS OF THE PRIVY COUNCIL DELIVERED ON THE 11TH JULY 1911, REMANDING THE CASE TO THE CIEF COURT.

(Before Lord Macnaghten, Lord Robson, Sir Arthur Wilson and Mr. Ameer Ali.)

July 11th, 1911.

Lord Robson.—The appellants are defendants in this action which was brought by the respondents in the Chief Court of Lower Burma on its Original Civil Side. Judgment was there given in favour of the respondents, and was affirmed on appeal to the Court on its Appellate Side.

The action was brought to recover possession of certain parcels of land which may be conveniently referred to as the first, second, third, and fourth hereditaments. The respondents claimed under certain deeds which purported to be absolute conveyances, but which the appellants contended were meant to be, and had always in fact been, treated by all the parties concerned as mortgages only, and they tendered evidence of the acts and conduct of the parties to that effect. This evidence was excluded by the Courts below under section 92 of the Indian Evidence Act, 1872, and the principal question arising on this appeal is whether or not that evidence was properly rejected.

The respondents also claimed that the Appellants were bound under the covenants for title contained in the conveyance

they had executed in favour of the respondents, to discharge a mortgage existing on the premises at the time of the conveyance.

On the 21st May 1895 Ko Shwe Myaing owned all the properties in question and he mortgaged the first hereditaments (with certain other properties not in dispute) to one Morrison for 12,000 rupees. On the 30th November 1901 he executed, what purported to be an absolute conveyance of the first and second hereditaments to the appellants for the sum of Rs. 8,500 saying nothing in the conveyance about the mortgage to Morrison. The appellants allege that this document, though in form a conveyance, was in truth a mortgage, and that possesion of the property was retained by Ko Shwe Myaing who paid various sums by way of interest on the alleged purchase money, and in part repayment of the principal sum showing, as they contend, that it was merely a loan.

Early in 1902 the third and fourth hereditaments were sold under an order of the Court in an action by one Miller against Ko Shwe Myaing. They were purchased by the appellants for Rs. 11,565, and a certificate of the sale was accordingly given by the Court to the appellants. With regard to this transaction the appellants contend that it also was in substance a mortgage and that Ko Shwe Myaing remained in possession until the 20th November 1905 when he executed a deed purporting to transfer the equity of redemption in all the said properties to the appellants absolutely.

On the 4th March 1903, by two instruments of conveyance of that date, the appellants purported to convey the beforementioned four sets of hereditaments to U Shwe Pe and his wife Ma Shwe La. The consideration money for the first and second hereditaments was stated as being 5,000 rupees, and for the third and fourth hereditaments as 11,000 rupees. The appellants allege that U Shwe Pe and Ma Shwe La knew that they, the appellants, were mortgagees merely, and that the supposed purchase moneys for the properties were simply the amounts of the mortgage debts outstanding, they having been to some extent reduced by repayments of principal, so that the deeds in question were in truth mere transfers of mortgages, and not absolute conveyances. The deeds of the 4th March

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1903 were not followed by possession on the part of the Respondents except as to the fourth hereditaments, possession of which was, according to the appellants, taken by the respondents on the terms that they, the respondents, should account for the rents and profits against interest at a reduced rate in respect of the mortgage debts.

In the month of December 1903, the said U Shwe Pe, as the holder of a decree against the said Ko Shwe Myaing, took proceedings to attach the first hereditaments, and, in order to preserve them from execution, the appellant, Maung Kyin, at the request of Ko Shwe Myaing, paid U Shwe Pe the amount of his execution debt. Of course a transaction of this kind, if proved, was clearly inconsistent with the respondents' contention that U Shwe Pe had become the owner of these premises by the deed of the 4th March 1903, and would go to establish the contention of the appellants that that deed was only a transfer for a mortgage.

On the 29th May 1905, Morrison's mortgage was transferred to trustees on behalf of the appellants, and was expressly kept alive by the terms of the said Indenture of the 20th November 1905, under which Ko Shwe Myaing purported to convey the equity of redemption to the appellants absolutely. The appellants entered into possession of the first, second, and third hereditaments under the conveyance of 1905, and the respondents brought this action against them on the 20th December 1905 to have it declared that they, the respondents, were absolute owners of the hereditaments in question. U Shwe Pe had, in the meantime, died, and the action was maintained by his widow and legal representatives.

The appellants at the trial sought to prove—(1) that the value of the hereditaments far exceeded the amount of the sums specified as the consideration moneys in the conveyances; (2) that interest was paid on those moneys and that they were in part repaid, thus showing that they were loans only; (3) that U Shwe Pe and Ma Shwe La were well aware of this, and knew (as shown by negotiations between themselves and Ko Shwe Myaing as well as the appellants) that the documents of the 30th November 1901 and 13th February 1902, under which the appellants claimed and the benefit of which they transferred

to U Shwe Pe and Ma Shwe La, were mortgages only; (4) that possession of the hereditaments remained with the alleged vendors; and (5) that after the alleged sale to U Shwe Pe and Ma Shwe La, of the 4th March 1903, U Shwe Pe himself treated the property as belonging to the alleged mortgagor, Ko Shwe Myaing, and attached a portion of it in execution of a decree against him or his wife.

The evidence which the appellants thus proposed to tender was described in general terms, and their Lordships have not the advantage of dealing with it in the form of questions specifically put and argued. So far, however, as it is still pressed, it, no doubt, consisted only of evidence relating to the acts and conduct of the parties as distinguished from evidence of oral statements and conversations constituting in themselves some agreement between them. Its object was to show that whatever the terms of the documents may have been, none of the parties had acted on them as effecting an absolute sale, but that through a long course of mutual dealings materially affecting their respective positions, they had always treated the business between them as one of loan secured by mortgage.

This may give rise to important and difficult questions under section 92 of the Indian Evidence Act, which provides that when the terms of any contract required by law to be reduced to the form of a document (and sales or mortgages of land are, by sections 54 and 58 of the Transfer of Property Act, 1882, included among such contracts), "no evidence of "any oral agreement or statement shall be admitted, as "between the parties to any such instrument or their represen- "tatives in interest, for the purpose of contradicting, varying, "adding to, or subtracting from, its terms."

The case has been argued before Their Lordships as though the questions in dispute turned entirely on the construction of this section as applied to the deeds of the 4th March 1903 under which the respondents claim. Their Lordships, however, are of opinion that the case for the appellants disclosed a charge of fraud against the respondents in relation to matters antecedent to those deeds, on which much of the evidence tendered would certainly be material. Thus it

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is said that the respondents, or the persons under whom they claim, took absolute conveyances of property from the appellants with notice that they in fact belonged to a third person, namely, the alleged mortgagor, Ko Shwe Myaing. If this be so, section 92 of the Indian Evidence Act, even if construed according to the respondents' contention, will not avail them. It is applicable to an instrument "as between the "parties to any such instrument or their representatives in "interest," but it does not prevent proof of a fraudulent dealing with a third person's property, or proof of notice that the property purporting to be absolutely conveyed in fact belonged to a third person who was not a party to the conveyance. The evidence of Ko Shwe Myaing is of course material and necessary on this point, and their Lordships after giving to this case very careful consideration, and without at present expressing any opinion on the construction or application of section 92 of the Indian Evidence Act in relation to the deeds of the 4th March 1903, think that the rejected evidence should be heard, subject, to any objections the respondents may be advised to take. The Court will then be in a position to deal hereafter (if it should become necessary) with the admissibility of the evidence in relation not only to the deeds of the 4th March 1903, but also in relation to the questions that may arise in connection with the alleged knowledge or conduct of the parties antecedent to the execution of those deeds and upon which their validity may possibly depend.

The claim of the respondents to have the mortgage existing on the premises at the time of the conveyance, discharged by the appellants will be dealt with, if necessary, after the case has been reheard.

Their Lordships will therefore humbly advise His Majesty that this action be referred to the Chief Court of Lower Burma for a new trial. The respondents must pay the costs of this appeal. The other costs will abide the result of the new trial and will be dealt with by the Chief Court.

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

Civil 1st Appeal No. 158 of 1915.

February 1st, 1917.

KHOO E KHWET AND SEVEN OTHERS v. MANIGRAM JAGANATH FIRM.

C. R. Connell—for Appellants.
Bilimoria—for Respondents.

Delivery order—Document of title—Negotiability—Indian Contract Act (IX of 1872), sections 108 and 178.—Transfer of Property Act (IV of 1882), section 137—Estoppel,

A, a rice miller, sold to B, a dealer in rice 660 bags of boiled rice under two contracts in form usual in the trade. On the 17th February B paid for the rice and obtained from A two receipted bills and a delivery order on the latter's godown-keeper. The delivery order was expressed to be subject to the terms of the two contracts and directed delivery to be given to B, or bearer. The goods were ascertained and were the property of B in the custody of A. Later on, the same day, B (being then in possession of the delivery order) obtained delivery of the goods from A's godown without giving up the delivery order, saying he would return it the next day. On the 22nd February B fraudulently obtained from the plaintiff an advance of money equal to the value of the goods covered by the delivery order on the pledge of the two receipted bills and the delivery order; and in May it became known that he had absconded. The plaintiff thereupon sued A to recover the amount advanced to B on the pledge of the documents abovementioned, and obtained a decree.

Held, on appeal,—applying the test laid down in *Ramdas Vithaldas Durbar* v. *S. Amerchand & Co.* (1916) 20 C.W.N., 1182 that the delivery order must be taken to be a document showing title to goods and that the law governing its transferability is the same as the law which governs the transferability of goods themselves and (apart from any question of estoppel) is to be found in the Indian Contract Act, sections 108 and 178 and the Transfer of Property Act, section 137.

Held, further—that the delivery order is not a negotiable instrument.

Per Ormond J.—A document is a "negotiable instrument" or has the element of "negotiability" properly so-called if and only if by the custom of the money market it is transferable *as if it were cash.*

A delivery order not being a negotiable instrument is exhausted when once delivery had been given to the person entitled. The delivery order issued by A to B purported to be a document of title to certain specific goods belonging to B in the custody of A which were deliverable under certain contracts, but when the plaintiff acquired this title the goods had ceased to exist and there was no title to any goods left in B. The plaintiff therefore acquired no title.

As to estoppel, the maker of a document which is transferable by delivery is not estopped from denying that it is a negotiable instrument either at law or by custom.

Ramdas Vithaldas Durbar v. *S. Amerchand & Co.* (1916) 20 C.W.N., 1182 followed.

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Gurney v. *Behrend*, (1854) 23 L.J.Q.B., 265 at 271; *London Joint Stock Bank* v. *British Amsterdam Maritime Agency*, (1910) 16 Com. Cas., 102 at 105; *France* v. *Clark*, (1884) L.R. 26 Ch. D. 257 at 264; *The Fine Art Society, Ltd.*, v. *The Union Bank of London, Ltd.*, (1886) L.R. 17 Q.B.D., 705 at 710; and *The Colonial Bank* v. *John Cady*, (1890) L.R. 15 A.C. 267 at 282—approved.

T. Robins Goodwin v. *Henry Christopher Robarts*, (1876) L.R. 1 A.C. 476; and *Rumball* v. *The Metropolitan Bank*, (1877) L.R. 2 Q.B.D., 194—referred to and distinguished.

S. R. M. Vyraven Chetty v. *Oung Zay*, (1890) 2 Bur.L.R., 1; *Le Geyt* v. *Harvey*, (1884) I.L.R. 8 Bom., 501; *Crouch* v. *The Credit Foncier of England*, (1873) L.R. 8 Q.B., 374; *Goodwin* v. *Robarts*, (1875) L.R. 10 Ex., 337; *Bechuanaland Exploration Company* v. *London Trading Bank, Ltd.*, (1898) L.R. 2 Q.B.D., 658; *Edelstein* v. *Schuler & Co.*, (1902) L.R. 2 K.B.D., 144; *Gilbertson & Company* v. *Anderson & Coltman*, (1901) 18 Times L.R., 224; *Anglo-Indian Jute Mills Co.* v. *Omademull*, (1910) I.L.R. 38 Cal., 127; *Cole* v. *The North-Western Bank*, (1875) L.R. 10 C.P., 354 at 363; *Merchant Banking Company of London*, v. *Phœnix Bessemer Steel Co.*, 1877 L.R. 5 Ch.D., 205; and *Baxendale* v. *Bennett*, (1878) L.R. 3 Q.B.D, 525 referred to

Fox, C. J.—Khoo Beng Ok, was a Chinese merchant who had a rice mill on the Dalla side of the Rangoon river and his office in Rangoon.

By two contracts in forms usual in the trade he sold 660 bags of boiled rice to S. P. S. Hoosain Nyna a dealer in rice. According to the terms of the contracts delivery of the rice was to be taken *ex*-hopper into the buyer's gunny bags, but the bags could not be removed from the mill until the price of the rice in them and other charges (if any) in respect of it had been paid for. Nyna took delivery of the rice *ex*-hopper and on the 17th February he paid for it by giving Khoo Beng Ok a Chetty's cheque on one of the European Banks. In exchange for this Khoo Beng Ok gave Nyna his receipted bills for the rice and an order to his godown keeper at the mill which is in the following terms:—

(On front of sheet.)

No. 55 *Rangoon 17th February* 1913.

Subject to terms of contract No. ..... Dated 4—2—1913
21—1—1913

(Chinese characters)

KHOO BENG OK RICE MILL,
No. 1, Angyi Creek, Dalla.
To Godown Keeper.

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Deliver to Messrs. S. P. S. Hoosain Nyna or Bearer 660 bags, say six hundred and sixty only.

Boiled rice.

Gunnies and Twines supplied by the buyer.....

Marks.....
Weight.....lbs.

Bill No. $\frac{54}{55}$.....

M/N No. $\frac{43}{37}$.....

KHOO BENG OK RICE MILL.

N.B.—This note is subject to our receipt of the gunnies receipt which has been granted.

(On back of sheet.)

Special attention of holders of this delivery Note is drawn to the following paras. copied from the Contract subject to which this delivery note has been issued.

9. Payment is to be made in cash before any rice is removed, but not in any case later than immediately after milling. Payment on completion of each day's milling if required.

12. Sellers have the option of disposing of the rice by private or public sale $\frac{\text{buyer}}{\text{buyers}}$ account should $\frac{\text{he}}{\text{they}}$ fail to take delivery *ex*-hopper as above or fail to pay for it as above within two days of presentation of the bill.

13. All risk of fire, damage by rats and other contingencies to be borne by $\frac{\text{buyer}}{\text{buyers}}$ from the time the rice is milled.

14. Sellers have the right of removing the rice to other than mill godowns at risk of $\frac{\text{buyer}}{\text{buyers}}$ after 24 hours' notice has been given.

15. Godown rent at the rate of Rs. 5/- per 100 bags per week will be charged to $\frac{\text{buyer}}{\text{buyers}}$ should $\frac{\text{he}}{\text{they}}$ fail to remove the rice on or before the 15 days after milling.

16. Sellers to have a lien on the rice until it has been paid for as above and until all godown rent and other charges are paid.

17. $\frac{\text{Buyer}}{\text{Buyers}}$ cannot claim the right of leaving the rice in seller's godown after the 15 days allowed for removal have elapsed.

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18. Accidents to machinery, strikes or sickness of mill hands or coolies always excepted.

19. No claim whatever to be made by $\frac{\text{buyer}}{\text{buyers}}$ after delivery of rice has been taken *ex*-hopper.

Acknowledgment of receipt.

Date 191	Boat No.	Mark.	Quality.	Quantity.	Net Wg.	Initial.

On the same day a durwan or messenger from Nyna went to the mill to take away the rice. He did not bring the delivery order but said that on his signature the delivery order could be obtained next day in Rangoon. Khoo Beng Ok's eldest son who was at the time in charge of the mill referred to his father in Rangoon by telephone, and was authorized by him to allow the rice to be removed by the durwan on his signing for it. The bags were loaded into cargo boat No. 914 and shipped on the same day on the S.S. "Oxfordshire" for Colombo. The Boat Note and the Bill of Lading represent S.S.A.S. Sockalingum Chetty, the man who had given the cheque in payment of the rice, as the shipper, and the consignee at Colombo was S.S.A.S. Palaniappa Chetty. It does not appear what rights this firm had over the rice, but having given a cheque for the price of it, and got the shipping documents for it made out in its name the firm in all probability had the rights of at least a pledgee in respect of it.

There is no evidence as to how Khoo Beng Ok was induced to authorize removal of the rice from his mill without production of the delivery order. His evidence was not available in the case because he died shortly after the suit was filed.

He did not get back the delivery order next day or at all. There is no evidence as to his having made any attempt to get

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it back. On the 21st February Nyna went to the plaintiff firm which lends money on the security of delivery orders and told the plaintiff's son that he had to pay for rice on the following day. The terms of an advance were arranged, and next day Nyna came to the plaintiff's office with a durwan who had the delivery order and receipted bills given by Khoo Beng Ok to Nyna on the 17th February. Nyna said that this man was the mill-owner's durwan. The plaintiff's son gave Nyna a cheque on a Bank for Rs. 4,000 which Nyna endorsed and handed over to the durwan, to whom was also paid Rs. 1,584-10-0, and the durwan gave the delivery order and Khoo Beng Ok's receipted bills to the plaintiff's son. The latter believed that the durwan was the employee of the miller, and understood that the money and cheque were going to the miller.

Nothing happened in connection with the delivery order until early in the following May when it became known that Nyna had absconded. The fraud committed by him in connection with the delivery order in suit was not the only one he committed. He apparently used forged delivery orders also, and is undergoing imprisonment on account of such offences. After presenting the delivery order in suit to Khoo Beng Ok and calling on him to deliver the rice mentioned in it, the plaintiff firm, on this being refused, filed their suit for Rs. 5,584-10-0 the price of the rice under the contracts with Nyna, and for Rs. 217-12-0 the cost of the gunny bags and twine supplied by Nyna. They also claimed interest. They based their claim on the ground that by the custom of the rice trade the delivery order which they held was a negotiable instrument entitling the *bonâ fide* holder of it for value to the delivery of the bags of rice mentioned in it. In 1890 the Recorder of Rangoon held (i) that a delivery order from the office of a rice-milling firm in Rangoon to one of its Mills in the outskirts was neither a document of title to the rice referred to in it, nor (ii) a negotiable instrument. He also held that it had not been proved in the case that there was a trade custom prevalent in Rangoon by which holders of delivery orders for rice can claim the rice mentioned therein free from the vendor's lien for the price and the charges thereon (1).

(1) *S. R. M. Vyraven Chetty* v. *Oung Zay &* 1, (1890) 2 Bur. L.R., 1.

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The first of the above propositions was based on *Le Geyt* v. *Harvey* (2). From the recent decision of their Lordships of the Privy Council in *Ramdas Vithaldas Durbar* v. *S. Amerchand & Co.* (3), it seems to follow that what was decided in *Le Geyt* v. *Harvey* is no longer good law.

The second proposition that delivery orders could not be negotiable instruments was based on *Crouch* v. *The Credit Foncier of England* (4). In that case Blackburn, J., one of the most eminent of Commercial lawyers laid down in effect that no instrument made in England could be a negotiable instrument unless it was so under the law merchant, or it had been made so by legislation. In *Goodwin* v. *Robarts* (5) in the Exchequer Chamber, Cockburn, C.J., an equally eminent lawyer expressly dissented from this proposition and held that negotiability could be attached to documents by the usages of a trade. The following are extracts from his judgment :—

"While we quite agree that the greater or less time during which a custom has existed may be material in determining how far it has generally prevailed, we cannot think that, if a usage is once shown to be universal, it is the less entitled to prevail because it may not have formed part of the law merchant as previously recognised and adopted by the Courts."

* * * * *

"We cannot concur in thinking that if proof of general usage had been established, it would have been a sufficient ground for refusing to give effect to it that it did not form part of what is called the ancient law merchant."

It has been suggested by Mr. Willis in his work on Negotiable Securities (6) that the above two decisions are reconcileable, and that the decision in *Crouch* v. *The Credit Foncier Company* was still good law, but Kennedy, J., in *Bechuanaland Exploration Company* v. *London Trading Bank*, (7) and Bigham, J., in *Edelstein* v. *Schuler & Co.* (8) held that the ruling of Blackburn, J., to which I have referred had been overruled. In a note on 273 of the 12th edition of Sir William Anson's English Law of Contract it is said : "This extension of the range of

(2) (1884) I.L.R., 8 Bom., 501.
(3) 9161)) 20 C.W.N., 1182.
(4) (1873) L.R. 8 Q.B., 374.
(5) (1875) L.R. 10 Ex., 337.
(6) (1901) W. Willis' Law of Negotiable Securities, 37.
(7) (1898) L.R. 2 Q.B., 658.
(8) (1902) L.R. 2 K.B. 144.

negotiability by recent usage may perhaps need confirmation by Courts of Appeal."

In *Gilbertson & Co.* v. *Anderson & Coltman* (9) Wills, J., refused to attach the attribute of negotiability to a delivery order by the vendor of goods on board a ship addressed to the master porter of a ship.

Whatever may be the future decision of the English Appeal Courts in England on the controverted ruling of Blackburn, J., this Court has to be guided by the decisions of Their Lordships of the Privy Council, and it appears to me that in *Ramdas Vithaldas Durbar* v. *S. Amerchand & Co.*, Their Lordships' decision involves the acceptance of the proposition that negotiability can be attached to documents by mercantile usage. In that case the main question was whether a railway receipt was a "document of title" or "a document showing title," but the question of negotiability was also involved, and Their Lordships held that by section 102 of the Contract Act the legislature intended to assimilate other documents of title to bills of lading for the purpose of determining the rights of stoppage in transit in favour of a *bonâ fide* purchaser for value. As regards the question of whether the railway receipt in question was a "document of title" or "a document showing title," Their Lordships remark:—

"In Their Lordships' opinion the only possible conclusion is that whenever any doubt arises as to whether a particular document is a 'document showing title' or 'a document of title' to goods for the purposes of the Indian Contract Act, the text is whether the document in question is used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise either by endorsement or delivery the possessor of the document to transfer or receive the goods thereby represented." They held that the railway receipt in question satisfied this test and that a pledgee who advanced money on the security of a railway receipt was entitled to the goods as against an unpaid vendor.

The effect of section 137 of the Transfer of Property Act is that in the case of the documents mentioned in the explanation

(9) (1901) 18 Times L.R., 224.

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to it a transfer in writing and notice to the holder of goods is not necessary in order to constitute a valid transfer of goods mentioned in them. Amongst the documents mentioned in the explanation is an order for the delivery of goods. In *Anglo-India Jute Mills Company* v. *Omademull* (10) a delivery order from the agents of the Company in Calcutta to the Manager of one of its mills to deliver goods to a named firm or order was held to be a document of title, and the evidence establishing that delivery orders of the nature of the one in suit passed from hand to hand by endorsement and were sold and dealt with in the market, and that according to the invariable course of dealing in the Calcutta jute trade delivery orders were only issued on cash payment and were dealt with in the market as absolutely representing the goods to which they related free from any lien of the seller, the Mill Company were held liable to pay the plaintiffs the amount they had advanced on the delivery order although a post-dated cheque which the buyers had given in payment for the goods was dishonoured, and the Mill Company had never received payment. The Company by issuing the delivery order lost its seller's lien on the goods in its possession. The main ground of the decision was that the Company had represented that the delivery order would pass and confer a good title to the goods, and they had put it in the power of the buyers to indorse the delivery order with this representation to the plaintiffs who, dealing in good faith and for value, were induced to alter their position on the faith of the representation so made.

The form of delivery order in the present case differs considerably from the form in the Calcutta case. In the latter the form is an order for delivery without any condition: in the present case the form expressly states that the order for delivery is subject to conditions, one of which appears on the front of the sheet of paper and the others on the back. Although it may be said that by it the miller undertakes to deliver the bags of rice mentioned in it to whoever produces it to the godown-keeper, the document itself gives notice to anyone asked to advance money on it that he may not be able to obtain the rice at all by means of it if the rice has been destroyed by fire,

(10) (1910) I.L.R. 38 Cal., 127.

and that he will not obtain it if the price and all godown rent and other charges in respect of it have not been paid. The conditions set out are sufficient to put a prudent man on enquiry as to whether the rice was still in existence and as to whether the price and all charges payable to the miller have been paid when he is asked either to buy the rice or to advance money on the order.

With such conditions plainly stated in the order itself it is difficult to see how the miller can be held to have made a representation to every one into whose hands the documents might come *bona fide* that he would hand over the rice even if he had not been paid its price. The ratio decidendi in the Calcutta case does not appear to me to apply in the present case because of the terms of the delivery order giving every one who reads them notice that the rice may not be in existence, and if in existence may not have been paid for, and that the seller retains his lien for everything due in respect of it. No doubt a document may be negotiable although it contains conditions: a bill of lading usually contains many conditions absolving the carrier from liability for not delivering the goods covered by it, but when a seller of goods issues a document the real effect of which is that he will hand over certain goods to anyone producing the document provided he has them and that he has been paid his price and all charges in connection with them, can any usage or custom of trade compel him to hand the goods over if he has not the goods and has not been paid his price and his stipulated charges? I think not. The above appears to me to be the effect of the delivery order which we have to deal with in the present case, and the right of any one claiming under it must in my judgment be determined by the terms of the document itself. Under proviso 5 to section 92 of the Indian Evidence a usage or custom by which incidents not expressly mentioned in a contract are usually annexed to contracts of that description may be proved provided that the annexing of such incident would not be repugnant to or inconsistent with the express terms of the contract. The usage sought to be applied to the delivery order in this case is that the miller who issues such a delivery order is bound to hand over the goods mentioned in it to any-

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one who produces the document notwithstanding he has not been paid for them. Such a usage would in my opinion be repugnant to and inconsistent with the express terms of the document under which the seller expressly has a lien on the rice mentioned in the delivery order until it has been paid for and until all godown rent and other charges have been paid.

How then can such delivery orders be said to have become negotiable instruments by virtue of a custom or usage in the trade when the custom or usage in the trade cannot be proved?

In my judgment Khoo Beng Ok was not liable to the plaintiff and his representatives are not. So far as it goes no doubt the evidence shows that delivery orders by mill-owners to their mill managers are used to obtain advance son in Rangoon, but I should require better and more cogent evidence than was produced in this case before being satisfied that the general body of mill-owners in Rangoon regard their obligations in respect of delivery orders issued by them to their mill managers in the same light as the witnesses for the plaintiff in this case. It would be surprising if mill-owners had given up the distinctly advantageous position in which the decision in *S. R. M. Vyraven Chetty* v. *Oung Zay and* 1 placed them.

If money-lenders choose to advance money without reading and having regard to the terms of the documents on which they are asked to advance, they do so at their own risk.

Khoo Beng Ok fulfilled the contract in respect to which he gave the delivery order. The order itself contains no guarantee or undertaking that he would hold the goods and not deliver to anyone except some one who produced the order. The terms of the order put every one asked to advance money on it on inquiry as to whether the goods exist, and whether the mill-owner will deliver them without payment. I am unable to hold that by issuing such a document Khoo Beng Ok estopped himself from denying that he had delivered the goods to the person with whom he had contracted, or to hold that he and his representatives are liable to the plaintiff on the ground of estoppel.

I would allow the appeal, set aside the decree of the original Court, and dismiss the suit ordering the plaintiff to pay the

defendants' cost of the suit and of this appeal, allowing the defendants extra cost of 10 gold mohours a day for 3 days in the original Court.

Ormond, J.—The respondents are the legal representatives of Khoo Beng Ok (deceased) who owned a rice mill and sold under 2 contracts 660 bags of boiled rice to Nyna a dealer in rice. On 17th February Nyna paid for the rice and the miller gave him receipted bills and a delivery order on his godown-keeper (Exhibit A). The document is expressed to be subject to the terms of the 2 contracts and directed delivery to be given to Nyna or bearer. The goods were ascertained and were the property of Nyna in the custody of the miller. Later, on the same day, Nyna obtained delivery of the goods without giving up the delivery order, saying that it was in Rangoon and that he would return it the next day. Nyna at that time was in possession of the delivery order. On the 22nd February Nyna fraudulently obtained from the plaintiff Rs. 5,584-10 on the pledge of the two receipted bills and the delivery order; and in May he disappeared. The plaintiff then sued the miller to recover this amount:—which was also the value of the goods covered by the delivery order. The plaintiff obtained a decree and the defendants now appeal.

The evidence shows that Exhibit A, which is in a form well known in the trade, is transferable by delivery; that it is not issued until the goods have been paid for; that receipted bills showing such payment are attached to the delivery order and the documents are passed on; that Banks will advance money on the delivery order when they are satisfied that the goods have been paid for; and that delivery is given upon production of the document.

In the case of *S. R. M. Vyraven Chetty* v. *Oung Zay and Mohr Bros., Ltd.*, (1) (which was decided by the Recorder of Rangoon in 1890) the transferee of Delivery Orders, similar to Exhibit A, sued the miller. He obtained a decree on the delivery order, the goods for which had been paid for; but his claim on the delivery orders, the goods for which had not been paid for, was dismissed:—on the ground that the delivery orders were not negotiable instruments and that the vendor

(1) (1890) 2 Bur. L.R., 1.

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had not lost his lien. It was also held in that case that the delivery orders were not documents of title :—following the English decisions:—but a decree was given to the plaintiff against the miller in respect of the rice which had been paid for, on the ground that the miller could not have refused to deliver to his buyer and that therefore he could not refuse to deliver to the holder of the delivery order.

The test whether a document is a document of title or merely a token of authority to receive possession, is laid down by the Privy Council in *Ramdas Vithaldass Durbar* v. *S. Amerchand & Co.*, (3) where it is said "The test is whether the document in question is used in the ordinary course of business as proof of the possession or control of goods, or authorising, or purporting to authorise, either by endorsement or delivery, the possessor of the document to transfer or receive the goods *thereby represented.*" Upon the evidence this delivery order must be taken to be a document showing title to goods. The delivery order expressly states that it is subject to the terms of the contract and that the goods are not to be removed before payment. It thus preserves the vendor's lien for the price of the goods (if not already paid for) and it shows that the person who acquires the property in the goods is subject to any liability which attaches to the original buyer under the contract.

The learned Judge has held that this delivery order is not only a document of title to goods, but that it is also a "Negotiable Instrument," and that the plaintiff as the "Holder" thereof was entitled to recover as against the defendant; and he also held that the defendant was estopped from saying that the delivery order was exhausted by reason of delivery having been given to the buyer.

The learned Judge has I think overlooked the fact that in all the cases where a document has been held to be a "Negotiable Instrument" an essential element of the decision was that by the custom of the money market, the document was transferable *as if it were cash.* A *bonâ fide* transferee of cash obtained a good title to the cash (because of its currency) although his transferor might have stolen it. The document in such a case

(3) (1916) 20 C.W.N., 1182.

therefore had the element of 'Negotiability' properly so called a *bonâ fide* transferee for value of the document acquired a good title even though his transferor had none. Upon this principle certain securities for money (such as Bonds & Scrip) have been held to be Negotiable Instruments although they would not be covered by the Bills of Exchange Act, 1882.

But a document showing title to goods is on a different footing:—the document is taken to represent the goods to which it relates; and the law governing its transferability is the same as the law which governs the transferability of the goods themselves. And this law, apart from any question of estoppel, is to be found in sections 108 and 178 of the Contract Act.

In Scrutton on Charter Parties at page 155, Note 1, it is said "Negotiable" is a term which perhaps strictly should be reserved for instruments which may give to a transferee a better title than that possessed by the transferor. A bill-of-lading is not "Negotiable" in this sense; the indorsee does not get a better title than his assignor. A bill-of-lading is "Negotiable" to the same extent as a cheque marked "not negotiable," *i.e.*, it is "transferable." Blackburn J. in *Cole* v. *The North-Western Bank* (11) says: "The possession of bills-of-lading or other documents of title to goods did not at common law confer on the holder of them any greater power than the possession of the goods themselves. The transfer of a bill-of-lading for goods *in transitu* had the same effect in defeating the unpaid vendor's right to stop *in transitu* that an actual delivery of the goods themselves under the same circumstances would have had. But the transfer of the document of title by means of which actual possession of the goods could be obtained, had no greater effect at common law than the transfer of the actual possession." And Lord Campbell C.J. in *Gurney* v. *Behrend* (12) says:— "A bill-of-lading is not, like a bill-of-exchange or promissory note, a negotiable instrument which passes by mere delivery to a *bonâ fide* transferee for valuable consideration, without regard to the title of the parties who make the transfer. Although the shipper may have indorsed in blank a bill-of-lading deliverable to his assigns, his

(11) (1875) L.R., 10 C.P., 354 at 363.
(12) (1854) 23 L.J.Q.B., 265 at 271.

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right is not affected by an appropriation of it without his authority: If it be stolen from him or transferred without his authority, a subsequent *bonâ fide* transferee for value cannot make title under it as against the shipper of the goods. The bill-of-lading only represents the goods, and in this instance the transfer of the symbol does not operate more than a transfer of what is represented."

The delivery order is a document of title to the goods to which it relates and the property of the transferor in the goods passes to the transferee by delivery of the document. This delivery order purported to be a document of title to certain specific goods belonging to Nyna in the custody of the defendant which were deliverable under certain contracts. But when the plaintiff acquired this title, the goods had ceased to exist and there was no title in Nyna; the plaintiff therefore acquired no title to any goods. No doubt the defendant by giving delivery to Nyna without the production of the delivery order, did so at his own risk: and if Nyna had pledged the delivery order with the plaintiff before he received delivery, the defendant would be liable to the plaintiff for having wrongfully disposed of the plaintiff's property. But Nyna was then in possession of the delivery order and was the person entitled to delivery.

When once delivery has been given to the person entitled, the delivery order is exhausted. Channell J. in *London Joint Stock Bank* v. *British Amsterdam Maritime Agency* (13) says, " If Messrs. Palmers were the persons entitled at that time to have the goods delivered to them, it seems to me that the bill-of-lading would be exhausted." See also Scrutton on Charter Parties, pages 183 and 273. Delivery having been given to the person entitled the delivery order ceased to have any effect.

Sections 178 and 108, exception 1 of the Contract Act do not help the plaintiff:—because there were no goods; and the delivery order having become exhausted, there was no delivery order. Moreover Nyna was not, and never had been, in possession of the document by the consent of the owner (defendant); for Nyna was himself the owner of the delivery

(13) (1910) 16 Com. Case., 102 at 105.

order until he took delivery; and after delivery, though the defendant was entitled to have the document given up to him, it was not by his consent that Nyna retained it.

As to estoppel:—If A issues a mercantile document to which, by the custom of the trade certain incidents are attached; he is estopped from denying that he his bound by those incidents, unless there is something in the document to show the contrary. Thus the maker of a delivery order which by the custom of the trade relates to goods which have been paid for, is estopped from saying that they have not been paid for:—and he loses his lien:—*Merchant Banking Company of London* v. *Phœnix Bessemer Steel Company* (14).

In *T. Robins Goodwin* v. *Henry Christopher Roberts* (15) followed by *Rumball* v. *The Metropolitan Bank* (16) it was decided that upon the ground of estoppel a person who deposits with an agent a security, on the face of it payable to bearer, cannot recover it from a *bonâ fide* holder for value to whom the agent had fraudulently transferred it, whether it be a negotiable instrument, recognized by law as such, or not. Because he had made a representation on the face of the scrip, that it would pass with a good title to anyone who took it in good faith and for value. But as pointed out by Lord Selborne in *France* v. *Clark* (17) and by Lord Esher in *The Fine Art Society, Limited,* v. *The Union Bank of London, Limited,* (18) the fact that the document in that case was treated as a "negotiable instrument" by the mercantile world was essential to the decision. And Lord Bramwell in *The Colonial Bank* v. *John Cady* (19) says:" I cannot, with all respect to Lord Cairns, see any ground for applying the doctrine of *Pickard* v. *Sears* in *Goodwin* v. *Robarts.* The plaintiff there was not making a claim inconsistent with anything he had theretofore said or done." It clearly could not have been intended to decide that the maker of every document which is transferable by delivery is estopped from denying that it is a "negotiable instrument" when it is not a negotiable instrument and either at law or by custom.

(14) (1877) L.R. 5 Ch. D., 205.
(15) (1876) L.R. 1 A.C., 476.
(16) (1877) L.R. 2 Q.B.D., 194.
(17) (1884) L.R. 26 Ch.D., 257 at 264.
(18) (1886) L.R. 17 Q.B.D, 705 at 710.
(19) (1890) L.R. 15 A.C., 267 at 282.

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In the present case there was no implied representation by the defendant that he would deliver the goods to anyone who was a *bonâ fide* transferee for value of the document:—but merely that he would deliver the goods to anyone who had a good title to the delivery order, and that an endorsement of the delivery order was not necessary in order to pass the title. If the bailee had notice that the person presenting the delivery order was not entitled to the delivery order, and he gave him delivery; he would do so at his own risk.

Lastly it is urged that the defendant is estopped by his negligence in not taking back the delivery order; and that by his omission to do so, he enabled Nyna to perpetrate the fraud on the plaintiff. There is no question as to the *bonâ fides* of the defendant. No duty was cast on the defendant to recover the document. Nyna was not the defendant's agent, and the defendant was not responsible for him. So far from there being any negligence on the part of the defendant, he could not possibly have recovered the document if Nyna did not intend to give it up. Nothing on the part of the defendant but actual notice to the plaintiff could have prevented Nyna from perpetrating this fraud on the plaintiff. Though the defendant might have foreseen the possibility of Nyna making a fraudulent use of the document, he could not foretell who the victim might be; and consequently he could not give notice to the plaintiff. The omission by the defendant was not the proximate cause of the loss; but rather the plaintiff's omission in not making enquiries from the defendant and satisfying himself that the document was a genuine delivery order and that the goods were in existence. See the Judgments of Bramwell and Brett L.J.J. in *Baxendale* v. *Bennett* (20).

I would allow the appeal; set aside the decree and dismiss the suit with costs to the defendant in both Courts. On the Original Side the plaintiff was given extra costs of 10 gold mohurs a day for 3 days—the defendant should have these extra costs.

(20) (1878) L.R. 3 Q.B.D., 525.

Before Sir Daniel Twomey, Chief Judge, and Mr. Justice Parlett.

Civil 1st Appeal No. 78 of 1917.

August 14th, 1917.

C. M. R. M. A. K. PERIANEN CHETTY *v.* (1) MAUNG BA THAW, (2) JAMALLUDDIN.

Anklesaria—for Appellant.

Mortgage—Attestation of—Transfer of Property Act (IV of 1882), section 59—Appeal Court bound to take cognizance of defect in attestation.

Mere acknowledgment of his signature by the person by whom a mortgage deed purports to be attested is not sufficient attestation under the law. The two witnesses by whom a mortgage must, according to the provisions of section 59 of the Transfer of Property Act, be attested must sign only after seeing the actual execution of the deed by the mortgagor.

The provisions of section 59 of the Transfer of Property Act being imperative it is the duty of the appellate Court to take cognizance of a defect in attestation although it was not noticed in the lower Court.

Shamu Patter v. *Abdul Kadir Ravuthan*, (1912) I.L.R., 35 Mad., 607, followed.

The learned Judge of the District Court has dismissed the suit of the plaintiff-appellant firm holding that the execution of the mortgage instrument is not proved. The circumstances attending the alleged execution, as set out in the judgment, give rise to strong suspicion of fraud and it is remarkable that though the mortgagor Azim is said to have died in 1909 a few months after the document was executed, and the mortgaged property passed into other hands, the mortgagees took no steps to enforce their mortgage rights in respect of either principal or interest for a period of seven years.

But though we are inclined to agree with the remarks of the District Court as to the suspicious character of the whole transaction, we find that it is unnecessary to decide the question whether the mortgage should be held unproved on that ground alone. For there is a fatal defect on the face of the mortgage instrument and the evidence called by the P. A. Firm to prove it. Under section 59, Transfer of Property Act, the mortgage instrument required for its validity the attestation of two witnesses. It purports to have been signed by two witnesses, Palaniappa Chetty and Virappa Chetty. Virappa was not called as a witness, and it is clear from the evidence that Palaniappa did not in fact witness the alleged execution by Azim at all. Palaniappa says that the document

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was brought to him at Pegu for signature and before signing it he was told by Azim that he had executed it. It must now be regarded as a well established rule of law, that mere acknowledgment of his signature by the executant is not sufficient; the witnesses must sign only after seeing the actual execution of the deed (1). Palaniappa was therefore not an attestation witness as contemplated by law. The document is not only inadmissible in evidence under section 68 of the Evidence Act, but owing to the want of two attestation witnesses under section 59, Transfer of Property Act, did not effect a mortgage at all.

The provisions of section 59 are imperative, and although the defect was not noticed in the lower Court we are bound to take cognizance of it.

On these grounds the appeal is dismissed.

Special Civil 2nd Appeal No. 190 *of* 1916.

December 3rd 1917.

Before Mr. Justice Rigg.

SAN HLA BAW *v.* (1) MI KHOROW NISSA; (2) MI SHORA BI; (3) SOTOGYA, (4) ABDULLA and (5) MI SHORA BI (MINORS BY THEIR GUARDIAN *ad litem* 1ST RESPONDENT.

S. M. Bose—for appellant.

J. E. Lambert—for respondents.

Judge's comment based on his personal knowledge of character of party or witness—Justification of.

The plaintiff instituted against the legal representatives of one Kalathan deceased a suit on the 25th November 1915 for rent claimed to be due on a lease alleged to have been executed by the said Kalathan on the 9th May 1913. In the Township Court which decreed the claim neither party was assisted by an advocate, and the evidence was recorded in a somewhat perfunctory manner without any attempt being made to test the creditbility of the witnesses. On appeal to the District Court, the District Judge in reversing the decree of the Township Court made remarks based on his personal knowledge on the conduct of the plaintiff as a litigant and of one Tha Kaing who gave evidence on his behalf as a witness.

Held, following *Bamundoss Mukerjea* v. *Mussamut Tarinee*, (1858) 7M.I.A., 169 at 203 and *Mahomed Buksh Khan* v. *Hosseini Bibi*, (1888) L.R. 15 I.A., 81 at 91, that the District Judge was justified in alluding to his experience of the plaintiff's litigation in his Court.

Hurpurshad v. *Sheo Dayal*, (1876) L.R. 3 I.A., 259 at 286, referred to and distinguished.

San Hla Baw sued Mi Khorow Nissa, wife of Kalathan deceased, Mi Shora Bi, Kalathan's daughter, and three minor

(1) *Shamu Patter* v. *Abdul Kadir Ravuthan*, (1912) I.L.R., 35 Mad., 607.

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children of the 1st defendant for recovery of Rs. 120 said to be the balance rent due on a lease executed by Kalathan on the 9th May 1913. The suit was filed in the Township Court of Rathedaung on the 25th November 1915. Neither party was assisted in the Township Court by an advocate in the trial in which as the District Judge has remarked the evidence was recorded in a somewhat perfunctory way without any attempt being made to test the credibility of the witnesses. The Township Judge decreed the claim. The decision was reversed on appeal to the District Court, Akyab. On second appeal to this Court exception has been taken to the nature of the judgment written by the learned District Judge. He commences his judgment by saying "This is a typical 'San Hla Baw' case. He wants really to get a decree for certain land standing in some one else's name so he brings a suit, something like two years after it is due, for rent against the heirs of the late owner. . . His ways of business are, I know, very slipshod, and usually sail very close to the wind, . . . San Hla Baw, of course, is a convicted perjurer and a man who by his own admission is prepared to swear to anything to gain time when he is pressed." The Judge also refers to the evidence of Tha Kaing who he states is a man who to his own knowledge is accustomed to give evidence on behalf of San Hla Baw. He describes Tha Kaing as San Hla Baw's creature. It is urged in the appeal to this Court that the Judge was not justified in making remarks about the characters of the witnesses when such characters were not established by any evidence on the record but were matters of personal knowledge of the Judge. In *Bamundoss Mukerjea* v. *Mussamut Tarinee* (1) Their Lordships of the Privy Council observe as follows: "An observation, however, is made by the Sudder Dewanny Court, that the Zillah Judge, with respect to two of the attesting witnesses, has spoken of them from his own knowledge, as being what he calls 'professional witnesses,' persons of no character, and, therefore, entitled to no credit whatever. He does not say that, as we understand him, from his own personal knowledge of the parties, as being in the habit of coming before his Court. Now, the Judges in the Sudder Dewanny Court have passed a severe censure

(1) (1858) 7 M.I.A., 169 at 203.

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upon the Zillah Judge, for making that observation. Their Lordships think it right to say that in that censure they do not at all concur. It is of great importance that the Judge should know the character of the parties, and it is of great advantage to the decision of the case, that it is heard by a Judge acquainted with the character of the parties produced as witnesses, who is capable, therefore, of forming an opinion upon the credit due to them." Again in *Mahomed Buksh Khan* v. *Hosseini Bibi* (2) Their Lordships say that they thought the Subordinate Judge was right in relying on the evidence of the sub-registrar and of the Mokhtar with whose character the Subordinate Judge seemed to have been acquainted. "The Subordinate Judge says he holds a diploma, and is a respectable person in his community, and the Court has never seen any act of his by which it can suspect him." These cases are sufficient authority for justifying a Judge in using his knowledge about the character of the parties to come to a decision upon the credit to be attached to their evidence or the case set up by them. On the other hand, it has been laid down by their Lordships in *Hurpurshad* v. *Sheo Dayal* (3) that a Judge cannot, without giving evidence as a witness, import into a case his own knowledge of particular facts. Their Lordships appear to draw the distinction between the conclusion drawn from the knowledge of a Judge about the general character and position of the parties and their witnesses and his knowledge regarding any particular facts connected with the facts in issue in the case. I am of opinion, therefore, that the District Judge was justified in alluding to his experience of San Hla Baw's litigation in his Court and in declining to believe in the *bonâ fide* of the class of the cases launched by him, many or others of which had been found to be false, unless the case was supported by evidence that left no doubt in the mind of the Judge about its credibility.

(2) (1888) L.R. 15 I.A., 81 at 91. (3) (1876) L.R. 3 I. A., 259 at 286.

Before Sir Daniel Twomey, Chief Judge and Mr. Justice Ormond.

Civil Misc. Appeal No. 166 of 1916.

December 11th 1917.

AUNG MA KHAING *v.* MI AH BON.

Ba Dun—for appellant.

J. E. Lambert—for respondent.

Probate and Administration Act, V of 1881, sec. 23—Claim to letters-of-administration based on an alleged adoption—Inquiry into—Claim by an heir.

Buddhist law: adoption—Married woman—Single woman—Divorced woman.

Respondent applied for Letters-of-administration to the estate of her full sister Chi Ma Pru deceased. The appellant opposed the application alleging that she (the appellant) was the adopted daughter of the deceased.

Held,—that in as much as respondent would not be entitled to any part of the estate if the adoption of appellant was proved the District Judge in going into the question of the adoption of appellant had correctly interpreted the ruling in *Ma Tok* v. *Ma Thi*, (5 L.B.R., 78).

Held further,—that the principle that a single woman can adopt applies to a woman who is divorced from her husband and has divided the joint property with him.

Semble, a married woman living with her husband cannot adopt without his consent. But an adoption being to a great extent a matter of intention, if the intention to adopt manifested during coverture continued after the divorce, there would be a good adoption without any formal declaration made after the divorce.

Ma Bu Lone v. *Ma Mya Sin*, 14 Bur. L.R., 9, referred to.

The present respondent Mi Ah Bon applied for Letters-of-administration to the estate of Chi Ma Pru who died in May 1916. The present appellant Aung Ma Khaing opposed the application alleging that she was an adopted daughter of the deceased. She is also the natural half niece of the deceased. Mi Ah Bon is the full sister of the deceased. Ma Khaing appeals from the order of the District Judge granting Letters-of-administration to Mi Ah Bon.

Mr. Lambert for Mi Ah Bon contends upon the authority of *Ma Tok* v. *Ma Thi* (1), that Mi Ah Bon was entitled to Letters-of-administration inasmuch as she was an admitted relation and the adoption of Ma Khaing was in dispute; but that decision refers to the case of an admitted heir and if the adoption of Ma Khaing in this case is proved Mi Ah Bon would not be an heir She would not be a person entitled to Letters-of-administration under section 23 of the Probate and Administration Act

(1) 5 L.B.R., 78.

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because she would not be entitled to any share in the estate. The District Judge has taken, we consider, a correct view of the case cited: He took the evidence in support of the adoption which lasted a whole day and then decided that it would be waste of time to take the evidence against the adoption, because it was shown that the deceased Chi Ma Pru adopted Ma Khaing against the wish of her husband. In consequence of this adoption by Chi Ma Pru there was a divorce between her and her husband by mutual consent and a division of their property was made. The learned Judge was of opinion that a sole woman can adopt but that a married woman cannot adopt without the consent of her husband and that the adoption of Ma Khaing at its inception being invalid, could not become valid after the divorce without some formal adoption or re-adoption in order to place her in the position of a child who had been adopted with a view to inherit. No authorities have been cited to show that a single woman cannot adopt. In the case of *Ma Bu Lone* v. *Ma Mya Sin* (2), it was taken for granted that a spinster could adopt. Mr. May Oung in his work on Buddhist Law remarks that it is quite usual for widows to adopt. There is no reason in principle why a woman who is divorced from her husband and has divided the joint property with him should be in a different position as regards the power to adopt. It seems probable as held by the District Judge in this case that a married woman living with her husband cannot adopt without his consent. But an adoption is to a great extent a matter of intention and if Chi Ma Pru's intention to adopt Ma Khaing continued after the divorce and full effect was then given to that intention, there would be a good adoption without any formal declaration.

From the evidence, so far as it has been taken, it would appear that Chi Ma Pru's intention was to adopt Ma Khaing; that such attempted adoption was the cause of the divorce and that Chi Ma Pru's intention continued after the divorce and that she gave effect to it.

The case is remanded in order that Mi Ah Bon may be allowed an opportunity of adducing evidence to show that Ma

(2) 14 Bur. L.R., 9.

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Khaing was not adopted; and the District Court will dispose of the application in accordance with the above remarks. The costs of this appeal will abide the final result.

Before Sir Daniel Twomey, Chief Judge, and Mr. Justice Ormond.

CHIT THA *v.* KING-EMPEROR.

Criminal Appeal No. 947 of 1917.

January 10th 1918.

Youth of Criminal—Sentence—Indian Penal Code, sec. 302.

In passing sentence on a youth the general principle to be observed is that ordinarily youth is in itself an extenuating circumstance.

The youth of the criminal is therefore a circumstance which should always be taken into consideration by Sessions Courts in exercising the discretion vested in them by section 302 of the Indian Penal Code.

Nga Pyan v. *The Crown*, 1 L.B.R., 359, distinguished and dissented from.

The appellant Nga Chit Tha has been sentenced to death for murder. The case is clear and the appeal was admitted only for the purpose of considering the propriety of the sentence. The appellant who is an agricultural labourer had been working with a wood-cutting *dhama* in his hand and returned to his employer's house to get a light for his cheroot. There he suddenly encountered the deceased Maung San Mya with whom he had a quarrel some months before. He fell upon the deceased with the *da* and inflicted fatal wounds on his head. The appellant at first stated that he had been threatened with death in an anonymous letter which he attributed to San Mya and when he suddenly met San Mya he was terrorstruck and attacked him so as to prevent San Mya from attacking him. The Sessions Judge was inclined to believe this story though the appellant modified it considerably when he was examined in Court. He then alleged that the deceased abused him and assaulted him when he entered the cooking place of the house.

There can be no doubt that the appellant was rightly convicted of murder. His age according to the medical subordinate who gave evidence at the trial is between 17 and 19. The Superintendent and Medical Officer of the Jail where Chit Tha is now confined was asked to give his opinion on this point and he reports that in his opinion Chit Tha is 16 years of age.

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The Sessions Judge thought that he would not be justified in remitting the extreme penalty on the ground of youth only. The learned Judge was perhaps influenced by the ruling in *Nga Pyan* v. *Crown*. (1). The following is an extract from Mr. Justice Fox's judgment in that case—

"The present case is one in which a youth must have silently brooded for a considerable time over chidings and abuse addressed to him by the man he subsequently murdered, but in the end his act was deliberate, previously meditated, done in cold blood, and was accompanied by great ferocity."

"To refrain from confirming a sentence of death in such a case on account of the criminal's youth would, in my opinion, be an act of pure mercy. The exercise of mercy is the prerogative of the Crown to be exercised in this country by the very highest authorities, and, if mercy is exercised towards a criminal, he and the public should understand that the mitigation of the sentence passed upon him by the Court of Justice is due to the exercise of the power of clemency which is an attribute of the King-Emperor, alone."

In the murder case now under consideration there appears to have been no deliberation; it is probable that the appellant acted on a sudden impulse. The case is therefore distinguishable from that of *Nga Pyan*.

As to the general principle we are of opinion that ordinarily youth is in itself an extenuating circumstance in murder cases as in other criminal cases. We refrain from laying down that the lesser penalty should be awarded in every murder case where the accused is below a certain age. Cases of extreme depravity do occur in which the youth of the accused may not be a sufficient reason for imposing the lesser sentence. But the youth of the criminal is a circumstance which should always be taken into account by Sessions Courts in exercising the discretion vested in them by section 302 of the Indian Penal Code. We respectively dissent from the view suggested in *Nga Pyan's* case that a Sessions Court which on the ground of the criminal's youth imposes on him the lesser sentence provided in section 302 is thereby encroaching on the prerogative of the Crown.

Having regard to the youth of the present appellant and the circumstances of the case we consider that the sentence passed on him may properly be reduced to one of transportation for life and it is reduced accordingly.

(1) 1 L.B.R., 359.

Before Mr. Justice Rigg.

Criminal Appeal No. 173 and 874 of 1917.

1. PO NYEIN AND 2. PO TIN v. KING-EMPEROR.

December 7th 1917.

Boat theft—Cattle theft—Sentence—Previous conviction—Indian Penal Code, sections 379 and 75—Criminal Procedure Code, section 221.

There is no hard and fast rule that a sentence of two years' rigorous imprisonment must be passed in all cattle and boat theft cases without regard to the value and utility of the stolen property, the youth of the accused, his previous character or any other circumstances that may justly be taken into consideration in passing sentence. A sentence should never be heavier than is necessary to deter the criminal from committing the offence again.

In the case of men with previous convictions, regard should be had to their career and to the time that has elapsed between the convictions had against them. Sections 75, Indian Penal Code, and 221, Criminal Procedure Code, were not intended for the purpose of automatically enhancing by a kind of geometrical progression the sentence to be passed after a previous conviction.

Queen-Empress v. *Nga San*, P.J.L.B., 198, and *Queen-Empress* v. *Nga Ni*, P.J.L.B., 563, referred to.

The appellants have been rightly convicted of the theft of a *bauktu* boat, worth Rs. 8 on the 2nd August, and another similar boat, worth Rs. 15 on the 12th August.

Nga Po-Nyein, who had a previous conviction proved against him, was sentenced to two consecutive terms of three and a half years' rigorous imprisonment or to seven years in all whilst Po Tin who has no previous convictions was sentenced to consecutive sentences of two years' rigorous imprisonment, or to four years in all. The sentence passed on Po Tin for the theft of two boats of little value is an example of that want of discrimination and thought that is shown in some of the sentences passed in these cases. The Magistrate probably had in mind the ruling in *Queen-Empress* v. *Nga San* (1) in which Aston J.C. said "the reason why boat thefts and cattle thefts call ordinarily for a sentence of two years' imprisonment is two-fold. They for the most part are committed by professional thieves, or by persons ready to join the ranks of professional thieves, and the injury inflicted on the owner is not measured by the intrinsic value of the property stolen, but is usually far beyond that value when the owners are deprived of their means of livelihood by the loss of their cattle or boats."

(1) P.J.L.B., 198.

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The proper sentence to be passed in cattle theft cases was again considered in *Queen-Empress* v. *Nga Ni and Nga Shwe Pi* (2) in which Birks J.C. said that where there are no extenuating circumstances, a sentence of two years'. rigorous imprisonment is not unsuitable. These pronouncements have unfortunately been sometimes interpreted as laying down a hard and fast rule that a sentence of two years rigorous imprisonment must be passed in all cattle and boat theft cases, without regard to the value and utility of the stolen property, the youth of the accused, his previous character, or any other circumstances that may justly be taken into consideration in passing sentence. When Mr. Aston spoke of cattle thefts being committed for the most part by professional thieves, he was probably thinking of the type prevalent in India, whereas in Burma many of the thefts are committed by young men, who are tempted to steal either by the careless way in which cattle are tended, or by motives of bravado. It is undesirable to send young men to jail if they can be suitably punished otherwise, and in many cases I think that a whipping would be a more appropriate sentence than imprisonment. Each case should be considered on its merits, and, if extenuating circumstances appear to exist, the sentence should be modified accordingly. A sentence should never be heavier than is necessary to deter the criminal from committing the offence again. In the case of men with previous convictions, regard should be had to their career and to the time that has elapsed between the convictions passed upon them. Sections 75, Indian Penal Code, and 221, Criminal Procedure Code, were not intended for the purpose of automatically enhancing by a kind of geometrical progression the sentence to be passed after a previous conviction. The reason for passing a more severe sentence in the case of a criminal with a previous conviction is primarily to protect society from the predations and offences committed by an habitual rogue, who has shown no signs of repentance. But there is a large number of men who commit offences more than once, but do not seek to live by crime. These seem to me to stand on a different footing from the professional criminal. On the other hand, a man

(2) P.J.L.B., 563.

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may have few if any previous convictions and may yet be a dangerous criminal whose powers of mischief need curtailment by a long sentence. I think that a Magistrate or Judge should make some enquiry into the repute and antecedent behaviour of a man whom he proposes to sentence severely. This could be done after the evidence has been heard and the Court has come to a decision about his guilt. The police officer in charge of the station within the jurisdiction of which the prisoner resides, or the headman of the village would be able to supply the necessary information.

Po Nyein must have had previous convictions before the one now set out against him, as he was sentenced to four years under section 379. He was released from jail in 1915, and has again committed two thefts in August 1917. His appeal is dismissed. The boats stolen by Po Tin were not of much value, but as it is in evidence that the country-side near the landing place from which they were removed, is one vast sheet of water, the thefts probably caused great inconvenience, if not loss to the owners. His sentence is reduced to one of six months' rigorous imprisonment on each charge to run consecutively.

Before Sir Daniel Twomey, Chief Judge, and Mr. Justice Ormond.

Civil 2nd Appeal No. 111 *of* 1916.

December 17th, 1917.

KYA ZAN *v.* (1) TUN GYAW, (2) MAUNG MYO, (3) TUN HLA, (4) AUNG DIN, (5) MA SHWE PON, (6) SHAUK SU.

Naidu—for Appellant.

Halker—for 2nd and 3rd Respondents.

1st, 4th, 5th and 6th Respondents *absent.*

Mortgage of land—Charge—Sale in execution of decree against party having a charge on the land—Auction-purchasers' position in suit for redemption of the land.

One Ma Si Li mortgaged the land in suit to Maung Te who obtained a money decree against her heirs for the amount of the mortgage debt. The 1st defendant, Tun Gyaw (son-in-law of Ma Si Li who was then apparently entitled to a share in the land through his deceased wife), paid off Maung Te's decree and with the consent of Ma Si Li's heirs remained in possession of the land. In execution of decrees obtained against Tun Gyaw by his creditors the land was put up to sale at which defendants 2 and 3 were declared to be the purchasers. Plaintiff, who was one of the heirs of Ma Si Li, sued Tun Gyaw for redemption and join as defendants, his co-heirs (defendants 4 to 6) and the auction purchasers.

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Held,—that Tun Gyaw (apart from any share he may have been entitled to as a co-heir through his deceased wife) had only a charge on the land for the amount he had advanced to pay off Ma Si Li's debt to Maung Te less the portion of that debt appertaining to his share in the land, if any; and that such charge was not an interest in the land which passed to the auction-purchasers, defendants 2 and 3; and that on payment of the amount of the charge plaintiff would be entitled to a decree for possession of the undivided share of himself and his co-heirs.

The plaintiff sues to redeem certain land on payment of Rs. 550. The plaintiff and the defendants 4, 5 and 6 are the surviving heirs of their deceased widowed mother Ma Si Li who had mortgaged the land to one Maung Te. Maung Te obtained a money-decree against Ma Si Li's heirs for the amount of the mortgage debt. The 1st defendant, Tun Gyaw, paid off that debt and with the consent of the heirs remained in possession of the land. Subsequently Tun Gyaw's creditors obtained decrees against him and attached this land and sold it in execution. Maung Myo, 2nd defendant, is the auction purchaser and the 3rd defendant is apparently purchaser from Maung Myo. The Divisional Judge dismissed the suit on the ground that the plaintiff had not shown that Rs. 550 was the amount of the charge. Mr. Naidu for the plaintiff-appellant contends that if Tun Gyaw was not a mortgagee he had a charge on the land which the plaintiff is entitled to redeem. Tun Gyaw was the son-in-law of Ma Si Li and at that time was apparently entitled to a share as a co-heir through his deceased wife. Tun Gyaw was clearly not a mortgagee. The transaction between Tun Gyaw and the co-heirs was oral and amounted to a joint charge given by the other co-heirs to him on their joint undivided share of the land in respect of the amount of their share in the debt. The charge would not be an interest in the land and therefore did not pass to the 2nd defendant who bought 1st defendant's interest in the land. All that the 2nd and 3rd defendants obtained by their respective purchases would be the share of Tun Gyaw, if any, in the land and such share was not the subject to the charge. The plaintiff being one of the co-heirs, on whose behalf the joint charge was made, is entitled to redeem it, he having made the other co-heirs parties to the suit. The plaintiff in his plaint asks to redeem by a payment of Rs. 550; he states that Tun

Gyaw paid off the mortgage debt by a payment of Rs. 550; but he does not admit in his plaint that Tun Gyaw was in the position of a co-heir. If Tun Gyaw was entitled (through his wife) to a share in Ma Si Li's estate, he would be liable for a corresponding share of the mortgage debt; and the charge he would then have would be the amount he advanced for the benefit of the other co-heirs when paying off the mortgage debt, *i.e.* Rs. 550 less his own share. It must first be ascertained what share (if any) Tun Gyaw had in this land, in order to ascertain what the remainder was which formed the subject-matter of the charge. If Tun Gyaw was not entitled to any share in Ma Si Li's estate, he would have only a charge on the land (Rs. 550), and the 2nd and 3rd defendants would have bought nothing. If Tun Gyaw was entitled to (say) a 1/5th share in Ma Si Li's estate, the charge would be Rs. 440 on an undivided 4/5ths share in the land; and the 2nd and 3rd defendants would have bought an undivided 1/5th share in the land. I would set aside the decree of the Divisional Court and remand the case under Order 41, Rule 23, to the District Court to try the following issues and to determine the case accordingly :—

(1) What share (if any) had Tun Gyaw in this land ?

(2) What was the joint share of the co-heirs of Ma Si Li, other than Tun Gyaw in this land ?

(3) What was the amount of the charge given to Tun Gyaw by such co-heirs on their joint share in this land ?

The answers to the 2nd and 3rd issues will depend upon the decision of the 1st issue.

Upon paying off the amount of the charge (to be ascertained under issue 3), the plaintiff will be entitled to a decree for possession of the undivided share to be ascertained under issue 2. The share to be ascertained under issue 1 will be the interest which the 2nd defendant bought.

Under Order 34, Rule 15, the decree should direct possession to be given to the plaintiff of the undivided share (to be ascertained under 2nd issue) upon his paying into Court the amount of the charge (to be ascertained under the 3rd issue) which amount Tun Gyaw will be at liberty to with draw.

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Costs throughout will abide the final result, *i.e.* the plaintiff will receive as against the first three defendants a share of his costs in all Courts proportioned to the share of the land of which possession is ultimately decreed to him.

Civil 2nd Appeal No. 211 of 1916.

January 7th, 1918.

Before Sir Daniel Twomey, Chief Judge, and Mr. Justice Ormond.

(1) SHWE LON, (2) MA TOK *v.* (1) HLA GYWE, (2) MA THEIN CHON.

N. N. Burjorji—for Appellants.

Higinbotham—for Respondents.

Mortgage by deposit of title deeds—Right of mortgagee in possession to retain possession until repayment of the mortgage debt—Indian Contract Act, 1872, *section* 202—*Transfer of Property Act*, 1882, *sections* 54 *and* 59.

Plaintiffs sued for recovery of possession of lands from defendants who (according to the concurrent findings of facts by the two lower Courts) were the successors in title of the original equitable mortgagee of the lands and had been put in possession thereof with plaintiffs' consent under an agreement that they (defendants) were to take the rents and profits of the lands in lieu of interest.

Held,—that the plaintiffs' suit for possession on the ground that no interest in the lands had passed to the defendants or their predecessor in title in the absence of a registered document was not maintainable. Assuming that a mortgagee by deposit of title deeds is not entitled to possession, it does not follow that when such a mortgagee has been put in possession of the mortgaged property he can be required to give it up before the mortgage debt is satisfied. If the mere putting of the defendants into possession under the agreement abovementioned did not give them the right to retain possession, it must be held that there was an implied promise that the plaintiffs would execute the necessary documents to give effect to the intention of the parties as expressed in the said agreement and since the defendants would still have the right to sue for specific performance of that agreement, under the authority of *Akbar Fakir* v. *Intail Sayal*, (1914) 29 I.C., 707, the plaintiffs would not be entitled to recover possession.

From another point of view the defendants may be regarded as having received authority from the plaintiffs to manage the lands and to receive the rents and profits in lieu of interest and as such authority was given to them in consideration of the loan to the plaintiffs, the authority could not be terminated under section 202, Indian Contract Act, until the loan is repaid.

There is nothing in the Transfer of Property Act or the Registration Act to require a registered document for such a transfer of possession as was effected in this case, for the transaction was not one of sale or mortgage requiring such an instrument under sections 54 and 59 of the Transfer of Property Act.

The plaintiffs claim to recover certain paddy lands of which they are the orginal owners and which are now in the posses-

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sion of the defendants. The plaint alleges that "the defendants purported to claim the said paddy lands by reason of fraudulent transfer on the 24th March 1909 from the plaintiffs which came to the plaintiffs' knowledge on the 31st May 1915." The plaintiffs admit that they mortgaged these lands to a Chetty by depositing the title deeds with the Chetty in 1905 and that they afterwards made over the lands to the Chetty agreeing that he should work the lands and pay the land revenue and keep any surplus of the produce of the lands. The defendants' case was that they had paid off the debt to the Chetty at the plaintiffs' request, that the promissory notes in favour of the Chetty were thereupon made over to the defendants, that the title deeds of the lands in suit had also been transferred to the defendants and that the lands were made over to the defendants with the plaintiff's consent, the arrangement being that the defendants in succession to the Chetty should take the rents and profits of the lands in lieu of interest.

The District Court found that the plaintiff had failed to make out his case and accepted the defendants' account of the manner in which they had become possessed of the lands. The Divisional Court concurred in the findings of the District Court. It is not suggested that these findings of fact should be disturbed in second appeal. The argument of the learned counsel for the plaintiff-appellants has been directed only to the question whether the defendants being equitable mortgagees who are in possession of the mortgaged property with the consent of the mortgagors can resist the plaintiffs' suit for possession on the ground that no interest in the lands has passed to the defendants in the absence of a registered document.

Assuming that a mortgagee by deposit of title deeds is not entitled to possession, it does not follow that when such a mortgagee has been put into possession of the mortgaged property by or with the consent of the mortgagor he can be required to give it up before the mortgage debt is satisfied. The defendants have a charge on the land and are entitled to retain possession thereof until the charge is paid off and in the meantime to take the rents and profits in lieu of interest as arranged at the time when they were put into possession. This undoubtedly was the intention of the parties. If the mere put-

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ting of the defendants into possession in such circumstances does not give them the right to retain possession until payment, there must have been an implied promise that the plaintiffs would execute the legal documents necessary to give effect to such intention. The defendants would still have the right to sue for specific performance of that agreement and therefore, under the authority of the Calcutta case *Akbar Fakir* v. *Intail Sayal* (1), the plaintiffs would not be entitled to recover possession.

From another point of view the defendants may be regarded as having received authority from the plaintiffs to manage the lands and to receive the rents and profits in lieu of interest and as such authority was given to them in consideration of the loan to the plaintiffs, the authority could not be terminated under section 202, Indian Contract Act, until the loan is repaid.

It may be added that there is nothing in the Transfer of Property Act or the Registration Act to require a registered document for such a transfer of possession as was effected in this case, for the transaction was not one of sale or mortgage requiring such an instrument under sections 54 and 59 of the Transfer of Property Act. As the plaintiffs did not sue to redeem their mortgage and even denied the existence of any mortgage to the defendants they are not entitled to a decree for redemption in this suit. On the grounds stated above, we decide that the plaintiffs are not entitled to recover possession of the lands. The appeal is therefore dismissed with costs.

Civil Miscellaneous Appeal No. 24 *of* 1917.

January 21*st*, 1918.

Before Sir Daniel Twomey, Chief Judge, and Mr. Justice Ormond.

SHWE YIN *v.* (1) MA ON, (2) BA TIN.

J. R. Das—for Appellant.

N. N. Burjorjee—for Respondents.

Probate and Administration Act (*V of* 1881), *sections* 23 *and* 41.

The rival claimants for Letters-of-Administration to the estate of one Maung Win Pan were Ma Shwe Yin who alleged herself to be his widow and the mother and brother of Ma Me who was admittedly the lesser wife of the deceased and had died after surviving him. The status of Ma Shwe Yin was disputed.

Held,—that the rule laid down in *Ma Tok* v. *Ma Thi*, 5 L.B. R., 78, applied to the case and the sole heirs or heir of Ma Me who would, if still

(1) (1914) 29 I.C., 707.

living, be entitled to Letters-of-Administration was entitled to stand in her shoes after her death.

Williams on Executors, 10th Edition, page 322. In the goods of *Mary Alicia Gill*, 1 Hagg. Ecc., 341; 162 E.R., 606, and *Ma Hnin Bwin* v. *U Shwe Gon*, 8 L.B.R., 1—referred to.

The appellant Ma Shwe Yin applied for Letters-of-Administration to the estate of Maung Win Pan, deceased, on the ground that she was his widow. The respondents Ma On and Maung Ba Tin also applied for Letters-of-Administration, jointly—as the legal representatives of Ma Me who was the 2nd wife of the deceased Win Pan, and who had survived him but has since died. Ma On is the mother and Maung Ba Tin is the brother of Ma Me. The status of Ma Shwe Yin was disputed but the status of Ma Me was admitted. The learned Judge on the Original Side found that the appellant had not proved that she was the wife of the deceased Win Pan and he granted Letters-of-Administration to Ma On under section 41 of the Probate and Administration Act.

Mr. Das for the appellant asks us to go into the evidence and to grant Letters-of-Administration to Ma Shwe Yin as the widow of the deceased Win Pan. The case of *Ma Tok* v. *Ma Thi* (1) lays down that where two rival applicants apply for Letters-of-Administration, one of whom is admittedly entitled to a share in the estate under section 23 of the Probate and Administration Act and the status of the other is disputed, the Court should grant Letters-of-Administration to the heir whose status is admitted. In the present case Ma Me was admittedly entitled to a share in the estate as the lesser wife. If Ma Me's legal representatives as such apply for Letters-of-Administration to the estate of the person to whom Ma Me was an heir, we see no reason why they should not stand in the shoes of Ma Me. This is the rule adopted under English Law:—On the ground that the grant of Letters should follow the interests (*see* Williams on Executors, 10th Edition, page 322, and *In the Goods of Mary Alicia Gill* (2). Ma Me lived in her husband's house and therefore lived separately from, and was not dependent on her mother Ma On. Ma On and Maung Ba Tin in their application stated that they were the sole heirs of Ma Me and that fact was not denied. But under

(1) 5 L.B.R., 78. (2) 1 Hagg. Ecc., 341; 162 E.R., 696.

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the Privy Council ruling in *Ma Hnin Bwin* v. *U Shwe Gon* (3). Maung Ba Tin, the 2nd respondent, would be Ma Me's sole heir: and he alone therefore represents her estate. We see no reason why the principle enunciated in *Ma Tok's* case should not be applied in the present case and Letters-of-Administration granted to the 2nd respondent as standing in the shoes of Ma Me and as her legal representative.

The learned Judge on the Original Side does not explain why he thought it necessary or convenient to proceed under section 41 of the Act. No reason appears for not granting Letters to the person entitled under section 23, namely Ba Tin.

We vary the order by cancelling the grant of Letters-of-Administration to Ma On and granting them to the 2nd respondent Ba Tin. There will be no order as to costs.

Civil 1st Appeal No. 186 *of* 1916.

January 22nd, 1918.

Before Sir Daniel Twomey, Chief Judge, and Mr. Justice Ormond.

(1) SAN PE, (2) KO HMAW, (3) HNIN KHIN *v.* (1) MA SHWE ZIN, (2) MA TIN, (3) BA SEIN (MINOR BY HIS GUARDIAN-AD-LITEM, MA SHWE ZIN), (4) PO YIN.

Kyaw Htoon—for Appellants.

J. E. Lambert—for Respondents.

Buddhist Law: Inheritance—Limitation—Claim by step children on death of step-father to a share in the jointly acquired property (i) of their deceased mother and step-father and (ii) of their step-father and his second wife.

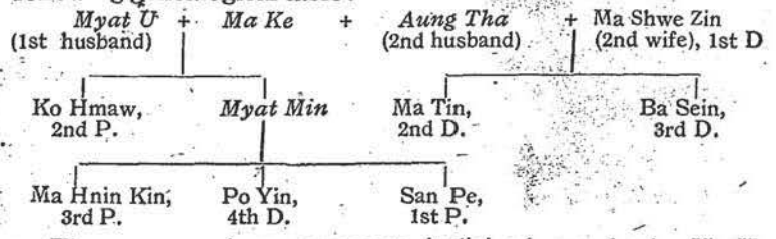
The children and grand-children of one Ma Ke by her first husband Myat U sued the widow and children of Ma Ke's second husband Aung Tha who, after Ma Ke's death, married as a second wife Ma Shwe Zin for a share of (*a*) the jointly acquired property of Aung Tha's marriage with Ma Ke and (*b*) the property acquired by Aung Tha and Ma Shwe Zin during their marriage. Myat U died 25 years before the suit and after his death Ma Ke married Aung Tha by whom she had no issue. It is not alleged that she brought any property to her marriage with Aung Tha. She died 20 years before the institution of the suit in 1916. Aung Tha died in 1914.

Held,—that the suit must fail, as it is only when the surviving step-parent dies leaving no natural issue and no widow surviving him that the children of the step-parent's deceased wife by a former husband are entitled to the step-parent's property under the Digest, sections 294 and 295 and that sections 216 and 222 of the Digest under which plaintiffs could have sued within 12 years of Aung Tha's death under Article 123 of the

(3) 8 L.B.R., 1.

Limitation Act for Ma Ke's property, if any, which was taken by Aung Tha to his subsequent marriage with Ma Shwe Zin must be held to relate only to the mother's (in this case Ma Ke's) *thinthi* property.

This is a suit for a share of inheritance brought by the descendants of one Ma Ke against the widow and two surviving children of Ma Ke's second husband Maung Aung Tha, deceased. The relationship of the parties is shown in the following genealogical table:—



The persons whose names are italicized are dead. Ma Ke by her first husband Myat U had issue Ko Hmaw, 2nd plaintiff, and Myat Min, deceased. Myat Min left three children surviving him, 1st plaintiff San Pe, 3rd plaintiff Ma Hnin Kin and 4th defendant Po Yin who was put in as a defendant because he refused to join as a plaintiff. Ma Ke's first husband Myat U died about 25 years before the suit and after his death Ma Ke married Aung Tha by whom she had no issue. About 20 years before the suit she died and Aung Tha who survived her married as a second wife the 1st defendant Ma Shwe Zin by whom he had issue Ma Tin, 2nd defendant and Ba Sein, 3rd defendant. Aung Tha died in 1914. The suit by the descendants of Ma Ke's first marriage against Aung Tha's widow and children was for a share of (*a*) the jointly acquired property of Aung Tha's marriage with Ma Ke and (*b*) the property acquired by Aung Tha and Ma Shwe Zin during their marriage. It is not alleged that Ma Ke or Aung Tha brought any property to their marriage. A further claim was made that Ma Ke's grandson San Pe, 1st plaintiff, had been adopted by Aung Tha and Ma Ke as their *kittima* son.

The District Court held that the adoption of San Pe was not established and, though one of the grounds of appeal to this Court is that the District Court's decision on this point was wrong, the learned counsel for the plaintiff's appellants expressly waived this ground at the hearing.

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As regards the remainder of the plaintiffs' claim the District Court found that the plaintiffs could not recover any part of the property jointly acquired by the Ma Ke and Aung Tha during their marriage because their suit was barred by limitation under Article 123 of the Limitation Act, more than 12 years having elapsed from the date of Ma Ke's death on the occurrence of which the cause of action arose. The District Judge further held that there was no authority for giving the plaintiffs a share in the property left by Aung Tha, as Aung Tha left a widow and children surviving him.

As regards the property acquired by Aung Tha and Ma Shwe Zin jointly, there can be no doubt as to the correctness of the District Judge's finding. It is only when the surviving step-parent dies leaving no natural issue and no widow surviving him that the children of the step-parents' deceased wife by a former husband are entitled to the step-parents' property under the Digest, sections 294 and 295. Thus it is only if Aung Tha had died without remarrying that the plaintiffs could have come in as his heirs under these sections.

We have to consider however whether the District Judge's decision is correct also as regards the property brought by Aung Tha to his marriage with Ma Shwe Zin. That property would presumably be, for some part at any rate, property acquired jointly by him and Ma Ke during his first marriage. The plaintiffs no doubt were at liberty to claim a share of this property at once after Ma Ke's death according to the ordinary rule for partition between step-father and step-children (*see* section 211 of the Digest). They could have done so at any time within 12 years from the date of their mother's death but they failed to do so. The question is whether the Burmese law of inheritance allows them to claim the same or a smaller share of that property on the subsequent happening of their step-father's death. The texts from *Pânam*, *Pyu* and *Sônda* in sections 216 and 222 of the Digest indicate that the step-children can claim, even at that late stage, their mother's property, if any, which was taken by the step-father to his subsequent marriage. But according to the *Pānam* text, the claim could be only in respect of property which had been brought by the deceased widow (*i.e.* in this case Ma Ke) to her

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second marriage and the text expressly relates only to cases where the step-father has no issue by his subsequent marriage. It must be held that the texts in sections 216 and 222 relate only to the mother's *thinthi* property, if any. As already noted it is not claimed in this case that Ma Ke brought any such property to her marriage with Aung Tha.

We therefore find that the suit was rightly dismissed and we dismiss the appeal against 1st, 2nd and 3rd respondents with costs.

As the appellants were allowed to appeal as paupers, we further direct the plaintiffs-appellants to pay the Court fees on the memorandum of appeal which would have been paid by the plaintiffs-appellants if they had not been permitted to appeal as paupers.

Before Sir Daniel Twomey, Chief Judge and Mr. Justice Ormond.

Civil 1st Appeal No. 68 of 1916.

January, 10th 1918.

KYIN WET *v.* 1. MA GYÔK, 2. SABYAPO. 3. SEIKWAN, 4. SAING THEIN, 5. KYIN MYO,—MINORS BY THEIR GUARDIAN MA GYÔK.

R. N. Burjorji—for Appellant.

Ba Shin—for Respondents.

Adoption by Chinaman—Chinese religion—Confucianism—Buddhism—Taoism—Burma Laws Act, XIII of 1898, *section* 13—*Chinese Customary Law.*

The plaintiff-appellant sued as the adopted son of a Chinaman to recover possession of his adoptive father's estate.

Held,—(Reversing the judgment of the District Judge) that a Chinaman who professed Buddhism is a Buddhist within the meaning of section 13 of the Burma Laws Act, XIII of 1898, and that the question of the plaintiff's adoption should be determined in accordance with the Chinese Customary Law.

Apana Charan Chowdry v. *Shwe Nu*, 4 L.B.R., 124, not approved.

Fone Lan v. *Ma Gyi*, 2 L.B.R., 95, followed.

Ma Pwa v. *Yu Lwai*, 8 L.B.R., 404; and *Hong Ku* v. *Ma Thin*, S.J.L.B., 135—referred to.

The plaintiff-appellant claimed to be the adopted son of U Shwe Hla, deceased, who was a Chinaman. The decision of the District Court is contained in the following passage of the judgment:—

"U Shwe Hla while adhering to his ancestral religion (Confucianism) conformed more or less to Burman Buddhist

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practices in subscribing to religious works and festivals, but I cannot hold that he was a Buddhist in the absence of definite evidence."

Unless the plaintiff-appellant could prove that Shwe Hla was a Buddhist, the law governing the devolution of Shwe Hla's estate would be the Indian Succession Act, 1865, which does not recognise adopted sons. (The definition of "son" in the General Clauses Act, 1897, does not apply to the Indian Succession Act, 1865—see section 4, General Clauses Act). If Shwe Hla was a Buddhist the law to be applied would be the Chinese Customary Law applicable to Chinese Buddhists. This was decided in *Fone Lan* v. *Ma Gyi* (1). In a later case *Apana Charan Chowdry* v. *Shwe Nu* (2) Mr. Justice Hartnoll observed that a Chinese plaintiff has to show that "there is a Chinese Buddhist Law in China applicable to Chinese Buddhists only as apart from the customary law applicable to all the inhabitants whether Buddhists or not". But this view does not appear to be well-founded and it was not followed by the Bench in *Ma Pwa* v. *Yu Lwai* (3). In the latter case Sir C. Fox pointed out that "the Chinese customs as to adoption and inheritance have no connection with Buddhism, Confucianism or Taoism, but appear to be based to a great extent on the veneration of ancestors which existed before the first teachers of the three religions appear and which still is the strongest influence with the majority of Chinese whichever of the above faiths they profess." As the law stands however we cannot give effect to these customs unless the Chinaman concerned is found to be of one of the three religions mentioned in section 13, Burma Laws Act, *viz.*, a Buddhist, Mohamedan or Hindu. There is no question of the deceased Shwe Hla being a Mohamedan or Hindu: the only question is whether he was a Buddhist.

The subject of Chinese religion was discussed at some length in the Special Court case *Hong Ku* v. *Ma Thin* (4). The Court held that it would be wrong to presuppose of a Chinaman that he is a Buddhist and various authorities were cited to prove that Confucianism, Taoism and Buddhism are distinct religions and that Confucians and Taoists are not Buddhists.

(1) 2 L.B.R., 95. (2) 4 L.B.R., 124. (3) 8 L.B.R., 404. (4) S.J.L.B., 135.

The Special Court judgment in that case may and probably has already given rise to serious misapprehension as it omits to notice a unique feature of Chinese religious life, namely, that most of the Chinese people are Confucians, Taoists and Buddhists all at once. The official state religion is Confucianism and it appears that there are strictly orthodox Confucians who do not follow Buddhist doctrines and forms of worship. But that the bulk of the Chinese follow all three religions is clearly shown by the writings of missionaries and others who have made a special study of Chinese life. A standard work on the subject is " Religion in China " volume 8 (5) by Joseph Edkins, D.D. and in Chapter V he writes :—

> China presents a fine field for observing the mutual influence and conflict of those ideas which have most to do with the formation of character—the religious and the moral. We have there three great national systems existing in harmony. Three modes of worship, and three philosophies underlying them, have been there for ages interacting on each other. Sometimes they have been in conflict, but usually they have preferred state of peace. The Chinese would rather have toleration than persecution. They did not drive out the intruding religion that came to them from India, as the Japanese did Christianity in its Roman Catholic form. Nor did Confucianism expel the Taouist religion, as the Brahmans did Buddhism from the land of its birth. The Chinese quietly adopted all these religions, after a limited period of persecution, and now they exist side by side not only in the same locality, but, what is more extraordinary, in the belief of the same individuals. It is quite a common thing in China for the same person to conform to all the three modes of worship.

The same chapter contains the following passage :—

> The religions of Confucius, Buddha and Taou are truly national, because the mass of the people believe in them all. They are far from feeling it inconsistent to do so. Philosophers may not know what to do with a fact like this; but it is true nevertheless. Those who themselves have a devoted love of truth, and feel strong convictions of certain things, do not understand how any one should belong to three religions at once. Hence some writers have parcelled out the Chinese among these systems, assigning so many millions to one and so many to another. In estimating the number of Buddhists in the world, one hundred and eighty millions of Chinamen are placed by one author at the head of his enumeration of nations. He has obtained this number by halving the whole population ; a process conveniently short, but far from giving a true view of the case. If it serves for other races to refer every individual belonging to them to some one religion it will not answer for China. Some other mode of classification must be employed. The majority of the inhabitants in that country comply with the worship of more than one religion, believe in more than one mythology of gods, and contribute to the support of more than one priesthood.

(5) Published by Trubner & Co., London, 1878.

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Commenting on Mr. Edkins' work the eminent Orientalist, Sir Alfred Lyall wrote as follows in Chapter II of his "Asiatic Studies" (6):—

* * *

It is only in China that we find two mighty religious potentates, such as Confucius and Buddha, reigning with co-ordinate authority over one nation, and their ritual mingled with the adoration of the miscellaneous primitive divinities, who have elsewhere been usually extirpated, subdued, or refined and educated up to the level of the higher and paramount religious conceptions. For, although the Chinese religions seem to have modified each other externally, and to have interchanged some colouring ideas, no kind of amalgamation into one spiritual kingdom appears to have ensued; it is at most a federation of independent faiths united under the secular empire. Whereas in other countries the chief religion is one, but the interpretations of it are many, so that the same faith is a moral system, a mysterious revelation, or a simple form of propitiating the supernatural, in China a man may go to different religions, according to his needs or feelings, for specialities of various sides or phases of belief. Confucianism gives the high intellectual morality, fortified by retrospective adoration of the great and wise teachers of mankind, and based on family affections and duties, but offering no promises to be fulfilled after death, except the hope of posthumous memorial veneration. Buddhism gives metaphysical religion of infinite depth, with its moral precepts enforced by the doctrine of reward or punishment, according to merits or demerits, acting upon the immaterial soul in its passage through numberless stages of existence. It contributes imposing ceremonial observances, the institution of monasticism, and a grand array of images and personified attributes for worship by simple folk who have immediate material needs or grievances. Buddha himself, having passed beyond the circle of sensation, is inaccessible to prayer, yet out of pity for men he has left within the universe certain disciples who, albeit qualified for Nirvana, have consented to delay for a time their navishing into nothingness, in order that they may still advise and aid struggling humanity. Both Confucius and Buddha seem rather to have despised than denied the ordinary popular deities, and to have refrained, out of pity for weaker brethren, from open iconoclasm. Taouism has rewarded both these great teachers by apotheosis into a pantheon, which appears to be filled by every imaginable device, by personifications of everything that profits or plagues humanity, of natural phenomena, of human inventions, of war, literature, and commerce, and by the deification of dead heroes and sages, of eminent persons at large, and of every object or recollection that touches men's emotions or passes their understanding. It is worth notice that the three persons who founded these three separate and widely divergent religions appear all to have lived about the same time, in or near the sixth century B.C. And the impartial veneration accorded to them by the Chinese is shown by their being worshipped together, as the Trinity of the Sages.

* * *

A more recent work "Buddhist China," by R. F. Johnston opens with a discussion of "The three religions of China" (7).

(6) 2nd Series 1899. Published by John Murray, London.

(7) Published by John Murray, London, 1913.

The following passage at the beginning of the book confirms the account given by Dr. Edkins:—

Within the grounds of one of the most famous Buddhist monasteries in China—Shaolin in Honan—may be seen two stone tablets inscribed with pictorial statements of a doctrine that is familiar to all students of Chinese religion and philosophy—the triunity of the San Chiao, or three Doctrinal Systems of Buddhism, Confucianism, and Taoism. On one of these tablets, the date of which corresponds to the year 1565 of our era, there is the incised outline of a venerable man holding an open scroll on which a number of wavy lines like tongues of flame converge and blend. The old man's draperies are symmetrically arranged, and his crouching figure is skilfully made to assume the appearance of a circle, the centre of which is occupied by the open scroll. The whole drawing is surrounded by a larger circle, which signifies ideal unity and completeness, or represents the spherical monad of Chinese cosmological philosophy. The other tablet, which is more than seven hundred years old, is of a less symbolical or mystical character. It shows us the figures of the representatives of the three systems standing side by side. Sakyamuni Buddha occupies the place of honour in the centre. His head is surrounded by an aureole, from which issues an upward-pointing stream of fire, and beneath his feet sacred lotus-flowers are bursting into bloom. On the left of the central figure stands Lao-Chun, the legendary founder of Taoism, and on the right stands China's "most holy sage"—Confucius.

The words which are ordinarily used to sum up the theory of the triunity of the three ethicoreligious systems of China are *San chiao i t i*—the three Cults incorporated in one organism or embodying one doctrine. The idea has found fanciful expression in the comparison of the culture and civilization of China with a bronze sacrificial bowl, of which the three "religions" are the three legs, all equally indispensable to the tripod's stability.

Such teachings as these are abhorrent to the strictly orthodox Confucian, who holds that the social and moral teachings of Confucius are all that humanity requires for its proper guidance; but they meet with ungrudging acceptance from vast numbers of Buddhists and Taoists, who, while giving precedence to their own cults, are always tolerant enough to recognise that Confucianism, if somewhat weak on the religious side, is strong and rich on the ethical side. They find an echo, indeed, in the hearts of the great majority of the Chinese people, who show by their beliefs and practices that they can be Buddhists, Taoists, and Confucians all at the same time.

* * *

The only other quotation that we wish to make is from Professor Giles' "Confucianism and its rivals" (8).

* * *

In 1908, when their mandate was already exhausted, the Manchus foolishly elevated Confucius to the rank of a god, an honour which the old sage himself would have been the very first to repudiate. Still, during all their tenancy of the empire, the Manchus kept Buddhism (an importation)

(8) Hibbert Lectures. Second Series. Published by Williams and Norgate, London, 1915. (Page 258).

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and Taoism (an imitation) well in hand, and away from political aspirations.

Confucianists will not readily avow any faith in either one or the other; at the same time, it is customary for all families to visit Buddhist or Taoist temples—often both, and to employ the priests—also of both, to recite masses for their dead.

* * *

It is probably true that every Chinaman who is not a Christian or a Mohamedan is a Confucian. He may be a Buddhist as well but we cannot assume that he is without evidence of the fact. The important point, to establish which it has seemed desirable to set out the above extracts is that the two religions are by no means mutually exclusive. On the contrary it appears to be exceptional for a Chinaman to be a Confucian and nothing else.

In enquiring whether a particular Chinaman is a Buddhist or not, one of the test questions might well be whether he worships Kuan-Yin also known as Kuan-Shih-Yin. As explained in the Special Court judgment Kuan-Yin is an object of almost universal reverence both in China and in Japan (where the name becomes Kwannon.) In "Buddhist China" Mr. Johnston describes Kuan Yin as one of the attendant *bodhisats* of the Buddha, Amitabha and this author says that "Kuan-Yin (Avalokitesvara) probably receives a larger amount of willing reverence in China to-day than any other object of Chinese worship."

In the present case the evidence as to the religion professed by Shwe Hla before he came to Burma is merely that he was of "the Chinese religion." One witness said that he worshipped "Ti-gaung" but I have been unable to trace this object of worship and there is nothing to show that it is connected with Buddhism. No mention is made of Kuan-Yin. It is not established that Shwe Hla was of the Buddhist religion before he came here. It is admitted, however, that he professed Buddhism after he came to Burma and that he followed Buddhist practices. The admissions of the defendant Ma Gyôk herself and of her witness Maung Twe confirm the evidence of the plaintiff's witnesses that Shwe Hla in Burma professed Buddhism in addition to his "Chinese religion". Assuming that his "Chinese religion" was the official religion Confucianism it would not render him incapable in Burma any more

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than in China of following the Buddhist religion as well. Like the bulk of his fellow countrymen he was probably a Buddhist before he came to Burma: but assuming that he was not, the fact that he became a Buddhist after he came to Burma would be sufficient under section 13, Burma Laws Act. It is not necessary for the application of that section that the person whose religion is under consideration should have been born a Buddhist, Mohamedan, or Hindu, as the case may be. It follows that the question of the plaintiff's adoption should be determined in accordance with the Chinese Customary Law. The Succession Act does not apply to U Shwe Hla's estate.

The decree of the District Court is set aside, and the case is remanded for determination of the remaining issues and for disposal accordingly.

The costs of this appeal will come out of the estate. A certificate will be granted to the appellant under the Court Fees Act for the refund of the Court fee on the memo of appeal.

Before Mr. Justice Twomey.

Criminal Revision No. 65B. *of* 1910.

April 1*st*, 1910.

KING-EMPEROR *v.* MAUNG KA AND THIRTEEN OTHERS.

Gambling Act I of 1899, *sections* 3 (3), 11, 12—*Common gaming house—Public place—Fighting cocks not instruments of gaming.*

Fighting birds are not "instruments of gaming" within the meaning section 3 (3) of the Burma Gambling Act, 1899. The fact that cock fighting and betting are carried on in a private enclosure does not suffice to make it a "common gaming house."

Queen-Empress v. *Hmat Gyi*, S.J.L.B., 317, referred to.

Fighting birds are not "instruments of gaming" within the meaning of section 3 (3) of the Burma Gambling Act, 1899, any more than they were "instruments of gaming" under the earlier Act (III of 1867). On this point the ruling in *Queen Empress* v. *Hmat Gyi* (1) has not been superseded or modified.

In the present case the Sessions Judge, Hanthawaddy, refers for the orders of this Court the convictions of certain persons who were fined under section 11 of the Gambling Act, 1899, for "aiding and abetting the fighting of two cocks" in a "common gaming enclosure." It is alleged that there was betting at the cock-fight and another accused named Maung Ka

(1) S.J.L.B., 317.

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took commission on the bets. He was convicted and fined under section 12 for "keeping a common gaming house."

Whether there was betting or not the convictions were all illegal because the cock-fighting was not carried on in a public place (*i.e.* in "a street or thoroughfare or place to which the public have access"). If it had been carried on in a public place the accused persons could have been dealt with under section 10 of the Act. The place in this case was a private enclosure.

The fact that cock-fighting and betting were carried on in the enclosure does not suffice to make it a "common gaming house." For, the definition of "common gaming house" [section 3 (1) of the Act] requires that "instruments of gaming" should be kept or used therein and as explained at the beginning of this order fighting birds are not "instruments of gaming."

On these grounds the convictions in this case under sections 11 and 12 of the Gambling Act are set aside and the fines of Rs. 15 paid by Maung Ka under section 12 and Rs. 5 each paid by the remaining 13 convicted persons under section 11 must be refunded.

Before Sir Daniel Twomey, Chief Judge, and Mr. Justice Ormond.

Civil 2nd Appeal No. 217 of 1916.

February 20th, 1918.

1. MA NYI MA *alias* MA KYIN HMÔN, 2. MA KYIN MYAING, AND 3. MA HLAING *alias* MA KYIN HLAING, HEIRS AND LEGAL REPRESENTATIVES OF MA SHWÈ BÔN, DECEASED, *v.* 1. AUNG MYAT, 2. MA HAN, 3. PO NYUN, 4. MA HNIN YIN, 5. MA SE, PERSONALLY AND AS LEGAL REPRESENTATIVE OF MAUNG PO NYO, DECEASED, 6. PO NGE, 7. MA U MA.

Doctor—for Appellants.

Ba Tin and J. A. Maung Gyi—for 1st and 2nd respondents.

Possession—Limitation—Sale by guardian—Sale by Administrator—restitution.

In 1913 Appellant sued for possession and mesne profits in respect of two-thirds of a certain holding which she bought by a registered conveyance from Ma Shwe Hmôn and Ma Pu on the 5th February 1913. The land originally belonged to Ko O Za who died in 1899 leaving three daughters Ma Hnin Yon the wife of Po Nyàn, Ma Shwe Hmon and Ma Pu. Letters of administration were taken out in the names of all four. In 1902 Po Nyan

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sued and recovered possession of the land from a stranger and in 1904 he and the two minors sold the land to Po Nyo, Chit Su and Ma Se for Rs. 1,750 and they in turn sold it to Po Nge and his wife. In 1912 a Chetty bought the land from Po Nge and his wife and then sold it to the first two respondents. Ma Shwe Hmon came of age in 1904 and Ma Pu in 1908. These two sold their two-thirds share in the land to the appellant in 1913.

Held,—(1) that Po Nyan was in no sense the guardian of his two minor sisters-in-law; a sale therefore by him as guardian would be altogether void and could not be ratified;

(2) that the two minors joining in the sale to Po Nyan, Chit Su and Ma Se was a nullity, and after attaining their majority they cannot be said to have intentionally caused or permitted the subsequent purchasers to believe that their interest in the property was being bought by such purchasers when they did not even know of the sales;

(3) that the grant of the letters to the two minors was a nullity. The sale was made by Po Nyan, the Administrator, without the leave of the Court and was good until avoided by the minors, *i.e.*, the plaintiff's vendors;

(4) that the suit for possession was not barred by limitation;

(5) that the minors not having affirmed the sale by the Administrator had the right of treating it as void; and they exercised that right by selling their two-thirds share to the appellant in 1913;

(6) that the appellant's title rested upon the avoidance by the minors of the sale by the Administrator and the minors could not avoid the sale without restoring the benefits they received from such sale.

The decree of the Lower Court was accordingly set aside and the appellant granted a decree for possession on her paying into Court the sum of Rs. 1,166.

Bijoy Gopal Mukerji v. *Srimati Krishna Mahishi Debi*, (1907) 34 I.A., 87; *Bhawani Prasad Singh* v. *Bisheshar Prasad Misr*, (1881) I.L.R. 3 All., 846; *Mohesh Narain Moonshi* v. *Taruck Nath Moitra*, (1892) 20 I.A., 30; *Bachchan Singh* v. *Kamta Prasad*, (1910) I.L.R. 32 All., 392—referred to.

Ormond, J.—The plaintiff Ma Shwe Bon sued for possession and mesne profits in respect of two-thirds of a certain holding which she bought by a registered conveyance from Ma Shwe Hmon and Ma Pu on the 5th February 1913. The land originally belong to Ko O Za deceased. The first two defendants are in possession and they purchased the holding from a Chetty in 1912. The Chetty purchased in 1908 from two other defendants, Po Nge and his wife, who purchased in 1904 from Po Nyo, Chit Su and Ma Se. Po Nyo was made a defendant but has died and Ma Se is also a defendant. These three bought the land in 1903 or 1904 from the administrators to the estate of Ko O Za deceased for Rs. 1,750. Ko O Za died in 1899 leaving 3 daughters Ma Hnin Yon, the wife of Po Nyan, Ma Shwe Hmon and Ma Pu. The last two, who were minors at the time of Ko O Za's death sold their two-thirds share in

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the land to the plaintiff in 1913. Ma Shwe Hmon came of age in 1904 and was an adult at the time of the sale to Po Nge, and Ma Pu came of age in 1908 and was an adult at the time of sale to the Chetty. The three sisters lived together and Po Nyan managed the property. He took out Letters of Administration to their father's estate, the Letters were granted in his name and his wife Ma Hnin Yôn's and also in the names of her two minor sisters. In 1902 he sued and recovered possession of the land from a stranger. Both the Lower Courts have found that Po Nyan sold the land to Po Nyo, Chit Su and Ma Se to defray the legal expenses of that suit; that as regards the two minors it was sold for necessaries; and that the two minors have benefited to the extent of two-thirds of the sale proceeds, *i.e.* two-thirds of Rs. 1,750 or Rs. 1,166⅔. Both of the Lower Courts apparently held that section 68 of the Contract Act makes the sale of the land by Po Nyan good and dismissed the suit. The suit was dismissed also on the ground of estoppel, acquiescence and ratification on the part of the plaintiff's vendors. The Divisional Court also held the plaintiff's claim to be barred by limitation, because the property having been sold by the administrator without the leave of the Court, the sale was voidable under section 90 of the Probate and Administration Act; and Ma Shwe Hmôn and Ma Pu could avoid that sale only within three years of the date of their attaining majority because Article 114 of the Limitation Act prescribes three years as the period within which a suit for the rescission of a contract can be brought.

First:—What was the effect of the sale to Po Nyo, Chit Su and Ma Se by Po Nyan, considered as a sale made on behalf of the two minors?

Po Nyan was in no sense the guardian of his two minor sisters-in-law; if therefore he sold their property as their guardian, the sale would be altogether void, and section 68 of the Contract Act could not make such sale good. And the sale being void, it could not be ratified.

Next as to estoppel:—There is evidence to show that the two minors joined with Po Nyan in the first sale to Po Nyo, Chit Su and Ma Se by applying for the mutation of names in the Revenue Register; but they did not know of the subsequent

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sales until after the sale by the Chetty in 1912. Their joining in the sale to Po Nyo, Chit Su and Ma Se when they were both minors was a nullity; and after attaining their majority they cannot be said to have intentionally caused or permitted the subsequent purchasers to believe that their interest in the property was being bought by such purchasers when they did not even know of the sales.

Lastly :—What was the effect of the sale to Po Nyo, Chit Su and Ma Se considered as a sale by Po Nyān as Administrator?

The grant of Letters so far as the two minors were concerned was a nullity. The sale was made by Po Nyan, the Administrator, without the leave of the Court and was good until avoided by the minors, *i.e.* the plaintiff's vendors. But the minors knew of the sale at the time and did not express any intention of avoiding it until they sold their two-thirds share to the plaintiff in 1913; *i.e.* after a lapse of 9 or 10 years—and 9 and 5 years, respectively after they had attained majority.

Mr. Doctor for the plaintiff-appellant contends that this being a suit for possession, the plaintiff can under Article 142 or Article 144 of the Limitation Act bring his suit at any time within 12 years from the time when his vendors discontinued their possession or when the defendants' possession became adverse, *i.e.* from 1903 or 1904 the date of the sale by Po Nyan; and he relies upon the case of *Bijoy Gopal Mukerji* v. *Srimati Krishna Mahishi Debi* (1).

The Divisional Judge thought that Article 114 applied:—but that Article only applies to a suit between promisor and promisee for the recission of an existing contract between them: see *Bhawani Prasad Singh* v. *Bisheshar Prasad Misr* (2). Article 91 does not apply because the sale in question was an oral sale and there was no instrument to be set aside; see Mittra on Limitation, p. 987. Article 120 apparently is the article that would apply by a suit by the plaintiff's vendors to set aside the sale by the Administrator on the ground that it was made without the leave of the Court. That article allows 6 years from the time when the right to sue accrued, *i.e.* from the date of the sale (1903-04):—and under sections 6 and 8 of the Limitation Act the plaintiff's younger vendor would

(1) (1907) 34 I.A., 87. (2) (1881) I.L.R. 3 All., 846.

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have up to 1910-11. As stated above, they did not attempt to avoid the sale until 1913 which would be beyond the period allowed by Article 120.

The present case I think is governed by *Bijoy Gopal Mukerji's* case :—In that case the plaintiffs sued for possession as reversioners upon the death of a Hindu widow. The defendants were in possession under an *ijara* (lease) granted by the widow. Article 91 of the Limitation Act provides 3 years for a suit to cancel or set aside an instrument :—and under that Article the suit would have been barred. Their Lordships of the Privy Council held that the *ijara* was voidable and not void ; that the reversioner could either affirm it or treat it as a nullity without the intervention of the Court ; that he showed his election to do the latter by commencing an action to recover possession of the property and that there was nothing for the Court either to set aside or cancel as a condition precedent to the right of action for possession, which was governed by Article 141.

That decision is based upon the principle that under the Limitation Act the remedy only, and not the right, is extinguished except the right to property, which is extinguished after the determination of the period prescribed for a suit for possession of such property (section 28).

The case of *Mohesh Narain Moonshi* v. *Taruck Nath Moitra* (3) is at first sight an authority in favour of the respondents.

In that case the plaintiff, a validly adopted son, sued for possession of property in the possession of the defendant whose adoption was invalid. Their Lordships held that the suit was a suit "to set aside an adoption" within the meaning of the Limitation Act of 1871 and that the suit was barred : —in other words, their Lordships held that in the case of an invalid adoption, the status of an adopted son is acquired after a lapse of the period prescribed for a suit to set aside the adoption ; if such status has been openly asserted during such period. The difference between the two cases is this :—in the last case a suit was necessary to clear away the obstruction to the plaintiff's title, *viz.* the defendant's adoption, whereas in

(3) (1892) 20 I.A., 30.

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the first case the plaintiff had the option of affirming or avoiding the lease by the widow and could treat the obstruction to his title as a nullity without the necessity of bringing a suit for that purpose.

In the present case the minors, not having affirmed the sale by the Administrator, had the right of treating it as void; that right was not extinguished by the lapse of six years under Article 120 and they exercised that right by selling their two-thirds share to the plaintiff in 1913. For these reasons I think the suit for possession is not barred by limitation.

The plaintiff's title rests upon the avoidance by the minors of the sale by the Administrator; but the minors cannot avoid the sale without restoring the benefits they received from such sale. As stated above, the minors benefited to the extent of Rs. 1,166⅔; the plaintiff must therefore refund that sum which should carry interest, but then the plaintiff would be entitled to a set-off in respect of 2-3rds of the net rents and profits—*Bachchan Singh* v. *Kamta Prasad* (4). In this case I think such interest and mesne profits should be taken as cancelling each other.

I would allow the appeal; set aside the decree of the lower Court and grant the plaintiff a decree for possession upon her paying into Court Rs. 1,166 within 3 months from this date, each party to bear their own costs throughout:—the plaintiff's vendors having delayed so long in declaring their election to avoid the sale by the Administrator.

Twomey, C.J.—I concur.

FULL BENCH.

Before Sir Daniel Twomey, Chief Judge, Mr. Justice Ormond, Mr. Justice Maung Kin and Mr. Justice Rigg.

Civil Reference No. 1 of 1918.

March 27th, 1918.

In re MAUNG HME *v.* MA SEIN.

Ko Ko Gyi—for appellant.

May Oung—for respondent.

Buddhist Law: Divorce—Husband taking lesser wife without the consent of the chief wife.

On a reference to a full bench under section 11, Lower Burma Courts Act, as to whether the chief wife of a Burmese Buddhist is entitled to divorce her husband if he takes a lesser wife without her consent.

(4) (1910) I.L.R. 32 All., 392.

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Held,—That subject to exceptions of the kind mentioned in sections 219, 232, 265-267, and 311 of Kinwun Mingyi's Digest, if a Burmese Buddhist takes a second wife without his first wife's consent, she has the right to divorce him, and that if she decides to claim the right of divorce, the division of property should in the absence of any contract to the contrary be made as in the case of divorce by mutual consent.

Thein Pe v. *U Pet*, 3 L.B.R., 175; *Aung Byu* v. *Thet Hnin*, 8 L.B.R., 50; *Ma Thin* v. *Maung Kyaw Ya*, 2 U.B.R. (1892-96), 56; *Ma Hnin Bwin* v. *U. Shwe Gôn*, 8 L.B.R., 1 at 12; *Ma In Than* v. *Maung Saw Hla*, S.J.L.B., 103; *Ma Ein* v. *Te Naung*, 5 L.B.R., 87; *Ma So* v. *Maung Shwe Ka*, 7 Bur. L.R., 47; *Ma Ka U* v. *Maung Po Saw*, 4 L.B.R., 340 at 344; *Maung Kauk* v. *Ma Han*, 2 U.B.R. (1892-96), 48; *Ma Shwe Ma* v. *Ma Hlaing* 2 U.B.R. (1892-96), 145 at 149; *Maung Kyaik* v. *Ma Gyi*, 2 U.B.R., (1897-01), 488; *Ma San Shwe* v. *Maung Po Thaik*, 2 Chan Toon's L.C., 165; *Ma Wun Di* v. *Ma Kin*, 4 L.B.R., 175; *Queen-Empress* v. *Nga Ne U*, S.J.L.B., 202; *Bhagwan Singh* v. *Bhagwan Singh*, (1899) I.L.R. 21 All., 412 at 422; *Collector of Madura* v. *Mootoo Ramalinga Sathupathy*, (1868) 12 M.I.A., 436; *Po Han* v. *Ma Talok*, 7 L.B.R., 79—referred to.

Reference made by Mr. Justice Rigg to a Full Bench under section 11 of the Lower Burma Courts Act, 1900:—

Civil 2nd Appeal No. 174 *of* 1916.

January 3*rd*, 1918.

The parties in this case were husband and wife. In August 1914, Ma Sein sued for divorce, alleging that her husband accused her of the theft of Rs. 50 and caught her by the throat and beat her. Her suit was dismissed and she did not appeal. She refused to return to him and in November of the same year, he took another wife. In June 1915, she instituted the present suit for divorce and partition of the joint property, which was valued at Rs. 1,925. The value of the property is not in dispute. She stated in her plaint that she had been falsely accused of theft in May 1914, and in consequence of this and previous ill-treatment left him. She claimed that she was entitled to divorce as the period of one year had elapsed since she left her husband, and that this coupled with the second marriage of Maung Hme are acts of volition that dissolved the marriage. The trial Court held that her desertion of her husband was an act of mere caprice and should not be the foundation for a divorce. This judgment was reversed on appeal, on the ground that the second marriage was an act of volition on the part of Maung Hme and indicated his consent to the dissolution of the marriage. The learned Judge treated the case as one of divorce by mutual consent and granted Ma Sein a decree for half the joint property.

It is clear that Ma Sein's reason for leaving her husband was annoyance at his false assertion that she had stolen Rs. 50.

He asked her to return to him, but she refused. He gave her no maintenance and took a second wife before the year had expired from the time of her desertion. Ma Sein then went to the headman to ask for a divorce to which Maung Hme said he would agree if she took none of the joint property.

In *Thein Pe* v. *U Pet* (1) a Full Bench of this Court held that desertion of the husband by the wife did not *ipso facto* dissolve the marriage tie without some further act of volition on the part of either party to the marriage. But desertion by either party to the marriage only renders the marriage voidable at the option of the deserted party. This is clear from the ruling in *Aung Byu and one* v. *Thet Hnin* (2) which followed the Upper Burma case of *Ma Thin* v. *Maung Kyaw Ya* (3). The Divisional Judge thought that such as act of volition was manifested by Maung Hme when he took a second wife. Maung Hme however wanted Ma Sein to come back to him, and it is by no means clear that he wished to dissolve his first marriage when he married Ma Pye. The evidence of Maung In only proves that he was willing to grant her a divorce upon his own conditions about the division of property. Polygamy is not unlawful amongst Burmese Buddhists and the mere fact that a man has taken a lesser wife is no indication that he desires to put away his chief wife.

There is authority, however, for the position that even if the chief wife deserts her husband, he is bound to wait a year before he marries again, and that if he does not do so, the chief wife has the option of divorcing him. In Chapter V, section 17, *Manugye*, the law is laid down as follows: "If the wife not having affection for the husband shall leave the house where they were living together, and if during one year he does not give her one leaf of vegetable or one stick of firewood, let each have the right of taking another husband or wife; they shall not claim each other as husband and wife. . . . . If when the wife has left the house, and within one year the husband shall take another wife, of the property of both, what was brought at marriage and that which belongs to both . . let all the property be demanded and taken from the person who failed in his or her duty." In section 312 of

(1) 3 L.B.R., 175. (2) 8 L.B.R., 50. (3) 2 U.B.R. (1892-96), 56.

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U Gaung's Digest, the *Dhamma Rajabala* and *Manu* penalize a husband who marries before the prescribed period, by the loss of all the property. The paramount authority of the *Manugye* has been pointed out by their Lordships of the Privy Council in *Ma Hnin Bwin* v. *U Shwe Gôn* (4) and it was said that where this *Dhammathat* is not ambiguous, other *Dhammathats* do not require examination. I think that there is no reason to doubt that if these *Dhammathats* are followed, a second marriage by a husband during the prescribed period not only gives the chief wife a right to obtain a divorce, but also imposes a penalty upon him. But it was held in *Ma In Than's* case (5) that a man who takes a second wife in the lifetime of his first wife does not commit a fault against her. This was stated to be the rule by Moore, J. in *Ma Ein* v. *Te Naung* (6) and on appeal Parlett, J., declared that *Ma In Than's* case had not been overruled. The correctness of that decision was doubted by Birks, J. in *Ma So* v. *Maung Shwe Ka* (7) and in *Ma Ka U* v. *Po Saw* (8), Hartnoll, J., said that he was unable to agree with the decision, and that a man who took a lesser wife without the consent of his first wife, committed a serious fault against her. The latter decision was referred to in *Ma Ein's* case in a passage that I confess I do not quite understand. In Upper Burma, in *Maung Kauk* v. *Ma Han* (9), Mr. Burgess said that before the ruling in *Ma In Than's* case should be applied to Upper Burma, the authorities ought to be examined and he cited section 132 of the *Wunnana* and section 43 of Chapter XII of the *Manugye*. In *Ma Shwe Ma* v. *Ma Hlaing* (10) Mr. Burgess remarked that the whole scheme of inheritance is drawn up on the basis of a man having but one wife at a time, and he expressed the opinion that the references in section 48, Chapter III and section 37, Chapter X, *Manugye*, and in other *Dhammathats* to a plurality of wives relate to Hindu rather than Buddhist law. In *Maung Kyaik* v. *Ma Gyi* (11), Mr. Burgess said that it was doubtful whether any but the chief wife could be properly so called.

(4) 8 L.B.R., 1 at 12.
(5) S.J.L.B., 103.
(6) 5 L.B.R., 87.
(7) 7 Bur.L.R., 47.
(8) 4 L.B.R., 340 at 344.
(9) 2 U.B.R. (1892-96), 48.
(10) 2 U.B.R. (1892-96), 145 at 149.
(11) 2 U.B.R. (1897-01), 488.

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Turning now to the Digest of U Gaung, I find that in section 256 the mere taking of another wife by the husband is regarded in six out of the eight *Dhammathats*, as a ground for a divorce. Section 208 describes the five duties of a husband towards his wife, and in all three *Dhammathats* fidelity to her is one of them. In the *Dhammathatkyaw* quoted in section 214, a husband is exhorted not to make his wife jealous by being unfaithful to her. Section 397 makes the penalty for taking a lesser wife without the chief wife's consent expulsion from the house and loss of all the property. In sections 393 and 394 of the *Atthasankepa* a divorce is contemplated if the husband takes a lesser wife. As against these authorities, there are three texts in section 253, Digest, but none of the *Dhammathats* cited are of great importance. It seems to be only under certain conditions that a wife may be put away and a second one taken (see section 219, Digest). I think there are sufficient reasons for reconsidering the decision in *Ma In Than's* case. It would be illogical to allow a wife who had deserted her husband to claim the right of divorce because he remarried within one year, if a chief wife without fault is debarred from the same privilege.

I therefore refer to a Bench, full or otherwise as the learned Chief Judge may direct, the following question:—

"Is the chief wife of a Burmese Buddhist entitled to divorce her husband, if he takes a lesser wife without her consent?"

The opinion of the Full Bench was as follows:—

Rigg J.—The question referred for decision in this case is whether the chief wife of a Burmese Buddhist is entitled to divorce her husband if he takes a lesser wife without her consent.

It will be convenient first to examine the course of decisions on this point or related points.

The earliest case is that of *Ma In Than* v. *Maung Saw Hla* (5) in which the Special Court held in 1881 that the chief wife had no right of objection. This ruling was declared to be still good law in 1909 in *Ma Ein* v. *Te Naung* (6) but doubts as to its correctness had been already expressed in various cases

(5) S.J.L.B., 103. (6) 5 L.B.R., 87.

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both in Upper and Lower Burma. In *Maung Kauk* v. *Ma Han* (9) Mr. Burgess said that before accepting the rule in *Ma In Than's* case, it would be necessary to examine the authorities, as there was much to be said on the other side. In 1893, the same learned Judge said in *Ma Shwe Ma* v. *Ma Hlaing* (10) "Polygamy is said to be lawful by Buddhist law, but it may be doubted whether this conveys a correct impression unless it is understood in a special or limited sense. The leading principle of Buddhism in this respect is monogamy rather than polygamy." He went on to express the opinion that allusions to a plurality of wives in most of the *Dhammathats* referred to Hindu laws and customs rather than Buddhist law. The precise point in issue in this reference has however never been decided in Upper Burma.

The decision in *Ma In Than's* case has been questioned in three reported cases since the constitution of the Chief Court in 1900.

In *Ma San Shwe* v. *Po Thaik* (12) Birks, J., discussed this ruling but did not come to any definite conclusion. In *Ma Ka U* v. *Po Saw* (8) a full Bench of this Court held that a chief wife could refuse to live in the same house as a lesser wife. Hartnoll, J., dissented from the opinion expressed in *Ma In Than's* case, and said that a husband who took another wife without his first wife's consent committed a serious matrimonial fault against her; but he did not come to a finding whether this fault would justify a claim to divorce, as it was not necessary to the decision of the matter in issue. In *Ma Wun Di* v. *Ma Kin* and others (13) Adamson, J., said "The learned advocate for respondents raised a question of Buddhist law as to whether a Burman Buddhist can legally marry a second wife during the life-time of his first wife, without her consent. I regret that the question does not require a decision in this case. I may say, however, that the arguments of the learned advocate, which he has embodied in a very interesting pamphlet, appear to me rather to throw doubt on the ruling of the Special Court in *Ma In Than's* . . . . than to prove the broader proposition that

(8) 4 L.B.R., 340 at 344.
(9) 2 U.B.R. (1892-96), 48.
(10) 2 U.B.R. (1892-96), 145.
(12) 2 Chan Toon's L.C., 165.
(13) 4 L.B.R., 175.

a second marriage under these circumstances is null and void."

There is no doubt that polygamy is legal in Burma. In *Ma In Than's* case, Jardine, J.C., held that in spite of the existence of some texts of the religious law books, the custom of polygamy is so fully established that it lay upon the objector to show that this custom was limited in its application. He further said that even if the religious law was expressly opposed to polygamy, he would hesitate to suppress by judicial decision an institution which is part of the life of the people. He thought that the whole tenour of the *Manugye* was in accordance with the custom of polygamous marriages, and should not be set aside on account of the existence of isolated texts. There are indications however that the learned Judge was inclined subsequently to modify the decided opinion he had expressed in *Ma In Than's* case. After that decision, the *Manu Wunnana* was translated, and at page 30 of his notes on Buddhist law Mr. Jardine observes that section 173 and 132 throw some doubt on the right of polygamy. In paragraph 32 of his second note he says "Throughout the *Dhammathat* (*Manugye*) polygamy is treated as lawful but with a feeling that it is a grievance to the first wife." Captain Forbes says:— "Even where polygamy is indulged in, the general feeling may be said to be against it. The supersession of the first by the second wife is a serious matter." In *Queen-Empress* v. *Nga Ne U* (14) Mr. Jardine said "I am aware that some Burmans think that a man who has a wife may not marry a second time in her life-time without her consent. The 173rd section of the *Wunnana* is in favour of this view: but it was not pointed out to the Special Court who held the contrary in *Ma In Than's* case." In *Ma Wun Di's* case, their Lordships of the Privy Council quoted with approval the following observations of the learned Chief Judge:— "It is not forbidden to a Burman Buddhist to have two wives at the same time, but it is universally conceded that the leading principle of Buddhism is monogamy rather than polygamy; that polygamy is rare and is considered disrespectable." There can be no doubt that in Lower Burma the position is that polygamy is tolerated but

(14) S.J.L.B., 202.

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regarded with disfavour, and that there has always been a body of opinion that it is only allowed if the first wife consents. Assuming that the *Dhammathats* only allow it under certain conditions or penalities, I am unable to see why the fact that these penalities have never been enforced in practice or that it is not possible to point to instances of such enforcement, should preclude this Court from declaring that they exist and can be claimed by the wronged wife. The law to be administered is the Burmese Buddhist law as laid down in the *Dhammathats* unless such law has been clearly modified by custom or is repugnant to equity, justice or good conscience. In *Bhagwan Singh* v. *Bhagwan Singh* (15) their Lordships of the Privy Council pointed out that the judgment in the *Collector of Madura* v. *Mootoo Ramalinga Sathupathy* (16) gives no countenance to the conclusion that in order to bring a case under the rule of any law, laid down for Hindus generally, evidence must be given of actual events to show that in point of fact the people subject to that general law regulate their lives by it. At page 423 of the same judgment their Lordships said that the general law should be ascertained by reference to authoritative text books and judicial opinions and that when the general law has been established, any one living where such law prevails and is applicable must be taken to fall under the general law, unless he can show some valid local, tribal or family custom to the contrary. The mere fact that the limitations to the license of having more than one wife have not been observed is insufficient to justify the Courts in holding that the law has been abrogated by custom, especially in a country like Burma where as Sir John Jardine himself observes (Notes on Buddhist Law, 111) the system of compromise based on consent and acquiescence almost supersedes custom. So far had this system of compromise been carried that when British Judges first attempted to ascertain what the Buddhist law was on any subject, they sometimes found great difficulty in obtaining any information on which a decision could properly be based. It appears to me therefore that there is no proof of any custom regarding polygamy, which custom overrides the general law laid down in the *Dhammathats* or precludes us

(15) (1899) I.L.R. 21 All., 412 at 423. (16) (1868) 12 M.I.A., 436.

from examining that law with a view to ascertain its scope and provisions. It is true that in Hindu law, to which to some extent the *Dhammathats* are indebted for their rules, there is no restriction against polygamy. But in Hindu law, the texts restricting polygamy have been held to be merely directory and not mandatory (Cowell, Lectures on Hindu law, part I, page 164; Mayne, Hindu law, paragraph 92, Sarkar's Lecture, page 54). They seem to be of the nature of counsels of perfection rather than absolute prohibitions coupled with a penalty in case of disobedience. But whatever may be the extent to which the *Dhammathats* are indebted to Hindu law, there can be no doubt that the Hindu law regarding marriage and divorce has been profoundly modified by Buddhism; although the compilers of the *Dhammathats* have in some cases not attempted to distinguish the two systems. Thus the division of the people into castes is recognised by the *Dhammathats* although such a distinction is unknown to Burmans. The Courts have always endeavoured to interpret conflicting passages in the *Dhammathats* in such a manner as to conform with the existing sentiments and practice of Burmese society, so far as it is possible so to do without usurping the functions of the Legislature. If on examination of the texts, it is found that there is a strong preponderance in favour of restrictions being placed on polygamy, we shall, I think, be taking a proper course in giving effect to those texts in harmony with the prevailing sentiments of the people. I do not attach much importance to the fact that polygamy is recognised in the *Dhammathats* and that much of their matter is occupied with rules for the division of property between various kinds of wives and their children. Such rules are necessary in view of the structure of society existing then and existing now. They are not necessarily inconsistent with rules tending to discourage polygamy.

In *Ma Hnin Bwin* v. *U Shwe Gon* (4) their Lordships of the Privy Council said that where the *Manugye* was not ambiguous, it should be followed. There is however no clear pronouncement in that *Dhammathat* on the subject of the chief wife's right to object to her husband taking a second wife without her consent. Section 43, Volume XII, deals with the

(4) 8 L.B.R., 1 at 12.

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five kinds of wives who may be put away, but it is explained that by putting away is only meant that the husband has the right to take another wife and his first wife is not entitled to oppose him. Section 24, Volume V, refers to a right of separation when the wife has taken a paramour or the husband a lesser wife, the division of property in such cases being made as in the case of a divorce by mutual consent. In section 17 of the same chapter a husband whose wife has left him is enjoined to wait for one year before he takes another wife, under penalty of loss of the property brought to the marriage and the joint property. But the right of the chief wife to demand a divorce is rather a matter of inference than a clear statement of the existence of such a right. Turning now to the Digest of the Kinwun Mingyi, I find that in section 208 three *Dhammathats* are cited which lay down fidelity to the first wife as one of the duties of a husband, but these texts are only directory. In the passage from the *Dhammathatgyaw* cited in section 214 there is a similar admonition to husbands not to be unfaithful. In two of the three *Dhammathats* cited in section 230, adultery on the part of the husband is placed on the same level as a repugnant disease and gives the wife a right of divorce. The most important section is No. 256, which contains extracts from eight *Dhammathats* and in no less than six of these, a second marriage without the chief wife's consent gives the latter the right to divorce and to retain the whole of the property. These texts seem to me to be very clear and to admit of no doubt as to their construction. In the passage from the *Manugye* cited in section 303, divorce is permitted if cruelty is coupled with the taking of a lesser wife, but no argument against the right of a chief wife to obtain a divorce on the ground of a second marriage can be founded on this passage, as most of the other *Dhammathats* quoted in that section give her the right of divorce on the ground of cruelty alone and this right has been affirmed in *Po Han* v. *Ma Talok* (17). In section 397, the penalty imposed on a husband for taking a lesser wife is expulsion from the house after being compelled to leave behind even his clothes. In section 259, an extract is quoted from the *Atthasankepa Vannana* of the rule relating to husbands and

(17) 7 L.B.R., 79.

wives who have been previously married. Here too the wife is said to have the right of divorce if the husband takes a lesser wife, and the husband forfeits all claims to the jointly acquired property.

As against these authorities, the learned advocate for the appellant has been able to cite only section 253, which is headed "a man may marry as many wives as he pleases." But this section does not deal with the case of a man marrying when his first wife objects, and there is no doubt that if she consents, there is no impediment to his taking other wives. The other arguments addressed to us were founded on the existence of the custom of polygamy and its recognition in the *Dhammathats* in the shape of rules for the division of property between more than one wife. These arguments have already been considered in an earlier portion of this judgment.

I think that it is clear that the general rule is that the chief wife may object to her husband taking a second wife and may claim a divorce if he does so. Her right is however subject to certain exceptions. These are found in sections 219, 232, 265-267, and 311 of the Digest. The husband is allowed to take a second wife when the first wife is barren or has borne only female children or is suffering from certain diseases. In Burmese society a higher value is attached to the begetting of sons than daughters. There is also nothing unreasonable in the exception based on the first wife becoming insane or a leper, maimed, blind or paralysed, and thus becoming unable to fulfil the duties of her position. I would therefore answer the reference as follows:—Subject to exceptions of the kind mentioned in sections 219, 232, 265-267 and 311 of the Digest, if a Burmese Buddhist takes a second wife without his first wife's consent, she has the right to divorce him.

I may add that if she decides to claim the right of divorce, I think that the division of property should in the absence of any contract to the contrary be made as if the divorce were one by mutual consent. This is the rule if the husband commits adultery (section 230), and is the rule given in *Manugye* where the husband has not only taken a lesser wife but has been cruel (section 303). In section 256, a severer penalty is to be imposed

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according to some of the *Dhammathats*, which are however not consistent regarding the penalty.

Twomey, C.J.—The question referred does not arise directly in the case which was before our learned colleague. But it does arise indirectly. Under the Special Court ruling in *Ma In Than* v. *Saw Hla* (5) head-wife has no remedy if her husband takes a lesser wife without her consent. So long as this ruling is in force it would be inconsistent to give effect to the provisions of *Manukye*, Chapter V, section 17 and let a deserting wife claim a divorce on her husband re-marrying within a year.

The learned Judges of the Special Court who decided *Ma In Than's* case apparently considered that the provisions of the *Manukye* debar the Courts from sanctioning any restriction on polygamy among Burmese Buddhists. The preeminent authority of this *Dhammathat* is still recognized, but its provisions have binding force only where they are free from ambiguity. As Rigg, J., points out, the *Manukye* in addition to the provisions which seem to contemplate unqualified polygamy contains also various passages from which it may reasonably be inferred that the Buddhist Law recognises a head-wife's right to demand a divorce if her husband takes another wife without her consent. We are therefore justified in turning for guidance to the other *Dhammathats* cited in the Kinwun Mingyi's Digct and to the same learned author's *Atthathankepa* which is the most recent *Dhammathat* of all. These other *Dhammathats* are not shown to leave no room for doubt as to the head-wife's right in question. Most of the texts became available only after *Ma In Than's* case was decided.

The Special Court regarded the restriction on the taking of lesser wives as a doctrine which was not shown to be "popularly accepted so as to extinguish the custom," *i.e.*, the custom of polygamy. The existence of a custom of *unrestricted* polygamy was not shown in that case. The fuller investigation of the *Dhammathats* which has now been carried out makes it clear that the restriction in question is an incident of polygamy as established among the Burmese Buddhists and in these circumstances the question of popular acceptance does not appear to arise.

(5) S. J. L. B. 103.

The texts of the Buddhist Law on the subject of polygamy are undoubtedly inconsistent. The *Manukye* contains various provisions (cited in *Ma In Than's* case) which take for granted a plurality of wives, while other provisions clearly contemplate that a man should have but one wife at a time. The explanation is that the Burmese Buddhist Law is largely of Hindu origin. Coming from a country in which polygamy flourished without restriction the law had to be adapted to a non-Indian race which followed the Buddhist religion and in which the position of the wife was essentially different from that of the Hindu wife. Thus the texts in the *Manukye* and the other *Dhammathats* which deal with a plurality of wives are probably imported from the ancient Hindu Law. Mr. Burgess in *Ma Shwe Ma* v. *Ma Hlaing* (10) remarked as follows:—"It is a remarkable thing that in the 81 sections of the Chapter on Inheritance, X of *Manukye*, the only provisions regarding contemporaneous wives and their children should be those in sections 37 and 38 which seem to have special reference to Hindu usages."

Ma In Than's case has been the law in Lower Burma since 1881. But it has not been followed in Upper Burma: and it is doubtful whether even in Lower Burma husbands have availed themselves to any large extent of the additional license given to them by the ruling of the Special Court. A plurality of wives is becoming more and more a rarity and is regarded socially with disfavour. The tendency towards monogamy has no doubt been accelerated by the annexation of Upper Burma. Before that event polygamy was encouraged by the example of the Burmese Kings and many of the higher officials.

In expressing our dissent from the ruling in *Ma In Than's* case and declaring the head-wife's right to a divorce if her husband takes another wife without her consent, it is clear that we are only expounding an integral part of the Buddhist Law as laid down in the *Dhammathats* and we need not fear that we are running counter to any cherished custom of the Burmese people.

I concur in answering the reference in the terms proposed by my learned colleague Mr. Justice Rigg. I agree with him

(10) 2 U.B.R. (1892-1896), 145 at p. 150.

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also in holding that the property should be partitioned as in the case of a divorce by mutual consent (in the absence of any contract to the contrary). It would be illogical to exact from the husband who takes a lesser wife a more severe penalty than is provided in the *Dhammathats* for a husband who commits adultery or who, in addition to taking a lesser wife, treats his head-wife with cruelty.

Maung Kin, J.—I concur and have very little to add. Unlimited polygamy is expressly allowed only by three *Dhammathats*, namely, *Kaingza*, *Kandaw* and *Pānam*. See section 253 of U Gaung's Digest, Volume II. They are, however, not of much authority. Other *Dhammathats* speak of polygamy being allowable under certain conditions and penalties and as regards *Manukye* in particular I agree with Mr. Jardine that, although it treats polygamy as lawful, it does so with a feeling that it is a grievance to the first wife. In addition to the six *Dhammathats*, cited in section 256 of the above Digest, which lay down the rule that a second marriage wtthout the first wife's consent gives the latter the right to divorce, we have extracts from three other *Dhammathats*, namely, *Vilassa*, *Dhammathatkyaw* and *Manuvannana* cited in section 397 of the same Digest laying down the same rule. Those six *Dhammathats* and these three others are well-known legal works. The other *Dhammathats* cited in section 256 couple the taking of a lesser wife with habitual ill-treatment as grounds for a divorce at the instance of the aggrieved first wife. The passage cited from *Manukye* in section 303 of the Digest would appear to support these *Dhammathats*. But I do not think that in deciding the point under reference any importance can be attached to the fact that the taking of a lesser wife is thus coupled with cruelty, in as much as the *Dhammathats* agree in allowing a divorce on the ground of habitual cruelty alone. It seems clear that in the passage cited from *Manukye* in section 303 of the Digest, the stress is on the husband 's cruelty rather than on his incontinence. I am therefore of opinion that the taking of a lesser wife must be regarded as an additional ground for a divorce at the instance of the existing wife. As regards the question of partition of property I would treat the divorce as if it were one by mutual consent for the reason

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stated by the learned Chief Judge, unless there has been a contract to the contrary.

Ormond, J.—I concur in the judgments that have been delivered.

Before Mr. Justice Pratt.

Criminal Revision No. 68B of 1918.

AH NGWE AND 13 OTHERS *v.* KING-EMPEROR.

May 17th, 1918.

Dawson—for applicants.

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

Gambling Act I of 1899, Sections 3 and 7—Instruments of gaming—Common gaming house—Presumption as to:

Before the presumption under section 7 of the Burma Gambling Act, 1899, can arise, it must be proved that articles, not devised for the purpose of gaming, such as white beans, fragments of cigarette cartons, coins, etc., which were seized in the alleged common gaming house, were actually used for the purpose of gaming.

Information given to a police officer is not evidence, etc

King-Emperor v. *Thu Daw*, 2 L.B.R., 60 (F.B.)—referred to.

A house used as a club and joss-house was raided under a warrant issued under section 6 of the Gambling Act.

A number of Chinamen were found in various parts of the building and on the persons of some of them was found a sum of money aggregating Rs. 256-6-6.

One hundred and fifty-nine white beans, a quantity of torn pieces of cigarette cartons and a broken cup were found.

The Magistrate convicted 14 accused of gambling, because the arresting officer stated that he had information that the beans, pieces of paper and cup were used as gaming instruments.

Information is not, however, evidence, a fact which the Magistrate entirely overlooked.

Besides the articles specially set forth in the definition in section 3 of the Gambling Act instruments of gaming is stated to mean and include articles devised or actually used for the purpose of gaming.

Neither white beans, pieces of cigarette cartons, cups or money are devised as instruments of gaming nor ordinarily intended to be so used.

Evidence was therefore necessary to prove that the articles seized were actually used for the purpose of gaming before any presumption under section 7 could arise.

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Of such evidence there was none.

It is quite natural that fragments of cigarette cartons should be scattered about, where Chinamen gather together. A broken cup is a very common article and white beans might be used for a variety of purposes unconnected with gambling.

In *King-Emperor* v. *Nga Thu Daw* (1) it was laid down by a full bench of this Court that coins found on the actual persons of gamblers are not necessarily instruments of gaming and are not liable to seizure and forfeiture unless there is evidence to show that they were actually used or intended to be used for the purpose of gaming. The sums found on the accused in the present instance were not unusually large, and it is quite impossible to draw any presumption that they were intended to be used for gaming.

There being no proof that the articles seized were used for the purpose of gaming, the presumption that the house entered was a common gaming house did not arise.

I set aside the convictions and sentences.

I would point out that even had the conviction been correct the substantive sentence of imprisonment passed upon the second accused was quite unjustified.

There was no evidence that he conducted the business of a common gaming house.

The case being one of some importance the Magistrate should have tried it regularly and not summarily.

It was obviously desirable that the accused should have the opportunity of appealing.

Before Mr. Justice Pratt.

Criminal Revision No. 96B of 1918.

June 10th, 1918.

SONA ULLAH *alias* U MAUNG *v.* MA KIN.

Ko Ko Gyi—for applicant.

May Oung—Amicus Curiæ.

Criminal Procedure Code, 1898, *section* 488—*Maintenance—Marriage according to Mahomedan Law—Apostasy of a Mahomedan wife—Effect of—.*

Ma Kin obtained an order for maintenance against her husband, a Mahomedan. On revision it was found on the facts that Ma Kin had reverted to Buddhism.

Held—that it must be taken as settled law that the apostasy of a Mahomedan wife *ipso facto* dissolves the marriage. Ma Kin therefore

(1) 2 L.B.R., 60.

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ceased to be the wife of Sona Ulla from the time of her reversion to Buddhism and was not entitled to maintenance.

Hussain Unwar v, *Fatima Bee*, S.J.L.B., 368; *Ali Ashgar* v. *Mi Kra Hla U*, 8 L.B.R., 461; *Amin Beg* v. *Saman* (1910), I.L.R. 33 All., 90; *Ghaus* v. *Musammat Fajji*, (1915) 29 I.C., 857,—referred to.

Ma Kin obtained an order for maintenance against Sona Ullah *alias* U Maung, a Mahomedan.

The case was taken on revision by the Sessions Judge who found on the facts that Ma Kin had reverted to Buddhism. Although she now denies her apostasy, the finding of the learned Sessions Judge on this point is undoubtedly correct.

The case is the not an uncommon one of a Burmese woman professing Mahomedanism and undergoing formal conversion to enable her to marry a Mahomedan, whilst at heart she remains the whole time a Buddhist. In view of the Special Court's ruling in *Hussain Umar* v. *Fatima Bee* (1) in which the Government Advocate's admission that the apostasy of a Mahomedan wife cancels the marriage was accepted, the Sessions Judge was of opinion that the order of the Magistrate for maintenance was wrong and has recommended that it be set aside.

The ruling cited by the Sessions Judge was followed by Mr. Justice Ormond in *Ali Asghar* v. *Mi Kra Hla U* (2).

In view of the fact, however, that Mr. Amir Ali in the latest edition of his work on Mahomedan Law seems to favour the view that apostasy by the wife does not necessarily cancel the marriage, the case was put down for argument on the law point involved and Mr. May Oung has been good enough to give the Court assistance by stating his view as *amicus curiæ*, since respondent was unable to retain an advocate.

In *Amin Beg* v. *Saman* (3) a bench of the Allahabad High Court after consideration of the authorities and in spite of the view expressed by Mr. Amir Ali in his work came to the conclusion that under Mahomedan Law a wife's conversion from Islam to Christianity effects a complete dissolution of marriage with her Mahomedan husband.

They considered the weight of authorities for this view was so strong that it wholly overbalanced the view of Mr. Amir Ali.

S.J.L.B., 368. (2) 8 L.B.R., 461. (3) (1910) I.L.R. 33. (1) All., 90.

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In *Ghaus* v. *Musammat Fajji* (4) a bench of the Punjab Chief Court took the same view, also after consideration of the authorities and pointed out that there is an array of authorities of that Court and High Courts to the effect that the apostasy dissolves the marriage and not a single judicial dictum to the contrary.

With reference to Mr. Amir Ali's expression of opinion the judgment observes: "It is clear that among the Mahomedan jurist there was a difference of opinion on the subject and it is further clear that the view taken by the jurists of Bukhara has been accepted by the Fatawa Alamgiri and almost all the Indian writers on Mahomedan Law. This exposition of law has been followed by the Courts in India and we are, in the circumstances, bound by the rule contained in the above authorities, and the fact that a rival school of law is in favour of a different opinion does not appear to us to be a sufficient ground for disturbing the long and continuous current of judicial decision."

With this view I entirely agree. The present case is even stronger since the apostasy is to a non-scriptural religion. It must be taken as settled law that the apostasy of a Mahomedan wife *ipso facto* dissolves the marriage.

Ma Kin therefore ceased to be the wife of Sona Ulla from the time of her reversion to Buddhism and is not entitled to maintenance. I set aside the order of the Magistrate accordingly.

Criminal Revision No. 958 of 1918.

June 13th, 1918.

Before Mr. Justice Ormond.

TAMBI v. APPALSAWMY (KING-EMPEROR).

Dawson—for applicant.

Sutherland—for respondent.

Criminal Procedure Code, 1898, *sections* 215, 433, 439—*Jurisdiction of District Magistrate under section* 433—*Jurisdiction of High Court under section* 215 *and section* 439.

On an application for revision against the order of the District Magistrate setting aside the order of discharge passed by a Special Power Magistrate and directing under section 436 of the Criminal Procedure Code that all the accused should be committed to Sessions.

(4) (1915) 29 I.C., 857.

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Held,—that the words in section 436 "triable exclusively by the Court of Session" refer to cases which are triable only by a Court of Session under Schedule 2 of the Code.

Held further,—that under section 215 the High Court can quash a commitment if there is no evidence to support it; the absence of such evidence being a question of law and not of fact.

The Committing Magistrate must consider the evidence, and if a *primâ facie* case is not made out against the accused, he should be discharged. If there is no evidence to connect the accused with the offence, or if the evidence falls short of disclosing an offence or if there is no credible evidence to support a conviction, the accused should be discharged. On the other hand, it is not necessary that a Magistrate before committing an accused, should be satisfied as to the accused's guilt; it is sufficient if a *primâ facie* case supported by credible evidence has been made out against him.

Held also—that the High Court has jurisdiction under section 439 to revise a commitment order made under section 436 on facts as well as on points of law.

Jogeshwar Ghose v. *King-Emperor*, (1901) 5 C.W.N., 411; *Sheobux Rain* v. *King-Emperor*, (1905) 9 C.W.N., 829; *King-Emperor* v. *Nga Taung Thu*, 7 Bur. L.T., 26; *Rash Behari Lal Mandal* v. *King-Emperor*, (1907) 12 C.W.N., 117—referred to.

On the 15th of March 1917 the complainant was shot in the back at Towgale about a mile from the Police Station at Kyaikto at 7-30 P.M. The three accused Tambi, Ban Si and Nga Po Hmin were tried for offences under section 307 and section 307 coupled with section 114 of the Indian Penal Code, *i.e.*, for attempt to murder and abetment thereof. The First Additional Magistrate who was also a Special Power Magistrate discharged the three accused. The District Magistrate under section 436 of the Code directed the Special Power Magistrate to commit all three accused to the Sessions and the Special Power Magistrate committed them accordingly on the 29th April 1918.

Mr. Dawson, on behalf of Tambi alone, applies for revision against the order of the District Magistrate. He contends that the District Magistrate has jurisdiction to pass such order only in cases which are "triable exclusively by the Court of Session," and that the Additional Magistrate having special powers could have tried the case himself. Section 436 gives the District Magistrate jurisdiction if he considers that the case is triable exclusively by the Court of Session. That may mean either (1) a case where the District Magistrate considers that the facts constitute an offence which is triable only by the

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Court of Session or it might mean; (2) a case in which the District Magistrate considers that the sentence which the Special Power Magistrate could pass might not be sufficient and therefore that it was a case which should be tried by a Court of Session. In my opinion the words in section 436 "triable exclusively by the Court of Session" refer to cases which are triable only by a Court of Session under Schedule 2 of the Code; and section 30 of the Code which gives the Local Government power to invest a Magistrate with Special Powers is not intended to curtail the jurisdiction given to the District Magistrate under section 436. In either of the above views the District Magistrate had jurisdiction to make the order.

Mr. Sutherland for the Respondent contends that this Court cannot interfere upon a question of fact, with an order of commitment.

Under section 215 of the Code this Court is precluded from entertaining an application for revision on a question of fact against an order of commitment made under sections 213 and 214; but this Court has power to quash a commitment if there is no evidence to support it; the absence of such evidence being a question of law and not of fact; see *Jogeshwar Ghose* v. *King-Emperor* (1) and *Sheobux Ram* v. *King-Emperor* (2). The case of *King-Emperor* v. *Nga Taung Thu* (3) cited by Mr. Sutherland for the respondent is not an authority to the contrary. In that case Mr. Justice Twomey held that he could not quash the commitment merely on the ground that the evidence was doubtful; which implies that there was credible evidence to support the case for the prosecution. And paragraph 123 of the Lower Burma Courts Manual must not be read as going beyond the provisions of the Criminal Procedure Code.

The Committing Magistrate must consider the evidence, and if a *primâ facie* case is not made out against the accused, he should be discharged. If there is no evidence to connect the accused with the offence, or if the evidence falls short of disclosing an offence or if there is no credible evidence to support a conviction; the accused should be discharged. On the other hand, it is not necessary that a Magistrate before

(1) (1901) 5 C.W.N., 411. (2) (1905) 9 C.W.N., 829. (3) 7 Bur. L.T., 26.

committing an accused, should be satisfied as to the accused's guilt; it is sufficient if a *primâ facie* case supported by credible evidence has been made out against him. And this Court has jurisdiction under section 439 to revise a commitment order made under section 436 on points of law as well as of fact. See *Rash Behari Lal Mandal* v. *King-Emperor* (4).

The case for the prosecution is that the third accused Nga Po Hmin shot the complainant at the instigation of Tambi the first accused who was complainant's enemy and that all three accused were in the conspiracy to shoot him; that at about 11 A.M. on the day of occurrence the three accused were together when Tambi pointed the complainant out to the third accused and said 'that is the man;' that about 3 P.M. the three accused were seen together in Tambi's house; that immediately before the occurrence the three accused were seen at the place of occurrence; that after the occurrence the 2nd and 3rd accused ran away chased by the complainant and others; that the complainant struck Ban Si and felled him to the ground; that the complainant recognized the 3rd accused at the time and pointed him out to the Sub-Inspector of Police in the bazaar on the 27th March when the 3rd accused was arrested. I doubt if the inference could be legitimately drawn from the above facts (if proved) that the shooting was done at the instigation of Tambi. The case I think is on the border line; as to whether there is any evidence to support a conviction against Tambi or not.

The case against Tambi is on a very different footing to the case against the other two. The complainant did not mention having seen Tambi at 3 P.M. or at the time of occurrence, either in his first information report or soon after the occurrence; and the Committing Magistrate has given good reasons for not accepting the evidence of the three witnesses who speak to having seen the three accused at or near the time and place of occurrence.

In my opinion the order of the First Additional Magistrate discharging Tambi was correct and it is confirmed. The order of the District Magistrate as far as Tambi is concerned is set aside and his order as to the other two accused remains good.

(4) (1907) 12 C.W.N., 117.

Civil 1st Appeal No. 3 of 1918.

June 19th, 1918.

Before Mr. Justice Maung Kin and Mr. Justice Rigg.

KATHLEEN MAUD KERWICK *v.* FREDERICK JAMES RUPERT KERWICK.

Giles—for appellant.
Higinbotham—for respondent.

Trusts Act, XI of 1882, *section* 82—*Burden of proof—Benami Transaction—Advancement—Presumption as to in favour of wife—English and Indian Law.*

Respondent-plaintiff purchased two pieces of land in the name of the appellant-defendant his wife, and built houses thereon. Several years later the parties separated after a quarrel. The question for decision in the suit was whether these two houses and pieces of land were intended as a gift to the wife or whether there was a resulting trust in favour of the husband on the ground that they were merely placed in her name *benami* in order to evade a supposed rule prohibiting Government servants from speculating in landed property.

Held,—that the parties being of British nationality, the English presumption of advancement in favour of the wife (defendant-appellant) applies, and the *onus* of rebutting the presumption is on the plaintiff-respondent.

Per Maung Kin, J:—The presumption allowed by English Law is not a presumption *juris et de jure*, but is one of fact; and it is made not only because the wife is found to be invested with one of the chief incidents of ownership, but also because the husband in putting the property in her name must have had some intention regarding the transaction and the probabilities are that the intention is to confer a benefit upon the wife. Having regard to the provisions of section 114 of the Evidence Act and the undoubted fact that persons of British nationality in India have not the inveterate habit of holding property in the name of others, there appears to be no reason why even under the law of British India the presumption of advancement should not be drawn in favour of the wife in this case.

Gopeekrist Gosain v *Gungapersaud Gosain*, (1854) 6 M.I.A., 53 at 75; *Kishen Koomar Moitro* v. *Mrs. M. S. Stevenson and others*, (1865) 2 W.R., 141; *McGregor* v. *McGregor*, (1898) 4 Bur. L.R., 38; *Moulvie Sayyud Uzhur Ali* v. *Mussumat Bebee Ultaf Fatima*, (1869) 13 M.I.A., 232; *Meeyappa Chetty* v. *Maung Ba Bu*, (1909) 3 Bur. L.T., 62—referred to.

Rigg, J.—The parties in this case were married in 1901. They have two children, Dagmar, aged about 14 and Terence, aged about 10. The husband is an Assistant Engineer, in the Public Works Department, whose pay with allowance does not now exceed Rs. 500 a month. In 1907 he bought a piece of land from Dr. Pedley for Rs. 10,000, and built a house which he called Kildare on it at a cost of about Rs. 16,000. He made out a cheque for Rs. 9,000 to his wife who endorsed it over to

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the vendor. The deed of sale of the land was registered in her name. In 1908, he again bought another piece of land, and built Kerry on it. This land was similarly registered in his wife's name. In 1915, the parties separated after a quarrel. The question for decision in this suit is whether these two houses and pieces of land were intended as a gift to the wife, or whether there is a resulting trust in favour of the husband on the ground that they were merely placed in her name *benami* in order to evade a supposed rule prohibiting government servants from speculating in landed property. The learned Judge on the Original Side found that there was no advancement and decreed the plaintiff's suit for a declaration that the properties were his and should be transferred to his name. The first point for consideration is whether the English Law relating to the presumption to be made from the investment of property by a husband in his wife's name is to be applied to the parties or not. The trial Judge describes the parties as English, but thought that because they had spent most of their lives in India, the presumption that would be made by an English Court should not be drawn in view of the fact that, the husband paid for the property, managed it and took the receipts. He treated the case on the same footing as a purchase by a Hindu or Mahomedan, and presumed that the transaction in the circumstances was a *benami* one. Mr. Higinbotham states that he is not prepared either to affirm or deny that the parties are English, but I am of opinion that there is not the slightest reason for supposing that they are not of British nationality. It is inconceivable that if they were not plaintiff would not have said so and thereby cut away at once one of the main foundations of the defendant's case. By virtue of section 13 (2) of the Burma Laws Act, the law to be administered on the Original Side of this Court is the same as would be administered by the Calcutta High Court, and in the present case that would be the common law of England. Mr. Higinbotham contends that sections 81 and 82 of the Trusts Act, 1882 (which is in force in Rangoon) governs the case. He admits that the burden of proof lay on his client in the first instance, as the tenor of the documents was adverse to his claim. But he contends that as soon as he

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proved the source of the funds for the purchase of the property, and his client's receipt of the rents, the burden shifts. Section 81 of the Trusts Act is as follows:—

"Where the owner of property transfers or bequeaths it, and it cannot be inferred, consistently with the attendant circumstances, that he intended to dispose of the beneficial interest therein, the transferee or legatee must hold such property for the benefit of the owner or his legal representative." Illustration (*d*) to that section deals with the case of a gift from a husband to a wife, and says that the presumption in such a case is that she takes the beneficial interest. The presumption is an inference from the relationship of the parties. I do not think that the enactment of this section was intended to abolish any presumption arising from the personal law of the parties. The question still remains whether the attendant or surrounding circumstances of the case are inconsistent with such a presumption.

In *Gopeekrist Gosain* v. *Gungapersaud Gosain* (1) their Lordships of the Privy Council declined to import the presumption that a purchase of property by a Hindu father in favour of his son was an advancement; but they did not do so on the ground that such a presumption could in no case be made in India, but that it was one that could not properly be aplied to Hindus, and that its incorporation would be foreign to and objectionable in a system of law that recognises the purchase by one man in the name of another, to be for the benefit of the real purchaser. For similar reasons, their Lordships have declined to import the English presumption in the case of gifts by Mahomedans. On the other hand, the English doctrine of advancement was recognised in *Kishen Koomar Moitro* v. *Mrs. M. S. Stevenson* and others (2). The learned Judges said "as between the father and daughter, both of English extraction, and living under the English Law, why should the doctrine of advancement not be considered applicable? If by English Law certain rights are secured to a child by the doctrine of advancement, why should the child by living with its parents in this country be deprived of that right? Had litigation arisen between French and his daughter that would have been

(1) (1854) 6 M.I.A., 53 at 75. (2) (1865) 2 W.R., 141.

governed by English Law and the doctrine of advancement might have been effectually pleaded by the daughter." The doctrine was assumed to apply in the case of *McGregor* v. *McGregor*, (3) which was decided by the Recorder of Rangoon in 1898. In section 39 of the Transfer of Property Act there is a reference to a provision for advancement and such an expression could only apply to persons of British nationality. The mere fact that the parties have been educated or have chiefly resided in India cannot effect their personal law, and in my opinion the burden of proving that the registration of the land on which Kerry and Kildare are built in the name of Mrs. Kerwick was not intended as an advancement lies upon plaintiff.

(The reminder of the judgment being on facts is not published.)

* * * *

Maung Kin, J.—I concur in holding that the onus is on the plaintiff of rebutting the presumption that the purchases were by way of advancement in favour of his wife, the defendant.

The Indian Law on the subject of advancement is contained in section 82 of the Indian Trusts Act which has been made applicable to Rangoon. The section provides:—

"Where property is transferred to one person for consideration paid or provided by another person, and it appears that such other person did not intend to pay or provide such consideration for the benefit of the transferee, the transferee must hold the property for the benefit of the person paying or providing the consideration."

It will be seen that on the subject of any presumption arising in the case of the transferee being the wife or the child of the person paying the consideration, nothing is stated in the section. The question of advancement or no advancement is left as one of intention, which will have to be proved according to the law of evidence. The same is the case in English Law.

So, in this case the question would be, "Did the husband intend that his wife should hold the property purchased as trustee for him or that she was to have the beneficial interest therein?"

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On whom, then, does the onus lie as to the intention of the husband ?

In England it is easy to answer the question, because a presumption in favour of an advancement to the wife is allowed.

In India there is at first sight some difficulty, for we have decisions between Hindus as well as between Mahomedans to the effect that the English presumption of advancement cannot be recognised. The reason assigned in the case of Hindus is their inveterate practice of holding land in the name of another. The principle of the decisions in Hindu cases has been extended to those of Mahomedans, because as observed by their Lordships of the Privy Council in *Moulvie Sayyud Uzhur Ali* v. *Mussumat Bebee Ultaf Fatima* (4), though "we cannot apply to the decision of a case between Mahomedans any reasons drawn exclusively from the Hindu law. It is perfectly clear that in so far as the practice of holding lands and buying lands in the name of another exists, that practice exists in *India* as much among the Mahomedans as among the Hindus." And as regards the Burmans we have the case of *Meyappa Chetty* v. *Maung Ba Bu* (5) where the principle was extended by a Bench composed of Sir Charles Fox, C. J., and Parlett, J. The learned Chief Judge observed in his judgment: "Neither Court had in mind the long line of decisions referred to at pages 531 and 627 of Ameer Ali and Woodroffe's Evidence Act as to the presumption to be made in India when a person purchases property and takes a conveyance in the name of a relation. As far back as 1854 it was decided by the Privy Council that the presumption made in English Law that the purchase in such a case was for the benefit and advancement of the person to whom the conveyance is made, does not apply in India, and that the presumption in India is that the purchase is *benami* and that the burden lies on the person to whom the conveyance has been made of proving that he was entitled to and beneficially interested in the property." It does not appear that the learned Chief Judge grounds his decision on the same reason as did the Privy Council in the Mahomedan case above cited.

(4) (1869) 13 M.I.A., 232. (5) (1909) 3 Bur. L.T., 62.

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It has now come to be stated in text-books and judicial decisions that in *India* a purchase by a husband in his wife's name creates no presumption of a gift to her or of an advancement for her benefit. I venture to think that the proposition stated in this form is far too wide and embraces cases of persons who were not in view, when the judicial decisions against the presumption of advancement were given. The case of persons of British nationality was clearly never under consideration. The presumption allowed by English Law is not a presumption *juris et de jure* but is one of fact and I consider that this presumption is made in English Law, not only because the wife is found to be invested with one of the principal incidents of ownership but also because the husband in putting the property in her name must have had some intention regarding the transaction and the probabilities are that the intention is to confer a benefit upon the wife. I am unable to see why such a presumption cannot be drawn in the present case. Under section 114 of the Indian Evidence Act Courts may presume the existence of any fact which it thinks likely to 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. There can be no doubt that in the case of persons of British nationality residing in India it cannot be said that they have the inveterate habit of holding property in the name of others. I would, therefore, hold that the English presumption of advancement should in this case be drawn in favour of the defendant.

Before Mr. Daniel Twomey, Chief Judge, and Mr. Justice Ormond.

Civil Miscellaneous Appeal No. 41 of 1918.

July 1st, 1918.

A.L.M.A.L. CHETTY FIRM *v.* MAUNG AUNG BA.

Lentaigne—for appellant.

B. Cowasjee with *Patker*—for respondent.

Stamp Act, II of 1899, *section* 26—*Subject matter of document.*

A document stamped with a stamp of Rs. 15 provided that A should advance to B 75 per cent. of the value of paddy purchased by B and brought to B's mill. The amount to be advanced by A was not to exceed Rs. 50,000. A was to advance and be repaid monies from time to time and he was to have a security up to Rs. 50,000 for what was at any time owing to him under the document.

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Held,—The amount or value of the subject matter of the document is the amount expressed in the document as intended to be secured. When there is a maximum limit in a document which creates a charge in respect of a varying account, the maximum must be taken to be the amount that was intended to be secured. The amount of the subject-matter of this charge was an ascertained sum, *viz*. Rs. 50,000, and section 26 of the Stamp Act therefore does not apply to it.

Aung Ba, a rice miller, became insolvent on the 5th of June 1917 and the Official Assignee took possession of his mill and its contents. Nanigram Jumnadas put in a claim in the insolvency proceedings claiming that he had a mortgage on the paddy in the mill to the extent of Rs. 41,237 under Ex. G. 1. The document is stamped with a stamp of Rs. 15 and the appellant contends that the document operates as a security only to the extent to which it has been stamped, *i.e.* as a security for Rs. 15,000 only, under section 26 of the Stamp Act. The learned Judge in Insolvency held that the document was a mortgage for Rs. 50,000 and was not governed by section 26 of the Stamp Act. Section 26 says: "where the amount or value of the subject matter of any instrument chargeable with *ad valorem* duty cannot be ascertained at the date of its execution, nothing shall be claimable under such instrument more than the highest amount of value for which, if stated in an instrument of the same description, the stamp actually used would, at the date of such execution, have been sufficient."

The document provided that Nanigram should advance to the miller 75 per cent. of the value of paddy purchased by the miller and brought to the mill. The amount to be advanced by Nanigram was not to exceed Rs. 50,000. The miller was to sell the rice milled and delivery of the rice was only to be given under Nanigram's signature. Nanigram was to collect the price of rice sold by the miller and Nanigram was to receive interest at 1 per cent. and a commission of 1 per cent. on the amount of sale-proceeds. Accounts were to be settled at the end of every month and Nanigram was to retain out of the sale proceeds received by him, all that was due to him. Nanigram was to have a charge upon all the paddy and rice kept by the miller in his mill and the miller was to insure such paddy and rice in the name of Nanigram for the sum of Rs. 50,000.

Under that document Nanigram was to advance and be repaid monies from time to time and he was to have a security

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up to Rs. 50,000 for what was at any time owing to him under the document. The question is whether the amount or value of the subject matter of this document could be ascertained at the date of its execution. "The amount or value of the subject matter" of a mortgage is the amount expressed in the document as intended to be secured. When there is a maximum limit in a document which creates a charge in respect of a varying account, the maximum must be taken to be the amount that was intended to be secured. Under section 79 of the Transfer of Property Act, a mortgage to secure a floating account which expresses the maximum to be secured, is expressly recognized as a mortgage for that amount. We think that "the amount of the subject matter" of this charge was Rs. 50,000. Section 26 of the Stamp Act therefore does not apply to this document and the deficiency in the stamp can be made good under section 35 (2) of the Stamp Act. We agree with the learned Judge in Insolvency and dismiss this appeal with costs.

Before Mr. Justice Pratt.

Criminal Revision No. 292A of 1918.

July 12th, 1918.

KING-EMPEROR *v.* PO KYWE AND 42 OTHERS.

Gambling Act, I of 1899, *sections* 3, 10, 11, 12—*Common gaming house—Fighting cocks not instruments of gaming.*

Cock-fighting in a public place is made an offence under section 10 of the Gambling Act, but holding a cock-fight on private premises, even if accompanied by wagering, will not render the place a common gaming house within the definition given in section 3. Fighting cocks are not instruments of gaming and setting cocks to fight is not in itself an offence in Burma. Similarly betting is not in itself illegal nor is it included in the definition of 'gaming' or 'playing' given in the Act. The mere fact that there was betting and that the stake holder took commission thereon will not render the scene of a cock-fight a 'common gaming house.'

King-Emperor v. *Nga Ka and others*, 9 L.B.R. 185, referred to.

Maung Po Kywe has been fined Rs. 10 or in default 14 days' rigorous imprisonment under section 12 of the Gambling Act for keeping a common gaming house, and Maung So Pè and 16 others have been fined Rs. 7 each or in default 12 days' rigorous imprisonment under section 11, for gaming in a common gaming house. It should be noted that for first offences the sentences in default were illegal under section 11.

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The facts of the case are that a cock fight took place in the garden of one Maung Tha Ye. There was betting on the fight and Maung Po Kywe took commission as stake-holder, whilst the remaining convicts bet.

Cock-fighting in a public place is made an offence under section 10 of the Gambling Act, but holding a cock-fight on private premises, even if accompanied by wagering, will not render the place a common-gaming house within the definition given in section 3.

As pointed out in *King-Emperor* v. *Nga Ka and others* (1) fighting cocks are not instruments of gaming.

Setting cocks to fight is not in itself an offence in Burma.

Similarly betting is not in itself illegal nor is it included in the definition of 'gaming' or 'playing' given in the Act.

The mere fact that there was betting and that the stake-holder took commission thereon will not therefore render the scene of a cock-fight a common gaming house.

I set aside the convictions and sentences.

Civil 2nd Appeal No. 11 of 1915.

January 10th, 1916.

Before Mr. Justice Twomey.

1. SHWE TON, 2. BA NAUNG, 3. MAUNG SHWE LIN *v.* 1. TUN LIN, 2. U SEIK KEINDA, 3. U NYA NAWUNTHA, 4. MA MYA ME, 5. LU DIN, 6. MA THEIN NYA.

R. N. Burjorjee—for appellants.
Ba Dun—for 1st and 3rd to 6th Respondents.

Buddhist Law: Religious gift—Right of pongyi *to inherit from his lay relatives after ordination—Right of lay relatives to inherit from a deceased* pongyi.

The following reference was made to a Full Bench:—

"A *pongyi* dies possessed of paddy lands part inherited after his ordination and part given to him after his ordination. Are his next of kin entitled to inherit the lands?"

The answer to the reference was confined strictly to the case of land given to a *pongyi* outright as a religious gift.

The reference was answered as follows:—

"A *pongyi* after his ordination cannot inherit from his lay relatives. On the death of a *pongyi* his lay relatives cannot inherit from him land which had been given to him outright as a religious gift."

(1) 9 L.B.R., 185.

U Thathana v. *U Awbatha*, 2 U.B.R. (1897-01), 62; *Ma Pwe* v. *Maung Mya Tha*, 2 U.B.R. (1897-01), 54; *Buddha, His Life, Doctrine and Order*": Oldenburg, translation by Hoey, 1882, p. 355; *Kullavaga* VI, 15, 2; *Mahavaga* I, 22, 18: *Vinaya Texts*, Pt. III and Pt. I (Sacred Books of the East); *Pakittiya*, p. 33: *Vinaya Texts*, Pt. 1; *Record of the Buddhist Religion as practised in India and the Malay Archipelago*, by I. Tsing, Clarendon Press, 1896, pp. 189, 193; *Maung Talok* v. *Ma Kun*, 2 U.B.R. (1892-96), 78; *Po Thin* v. *U Thi Hla*, 1 U.B.R. (1910-13), 183; *Maung Hmon* v. *U Cho*, 2 U.B.R. (1892-96), 397; *Bigandet's Legend of Gautama*, pp. 249, 250; *Maung On Gaing* v. *U Pandisa*, P.J.L.B., 614; *U Wisaya* v. *U Zaw Ta*, 8 L.B.R., 145 and *Ma Taik* v. *U Wiseinda*, 2 Chan Toon's L.C., 235—referred to.

In this case a *pongyi's* brothers claim a piece of paddy land worth about Rs. 700 which the *pongyi* left when he died.

The three plaintiffs are sons of Shwe Waing and Ma Bwin to whom the land measuring 4½ acres, formerly belonged. It was alleged in the plaint that Shwe Waing died in 1249 B.E. and his widow Ma Bwin in 1259 B.E. that after Ma Bwin's death there was a partition of the family land in 1260 B.E. and that in this partition the piece of land in suit, being about one half of the whole, was allotted to the eldest son a *pongyi* named U Wiseitta, also called shortly U Seitta, for his support. U Seitta died in 1274 B.E. and then the 2nd defendant, a *pongyi* named U Sekkeinda, a disciple of U Seitta, claimed that the land had been given outright to him and another *pongyi* U Nyanawuntha by the deceased and refused to comply with the plaintiffs' demand to restore the land to them. The 1st defendant Tun Lin is a *Kappiya* (or lay steward of a monastery) who managed the land for U Seitta and continued to manage it after U Seitta's death. The total area of the land left by Ma Bwin was 9·52 acres and it appears that U Seitta received such a large portion as 4·50 acres because one of his brothers, Shwe Chon and a niece named Mi Mya Me gave up their right to shares in favour of their *pongyi* brother. The balance, some 5 acres, was taken by the three plaintiffs and it appears that it was subsequently sold by them.

The plaintiff Shwe Ton in his examination before issues were fixed alleged that U Seitta renounced his share of the family property at the partition of 1260 B.E. but that his brothers nevertheless made over the land to him for his support during

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his life-time on his agreeing that it should revert to the co-heirs on the *pongyi's* death.

The District Court found, as a matter of fact, that there was no such agreement, that the whole land (9·52 acres) was first given by the father Shwe Waing to U Seitta, but that subsequently (*i.e.* after Ma Bwin's death) the land was partitioned "on the brothers (*i.e.* plaintiffs) clamouring for it" and that U Seitta received his own share and was made a gift of Shwe Chon's share and the share of Ma Dwe's daughter Ma Mya Me.

The District Court found, secondly, that U Seitta "left" the land to two *Rahans*, his pupils U Sekkeinda and U Nyanawuntha, not specifically but by a deathbed gift or bequest in general terms of his *Garubhan* property, and that this gift or bequest was valid.

The plaintiffs' suit was therefore dismissed. They appealed to the Divisional Court which conceived that "the only point for determination is—Was the plaint land only made over to U Seitta for his life-time ?" and had no difficulty in affirming the decision of the District Court on this point. The Divisional Court left the matter there and dismissed the Plaintiffs' appeal without considering the further questions (raised in paragraph 2 of the memo. of appeal) as to U Seitta's powers of disposing of the land and as to the validity of the alleged gift or bequest to his two disciples. These questions called for consideration and solution because it is clear from the pleadings that the plaintiffs as the brothers of the deceased *pongyi* claim the land as land belonging to the family. Shwe Ton in his examination said:—"On the death of U Seitta the land reverted to the heirs of Shwe Waing and Ma Bwin." The plaint says nothing about an allotment to U Seitta for his life-time. It was only in the preliminary examination of parties that the allegation of a life-time allotment was made. Although the plaint does not contain an express claim by the plaintiffs as heirs of the deceased I think this alternative claim is involved in the pleadings. It was apparently for this reason that the District Court did not confine itself to deciding the issue as to the alleged agreement for a life-time usufruct, but went on to decide whether U Seitta disposed of the land in his

life-time and whether the disposal he made was valid as against the next of kin.

Mr. Burjorji for the appellants has asked leave to amend the plaint now so as to make it clear that the plaintiffs' claim in the alternative as heirs of U Seitta and I think this may be done. There can be no objection on the score of want of parties as the other co-heirs were joined at the outset as co-defendants on the application of the defendants Tun Lin and U Sekkeinda (paragraph 5 of the Written Statement).

There is a concurrent finding of fact on only the one point, namely that the plaintiffs' story of a definite agreement for a life-time usufruct is untrue. That finding appears to be correct and it would not be proper to disturb it on second appeal.

As to the District Court's further findings the Divisional Court has given no decision and they may therefore be considered now. It is not proved that the father Maung Shwe Waing gave the land 9·52 acres to U Seitta. If the whole land had been given to U Seitta before 1249 B.E. (the year of Shwe Waing's death according to the plaint) it is unlikely that U Seitta would have consented to the partition in 1260 by which the plaintiffs got more than half of the land. There is no evidence that U Seitta had any of the land before Ma Bwin's death (1259). The witness U Sandima's evidence as to the gift by Shwe Waing is mere hearsay, and U Sandima himself says that U Seitta was using the land for about 15 years only. That would tally with the view that U Seitta got it only after Ma Bwin's death. The defendants' witness Maung Pye (husband of Ma Dwe, deceased and therefore a brother-in-law of the plaintiffs) who speaks of Shwe Waing's gift of the land to U Seitta says "the *pongyi* left the land in Maung Shwe Waing's possession," from which it may be inferred that Shwe Waing even if he intended giving the land to his *pongyi* son did not actually carry out his intention by making over possession in his life-time. Moreover the extract from the Kwin map for 1897-98 (attached to plaint) shows that the whole land was entered in the revenue records as the widow Ma Bwin's holding after Maung Shwe Waing died.

I think it may be taken as established that U Seitta got the land in 1260 B.E. when the ancestral holding of 9·52 acres

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was partitioned by the Circle Thugyi, Maung Tha Nyo (7 D.W.) into two portions one of which *viz.* :—the land now in suit measuring 4·50 acres, was allotted to the *pongyi* brother U Seitta and the rest to the three plaintiffs. The 4.50 acres included besides the *pongyi's* proper share, the portions that would have gone to Shwe Chon and Ma Mya Me had they not piously relinquished their shares in favour of U Seitta. Shwe Chon predeceased U Seitta. Ma Mya Me says that she went privately through a libation ceremony *(Ye-Set-Kya)* of dedication and that her uncle Shwe Chon did so too. It appears that at the time of partition Mi Mya Me got 15 or 18 *tickles* of gold and the plaintiffs say she got this gold in place of her grandchild's share of Shwe Waing's land, but Mi Mya Me contends that she was to get a share of the land as well as the gold. She says that both her gift of her share of the land and her uncle Shwe Chon's gift of his share were *Thingika* gifts, *i.e.*, were intended to be ultimately to the *Thinga* or Assembly. In view of the Thugyi, Maung Tha Nyo's evidence (7 D.W.) I think the District Court was right in holding that Mi Mya Me and Shwe Chon were entitled to shares at the partition of 1260 B.E. and that they virtually made a gift of their shares to U Seitta.

U Seitta remained in possession of the land till he died in 1274 B.E. It is not seemly for a *Rahan* to engage in trade or agriculture or to handle money and to do so is inconsistent with the precepts of the *Vinaya*, but much may be done through the convenient agency of the *Kappiya Dayaka*, or monastery lay steward. By acting through a *Kappiya* the *Rahan* can enjoy most of the privileges of property without actually soiling his hands. It appears that U Seitta had a series of *Kappiyas* the last being Tun Lin the 1st defendant who was in charge of the and at the time of U Seitta's death and still has charge of it. Tun Lin let the land to tenants and supplied the *pongyi* with money whenever he wanted it. According to Tun Lin, the *pongyi*, a few days before his death, dedicated the monastery, *thein*, and paddy land to the sacred Order in perpetuity. He says :—" U Seitta made over the land to me entirely in trust for the priesthood to keep the monastery in repair and to maintain the *pongyis* of the monastery. He entrusted it to no

other person." He also says: "U Seitta made over his *Garubhan* and *Lahubhan* properties to U Sekkeinda and U Nyanawuntha." What U Sekkeinda says is much to the same effect: "U Seitta left the monastery, *thein*, land on which they are, and the paddy land to me and U Nyanawuntha, but the paddy land was to continue in the possession of Maung Tun Lin for the benefit and upkeep of the monastery, *thein*, and *pongyis* in charge of them." U Sekkeinda mentions U Seitta's making over his *Garubhan* and *Lahubhan* properties to the two pupils and suggests that paddy land can be included in *Garubhan*, but he admits that U Seitta said the paddy land was to continue in Maung Tun Lin's possession and in another place he says U Seitta ordered the monastery, *thein* and paddy land to be *Withongama*.* He probably had only a vague idea of the meaning of that word. The second disciple U Nyanawuntha was not present at all when the *pongyi* made his alleged dying dispositions. It is clear I think that there was no actual gift of the paddy land by U Seitta to the two pupils. Tun Lin was to go on managing the land and was to apply the proceeds as before for the support of the *pongyis* and the upkeep of the *kyaung*.

U Seitta probably desired to make this arrangement permanent, but there was no transfer of the land in trust to Tun Lin and the *pongyi* died still possessed of it. It has been definitely ruled in Upper Burma that a gift made by a Buddhist monk not accompanied or followed by delivery of possession and intended to take effect after his death is not valid (1). The ruling applied specially to a gift of a monastery but there is certainly no reason to think that it should apply with any less force to a gift of paddy land.

It still remains to decide whether the lay co-heirs of the deceased *pongyi* are entitled according to Buddhist law to inherit the paddy land from him or whether it goes to the Assembly.

* I have ascertained that this compound word is made up of two Pali words meaning "separate" and "village" *i.e.*, separate from the general village land. It is commonly used in Burma in connection with the dedication of *Theins* (Ordination-halls) to signify that the land is freed from all Government claims and set apart in perpetuity for religious uses.

(1) 2 U.B.R. (1897-01), p. 62: *U Thathana* v. *U Awbatha*.

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The possession of paddy lands by a *Rahan* is clearly inconsistent with the fundamental rules of the Order as expounded in the *Vinaya*. Mr. Burgess held in *Ma Pwe* v. *Maung Myat Tha* (2) that a person who becomes a Buddhist monk *ipso facto* divests himself of his worldly possessions and the texts cited in that case are sufficient to establish this proposition. No express vow of poverty is taken in the ordination ceremony of a *pongyi* but the order which he joins is a community of mendicants and both the marriage-tie and the rights of property of him who renounces the world are retarded as *ipso facto* cancelled by the "going forth from home into homelessness" (3). It is clearly implied that the only possessions which a *Bhikku* or Mendicant can lawfully hold or which he could dispose of on his death-bed are the simple necessaries of monastic life. In some texts, parks and monasteries (*Arama*, *Vihara*) are mentioned but only as the indivisible property of the Assembly, not of individual *Bhikkus* (4). The learned author of "Buddha, His Life, etc." remarks in particular that nothing is found in the *Vinaya* texts which points to the pursuit of agriculture except one quite solitary passage, Mahavagga VI, 39, which hardly refers to more than the occasional sowing of seed in the land belonging to the *Aramas* or parks (attached to monasteries) (5). On the other hand it is expressly laid down that whatsoever *Bhikku* shall dig the ground or have it dug—that is a *Pakittiya*, *i.e.* a matter requiring expiation (6). The learned author above cited after referring to the four requisites of a *Bhikku*, *viz.*, clothing, food, lodging and medicine, goes on to say that "what did not come within the narrow circle of these immediate necessaries of life could as little constitute part of the property of the order as that of the individual monk. Lands, slaves, horses, and livestock the order did not possess and was not allowed to accept. It did not engage in agricultural pursuits nor did it permit them to

(2) 2 U.B.R. (1897-01), p. 54.

(3) *Buddha, His Life, Doctrine and Order*: Oldenburg, Translation by Hoey, 1882, p. 355.

(4) *Kullavaga* VI, 15, 2; *Mahavaga* I, 22, 18: *Vinaya Texts*, Pt. III and Pt. I (Sacred Books of the East).

(5) "*Buddha, His Life*," etc., p. 357, Note.

(6) *Pakittiya*, p. 33: *Vinaya Texts*, Pt. I.

be carried on on its account." The opinion that the Order was allowed to have any kind of possession whatever which was forbidden to the individual brethren is considered by him to be quite groundless (7). (Presumably, however, the Order or a body of monks under a head monk could possess as the general property of the monks, a monastery and its site with or without a garden attached to it, these being possessions which the *Vinaya* recognizes as lawful.)

According to the letter of the ecclesiastical law it is clear that neither an individual *Bhikku* nor the Assembly (*Sangha*) can hold paddy lands. It is true that the strict letter of the law has not been followed in this respect. The Chinese Buddhist traveller I. Tsing (7th Century, Christian Era) appears to have found the Buddhist monasteries in India in possession of farms and gardens the produce of which was distributed to the monks annually in shares (8). The description he gives of "the arrangement of affairs after death" shows that there was practically no limit to a *Bhikku's* possessions in those days. Coming down to modern times we do not find Buddhist monks and monasteries in Burma in possession of extensive endowments. But the primitive austerity of the *Vinaya* is by no means universal. Mr. Burgess writes in case cited above: "In modern days the Burman Buddhist monk's vows of poverty sit lightly on him, as is well known and is recognized even in the *Dhammathats* (see *Manukye*, X, 63 and *Wunnana* 75 *et seq*). But it seems clear enough that his possessions must have been bestowed upon or acquired by him after ordination." Another Judicial Commissioner of Upper Burma, Mr. Copleston, in *Maung Talok* v. *Ma Kun* (9) said: "Whatever may have been the primitive rules of Buddhism, Buddhist monks at the present day do and may as far as authorities go, possess property" (meaning *inter alia* paddy lands). He cited Wunnana, 82, according to which property "*hlu'd*" to a *Bhikku* reverts to the donor on the *Bhikku's* death and *Manukye*, VIII, 3, which divides gifts "having reference to a future state of existence" into *Poggalika* and *Thingika*, and

(7) *Buddha, His Life, etc.*, p. 356.

(8) *Record of the Buddhist Religion as practised in India and the Malay Archipelago*, by I. Tsing, Clarendon Press, 1896. pp. 189, 193.

(9) 2 U.B.R. (1892-96), p. 78.

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says that the *Poggalika* donee has a right to keep the property while property given as a *Thingika* gift becomes the property of the Assembly. This text goes on to say that the original donor has no further claim to what he has given but it is not clear whether this applies to *Poggalika* gifts as well as *Thingika* or only to the latter.

In the case last cited the claim was in some respects similar to that of the plaintiffs in the present case. It was a case in which land had been *hlu'd* to a *pongyi*. Then the donor died. Subsequently the *pongyi* made a gift of the land to certain laymen. The heirs of the original donor sued to recover the land. The District Judge held that "*pongyis* cannot own *Poggalika* property and at most can only have a usufruct in such things as gardens, etc., for the purpose of obtaining by means of their produce those few things lawful to be possessed," and this view is certainly in accordance with the *Vinaya* canon. But allowing for the relaxation of the rules of the Order in modern times the learned Judicial Commissioner differed from the District Judge and decided the case in favour of the deceased *pongyi's* donees and against the heirs of the original donor.

The subject of gifts by *pongyis* has been examined again by Mr. McColl in a more recent Upper Burma case *Po Thin* v. *U Thi Hla* (10). The learned Judge decided that the *Vinaya* texts should be applied and held that a gift by a monk whether to a layman or to another monk of a monastery or of a site for a monastery whether it has been dedicated to him personally or not (*i.e.* whether *Poggalika* or *Thingika*) is invalid, which decision is in accordance with that of the District Judge in the earlier case cited above. Mr. McColl also expressed the opinion that a monastery dedicated to a monk does not become his absolute property and he can only claim exclusive rights over it for 12 years at most, after which it would become the property of the Assembly.

In the present case we are dealing not with a monastery site but with paddy land and, at any rate as regards part of it, it is land that was not made over by way of gift to the

(10) 1 U.B.R. (1910-13), p. 183.

pongyi U Seitta but which came to him by partition of inheritance. A further difference between this case and the Upper Burma case is that the deceased *pongyi* U Seitta made no disposition of the land in his life-time.

The rules for the partition of a *Rahan's* or *pongyi's* estate as contained in the various *Dhammathats* are set out in Chapter XXV of the Digest. Mr. McColl points out that these rules are very conflicting and as the Kinwun Mingyi has remarked they are moreover inconsistent with the rules laid down in the *Vinaya* (Digest, p. 464). Side by side with stringent provisions that only *Rahans* can inherit from *Rahans* are found texts which allow lay co-heirs (or other laymen) who attended on the deceased during illness to inherit his property (section 406). According to the texts in section 407 a *Rahan's* lay co-heirs cannot inherit property given to him by others as a religious gift, but section 408 allows parents and relatives to resume property given by them "as such property does not properly belong to the members of the Order." On the question of property reverting to the donor sections 405 and 410 are in direct conflict. The texts in section 409 are instructive as showing that even in modern times Buddhists generally look askance on the acquisition of worldly possessions by *Rahans*. The texts in section 408 also support this view showing that the possession of certain kinds of property by members of the Order is unbecoming. The *Cittara* * extract in section 406 also bears directly on this point. It is as follows:—

"It is forbidden in the case of a *Rahan* or novice who owns paddy and culturable lands, to devote much of his attention to them, nor is he permitted to let the lands on his own motion, but he is permitted to give his consent to any one requesting him to have them let at a specified rent. On the death of the *Rahan* possessing such lands, his co-heir (*Amwesaing-thu*) who attended on him and performed the burial rites shall inherit them; while those who did not render such services shall be debarred from inheriting the property."

This text clearly contemplates that a *pongyi's* lands shall go to his next of kin and not to his religious brethren.

* Author and date of this compilation are unknown. See Digest p. 13.

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The rules as to the *Garubhan* and *Lahubhan* property of *Rahans* are given in sections 396, 397 and 398. The line of demarcation between the two kinds of property seems to be purely arbitrary, but in general terms it may be said that *Garubhan* includes the monastery and its site and any garden lands appurtenant to it as also the more important utensils and furniture used by a *pongyi*, while all the less important personal effects fall under the head of *Lahubhan*. *Garubhan* property is not subject to partition but goes to the Assembly, while *Lahubhan* property is divided among the disciples of the deceased. None of the *Dhammathats* mention paddy lands as capable of being *Garubhan*. (The District Court judgment now under appeal refers to *Wunnana*, section 82, as authority for including paddy lands in *Garubhan* property, but I think the learned Judge has misread the text.) From a consideration of the conflicting *Dhammathats* and the *Vinaya* texts it may perhaps be inferred that the rule prohibiting laymen from inheriting a *Rahan's* property applies only to property which a *Rahan* may lawfully possess according to the rules of the Order, *viz.*, *Garuabhan* and *Lahubhan* property and not to worldly possessions such as paddy lands, cattle, etc., which he may have acquired by gift or by way of inheritance. It would I think be going too far to say that a *Rahan* is incapable of holding such property, seeing that the *Dhammathats* clearly recognize gifts of lands, etc., to *Rahans* as religious offerings and (as in the present case) we find *pongyis* accepting such gifts and acquiring land by inheritance. But as the rules of the Order do not permit such possessions it would perhaps be correct to treat a *Rahan* holding paddy lands on the footing of a layman to that extent, and to hold that the lands if not disposed of in the *Rahan's* life-time are inherited by his next of kin in the same way as if he were not a *Rahan*. It cannot in my opinion be held that on the *Rahan's* death the lands pass to the Assembly (*Sangha*), for in the first place the Assembly is an indeterminate body with little or no co-herence and without a recognized hierarchy (at any rate in Lower Burma), and secondly, because as the learned author of "Buddha, His Life, etc.," points out there is no authority for the view that the Order was allowed by its founder to have any

kind of possession which was forbidden to the individual brethren. It would be wrong for the Assembly to hold lands and so far as I am aware it has never been the practice in Burma for paddy lands and other worldly property to be held either by the general body of monks or by monastic groups. We find individual monks infringing the *Vinaya* rules by holding paddy lands and the Burmese Buddhist law books recognize the practice. But very little will be found in the *Dhammathats* to support the view that the Assembly in general may hold paddy lands. In section 410 of the Digest the *Kungyalinga* extract provides that when a gift of specified kinds of property including paddy lands is made to all *Rahans* in general the property does not revert to the donor and in the *Yazathat* extract a similar rule is implied. But I have already referred to *Dhammathat* texts indicating that the possession of lands is repugnant to the Order. Finally as Mr. McColl points out in the case *Po Thin* v. *U Thi Hla* (10) already mentioned, the members of the Order in Burma still profess to regulate their lives by the strict rules of the *Vinaya*, and though backslidings and eccentricities on the part of individual monks may be tolerated, it would seem that in a matter such as this affecting the fundamental character of the Order, the authority of the *Vinaya* ought to prevail and it should be laid down definitely that the Assembly is incapable of holding paddy lands, and that if such property is given to a *pongyi* (whether the gift is expressed as a *Thingika* gift or a *Poggalika* gift) or inherited by him he has disposing power over it during his life but if he leaves it undisposed of at his death it goes to his next of kin.

A correct and authoritative decision on these points is very desirable in the interests not only of the lay community but also of the Order. I therefore refer for decision by a Bench the following question:—

A *pongyi* dies possessed of paddy lands part inherited after his ordination and part given to him after his ordination. Are his next of kin entitled to inherit the lands?

(10) 1 U.B.R. (1910-13), 183.

Civil Reference No. 1 of 1916.

June 2nd, 1916.

Before Mr. Justice Parlett and Mr. Justice Maung Kin.

May Oung—for 1st and 3rd to 6th respondents.

Maung Kin, J.—The question referred is :—

"A *pongyi* dies possessed of paddy lands part inherited after his ordination and part given to him after his ordination. Are his next of kin entitled to inherit the lands ? "

The first point that arises is as to the law that is applicable. Are the *Vinaya* texts or the *Dhammathats* or both applicable? The point has been dealt with by Mr. McColl in *Nga Po Thin* v. *U Thi Hla* (10) where the dispute was between a Buddhist layman and a monk, relating to land on which a monastery stood. The learned Judge said: "If the *Dhammathats* be referred to it will be found that they are hopelessly contradictory and they are also inconsistent with the rules in the *Vinaya*. Thus in Volume I, U Gaung's Digest, page 464, the compiler says :— "The rules laid down in the old *Dhammathats* are inconsistent with those in the *Vinaya* and an attempt has been made in the present treatise to reconcile them and readers are requested to exercise their own discretion in their application of the rules." The learned Judge then goes on to point out certain inconsistencies contained in sections 405, 399 and 404 of Volume I of the Digest and to observe :— "The questions which arise for decision in this are such as would be better decided by the Ecclesiastical authorities, but as I have found that the Civil Courts have jurisdiction to try this case, those questions must be decided, and I think the proper basis for the decision should be the texts of the *Vinaya* so far as they can properly be applied * * * * * All monks profess to be bound by them and when a case of this nature is brought before the Ecclesiastical authorities for decision it is in accordance with texts from the *Vinaya* that they decide it."

The rules of the *Vinaya* are to be found in—

(1) Vinaya Pitaka.

(2) Vinaya Pali Atthagathas.

(3) Vinaya Tikas.

The *Vinaya Pitaka* consists of five books, namely, *Parajikam, Pacittiya, Mahava* or *Mahavagga, Chulava* or *Chulavagga*

(10) 1 U.B.R. (1910-13), 183.

and *Pariva.* Since the death of Buddha there have been five convocations at which the *Pitakas* were rehearsed by the learned *Bhikkhus.* The first was held at Rajagaha, at that time the capital of Magadha, 61 days after the death of Buddha or B.C. 543. The whole of the *Pitakas* was then rehearsed, every syllable being repeated with the utmost precision, and an authentic version established. The last was in Burma in the reign of King Mindôn, when the texts of the *Pitaka* were engraved on stone slabs which are now kept under proper supervision at the *Lokamarzain Kuthodaw* Pagoda at Mandalay.

The *Atthagathas* are the commentaries on the *Pitakas* written in Pali by *Shin Buddha-ghosa* in 630, the year of the Religion, in Ceylon.

As regards the *Tikas* there are the Old and the New. The Old *Tikas* were written in Pali by a monk named *Shin Thari-puttra* in Ceylon during the reign of *Thirimahaparakkama Bhahu,* a King of Ceylon. The New *Tikas* were written also in Pali by a monk named *Munainda-ghosa* in the reign of *Thalunmintayagyi* of Burma. The *Pitaka Thamaing* does not give the date of either *Tikas.* The *Tikas* are commentaries on the *Atthagatha.*

The Buddhist monks of Burma profess to be governed by the *Pitaka,* the *Atthakathas* and the *Tikas,* and texts from these are quoted and relied on in the decisions of *Sayadaws* on disputes relating to property between monks or between monks and laymen, where the property in question is that of a monk. My enquiries in Mandalay show that the *Dhammathats* are never referred to in the decisions of such disputes and that only the *Tipitaka* and the commentaries are relied on. I am therefore of opinion that the law applicable to this case is that to be found in the rules of the *Vinaya* and not in those of the *Dhammathats.* In these texts we find seven kinds of sin mentioned.

The sins are as follows:—

(1) *Parajikam.*
(2) *Sanghadissesa.*
(3) *Thullaccaya.*
(4) *Suddha pacittiya*
(5) *Nissaggi pacittiya.*
(6) *Dukkata.*
(7) *Dubbhasi.*

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The first class is unpardonable and consists of four sins, *viz.*, (1) Murder, (2) theft of property worth 5 ticals or more, (3) unchastity, and (4) a false profession of the attainment of *arahatship*. The direct result of the commission of any of these four sins is that the offender ceases to be a *rahan* and is no longer eligible for ordination. By the commission of any of the other classes of sins, a member does not lose the character of a *rahan*. He may confess to his particular sin and thus get free from the consequences of it.

The sins committed by holding property are *Nissaggi, pacittiya* and *Dukkata* and in this connection property is divided into *Nissaggi, Dukkata*, and *Kappiya*.

Nissaggi property consists of valuables such as gold, silver, precious stones and the like. Among the *Dukkata* property are classed culturable lands, such as paddy lands and garden lands. *Kappiya* are things other than *Nissaggi* and *Dukkata* and are things fit to be possessed by *rahans*.

An individual monk may not possess gold or silver or precious stones. If he does he is guilty of *Nissaggi apat*. He may be pardoned for it, if he confesses to it and discards the property. Nor may he possess land, such as paddy land. If he does, he is guilty of *Dukkata apat* for which he may be pardoned on confessing. A monk who possesses such property remains guilty (အာပါတ်သင့်လျက်သဲ) so long as he does not confess but he does not thereby cease to be a *rahan*.

But even *Nissaggi* and *Dukkata* property may be accepted by a *rahan*, if he accepts it in the right way.

All that a *rahan* requires are (1) food, (2) raiment, (3) shelter (*Kyaung*) and (4) medicine. Beyond these he ought to have no requirements. These requirements are described as စတ္တာရောပစ္စယော=ပစ္စည်းလေးပါး If money is offered to a *rahan* for the purpose of the four requirements, he may accept the gift by appointing a *kappiya karaka*, a person who makes (*karaka*) it right (*kappiya*) for the *rahan* to accept a gift of property which he is not allowed to handle. The *kappiya karaka*, or shortly *kappiya* will then actually receive it, and out of it supply the *rahan* with his requirements. The proper words for the donor to use in offering money are "*navakam-*

massa dema" (နဝတ္ထုသာသနေမ) which means I make you a gift of your future (lit. new) requirements. 1918.

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This kind of gift of money is made to monks frequently at the present day.

At pages 180—186 of Volume I, of his *Tipitaka Viniccaya Kyan*, Maingkaing *Sayadaw*, one of the most learned in the reigns of King Mindôn and King Thibaw explains how a *rahan* may receive a gift of paddy lands. He says that if the donor says "I make a gift of this paddy land to this *kyaung*," the gift may be accepted and the property will then remain for the benefit of those residing in the *kyaung* and if there is only one at the time of the gift the property is to all intents and purposes his, but as a *rahan* is not permitted himself to cultivate the land or let it to tenants, the donee must appoint a *Kappiya Karaka* to take charge of and work the property and to supply the needs of the residents out of the profits of the land. There are other permissible modes which it is not necessary to mention here. The learned author quotes texts from the *Tipitaka*, *Atthakathas* and *Tikas* in support of his views. The work was written in 1237 B.E., that is, 30 years ago and was printed in 1901 by the Mandalay Times Press. The result of my inquiries is that the printed book is widely read by the monks of Mandalay and acknowledged to be a correct copy of the original on palm leaf. At page 229 of his printed work "*Tipitaka Pakinnakadipani Kyan*," Monangon *Sayadaw*, a recognised authority, expresses the same views as Maingkaing *Sayadaw* on the subject. This work is also widely read in Mandalay.

And the practice of dedicating paddy and other culturable lands to monasteries for the necessary repairs of the buildings and for the maintenance and support of those monks who dwell in them has grown up in Burma as being in accordance with the teachings of the Sage.

The inscriptions of Pagan, Pyinya and Ava translated by Maung Tun Nyein, Government Translator, show that the practice was very general in those ancient capitals of Burma commencing from about the 12th or 13th century A.D. In one of the inscriptions it is stated that the dedication of certain lands was made to a monastery "*in order that the Religion might continue to flourish during its period of* 5000 *years.*"

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See page 169 of the "Inscriptions." At the present day also we know of many cases of lands being *hlu'd* for the maintenance of monks in monasteries.

For the above reasons it may be held that there is nothing in Buddhist literature which prohibits the gifts of paddy or other culturable lands to Buddhist monks, if made and accepted in any of the prescribed ways.

The next question for consideration is what becomes of the property of a deceased monk.

The question is discussed at pages 58 to 69 of the printed work "*Winiphyatton*" (Decisions on *Wini or viniya*) by Thalon *Sayadaw*. This work was printed and published under the editorship of Saya U Pye, a renowned Pali scholar of Rangoon who has received the title of *Aggamahapandita* for his distinguished scholarship. Thalon *Sayadaw* was a famous scholar who flourished in the reigns of Pagan and Mindôn. Two of his pupils were Thingasa *Sayadaw* and Shwegyin *Sayadaw* both of whom were respected for their learning and piety throughout Burma. There can be no doubt as to the authority of this book and it is largely used by the monks as a hand-book on matters concerning Discipline. The texts quoted are all on the subject of *Matasantaka*, the property of a deceased monk and are from *Mahavagga, Mahavagga Atthagatha, Vajirabuddhitika, Sarathadipanitika*. I have had these quotations verified by a Pali scholar who found them correct. Indeed, the fact that Saya Pye saw the book through the Press is a sufficient guarantee of its authenticity. The first quotation is from *Mahavagga*, Chapter on *Civarakkhandhaka*. It means that if a *rahan* dies leaving property, all of it becomes the property of the *Sangha*. But as much credit is due to those who tend a sick person, such things as begging bowl and robes may be given to one who tended the deceased during his illness. As regards the remainder of the *Lahubhan* property, it may be divided amongst those *rahans* who were present on the occasion. As regards *Garubhan* property let it not be divided and no one is allowed to give it away.

The next quotation is from *Mahavagga Atthakatha* and it means that on the death of a *rahan*, such things as his robes and begging bowl may be given to the person who tended

him during his illness. What remains, whether it be *Kappiya* property (property which it is proper for monks to possess or own) or *Akappiya* (property which it is not proper so to do) or property which it is proper to partition amongst the monks or not, or *nissaggi* property (property which should be abandoned) or *anissaggi* (property which need not be abandoned) is the property of the *Sangha*. The *Sangha* should therefore deal with it in accordance with the rules of Discipline. The other quotations are to the same effect as the above.

In 1250 B.E., two years after Upper Burma was annexed, the *ex*-Ministers of the old regime referred the questions whether a *rahan* could make a gift of his property to take effect upon his death and if not, what the nature of his property would be on his death, were submitted to Maingkaing *Sayadaw* and his answer was that a gift made by a monk to take effect upon his death was not valid and that the property became, on his death, the property of the *Sangha*. See page 440 of Volume 2 of *Tipitaka Viniccaya Kyan*.

From these authorities it seems clear that property left by a deceased *rahan* becomes the property of the *Sangha*, whether it had been held by the deceased in accordance with the *Vinaya* rules or not and that it is for the *Sangha* to deal with it in such a way that it may be lawful for them to hold and possess it. And I have shown above how *nissaggi* property and *dukkata* property may properly be received by a *rahan*.

I am therefore of opinion that the answer to the reference should be in the negative.

Parlett, J.—Though the first source of authority to be looked to for an answer to the question referred is the *Vinaya*, I think we are at liberty to look further than that, *e.g.*, at the *Dhammathats*, at any rate on points on which the *Vinaya* is silent or regarding which the *Dhammathats* are not clearly in conflict with the *Vinaya*. Further I think that in endeavouring to interpret the *Vinaya* we may have regard to the views of commentators of recognised or proved authority and apply its rules in the light of what are found to be the actual modern condition of the Buddhist monkhood. I presume that the Buddhist monastic orders in all countries accept as authoritative some such code of rules as that which we call the *Vinaya*.

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Doubtless in all countries they have availed themselves of tradition and the ingenuity or sophistry of subtle writers to modify or enlarge the strict provisions of those rules. Scarcely any rules could be plainer than those prohibiting the handling of money and enjoining celibacy, yet it is a matter of common experience that, some at least, of the monks of Ceylon handle money freely, while many Lamas of the Northern school marry and have families. I doubt not that these phenomena are plausibly explained by the theologians of those countries. Though it has been thought by some writers that the *Vinaya* does not recognize the possession of arable land either by individual monks, or by the monastic order, possession of both kinds has been recognised by the Courts in Burma, *Maung Talok* and 1 v. *Ma Kun* and 2 (1), and *Maung Hmon* and 1 v. *U Cho* and 1 (2) and the present reference is based upon possession by an individual monk. If an individual monk can possess it one obstacle to its possession by the order appears to be removed. Nor do I think that the indeterminate nature of the order and the absence of a recognised hierarchy are fatal objections to its holding lands. The Buddhist priesthood in Burma is, I should say, as determinate a body as the clergy of most religions. Moreover property is sometime dedicated to and held by the incumbents for the time being of a particular monastery or group of monasteries (*taik*) which are sufficiently definite bodies. As to the hierarchy, Government may not have officially recognised the *Thathanabaing's* authority in Lower Burma, but I believe that in matters of discipline and doctrine the monks of Lower Burma submit to his rulings. But whether that be so or not a hierarchy extending to the next lowest rank, namely, the *Sayadaws*, exists and I should think is thus far as complete and full of vitality as when Bishop Bigandet wrote his article upon it and formed the opinion which he expressed in the following striking words:— "There is another characteristic of the religious order of Buddhists which has favourably operated in its behalf and possibly contributed to maintain it for so many centuries in so a compact and solid a body that it seem to bid defiance to the destructive action of revolutions. We allude to its regularly constituted

(1) 2 U.B.R. (1892-96), 78. (2) 2 U.B.R. (1892-96), 397.

hierarchy, which is as perfect as it can be expected, particularly in Burma and Siam (3) ". It is recognized that the order shall be capable of holding, and it does in fact hold, land (parks and gardens) and it appears to me that there is no practical reason why it should be incapable of holding land used for other purposes.

The provisions of the *Vinaya* as to the disposal of the effects of a deceased monk are brief and refer expressly only to property which it is necessary for him to have or which the canon allows him to possess, and this goes to the surviving members of the order. Sections 394 to 412 of Volume I of the Kinwin Mingyi's Digest contain fuller rules collected from the *Dhammathats*, and these too repeat the general rule that a layman cannot inherit the property of a monk. The property of monks is classified as *Garubhan* and *Lahubhan*; broadly speaking the former goes intact to the order, the latter is shared by the inmates of the deceased's monastery. Culturable lands are not expressly included in the list of the *Garubhan* property though the *Dhammathatkyaw* quoted in section 393, groups it with other property which is *Garubhan*. On the other hand the *Cittara*, quoted in section 406, gives culturable land to a lay co-heir attending upon the deceased, as being property to which a monk is forbidden to devote much attention. If, as I understand, the term *Garubhan* means that property of a monk to which importance is attached, I consider it should be confined to the articles necessary for him and to such other property as the *Vinaya* expressly allows him to hold, and that it cannot properly include culturable land of which the possession, if not implicitly forbidden, is certainly not countenanced. If this be so, it is difficult to see how the whole order can succeed to such land if left undisposed of by a deceased monk. None of the texts appear to class culturable land as *Lahubhan* property of a monk, nor do I think that that term can be properly applied to property which it is not contemplated that a monk should hold at all. On the contrary it appears to me that the 5th principle deduced in *Maung On Gaing* v. *U Pandisa* (4) can be traced both in the passage from *Cittara* referred to above and also in the texts in section 409 of the Digest, and that property either

(3) *Bigandet's Legend of Gautama*, pages 249 and 250. (4) P.J.L.B., 614.

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acquired by laymen's pursuits or which like culturable land it is not proper for a monk to possess is not religious property and reverts to the lay heirs of the deceased.

My learned colleague has deduced from the *Vinaya* and commentaries that a monk may possess even property which it is improper for him to hold, if he holds it in the right way, which I take to mean vicariously. Unless one can be assured that the Buddha himself would have countenanced what appears to be a subterfuge, I doubt if one should accept it.

The land covered by the reference is moreover of two kinds part inherited by, and part given to the deceased monk, after his ordination, and it appears to me that the two classes are not necessarily on the same footing. Bishop Bigandet wrote: "His (the Buddhist monk's) complete separation from the world has broken all the ties of relationship * * * Like Buddha himself he parts with his family, relatives and friends, and seeks for admission into the society of the perfect" (5). It may be doubted whether one who has entirely severed all ties of blood, one who is even enjoined to pull his own mother out of a pit with no more regard for her personality than if she were a log of wood, is capable of inheriting at all from kinsmen from whom he has so completely cut himself off. In this view this part of the land at any rate should properly go to his surviving next of kin.

As regards the land given to him a passage is cited from a work by the *Maingkaing Sayadaw* showing how a monk may receive a gift of culturable land. The *Sayadaw* explains that a donor may make a gift of paddy land to a *kyaung* for the benefit of those residing in it. Then if there chance at the time to be only one inmate of the *kyaung*, "the property is to all intents and purposes his". It appears to me however that even in the circumstances supposed, the monk is at most a trustee of the land for future incumbents of the monastery. A monastery is, or at any rate can be, *Thingika* property, and land dedicated to a monastery for the maintenance of those who from time to time occupy it, would attach to the monastery and become *Thingika* equally with it. The conditions assumed by the *Sayadaw* are not present in the case under reference,

(5) *Bigandet's Legend of Gautama*, pages 249 to 255.

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which deals with a gift, not to the residents of a monastery for the time being, but to a particular monk; the passage therefore does not apply to the present case though at the same time it does appear to my mind to imply that a gift of culturable land cannot be made to or accepted by an individual monk. I have heard it suggested that a monk could not rightly refuse such a gift, as he would thereby be denying the acquisition of merit to the would-be donor. I confess that this savours to me of sophistry, and that I cannot fathom the philosophy which treats as a meritorious act an attempt to seduce a monk from his vows or at any rate to induce him to break the canon of his order. It appears to me that the omission in the *Vinaya* of arable land from the property which alone the Buddhist order of medicant monks may possess is too strong an authority to be explained away by mere commentators, and that a monk cannot accept a gift of culturable land. If he does so, it is not religious, but lay property, and if left undisposed of at his death, it should go to his next of kin.

In view of this difference of opinion the question must be referred to a Full Bench.

FULL BENCH.

Before Sir Daniel Twomey, Chief Judge, Mr. Justice Ormond, Mr. Justice Maung Kin, Mr. Justice Rigg and Mr. Justice Pratt.

J. A. Maung Gyi—for appellant.
May Oung—for respondents.

The opinion of the Full Bench was as follows:—

February, 12th 1918.

The question referred to the Full Bench in this case is as follows:—

"A *pongyi* dies possessed of paddy lands part inherited after his ordination and part given to him after his ordination. Are his next of kin entitled to inherit the lands?"

The reference was originally heard by a Bench of two Judges but as they disagreed it was further referred to a Full Bench. There is no doubt that the Civil Courts have jurisdiction to adjudicate on this question. This point is clear from the decision in *U Wisaya* v. *U Zawta* (1) which was a suit for

(1) 8 L.B.R., 145.

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the recovery of certain lands, both parties being Buddhist monks; the Bench held that Civil Courts in Lower Burma have jurisdiction to decide suits of a civil nature in which points of ecclesiastical law arise.

Certain questions* arising from the present reference were framed by the Court and sent to the Mandalay *Thathanabaing* with the request that he would favour the Court with his opinion on them. The *Thathanabaing* has been so good as to comply with this request and his answers* to the question have been considered by the Court.

The first point that arises is as to the law which should govern our decision. The *Thathanabaing's* answer show that if the case were to be decided by an eccleciastical tribunal that tribunal would be guided by the *Vinaya* text and the various commentaries thereon (*Atthakathas, Tikas, etc.*), and that the authority of the *Dhammathats* is not recognised by the ecclesiastical tribunals. In the Upper Burma case *Po Thin* v. *U Thi Hla* (2) which was a dispute between a Buddhist layman and a monk relating to a monastery site the learned Additional Judicial Commissioner held that the proper basis for decision should be the *Vinaya* text (*i.e.*, what is known in Burma as "*The Palidaw*"). We are at one with Mr. McColl in holding that cases of this nature should be decided according to the ecclesiastical law, but we think that in basing his decision on the *Palidaw* alone he took too narrow a standpoint. The *Vinaya* and its commentaries form part of the Buddhist Law and where the devolution of the property of a *pongyi* is concerned it seems right that this branch of the law should govern the decision. Moreover, there are passages in U Gaung's Digest which suggest that in the learned compiler's opinion the *Vinaya* writings and not the *Dhammathats* should be regarded as the authentic guide in such matters (*vide* Volume I, pages 452, 462, 463, 464). At the same time we cannot entirely exclude the *Dhammathats* from consideration and where the ecclesiastical law is silent we are of opinion that the provisions of the *Dhammathats* should be taken into account if they are not inconsistent with the *Vinaya* and its commentaries, for the *Dhammathats*

(2) 1 U.B.R. (1910-13), 183.

* See annexures.

throw a valuable light on the established custom of the country even in regard to ecclesiastical matters, at a period still very recent when compared with the age of the *Vinaya* and the earlier commentaries thereon.

The general rule to be drawn from the *Vinaya* (see *Mahavagga*, Volume 8, Chapter 27, section 5) (3) is that religious property belonging to a *Bhikkhu* or *Rahan* passes on his death to the *Sangha*. Provision is made for the division of the less important articles—*Lahubhan*—amongst the members of the Order who are present. But the more important property—*Garubhan*—is impartible and passes to the *Sangha*. This rule no doubt was originally intended to apply only to property falling within the descriptions of the Four Requisites—food, raiment, shelter, *i.e.* (monastery and site), and medicine—for these are the only things which a *Rahan* could possess. But it is clear that this restriction has long ceased to be operative. Individual *Rahans* do possess paddy land and other property not of a monastic kind which the original *Vinaya* text would forbid to them. Modern monks interpose a *kappiya karaka* or lay steward who holds the forbidden property for the *rahans*. The germ of this practice may be found in the *Palidaw* itself. The passage from *Parajikam Vinaya* in the extracts from *Winiphyatton* (4) given in Mr. Justice Maung Kin's notes attached to this judgment shows that if gold and silver was received by a *rahan* he had to abandon it and confess a sin. A *Taga* (layman) could then pick it up and buy robes, etc., for the *other rahans*, but not for the *rahan* who originally received it. In modern times [as the extracts from *Winiphyatton* (4) and *Tipitaka Viniccaya* (4) show] the *kappiya* practice has been much extended. Gifts of paddy land and even gold and silver which it would be sinful for a *rahan* to accept directly are taken vicariously by means of a *kappiya*. The gifts are expressed to be made for the purpose of supplying the four requisites and property received in this manner becomes what is called *kappiya* property, *i.e.*, property which a *rahan* may hold lawfully. The *kappiya* system is approved in the answers sent to our questions by the *Thathanabaing* who is the head of the

(3) Sacred books of the East, Vol. XVII, *Vinaya Texts*, Part II, page 245.

(4) See annexure to this judgment.

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Upper Burma monks. It may be objected that the system in its present extended form is not consistent with the spirit of the rules laid down by the Great Founder of the Order seeing that it would enable a monk to evade most of the onerous obligations of the monastic life. It cannot be forgotten that the Order is essentially an order of mendicants who have renounced the world. Although they make no actual vow of poverty they divest themselves of all worldly possessions at the time of ordination and the *Vinaya* text certainly contemplates a body of ascetics living in poverty and dependant upon alms even for the necessaries of life. But the Civil Courts have not hitherto questioned the propriety of the *kappiya* system and it does not appear competent for them to do so. On the other hand, the Courts have in many cases tacitly admitted that there is nothing to prevent a *pongyi* from holding paddy land. This view is in accordance with long established custom ; it is supported by passages in the *Atthakathas*, the authority of which is regarded as inferior only to that of the *Palidaw* itself, and the practice in its existing extended form has the approval of the *Thathanabaing* in Upper Burma. If reform is desirable, a point as to which we express no opinion, it must come from within the Order itself or must be brought about by pressure of lay Buddhist opinion ; it cannot be imposed by the action of the Civil Courts for it appears in effect that the rigid monastic rule contemplated in the canonical text has long since become only a pious memory and a counsel of perfection. The *Dhammathats* moreover support the view that a *pongyi* may hold property which is not of a monastic kind. Although arable land is not included in the lists of *garubhan* property in section 396 of the Digest other sections show that the holding of such land by *pongyis* has long been recognised by custom (*see* sections 407 and 410).

In the question referred to us it is assumed that a *pongyi* may inherit paddy land from his lay relatives and that he may accept a gift of such land. As regards gifts, for the reasons noted above it appears that there is nothing unlawful in the dedication of paddy land to a *pongyi* as a religious gift. But the case of inheritance is different and we are not prepared to hold that a *pongyi* can inherit from his lay relatives. When a

pongyi or *rahan* is ordained his severance from his family is so complete that, if he was a married man before, he is regarded as having divorced his wife. He is certainly cut off as completely from his original family as if he had been adopted into another family. Sir George Shaw in *Ma Taik* v. *U Wiseinda* (5) pointed out that it is nowhere laid down in the *Dhammathats* that a monk is incapable of inheriting and he thought that there was nothing to prevent a monk from acquiring by inheritance " property which he proceeds to devote to religious purposes." We are unable to agree in this view as we consider it inconsistent with a *pongyi's* personal status that he should inherit from his natural family with whom all ties of relationship have been annulled. Although the *Dhammathats* do not lay down that a monk is incapable of inheriting from his family we are not aware that there is any passage in the *Dhammathats* or in the *Vinaya* or its commentaries which expressly recognise that a monk is capable of inheriting. If therefore land is allotted to a *ponygi* by his relatives as his share of the family inheritance and the *pongyi* accepts it in accordance with the *kappiya* method it can only be regarded as a religious gift to that *pongyi*.

Dealing now with the main question referred, as to the disposal of a *pongyi's* land after his death, the general rule deducible from the *Vinaya* and the commentaries is clearly that all *garubhan* property which had been given to the *pongyi* outright by way of religious gift and of which he dies possessed goes to the *Sangha* and that a layman cannot inherit such property from a *pongyi* and this general rule is recognised also in the *Dhammathats* (*see* section 397). The *Winiphyatton* contains an extract from *Mahavagga Atthakatha* extending the rule to all *kappiya* and *Akappiya* property, but the original *Atthakatha* text has not been traced. (*See* extract No. 2 from *Winiphyatton* in annexure). The *Dhammathats* cited in section 407 of the Digest lay down expressly that a *rahan's* co-heirs shall not inherit property given to him by others as a religious gift but that all such property shall go to the Order. The same rule is found in the *Manukye* text extracted in section 398, and other texts in that section also reiterate the rule that a lay co-heir cannot inherit the property.

(5) 2 Chan Toon's L.C., 235.

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When land is given outright to an individual *pongyi* as a religious gift it becomes the property of the Order on his death or on his leaving the Order. We regard this as a devolution not by inheritance but by virtue of the original dedication to religious uses made by the donor.

Sections 408, 409 and 410, of the Digest contain texts which at first sight appear to conflict with the general rule that laymen cannot inherit from a *rahan*. Section 408 provides that lay co-heirs can resume property given to a *rahan* by his parents as a religious gift "because such property does not properly belong to the member of the Order" (*Yazathat, Manuvannana and Kungyalinga*). Other texts from the same three *Dhammathats* (*vide* section 410) provide that gifts made to an *individual rahan* revert on his death to the original donor. According to the texts in section 409 the *rahan's* lay relatives inherit property which he himself acquired by trade, agriculture or usury.

The special provisions contained in these three sections appear to contemplate cases in which the property in question has not been given outright as a religious gift. In such cases the property would not devolve on the Order on the owner's death. The texts in section 408 should be read with section 97 which deals with the revocation of parental gifts: the texts in section 409 clearly relate to property which is not religious property at all: and the texts in section 410 expressly state that the property which the lay co-heirs inherit is property in respect of which the dedication was limited to the *individual rahan* with no intention that the property should ultimately pass to the Order generally.

In the appeal out of which this reference arose the District and Divisional Courts treated the land in suit as having become the outright property of the deceased *pongyi*. Accordingly, in answering the reference we confine ourselves strictly to the case of land given to a *pongyi* outright as a religious gift. Cases may occur in which the land is not given outright, the intention being to make a gift of the produce only for the donee's lifetime. Our decision does not relate to such cases. Nor does it relate to the class of cases exemplified in the Digest, section 409, in which *pongyis* acquire land otherwise than by religious gift.

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We answer the reference as follows :—

A *pongyi* after his ordination cannot inherit from his lay-relatives. On the death of a *pongyi* his lay-relatives cannot inherit from him land which had been given to him outright as a religious gift.

ANNEXURES.

Questions referred to the Thathanabaing.

1. When a matter concerning *rahans*, which involves a dispute about property either between monks themselves or between monks on the one hand and laymen on the other, comes before an ecclesiastical tribunal, by what written authorities should the tribunal be guided ?

2. Is it permissible to look to any authorities besides the actual canonical text of the five *Vinaya* books ? If so, by reference to what authoritative works should disputes be decided? (Please enumerate them fully in the order of their importance.)

3. Where the dispute is between a layman and a *rahan*, to what extent is the authority of the *Dhammathats* recognised by the *Sangha* ?

4. Can the *Sangha* (the whole Order) or a *gana* (group of *rahans*) accept a *Sanghika* gift of paddy lands ?

5. Can a *bhikkhu* inherit paddy land or any other property from his deceased relatives? If the surviving heirs of a deceased relative allow the *bhikkhu* to take a share, would that be considered an inheritance or a gift ?

6. What are the properties which a *bhikkhu* can lawfully own as his *poggalika* ?

Can a *bhikkhu* own paddy land as *poggalika* so as to have exclusive control over it, and to receive the rents and profits for his individual use, and to dispose of it at his pleasure to whomsoever he chooses ?

7. Bearing in mind the answers to questions 4, 5, and 6 where a *bhikkhu* dies leaving paddy lands, the profits of which he had enjoyed in his lifetime, on whom do the lands devolve, the *sangha*, the *gana* or the *bhikkhu's* next of kin ?

Answers.

I. The written authorities are—

(*a*) The five books of *Vinaya* texts.

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(*b*) The *Atthakathas* or the commentaries on the *Vinaya* texts.

(*c*) The *Tikas* or the sub-commentaries.

(*d*) And the *Gandhand ara* or scholia.

II. The other authoritative works besides the five books of *Vinaya* texts in order of their importance are :—

(*a*) *Samanta pasadika atthakatha* or commentaries on the five books of the *Vinaya*.

(*b*) *Kankha Vitarani atthakatha* or commentary on the *Pati Mokkha*.

(*c*) *Vajira buddhi tika*
(*d*) *Saratta dipani tika*
(*e*) *Vimati Vinodani tika*
} These books are sub-commentaries on the five books of the *Vinaya* and the *Samanta pasadika*.

(*f*) *Kankhavitarani tika* (old) &
(*g*) *Kankhavitarani tika* (new)
} are sub-commentaries on the *kankhavitarani atthakatha*.

(*h*) *Vinaya Sangaha atthakatha*
(*i*) *Vinaya Sangaha atthakatha tika* (old)
(*j*) *Vinaya Lankaratika* (new)
(*k*) *Khudda Sikkha*
(*l*) *Mula Sikkha*
} Scholia on the above.

III. There is no precedent for the *Thathanabaing* in council to recognize the authority of the *Dhammathats*. They are accustomed to decide according to the *Vinaya* only.

IV. If gifts of paddy lands are made in accordance with the *Vinaya* rules the *Sangha* (whole Order) and the *gana* (group of *rahans*) can accept them as *sanghika* gifts.

V. A *rahan* can inherit paddy lands or other property from his parents or relatives in accordance with the *Vinaya* (rules) and the property that he inherits is called his inheritance.

VI. The properties which a *Bhikkhu* can lawfully own as his *poggalika* are:—

(*a*) robes, food, monastery and medicine known as the four requisites;

(*b*) all utensils allowed by the *Vinaya* ;

(*c*) when paddy lands are made over to a layman (the *kappiya karaka*) and the benefits derived from the said lands are handed over to the *bhikkhu*, he can enjoy them according to the *Vinaya* rules.

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The *Bhikkhu* owns the paddy field as his *poggalika* and has full rights of disposal.

VII. Bearing in mind the answers to questions 4, 5 and 6 if a *bhikkhu* dies leaving paddy lands without disposing of them in his life-time, the lands so left become *Sanghika* property. If in his life-time he gave them away in accordance with the *Vinaya* to others and the donees accept them in accordance with the *Vinaya* rules the donees who so accept them are the owners thereof.

Texts relied on by the Thathanabaing in support of his answers.

Translation of Pali passages.

Question I.—(*a*) O, Ananda, I have already preached to you the *dhamma* and ordered the rules of the *Vinaya*. Let them be as teachers to you all when I have passed away.

(*Sutta Maha Vagga—Maha Parinibbana Sutta.*)

(*b*) The *Vinaya Pitaka* is called *Anadesana* or mandatory sermons because rules were enjoined by the Lord Buddha who was entitled or had authority to make rules.

Question II.—The Buddha explained the meaning of every passage. There is no passage which can be said to have been left unexplained by him.

(*Majjhima Panasa Atthakatha—Upali Sutta*).

Question III.—Same as (a) in question I.

Question IV.—(a) If (the donor says) " I give this irrigation tank or reservoir, this field, this plantation to the monastery " the gift should not be declined or refused.

(*Samanta Pasadika ; Parajikan atthakatha ; Raja Sikkhapada*).

(*b*) How is a gift lawfully made? When the gift is accompanied with the words " make use of the four requisites ". If the donor says " My Lord, I pray you, let the order made use of the four requisites ", then the gift is lawful.

(*Samanta Pasadika ; Parajikan atthakatha ; Raja Sikkhapada*).

(*c*) A gift is made accompanied with the words " Please make use of the four requisites."

Now with reference to this or in explanation of this, the gift is valid, if the following words are used " We give this

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irrigation tank in order that the *Bhikkhus* may make use of the four requisites" or the words " We give this irrigation tank for the purposes of the four requisites." So much the more fitting is it therefore if the words used are " We give the profits derived from this irrigation tank for the four requisites."

(*Sarattha-dipani Tika Samanta pasadika—Parajikan atthakatha*).

Question V.—(*a*) *Bhikkhus*, a debtor should not be ordained. He who ordains such a one is guilty of a *dukkata* offence. (*Vinaya Mahavagga*).

(*b*) O, *Bhikkhus*. The meaning of " debtor " in the sentence " a debtor should not be ordained " is as follows:—

A man's father or grand-father has contracted debts; or he himself has contracted debts; or his parents have taken property from others with limiting conditions; that person commences to pay the debts or binds himself to pay the debts; for that reason he is called a debtor.

Question VI.—(*a*) If without naming either the *Sangha*, the *Gana* or an individual *Bhikkhu*, gold and silver be offered with these words " this gold and silver I give to the Pagoda (*cetiya*), to the monastery for the purpose of the requisites (*nava kammassa* new purposes) the gift should not be declined. The *kappiya karaka* should be told that the *Bhikkhus* have need of (these offerings) for such and such purposes.

(*Samanta pasadika parajikan atthakatha; Raja Sikkhapada*, commentary).

(*b*) It is lawful to appoint a *kappiya karaka* to be in charge of an irrigation tank received for the purposes of the four requisites.

(*Samanta pasadika parajikan atthakatha; Raja Sikkhapada*, commentary).

Question VII.—(*a*) At that time a certain *Bhikkhu* died, possessed of much property and utensils (*bandha* and *parikkhara*) and they told this to the Blessed One.

The Blessed One said, " O, *Bhikkhus*, the *Sangha* are the owners of the robes and begging bowl of the deceased, but as the *Bhikkhu* nursing the deceased has rendered great services I allow the *Sangha* to give him either the three robes or the begging bowl. Now with regard to the property left by the deceased *bhikkhu* I allow the *lahuban* or light property to be

divided among the *Sangha* actually present. As to the *garubhan* or heavy property and immovable property I ordain that it shall not be divided but be reserved for the *Sangha* from the four quarters."

(*Vinaya Mahavagga—Civara kandaka*).

(*b*) If while living (a *Bhikkhu*) gives away all his utensils or furniture to another and that other knowing it accepts it, then the property passes to the donee.

(*Vinaya Mahavagga atthakatha-Civara kandaka*, commentary).

(*c*) If the furniture which is kept elsewhere (*i.e.* away from the donor) is not given away then such furniture belongs to the *bhikkhu* residing where the furniture is, it is *Sanghika* property.

(*Vinaya mahavagga atthakatha-Civara Kandaka*, commentary).

Maung Kin, J.'s note on the Thathanabaing's quotations.

Quotations in support of the answer to question 4—

(*a*) Is the same quotation as No. 5 of Maingkaing *Sayadaw's.*

(*b*) Lines 24-27 at page 560 of Volume II of *Parajikam Atthakatha, Rajasikkhapada* Chapter, Saya Pye's edition.

(*c*) Lines 29-30 at page 103 and lines 1-3 at page 104 of Volume I of *Terasakam Tika*, otherwise known as *Saratthadipani Tika.*

Quotations in support of answer to question 6—

(*a*) Lines 26-28 of *Mahavagga* at page 88, Saya Pye's edition.

(*b*) Lines 15-18 at page 231 of Volume I of *Pacitaradi Atthakatha, Mahakhanda* Chapter.

Quotations in support of answers to question 5—

(*a*) Lines 23-26 at page 559 of Volume II of *Parajikam Atthakatha.*

(*b*) Lines 29-30 at page 561 *ibid.*

Quotations in support of answers to question 7—

(*a*) Same as the first quotation of Thalone *Sayadaw's.*

(*b*) Lines 10-12 at page 349 of Volume I of *Pacitaradi Atthakatha-Civarakkhandaka* Chapter.

(*c*) Same as the 3rd quotation of Thalone *Sayadaw's.*

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Maung Kin, J.'s extracts from the Maingkaing Sayadaw's treatises on Buddhist ecclesiastical law.

Translations of Texts cited by Maingkaing Sayadaw at pages 180 to 183 of Tipitaka Vinicchaya Kyan.*

(1) Gautama, the excellent Paya, abstained from receiving (a gift of) paddy lands. (*Silakkhan Pali.*)

(2) One (a *rahan*) should not accept for the benefit of himself or of the *gana* (*i.e.*, a group of *rahans*) or of the *Sangha* (*i.e.* five or more of the Order) any *nissaggi* property. The *rahan* who receives (such property) for the benefit of himself is guilty of *nissaggipacitti apat.* The *rahan* who receives it for the benefit of other *sanghas* (*i.e.*, *Rahans*) is guilty of *dukkata apat.* Where he receives *kappiya* property, he is not guilty of any *apat.*

(*Rupiya Sikkhapada Chapter, Parajikam Atthakatha* Lines 15 to 19 at page 570 of Volume II the *Parajikam Atthakatha* edition by Saya Pye.)

(3) If *ya* land which gives crops, large or small, or paddy land is given with the words " I give you this *ya* or this paddy land," it is not competent (to a *rahan*) to accept the gift. The same is the case where a bunded reservoir, *i.e.* a tank formed by raising a bund on one side, is given in a similar way. If (it) is given in accordance with the *Kappiya* practice [*kappiya-vohara* = (*kappiya* = *kappiya* + *vohara* = practice)] that is to say, if it is given with the words, " I give it in order that you may obtain the four requisites, then it is competent to the donee to receive it. If a forest is given in this way, it is proper to accept it.

* Notes on Thalon and Maingkaing *Sayadaws* as furnished by Mr. May Oung after consultation with *Aggamahapandita* Saya Pye.

The Thalon *Sayadaw* was a high ecclesiastic of Shwebo district, renowned during the reigns of Pagan Min and Mindon Min for his erudition. He was the teacher of the Thingaza and the Shwegyin *Sayadaws*, the latter of whom founded the Shwegyin or Sulaghandi Sect (as opposed to the Thudhamma or Mahaghandi Sect). The Thingaza *Sayadaw* was also highly venerated, and in his day was head of the Mahaghandi. But the monks of *both* sects look up to the decisions of the Thalon *Sayadaw* given in his *Wini-phyatton.*

The Maingkaing *Sayadaw* was of the Mahaghandi Sect and flourished in the reigns of Mindon and Thibaw. He died after the annexation of Upper Burma. His principal work, the *Tipitaka Vinicchaya* is very highly esteemed by all scholars in Burma.

(4) If land with growing crops is given the donor regarding it as a *sima* (*thein*), the gift is acceptable.

(5) If the gift is made with the words, "I give this paddy land, this *ya* land to the *kyaung*," it is not competent to the *rahan* to reject it.

(3) is at page 563, lines 14—17, *ibid.*

(4) is at page 563, line 24, *ibid.*

(5) is at page 565, lines 1—2, *ibid.*

(6) All things, such as paddy land, can be received only for the *Sangha*, because the Pali texts (*Tipitaka*) say that they cannot be received for the individual. Why? Because the *Atthakatha* speaks of the giving of a *kyaung* with the intention of benefiting the *Sangha*.

(*Vimativinodani Tika*, Saya Pye's edition, Volume I, lines 1—3 at page 309.)

(7) If a gift is made with the words, "I give you this tank (bunded reservoir or other tank)," it can be accepted with the words, "Very well, *taga*, I shall now have water to drink" or some such *kappiya* words.

(Lines 5—7 at page 561 of Volume II *Parajikam Atthakatha, Rajasikkhapada*, Saya Pye's edition).

(8) In the case of a gift of paddy land or *ya* land, it can be accepted, if the donor says, "I give this rice or this bean (taking the particular *ya* to be for raising beans) to the *Sangha*." (Lines 27—30 at page 562 of Volume II *Parajikam Atthakathā*, Saya Pye's edition.)

(9) If the donor says, "O Monk! I give thee the four requisites for your use," the gift is proper.

(Lines 26—27 at page 560 of Volume II *Parajikam Atthakatha, Rajasikkhapada*, Saya Pye's edition.)

(10) *Re* the statement that, if the gift is to the *Sangha*, it is valid. If the words used in giving paddy lands and bunded reservoirs are, "I give this individual *rahan* the four requisites," the gift should not be accepted. But, if in giving a tank (bunded reservoir or other tank) to a *rahan* who possesses a pure mind, it is said "I am giving it so that you may be able to obtain water," the gift can be accepted.

(Lines 24 to 28 at page 307 of Volume I of *vimati Tika*, Saya Pye's edition).

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* (11) "Taga! I will not take the money equivalent of a robe, I will only take a robe."

(Lines 3—5 at page 258 of *Parajikam vinaya Rajasikkhapada*, Saya Pye's edition).

(12) If a *rahan* takes pleasure in finding gold and silver near him or if he desires to appropriate the same to himself, he shall not touch it with (any part of) his body or otherwise give expression to this thought, for instance by saying "I will take it." It is property which is *nakappi, i.e. akappi.* If the *rahan* refuses the gift, he is not guilty of any *apat.*

(Lines 28—30 at page 570 and line 1 at page 571 of Volume II of *Parajikam Atthakatha, Rupiya Sikhapada*, Saya Pye's edition.)

Comments by Maingkaing Sayadaw.

The Sayadaw's comment on text No. 6 from *Vimati-vinodani Tika* is:—"Generations of excellent *Sayas* have disapproved of this view. If paddy land cannot be accepted by an individual monk, because as stated by the author of *Vimati-vinodani Tika*, the Pali texts do not justify even an acceptance *for* the benefit of the *Sangha*, acceptance by the *Sangha* must also be held to be improper. (Page 181 of *Tipitaka Vinicchaya Kyan.*)

Regarding text No. 10, the Sayadaw's comment is, "It is stated that paddy land and *ya* land can be accepted only by the *Sangha* but not by the *Gana* or an individual *rahan*, while as

* Translation of the lines as extracted by Maung Kin, J :—

"Suppose the king or his minister or a *ponna* or a *thute* intending to make a gift of it to a *rahan* sends the price of a robe by a messenger saying :—'Go. Buy a robe with this money and give it to so and so (or cover so and so with it)' and the messenger approaches the *rahan* and says thus :—'O Lord, my master has sent me to give you the price of a robe. Please receive it,' the *rahan* ought to reply thus :—'O *taga*! We, *rahans*, do not receive the price of a robe. We wish to receive robes only at the proper time.' Suppose in that case the *taga* says to the *rahan* thus :—'O Lord! is there one who carries out your affairs?' the *rahan* who wishes to obtain a robe should point out a person saying thus :—'This watchman (or this *taga*) is the person who looks after the affairs of *rahans*.' The messenger should say :—'O Lord! you have pointed out the *veyavissa karaka*, you have caused me to know him. O Lord! At the proper time he will give you a robe.' When the *rahan* wishes to obtain a robe, he should approach the *veyavissa karaka* and give him notice of his wishes two or three times, etc. etc. etc." (Lines 29—31 at page 257 and lines 1—22 of *Parajikam Vinaya*, Saya Pye's edition).

regards a tank it is stated that it may be accepted by the *Sangha*, or a *Gana* or an individual monk. I dare not accept such a proposition." (*Ibid*, page 182.)

Regarding text No. 12 the Sayadaw says, "Although such is this text, it has also been stated that if it is given as the four requisites in accordance with the *kappiyavohara* practice an individual monk, a *Gana* or the *Sangha* may accept the gift. Why should it be said that only the *Sangha* can accept it and not a *Gana* or an individual monk? (*Ibid*, page 182.)

Maung Kin, J.'s extracts from the Thalôn Sayadaw's treatises on Buddhist Ecclesiastical Law.

Translations of the Texts quoted in Thalôn Sayadaw's Winiphyatton, pages 58, 59 *and* 60.

(1) "At that time a *rahan* who possessed much property (*Bhandha* and *Parikkhaya*) had died. And certain *rahans* reported the news to the excellent *Paya*. (The *Paya* said): "O, *Rahans*, the *Sangha* will get the alms-bowl and the robes. Even so, I will allow you, *Rahans*, to give the three robes (*ticivaram*) and the alms-bowl to the person who attended on the deceased during his illness because gratitude is due to him. If the deceased *Rahan* died possessed of *lahubhan bhandha and lahuparikkhaya*, I will allow the property to be distributed among the *Sanghas* present [*Sammukhibhutena Sanghena* (1)]. If in that place there were the deceased's *garubhandha and garuparikkhaya*, such property should not be abandoned or given away to or be divided among the *Sangha* including those who have arrived, those at the point of arriving and those who are expected to arrive."

(Lines 30—31 at page 349 of *Mahavagga* and lines 1—6 at page 350 of the same.)

(2) "If the *rahan* died within the precincts of his *kyaung*, only his alms-bowl and robes may be given to the person who attended on him during his illness. If, after giving what should be given to such an attendant, there should remain property proper for the use of the *rahan* (*kappiya bhandha*) and property not proper for the use of the *rahan* (*akappiya*

(1) The four or more *rahans* who were present within the radius of 12 cubits of the place of death.

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bhandha), if there is proper or improper property or property which may be divided or property which may not be divided or property which is *nissaggi* or which is *anissaggi*, all such property belongs to the *Sangha*. Act according to the *Palidaw*."

(Mahavagga Atthakatha. This extract cannot be found in any printed edition of the *Mahavagga Atthakatha.)*

(3) If there is property at a distance which has not been given away to another, such property should go to the *Sangha* of the place where it is.

(Lines 13—14 at page 349 of Volume I of *Pacitayadi* Chapter, Saya Pye's edition. *Mahavagga Atthakatha*).

(4) O *Rahans*! if a *rahan* dies, the *Sangha* get the alms-bowl and the robes. But gratitude is due to the person who attended the deceased during his illness; I, the *Paya*, allow you to give his alms-bowl and his robes to such attendant.

The commentary on the last Pali text according to the *Sayadaw* is as follows :—

(5) "The person who attends upon a sick person whether a monk or layman or even a female should be paid his or her hire."

(6) The *Sayadaw* goes on to say, "In *Vajiyabuddhi Tika*, a sub-commentary on a commentary *(Aithakatha)* known as *Samantapasadika* it is stated :—'In a certain *kyaung* there lived two monks. One of them died. If the other *rahan* takes the property of the deceased with the intention of stealing it but not by resolving that it shall come to him, it should be decided that the *rahan* is responsible for the value of the property, because he takes a *rahan's* property. If, when that *Rahan* takes it, it is not within the precincts of the *kyaung* but outside, the decision should be different. Why? Because he can take an ownerless property. If the property of the deceased *Rahan* consists of *akappiya* property, such as, gold and silver, such property can be received only, it should be received according to rules of *Uggahisikkhapada* (1) (rules of discipline regarding the receipt of gold and silver). To receive it according to rules the *kappiya karaka* should be informed. If a slave is to be received, the monk will have no control (over

(1) See *ibid* under heading "*Uggahisikkhapada.*"

him). If a watchman is to be received, the monk will have rights over him. If bulls or buffaloes are to be received, the monk will have right and control over those within the precincts of the *kyaung*. He will have no control over those outside. If he caught them outside and brought them within the precincts of the *kyaung*, after having made them his property, the manager of the *kyaung* will have the right to control them. If property was left in trust with the watchman of the *kyaung*, the result is the same."

(*Vajiyabuddhi Tika*, Saya Pye's edition, page 167, lines 1—4.)

The *Sayadaw* next quotes from *Saratthadipani Tika*, a sub-commentary upon a commentary upon *Vinaya* known as *Samantadipani pasadika* as follows:—

(7) "Regarding the resolution made in connection with robes (the explanation is this):—If a *rahan* who is on a journey and has with him a robe belonging to another *rahan*, hears of that *rahan's* death, and this was not at a *kyaung* but outside in the field which is not "*kyaung*," he may resolve, "May this robe come into my possession," provided that there is no other *rahan* within the radius of 12 cubits."

(*Sarathadipani Tika* is also called *Terasakam Tika*. Lines 6—8 of the latter, Volume II, Saya Pye's edition.)

(8) The next quotation is from *Cullavagga Atthakatha*, a commentary on *Cullavagga Palidaw*, whose author is *Buddhaghosa*. "Suppose one of the five *rahans* who live together dies having said that his *parikkhaya* should go to his teacher or his pupil who lives with him or to his father or to any other person, the property left does not go to any of those persons. It shall belong to the *Sangha*. That is true. Even if the *rahan* had said to his fellow-dwellers, "On my death, take my property," the gift will not be good. The layman's gift to the five *rahans* who live together saying, "On my death you all may take my property" is good.

(Lines 20—25 at page 379 of Volume II, *Pacittaradi Atthakatha, Cullavagga* section.)

Uggahisikkhapada referred to in quotation 6 above is, as I have found, as follows:—

A *rahan* takes gold or silver, makes another to take it for him, or desires to possess such (gold and silver) as is near him,

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he ought to abandon it or the desire (as the case may be) as he is guilty of *pacitta apat.*

Explanation of terms used in the passage translated as above follows.

The text goes on—

The *rahan* should approach the *Sangha* and seated on his haunches with (one end of) his upper garment on his left shoulder should *shiko* the Senior *rahan* with joined hands and say thus:—"My Lord, I have received this (gold or silver). It is right that I should abandon it. I (hereby) abandon it to the *Sangha.*" After this abandonment confess the guilt. The confession should be received by the *rahan* who knows how to receive it. If where the abandonment has taken place, the watchman of the monastery or a *taga*, happens to be present, it should be said thus:—

"*Avuto imam janahi,*" "O *taga* know this." What then is the *taga* to do with the thing? He should not say thus:—"I bring this thing (to you)." He should say, "Ghee, oil (sessamum), honey, or jaggery is suitable." If the *taga* brings a *kappiya* thing by exchanging the gold for it, all the *rahans* except the one who has received the gold can enjoy it (*i.e.* the thing brought.)

(*Parajikam Vinaya Rupiya Sikkhapada*, page 274, lines 11 to 29 of Saya Pye's Edition.)

Civil 1st appeal No. 153 of 1916.

February 12th, 1918.

Before Sir Daniel Twomey, Chief Judge, and Mr. Justice Ormond.

U ZAYANTA *v.* U NAGA.

May Oung—for appellant.

Villa—for respondent.

Transfer of Property Act, IV of 1882, section 123—Dwithantaka (joint ownership)—Buddhist Law: Religious Gift.

Appellant applied for possession of a certain pucca *kyaung* and site forming part of a *kyaungtaik* at Moulmein. He claimed the property as presiding *pongyi* in succession to U Eindasara who went through the ceremony of *Dwithantaka* with him whereby he was admitted to joint ownership of the *kyaungtaik* so that on U Eindasara's death he could become the sole *Taik-ok.* On U Eindasara's death appellant admitted U Wunna to joint ownership with him by the *Dwithantaka* method. During appellant's absence in Rangoon the *kyaung* was on completion dedicated to U Wunna who subsequently discarded the yellow robe after making over the newly built *kyaung* to U Naga, the respondent.

Held,—that the evidence established that appellant became presiding *pongyi* or. *Taik-ok* in succession to U Eindasara and in that capacity he obtained control over the whole *kyaungtaik*.

Held, also,—that even if U Wunna himself could have resisted a claim by the appellant for possession, the respondent who merely claimed under an invalid transfer from the ex-*pongyi* had no title to oppose the appellant's claim as presiding *pongyi* of the whole *kyaungtaik*.

Held, further,—that Buddhist religious gifts are not excepted from the operation of section 123 of the Transfer of Property Act IV of 1882, and that the gift or dedication of the pucca *kyaung* in favour of U Wunna by the lay donors and the gift thereof by U Wunna to the defendant not having been effected by a registered document were invalid.

Twomey, C. J.—This was a suit for possession of a certain pucca *kyaung* and site forming part of a *kyaungtaik* at Moulmein. In paragraph 1 of the plaint the plaintiff claimed that the whole *kyaungtaik* within the specified boundaries, known as *Damayon Kyaungtaik*, belonged to him according to the Buddhist Ecclesiastical Law, in other words he claimed the property as presiding *pongyi* (*Taik-ok or Kyaung-daing*) in succession to the former *pongyi* U Eindasara who is referred to in the proceedings as the leper *pongyi*. U Eindasara died from 7 to 12 years before the suit which was filed in July 1915. The plaintiff was a pupil of U Eindasara and states that in 1263 B.E., that is about 1901, U Eindasara went through the ceremony known as *Dwithantaka* with him. The effect of this ceremony was to admit the plaintiff to joint ownership to the *Kyaungtaik* with U Eindasara so that on U Eindasara's death the plaintiff would become the sole *Taik-ok*. The plaintiff states that after he had succeeded U Eindasara on the latter's death he in turn admitted another *Pongyi* U Wunna to joint ownership with him by the *Dwithantaka* method. He afterwards left U Wunna in sole charge and went to Rangoon to study. During his absence the pucca *kyaung* building which had been begun in Eindasara's time was completed by the lay donors and these laymen dedicated it to U Wunna in the plaintiff's absence. Subsequently while the plaintiff was still absent from Moulmein, U Wunna discarded the yellow robe and went into the world, but just before doing so he made over the newly built pucca *kyaung* to another *pongyi*, namely, his uncle U Naga the defendant. When the plaintiff came back and tried to eject U Naga the latter instituted proceedings under the Criminal Procedure Code and

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successfully resisted the plaintiff who thereupon brought this suit against him for possession of the brick *kyaung*.

Plaintiff's first witness U Athaba gives evidence as to the *Dwithantaka* ceremony between Eindasara and the plaintiff Zayanta. The 2nd and 3rd witnesses give evidence as to the later *Dwithantaka* ceremony between Zayanta and Wunna.

The evidence shows that Eindasara presided over the *Kyaungtaik* up to his death. The actual *Kyaung* that he occupied first by himself and afterwards with Zayanta, was a wooden building on the site of the pucca building now in dispute and this wooden building has been removed and re-erected at another spot within the *kyaungtaik*. The plaintiff says that this wooden building had been given to Eindasara by another *pongyi* by a document but there is no other evidence on this point. Ma Hlaing (4 P.W.) an aged woman who was one of the supporters of the *Kyaungtaik* states that when Eindasara died the supporters telegraphed to Zayanta, the plaintiff who was then absent in Mandalay; that Zayanta then came and presided over the *Kyaungtaik* in succession to Eindasara and that no one raised any objection, but as Zayanta wanted to go away temporarily to continue his studies he invited another *pongyi* (Wunna) to take charge of the *Kyaungtaik* in his absence. The defendant Naga's witness U Zarita also says that Eindasara was head *pongyi* (*i.e.*, *Taik-ok*) and that afterwads the plaintiff "invited Wunna to come to the small *Kyaung* (*i.e.*, the old wooden *Kyaung*) and then went away." Subsequently when the new brick *Kyaung* was about to be dedicated "U Wunna went to Rangoon to call the plaintiff (*i.e.*, presumably for the purpose of receiving the dedication) but he refused to come." This witness admits having heard that Eindasara and the plaintiff had performed the *Dwithantaka* ceremony and the defendant's witness No. 3, Maung Po Te also states that Eindasara presided in the *Kyaungtaik* and that plaintiff presided after Eindasara's death.

The evidence as to the *Dwithantaka* ceremony between Eindasara and Zayanta is not rebutted and there is no reason to disbelieve it except that it was not relied upon by Zayanta

or mentioned by him in the criminal proceedings under section 145, Code of Criminal Procedure. But even apart from that alleged ceremony the fact that Zayanta succeeded Eindasara as presiding *pongyi* of the *Kyaungtaik* appears even from the evidence of the defendant's own witnesses. It is shown by this evidence also that the defendant Naga's donor Wunna had originally come to the *Kyaungtaik* on the invitation of the plaintiff Zayanta and there is therefore all the more reason for believing the statements of the plaintiff and his witnesses as to the *Dwithantaka* ceremony between Zayanta and Wunna.

It is proved that the brick building in suit was dedicated to Wunna during Zayanta's absence without a registered document. The defendant Naga's claim rests on an unregistered document of transfer written by Wunna on the day he discarded the yellow robe. The transfer was invalid for want of a registered document. But though Naga's title is defective he is in possession and cannot be ejected unless the plaintiff is held to have proved his title. It is clear however that the plaintiff has proved it. Whatever may have been the effect of the two *Dwithantaka* ceremonies the evidence establishes that Zayanta became presiding *Pongyi* or *Taik-ok* in succession to Eindasara and in that capacity he obtained control over the whole *kyaungtaik*. The brick *kyaung* built within the *Kyaungtaik* was dedicated to Wunna but Wunna was either subordinate to Zayanta (as *Taik-ok*) or else he was joint owner with Zayanta (by virtue of the *Dwithantaka* ceremony). Wunna on discarding the yellow robe disappeared and his evidence was not forthcoming. Even if we assume that Wunna himself in whose name the brick *kyaung* was dedicated could have resisted a claim by Zayanta for possession, it must be held that the defendant Naga who merely claims under an invalid transfer from this ex-*pongyi* has no title to oppose the plaintiff's claim as presiding *pongyi* of the whole *Kyaungtaik*. But it must be observed that the gift of the brick *kyaung* to Wunna by the lay builders also appears to have been inoperative for want of a registered instrument under section 123 of the Transfer of Property Act, which was in force in Moulmein at the time of the dedication.

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The District Judge confused *Dwithantaka* with *Withathagaha* which have nothing in common except that they are both Pali words. He also lost sight of the fact that the plaintiff was claiming as presiding *pongyi* of the whole *kyaungtaik* and he therefore attached undue importance to the fact that neither the plaintiff nor his predecessor Eindasara had ever lived in the new brick building in suit. He treated the gift of the brick *kyaung* to Wunna and the transfer by Wunna to the defendant Naga as valid transfers, overlooking the absence in each case of a registered instrument. The District Court's decision is clearly wrong and I would set it aside and grant the plaintiff a decree for possession as prayed with costs in both Courts. The defendant should be ordered to pay to Government Rs. 630 namely the amount of Court fees which would have been paid by the plaintiff appellant if he had not been permitted to sue and to appeal as a pauper.

Ormond, J.—The evidence shows that the plaintiff was the Head Monk of the monastery after U Eindasara's death in 1907 or 1908. The *kyaung* in dispute was completed in 1908 or 1909, after the death of Eindasara, and was dedicated to U Wunna who was then acting as Head Monk during the plaintiff's absence in Rangoon, and who was joint Head Monk with the plaintiff.

The plaintiff claims possession of the *kyaung* by virtue of being the Head Monk and also under a *Dwithantaka* made between himself and U Wunna. The defendant's title rests upon a gift of the *kyaung* made to him by U Wunna in 1911 or 1912.

No gift of the *kyaung* could be made until the *kyaung* had been built. It was not completed until 1908 or 1909, *i.e.*, after section 123 of the Transfer of Property Act had been extended to Moulmein. Burmese Buddhist religious gifts are not excepted from the operation of that section and as none of the alleged gifts of this *kyaung* were effected by a registered document each of these gifts was void; namely,—the gift or dedication of the *kyaung* in favour of U Wunna by the lay donors, the gift of a joint share in the *kyaung* by U Wunna to the plaintiff under the *Dwithantaka* and the gift of the *kyaung* by U Wunna to the defendant.

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U Wunna therefore acquired no title to the *kyaung*, except as joint Head Monk with the plaintiff; and U Wunna had no right to hand over the *kyaung* to the defendant without the plaintiff's consent.

The *kyaung* having been built on monastery land, must be taken to be an addition to the monastery property and the plaintiff as Head Monk of the Monastery is entitled to possession. I concur in the order passed by the learned Chief Judge.

Before Sir Daniel Twomey, Chief Judge, and Mr. Justice Ormond.

Civil Revision No. 8 of 1918.

July 29th, 1918.

BABU GORIDUT BAGLA *v.* BABU H. ROOKMANAND.

J. R. Das—for applicant.

Leach—for respondent.

Revision—Section 115, *Civil Procedure Code, V of* 1908.

On an application under Section 152, Civil Procedure Code, by the defendant to amend a consent order passed by the District Judge for the examination of accounts by Commissioners "as it was obvious that there was a mistake or error on the face of the decree" the District Judge cancelled the consent order on the ground that the parties were not *ad idem*. The plaintiff applied for revision of the order cancelling the consent order above-mentioned.

Held,—that the District Judge had no jurisdiction upon an application to amend the decree (or formal order) so as to bring it into conformity with the judgment to annul the order and that therefore under section 115, Civil Procedure Code, the order of the District Judge cancelling the consent order for the accounts to be taken by the Commissioners must be set aside and the latter order restored.

Held further,—that the recent Privy Council decision of *T. A. Balakrishna Udayar* v. *Vasudeva Aiyer*, 22 C.W.N., 50, does not impugn the correctness of the decision in *Zeya* v. *Mi On Kra Zan*, 2 L.B.R., 333.

T. A. Balakrishna Udayar v. *Vasudeva Aiyer*, 22 C.W.N., 50 at 58, —referred to.

Zeya v. *Mi On Kra Zan*, 2 L.B.R., 333,—approved.

Kumar Chandra Kishore Roy Chowdhury v. *Basarat Ali Chowdhury*, 27 Cal. L.J., 418,—not followed.

Ormond, J.—Mr. Leach for the respondent contends that the District Judge having jurisdiction to entertain the application, this court cannot interfere in revision. He relies upon the recent pronouncement by the Privy Council upon section 115 of the Code, contained in the case of *T. A.*

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Balakrishna Udayar v. *Vasudeva Aiyer* (1) and he cites a recent case decided by Mr. Justice Rigg—*Ko San Hla* v. *Maung Po Thet*, Civil Revision No. 30 of 1918—in which the learned Judge has apparently held that the decision in *Zeya* v. *Mi On Kra Zan* (2) is shown to be not good law by the above Privy Council ruling. The learned Judge also cites the recent case of *Kumar Chandra Kishore Roy Chowdhury* v. *Basarat Ali Chowdhury* (3).

Section 115 of the Code allows revision if it appears that lower Court (*a*) exercised a jurisdiction which it had not, or (*b*) failed to exercise a jurisdiction which it had, or (*c*) acted in the exercise of its jurisdiction illegally or with material irregularity.

In *Zeya* v. *Mi On Kra Zan* it was held by a Bench of this Court, that where the lower Court has applied its mind to the case and duly considered the facts and the law applicable, then although its decision may be erroneous, the error cannot be corrected on revision; but that if the lower Court has failed to take into account some proposition of law or some material fact in evidence, it has acted illegally and its decision may be revised.

In the Privy Council case above cited the District Judge under section 10 of the Bengal and Madras Native Religious Endowments Act ordered a Committee to elect a member. The High Court on revision set aside the order on the ground that the District Judge had no jurisdiction to pass such an order under section 10. On appeal to the Privy Council the decision of the High Court was upheld. The effect of the Privy Council judgment is that a wrong construction of the section by the District Judge would not have been a ground for revision if it had not involved a question of jurisdiction; but inasmuch as he had by such wrong construction assumed a jurisdiction which he did not possess, the High Court could interfere in revision. The judgment does not deal with clause (*c*) of section 115, beyond paraphrasing it as "the irregular exercise of jurisdiction." I can find nothing in this judgment which is inconsistent with the decision in *Zeya's* case.

(1) 22 C.W.N., 50 at 58. (2) 2 L.B.R., 333. (3) 27 Cal. L.J., 418.

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In *Chandra Kishore's* case (27 C.L.J., 418) the question before the District Judge was whether property which had been sold by the Court had fetched an adequate price. The property sold was admittedly a two-third's share in a certain *taluk* but the District Judge erroneously assumed that it was only a one-third share; and upon that assumption he found the price realized was adequate. Upon an application in revision to the High Court the two Judges disagreed as to whether an application for revision would lie under section 115. Upon appeal to a Bench of three Judges, two Judges held that the High Court could not interfere in revision:—the District Judge having merely come to an erroneous conclusion of fact. With great respect I do not agree with this decision. Supposing all the facts of a case are admitted but the Judge erroneously assumes them to be exactly the opposite, the injured party would then have no remedy in revision. The question I think resolves itself into this:—was the method irregular by which the conclusion of fact or of law was arrived at? If the Judge arrives at a conclusion of law or of fact without having considered the law or a material part of the evidence, or by misunderstanding or erroneously recording the statements of pleaders or witnesses; the method of arriving at such conclusion is illegal and irregular, and is a ground for revision: provided the irregularity is material and the petitioner has suffered an injustice thereby.

The present case is one of acting without jurisdiction in annulling the consent order upon an application to bring the formal order into conformity with the judgment, rather than of arriving at a conclusion of fact in an irregular manner. I would set aside the order of the District Judge of the 28th December 1917 and restore the consent order of 8th March 1917 for the accounts to be taken by the Commissioners. The costs of this application (five gold mohurs) should I think abide the event.

Twomey, C.J.—I concur. The Privy Council case reported in the Calcutta Weekly Notes, Volume 22, page 50, does not in my opinion restrict the scope of section 115, Code of Civil Procedure, as expounded in *Zeya* v. *Mi On Kra Zan* (2).

(2) 2 L.B.R., 333.

Civil Miscellaneous Application No. 10 *of* 1918.

January 14*th*, 1918.

Before Sir Daniel Twomey, Chief Judge, and Mr. Justice Maung Kin.

MA ON BWIN *v.* (1) MA SHWE MI, (2) MA SHWE BYAUNG, (3) PO MYIT, (4) MA NYUN, (5) SO LWIN.

Robertson—for applicant.

Giles—for respondents.

Civil Procedure Code, V of 1908, *Order* 17, *Rule* 3—*Default of appellant in paying translation and copying fees in a Bench Appeal —Dismissal of appeal for—.*

Appellant having failed to pay translation fees and fees for the preparation of copies in a Bench Appeal by a fixed date and no cause having been shown by her Advocate for extension of time on the day on which the appeal was called before the Bench, the appeal was dismissed for default.

Held,—On an application to review the order of dismissal on the ground that the Court had exceeded its jurisdiction under Order 17, Rule 3, in ordering the appeal to be dismissed, that, as the default of the appellant consisted in omitting to take the necessary steps for the preparation of Bench copies and translations of vernacular documents without which it was impossible for the case to proceed at all, the Court had power under Order 17, Rule 3, to strike off or dismiss the appeal.

Sitara Begam v. *Tulshi Singh*, (1901) I.L.R. 23 All., 462; *Shaik Saheb* v. *Mahomed*, (1890) I.L.R. 13 Mad., 510; and *Pethaperumal Chetti* v. *Murugandi Servaigaran*, (1895) I.L.R. 18 Mad., 466,—referred to and distinguished.

In Civil Miscellaneous Appeal No. 161 of 1917 time was allowed to the appellant to pay translation and copying fees by the 25th February. The fees had not been paid on that date and there was no appearance on behalf of the appellant before the Assistant Registrar although the case had appeared on the Warning List on the 22nd February and on the Daily List of the 25th February. The Assistant Registrar ordered that the advocate should be reminded and that the case should be laid before the Bench on the 4th March. When the case was called on the 4th March no cause was shown for further extension of time. It was admitted that no intimation had been sent to appellant up to that date. The Court thereupon directed that the appeal should be dismissed for default.

Subsequently an application was made to review the order of dismissal on the ground that the Court had exceeded its jurisdiction under Order 17, Rule 3, in making the order of dismissal. The application was admitted and notice was issued to the respondent. The learned advocates on both sides have now been heard. Mr. Robertson for the appellant cites the

Allahabad case of *Sitara Begam* v. *Tulshi Singh* (1). In that case it was held that a Court had no power to dismiss summarily a plaintiff's suit merely because the plaintiff had failed to comply with an order of the Court directing him within a certain time to pay in a sum of money as the cost of preparing a map which the Court considered to be necessary for the decision of the suit. But the learned Judges remarked that the Munsif in that case was certainly not bound to adjourn the hearing of the suit, that it was for the plaintiff to establish her claim by such evidence as she was in a position to adduce on the date fixed and if that evidence failed to substantiate the claim it should of course be dismissed. It is true that Order 17, Rule 3, does not expressly authorize the Court to dismiss the suit where the party to whom time has been granted fails to produce his evidence or to cause the attendance of his witnesses or to perform any other act necessary to the further progress of the suit. What the rule says is that the Court may in those circumstances proceed to decide the suit forthwith notwithstanding the party's default. Mr. Giles argues that this is intended to be a concession to the party who is at fault inasmuch as it permits the Court to pronounce a decision there and then on such deficient materials as it may have before it. The wording of the rule certainly favours this view. We have to consider what course remains for the Court to follow when it does not or cannot on the materials before it pronounce a decision. It is certainly not bound to grant an adjournment to the party at fault for the purpose of doing that which he has already had sufficient time to do. The wording of the rule shows that the default of the party may be such as to prevent the suit from proceeding any further. In such circumstances it seems reasonable to infer that the suit must be struck off or dismissed. The default in the present case consisted in omitting to take necessary steps for the preparation of Bench copies and translations of vernacular documents without which it was obviously impossible that the case could proceed. It was not a case in which the Court could proceed to decide the suit forthwith, the materials before the Court being insufficient for that purpose. In the

(1) (1901) I.L.R. 23 All., 462.

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Allahabad case it was no doubt possible for the Munsif to decide the case without the aid of the map which he had called for; but if Bench copies and translations are not provided for a Bench Appeal it is impossible for the case to proceed at all.

Two Madras cases, *Shaik Saheb* v. *Mahomed* (2) and *Pethaperumal Chetti* v. *Murugandi Servaigaran* (3), were also cited on behalf of the applicant. These cases are authorities for holding that an order of dismissal for default does not always operate as a bar to a subsequent suit. But they do not show that a Court acts *ultra vires* in dismissing a suit when materials essential for the progress of the suit are wanting owing to the plaintiff's default.

We are of opinion that the order dismissing the appeal in the present case was a lawful order and we dismiss this application for review with costs, Advocate's fee three gold mohurs.

Civil 1st Appeal No. 155 of 1917.

August 19th, 1918.

Before Sir Daniel Twomey, Chief Judge, and Mr. Justice Ormond.

JOGENDRA LALL CHOWDHURY v. (1) MI ASHA, (2) ABDUL HAMID.

Giles with J. R. Das and Lambert—for appellant.
McDonnell—for respondents.

Construction of document—Assignment of the remainder of the term of a lease or grant of land for a term of years with right of renewal in favour of the lessee or grantee for a further term of years —Covenant running with the land.

A the holder of a waste land grant or lease under the Arakan Waste Land Rules 1839 and 1841 for a term of 30 years from 9th July 1884 had a right to the renewal of the grant on the expiration of the term of 30 years for a further term of 20 years on certain conditions. By a document of transfer purporting to be an assignment of the remainder of the term of 30 years computed from the 9th July 1884, A transferred the land to B on the 8th June 1897. After B had obtained a fresh grant or lease of the land in pursuance of the provisions for renewal in the Waste Land Rules, A sued B for possession of the land and mesne profits, her claim being that by the document of transfer dated 8th June 1897, she had sub-leased the land to B for the unexpired portion of the 30 years term granted to her predecessor in title on the 9th July 1884.

Held,—(Reversing the finding of the District Judge) that in the absence of A's intention expressed or necessarily implied in the document

(2) (1890) I.L.R. 13 Mad., 510. (3) (1895) I.L.R. 18 Mad. 466.

of transfer to retain for herself the benefit of the covenant for renewal which is a covenant running with the land, the intention of the parties must be deemed to have been that A should transfer her whole interest in the property to B.

Twomey, C.J.—The question in this appeal is as to the construction and effect of a document dated 8th June 1897 by which the first respondent Mi Asha as executrix of the estate of her late husband Abdul Hashim deceased transferred a piece of land measuring about 1,824 acres in the Akyab District and known as the Taung Chaung Grant for the sum of Rs. 18,000 to one Obborno Charun Chowdhury who has since died and who is represented by his executor the present defendant-appellant Jogendra Lall Chowdhury.

This land was originally granted in 1844 under the Arakan Waste Land Rules of 1839 and 1841. Those rules authorised the Local Revenue Officers to give grants of land—which were to be rent free for a specified period and were then to be assessed at certain prescribed rates which were to be in force for a specified period and at the end of this period it was provided that the grantees would "be entitled to a new lease of 20 years duration and on the expiration thereof to further renewal for a similar period and the same on the lapse of each successive lease." At each renewal the payment to be made by the grantee was to be subject to revision and no alteration was to take place until the expiration of the period of the lease. At the time of the transfer in 1897 the grant was held by Mi Asha under a renewal made in favour of her husband Abdul Hashim by the Settlement Officer, Akyab District, on the 9th July 1884. The transaction of 1884 between Government and Abdul Hashim consisted of two documents. By the first document the Government granted the land to Abdul Hashim, his heirs, executors, administrators and assigns, Abdul Hashim for himself, his heirs, etc., on the other hand, undertaking to pay Rs. 1,700 per annum to Government and to abide by the conditions in the second document executed on the same date. By the second document Abdul Hashim undertook to pay the sum of Rs. 1,700 annually for a period of 30 years and he expressly waived his claim to abatement on account of bad seasons or other specified causes. These two documents are clearly the *potta* and *kabuliyat* referred to in rule 6 of the rules.

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On the 10th of May 1897, Mi Asha as executrix petitioned the District Court for permission to sell the grant land in order to pay off a certain decree and this petition was granted by the Court. It was in pursuance of this permission that she transferred the land to O. C. Chowdhury on the 8th June following. The document of transfer is drawn up in the form of an assignment of the remainder of the term of 30 years computed from the 9th July 1884, when the last renewal was granted as mentioned above. It recites that Mi Asha has agreed with Chowdhury for the absolute sale to him of the grant land. Subsequently on the 9th August 1897 she put in a petition to the Deputy Commissioner objecting to the transfer of the grant to Chowdhury's name. In this petition she represented that there was a contemporaneous oral agreement by which the sum of Rs. 18,000 was to be paid back in the sum of Rs. 30,000 within six years, which sum of Rs. 30,000 includes the principal and all interest. She apparently meant to represent that the transfer was intended to be only a usufructuary mortgage for six years. The petition was dismissed and she was referred to the Civil Court and Chowdhury was registered as proprietor of the grant in due course. In her written statement in two subsequent suits Civil Regular No. 20 of 1897 and Civil Regular No. 15 of 1898 in the District Court of Akyab, Mi Asha repeated her plea as to the transaction being only a mortgage for six years. The present suit was filed on the 11th of May 1917, Chowdhury having obtained from the Deputy Commissioner on the 28th October 1914 a fresh lease for twenty years from the 1st October 1914 in pursuance of the provision for renewal in the Waste Land Rules. Mi Asha's suit was a suit against J. L. Chowdhury the legal representative of the original transferee for possession of the grant and for payment of Rs. 30,000 as mesne profits. In her plaint she abandons the position formerly taken up by her, *viz.*, that the transfer was intended to be for a period of six years. Her claim is that she sub-let the land to Chowdhury for the unexpired portion of the 30 years term in respect of which a renewal was granted in 1884. The sub-lease according to this plea would be for a period of 17 years from June 1897 to September 1914. Mi Asha claims that the renewal

of the grant obtained by the respondent in 1914 must be taken to have been obtained on her behalf as he was her tenant and was bound to protect her interests and any act done by him to improve or add to the land must be taken to have been done on behalf of Mi Asha as his landlord.

The District Court has decreed the plaintiff's suit. The learned Judge after detailed examination of the rules, expressed the opinion that leases granted under these rules savoured of a freehold and that the land was not merely leased to the grantees but became their absolute property subject only to the payment of revenue. He was much impressed by the provision in rule 6 which provides that all land assigned under these rules shall be the "hereditary property" of the grantees and he considered that the rules gave more than a lease with the right of renewal. He was satisfied that in the case of a mere lease the right of renewal is a covenant running with the land and that the right to renewal would therefore accrue to the transferee of the lease; but as he considered that Mi Asha had a higher tenure than that of mere lessee and as she purported to assign and convey the land only for some 17 years, *i.e.* the remainder of the term of 30 years from 1884 without any reference to the right of renewal, the learned Judge could not see how she could be held to have conveyed away her right of renewal by mere implication. He considered that the absence of any mention of that right in the document of June 1897 was far more significant than the absence of a covenant to reconvey the land to Mi Asha at the end of the period for which she parted with possession.

In construing rule 6 of the Waste Land Rules as favourable to the notion of a freehold the learned Judge appears to have overlooked the concluding words of that rule which provide that on the execution of a *kabuliyat* the grantee shall be entitled to a *potta*. The words *kabuliyat* and *potta* are capable of various meanings but when they are used in association with one another it is clear that the word *potta* has the meaning of a lease, and that the word *kabuliyat* means the tenant's agreement to pay rent to the landlord. This is exemplified by the terms of rule 15 of these very rules which speak of a *potta* given to a *ryot* or tenant in exchange for a *kabuliyat* received

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from the *ryot*. It is plain also that the Waste Land Rules make no clear distinction between revenue and rent. In rule 1 the word "rent" is used for the payment made by the grantee to the Government, while in rules 14 and 15 we find the word "revenue" used indifferently to describe payments by the *ryots* to the grantee and by the grantee to the Government.

It matters not for the purposes of this case whether the holders of grants under these rules are correctly described as lessees or grantees. The essential point is that their tenure whatever it may be called is subject to periodical renewal and the point which we have to determine is whether the right of renewal passed to the transferee by the document of 8th June 1897. There can be no doubt that the intention of the parties was that Mi Asha should transfer her whole interest in the property. There was an agreement for an absolute sale, and the document was drawn up in the form of an assignment of the remainder of the term of a lease only because it appeared that that was the apt way of transferring Mi Asha's whole interest under the *potta* and *kabuliyat* of 1884. Section 8 of the Transfer of Property Act was not in force, but that section merely puts in statutory form the ordinary law as to the operation of transfers of property. It shows that if Mi Asha desired to retain for herself the right of renewal she could only do so if the intention was expressed or necessarily implied in the document of transfer. A covenant for renewal is a covenant running with the land and this is true not only in the case of ordinary leases, but also in the case of other tenures which are subject to periodical renewal.

On these grounds I would set aside the decree of the District Court and dismiss the plaintiff's suit. The plaintiff Mi Asha should pay the defendant-appellant's costs in both Courts and the second respondent Abdul Hamid, who was joined as a party in the appeal in this Court should be made jointly liable for the costs in this Court. Costs of two counsel will be certified. The plaintiff-respondent should be ordered to pay the Court fees which would have been paid by her in the District Court if she had not been permitted to sue as a pauper.

Ormond, J.—I agree.

Before Sir Daniel Twomey, Chief Judge, and Mr. Justice Ormond.

Civil Miscellaneo Appeal No. 119 *of* 1917.

August 20*th* 1918.

ABDUL RAHMAN *alias* LUN MAUNG *v.* MAUNG MIN.

R. N. Burjorjee—for appellant.
Ba Dun—for respondent.

Probate and Administration Act (*V of* 1881), *section* 50—*Application for revocation of Letters of Administration—Limitation—Res judicata.*

Respondent obtained Letters of Administration to the estate of appellant's father in 1902 and at the instance of the appellant he filed his account as Administrator in 1914. Appellant's suit for the administration of the estate filed in 1915 was dismissed on the ground that his claim for a share in the estate was barred by limitation, the respondent being one of the defendants in that suit. Then appellant applied in 1916 for revocation of the grant of Letters of Administration. His application was dismissed; hence this appeal.

Held,—that as the administration suit between the parties was dismissed on the ground that appellant's claim for a share in the estate was barred by limitation under Article 123 of the Indian Limitation Act, the determination of the issue as to whether the appellant has an interest in the estate is *res judicata* as regards the present application, which was therefore rightly dismissed.

The appellant applied to the District Court for revocation of the grant of letters of administration to his maternal uncle the respondent, in respect of the estate of appellant's father who died in June 1902. Letters were granted to the respondent in August 1902. The respondent filed his account as administrator in 1914 at the instance of the present appellant. In May 1915 the present appellant sued for the administration of the estate, the present respondent being one of the defendants in that suit. It was dismissed in August 1915 on the ground that the claim for a share in the estate was barred by limitation under Article 123, Indian Limitation Act, and the Divisional Court on appeal upheld that decision. Then in April 1916 the appellant filed the present application. Two issues were framed: (1) Was the present application *res judicata* by reason of the decision in the suit for administration? and (2) Was the grant of letters of administration obtained fraudulently by the respondent? Only documentary evidence was put in before the District Judge. He found that the present application was not barred by reason of the administration suit and that the present appellant had not only

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failed to prove that the grant had been obtained fraudulently but that he was a consenting party and tacitly accepted the accounts rendered by the respondent; and the application was dismissed. The appellant in his application not only relied upon the allegation that the grant had been originally obtained by fraud, but he asked for the revocation of the grant on the ground of subsequent fraud on the part of the administrator in respect of the accounts rendered by him. But no issue was framed on the allegations of subsequent fraud.

Under the 5th Explanation to section 50 of the Probate and Administration Act, the exhibition by an administrator of an account which is untrue in a material respect is "just cause" for the revocation of the grant. If the appellant's right to bring this application was not in our opinion clearly barred by limitation we should send the case back to the District Court to frame the necessary issue as regards the allegations of subsequent fraud in the inventory or account and to try that issue. But as it was held in the suit for administration between these parties that the appellant's claim for a share in the estate was barred by limitation under Article 123, the determination of that issue is *res judicata* as regards the present application. No period of limitation is expressly provided for an application to revoke the grant of letters of administration; but it is clear that if the applicant has no right to claim his share of the estate from the administrator, he has no interest which would support an application for the revocation of the grant of letters of administration. This question was not raised in the Lower Court but it is a matter that appears on the face of the proceedings and we feel bound to take cognizance of it. The appeal is therefore dismissed with costs—three gold mohurs.

Before Sir Daniel Twomey, Chief Judge, and Mr. Justice Ormond.

P. MOOLCHAND *v.* PO THEIN.

Barnabas—for appellant.

Wiltshire—for respondent.

Civil Miscellaneous Appeal No. 73 of 1918.

September 6th, 1918.

Amendment of plaint—Abandonment of part of claim—Jurisdiction.

Plaintiff instituted a suit as assignee of an equitable mortgage of property situate outside the original jurisdiction of the Chief Court for a personal decree against the mortgagee defendant 1 and for a mortgage decree against the mortgagors defendants 2—5. His application to amend the plaint by striking out defendants 2—5 and his prayer for a mortgage decree, leaving only his claim against defendant 1 for a personal decree, was disallowed.

Held,— (on appeal) that by allowing the plaintiff to abandon a claim the Court cannot be said to entertain that claim. The effect of an application to amend a plaint by striking out certain claims is in substance as if the suit had never been commenced in respect of such claims.

Hara Lall Banurjee v. *Nitambini Debi*, (1901) I.L.R. 29 Cal., 315; *Jairam Narayan Raje* v. *Atmaram Narayan Raje*, (1880) I.L.R. 4 Bom., 482; *Kannusami Pillai and another* v. *Jagathambal*, (1918) 46 Indian Cases 265; *Khimji Jivraju Shettu* v. *Sa Purushotam Jutani and another*, (1883) I.L.R. 7 Mad., 171; *Abdul Karim Sahib and others* v. *Badrudeen Sahib and others*, (1904), I.L.R. 28 Mad., 216; and *Gudru Lal and another* v. *Jagannath Ram*, (1886) I.L.R. 8 All., 117—referred to.

Defendants 2 to 5 executed certain mortgages in favour of defendant 1, who being indebted to the Burma Rice Trading Company deposited those mortgages and title deeds with that Company by way of security. The plaintiff is the assignee of the Company's debt and mortgage. He asked for a personal decree against the 1st defendant and for a mortgage decree against defendants 2 to 5. Defendants 2 to 5 did not appear. The immovable property, the subject matter of the mortgages were all situated outside the jurisdiction of this Court. The plaintiff applied to amend his plaint by striking out defendants 2 to 5 and his prayer for a mortgage decree, leaving only his claim against the 1st defendant for a personal decree. The learned Judge on the Original Side held that he had no jurisdiction to entertain the suit; that by allowing such an amendment he would be entertaining the suit; and that under Order 7, Rule 10 the only order he could make was to return the plaint to be instituted in the proper Court. He relied upon the case of *Hara Lall Banurjee* v. *Nitambini Debi* (1) and he

(1) (1901) I.L.R., 29 Cal., 315.

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refers to the case of *Jairam Narayan Raje* v. *Atmaram Narayan Raje* (2). The case in 29 Calcutta has very little bearing on the point. The suit was dismissed on the ground that it was a suit for land outside the jurisdiction, and it was held that the claim for the construction of a will was merely ancillary to the claim for land. In the case reported in 4 Bombay the suit was dismissed as to the property outside the local jurisdiction of the High Court but it is not clear whether it was entertained as regards the rest of the property.

In our opinion the Court by allowing the plaintiff to abandon a claim cannot be said to be entertaining that claim. The effect of an application to amend a plaint by striking out certain claims is in substance as if the suit had never been commenced in respect of such claims (see *Manindra Chandra* v. *Balaram Das*, 5 Indian Cases, p. 725). Mr. Wiltshire for the respondent cites the case of *Kannusami Pillai and another* v. *Jagathambal* (3), which was a case decided by the Madras High Court in January 1918 and there apparently the Court was of opinion that where a plaintiff applied to amend his plaint by striking out a portion of his claim so as to bring it within the jurisdiction of the Munsif's Court, the Munsif had no power except to return the plaint to be presented to the proper Court under Order 7, Rule 10; but the chief ground of the judgment apparently was that the Munsif exercised a wrong discretion in allowing the amendment and giving leave to the plaintiff to bring a fresh suit, because the plaintiff had grossly undervalued the suit. Mr. Wiltshire also cites the case of *Khimji Jivraju Shettu* v. *Sa Purushotum Jutani and another* (4), but that was a case where the plaintiff instituted a suit in the Subordinate Judge's Court upon two causes of action, one of which was triable by the Munsif and the other by the High Court. If the two could have been joined together the Subordinate Judge would have had jurisdiction; and because the Subordinate Judge had no jurisdiction to entertain either of the causes of action it was held that he should have returned the plaint. The following cases cited by Mr. Barnabas for the appellant:— *Abdul Karim Sahib and others* v. *Badrudeen Sahib and*

(2) (1880) I.L.R. 4, Bom., 482. (3) (1918) 46 Indian Cases, 265.
(4) (1883) I.L.R. 7 Mad., 171.

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