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CIVIL.

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Upper Burma Rulings for the years 1902-03.

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A

Advocates.

Before H. Adamson, Esq.

Civil Revision No. 25 of 1902. April 21st.

In the matter of an application by N. GHOSH.
Mr. H. M. Lütter—for applicant.

Transfer of brief by an advocate orally to another advocate—Recognized practice and not contrary to law.

[*See* Power-of-attorney, page 1.]

Appellate Court—Duty of.

Before H. Adamson, Esq., C.S.I.

Civil Second Appeal No. 45 of 1903, September 28th.

VALLEAPPA CHETTY } *v.* { (1) MAUNG KE. (2) MA THIT. (3) MA HMI.

Mr. H. M. Lutter—for Appellant. | *Mr. C. G. S. Pillay*—for Respondents.

A Civil appeal should ordinarily be fixed for hearing so as to allow at least an interval of a month between the date of serving the notice and the date of hearing the appeal.

[*See* Civil Procedure, page 15.]

Arbitration.

Before H. Adamson, Esq., C.S.I.

MA THET TIN *v.* (1) MA SAW KIN, (2.) MAUNG KE.

Mr. H. N. Hirjee—for Appellant. | *Mr. J. N. Basu*—for Respondents.

Civil Second Appeal No. 18 of 1903. June 8th.

Held—(1) that where arbitrators resolve that their award shall be put in the form of a document and signed by them, nothing but that document can be treated as the award,

(2) that one arbitrator cannot delegate his powers of decision to another,

(3) that when arbitrators have been appointed by agreement, and no provision has been made for a difference of opinion, the award is invalid, unless it is unanimous.

References:—

2, Upper Burma Rulings, 1892-96, page 276.

18.

The appellant sued for partition of property, and one of the defences raised was that the dispute had already been settled by an award of arbitrators. To this it was replied that the award was invalid.

The Lower Courts concurrently held that the award was valid and dismissed the suit.

Four arbitrators were appointed by agreement, and no provision was made for a difference of opinion among the arbitrators.

Evidence was heard at Sithe by the four arbitrators, and a rough draft of an award was written. It was then resolved by the arbitrators that they and the parties should meet at Ye-u, where the final award should be written out by the arbitrators on stamped paper, and signed by the arbitrators, and delivered.

The meeting as arranged was held at Ye-u, where an award was on the day fixed written and delivered. In *Maung Nyo* v. *Maung Shwe O** it was held that though an oral award may be given, and a note or minute of it taken for record, still if the arbitrators resolve that their award is to be put in the form of a document to be signed by them as the final expression of their decision, nothing but that document can be treated as the award. It is therefore clear that the award delivered at Ye-u must be held to be the final and only award, and the conclusion of the arbitration.

Two of the arbitrators found that it would be inconvenient to go to Ye-u, and they entered into an agreement (Exhibit E) with the other arbitrators to the effect that as they were related to both parties and as the case had not been finished, and another date had been fixed on which they could not attend, they should abide by the decision to be given by the other two arbitrators. If this is an agreement delegating their powers of decision to the other arbitrators, as on the face of it, it appears to be, it would render the award invalid because *delegatus delegare non potest.* But it is argued that everything had been done

* 2, U. B. R., 1892—96, page 276.

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except copying out the stamped paper and signing it, and that the delegation was merely for ministerial purposes.

The point is immaterial, because one of the two arbitrators who had signed Exhibit E, after all went to Ye-u at the time fixed, and he there refused to sign the award or to agree to it. There is no reason why an arbitrator should not be at liberty to change his mind at any time before the award is signed. The result is that the final award was that of two or at most three of the four arbitrators. The contract between the parties however was that they should accept the finding of four arbitrators. The four arbitrators have made no award and consequently there is nothing that the appellant is bound to accept. A similar ruling was given in *Maung Kan* v. *Ma Hmwe Chon* *.

It would therefore appear that in any case the award must be held to be invalid. The District Judge has held that the irregularities would be sufficient to vitiate the award, but he has also held that they were condoned by the conduct of the appellant, who is now estopped from raising objections to the validity of the award. The contract referred to is that she took no objection to the award when the rough draft was made at Sithe, and that she sent her representative to be present at Ye-u at the final reading of the award. I am unable to see how appellant can be estopped by such action. Her objection would have been of little avail at Sithe where it was understood that the four arbitrators were of one accord. In fact any objection that she could have raised at Sithe would not have been worth a moment's consideration, as she had entered into an agreement to abide by the decision of the four arbitrators, and was bound thereby. It was only after arrival at Ye-u when it was found that one of the arbitrators had changed his mind and refused to sign the award, that any valid ground for objection on her part arose.

I must hold for the reasons stated that the award is invalid, and set aside the decrees of the Lower Courts, and return the case to the Subdivisional Court for decision on its merits. Costs to follow the result.

* 2, U. B. R., 1892—96, page 18.

Buddhist Law—Adoption.

Before H. Adamson, Esq., C.S.I.

MAUNG SEIN *v.* MA MON.

Civil Appeal No. 307 of 1902. May 18th.

Mr. Z. M. D'Silva—for Appellant. | *Mr. J.C. Chatterjee*—for Respondent.

Held,—that when a Buddhist parent has given his child in adoption to another he is entitled until the child has grown up, to cancel the adoption, and recall the child.

Reference:—

Manukyè, Book 8, sections 3 and 4.

The appellant gave his son, a boy of seven, to the respondent in adoption and the question is whether he can recall his son and cancel the adoption at pleasure. The Lower Court has refused to be guided by the principles of the Dhammathat on the ground that the suit is not one relating to marriage, inheritance or caste, or any of the matters to which Buddhist Law is applicable. But a human being cannot be regarded as a chattel that can be the subject of a gift. Adoption is an institution of Buddhist Law, and for the incidents that govern it, we must look to Buddhist Law or to custom, if custom has modified the law. There is no other means of getting light on the subject. Now it is clear from the 8th Book of the Manukyè, sections 3 and 4, pages 234, 235 and 236 of Richardson's edition, that parents who have given a child in adoption to another, are at liberty until the child has grown up to take the child back when they please. They are required to pay a certain proportion of its price, which would probably be interpreted by our courts as meaning that they should pay the costs incurred. It is not suggested that the law as laid down in the Dhammathat is contrary to custom, or that it has been modified by custom. In the present case no claim has been made for any costs incurred. It therefore appears that the document by which appellant gave away his child is voidable at his own pleasure and that he is entitled to get back the child when he pleases.

The decree of the District Court must therefore be set aside, and appellant will get a decree entitling him to the custody of the child. But in view of the whole circumstances of the case I think it is proper that each party should bear their own costs in both courts.

Buddhist Law—Divorce.

Before H. Adamson, Esq.

Civil Appeal No. 54 of 1902. August 18th.

KIN KIN GYI *v.* MAUNG KAN GYI (DECEASED) BY HIS LEGAL REPRESENTATIVES (1) MA MYIT, (2) MI ON CHEIK (A MINOR BY HER GUARDIAN MA MYIT, (3) MA HLA WIN, (4) MA TA I (A MINOR BY HER GUARDIAN MA HLA WIN).

Mr. H. M. Lütter—for Appellant. | *Mr. C. G. S. Pillay*—for Respondent.

Held,—that in a divorce as by mutual consent between parties not previously married the wife is entitled on partition to one-third of property inherited by the husband during coverture and *vice versâ*.

References:—

Attathankepa, sections 391—393.
Chan Toon's Leading Cases on Buddhist Law, pages 5, 74, 84, 133, 143, 195, 369, 391 and 463.
Jardine's Notes on Buddhist Law, page 2, and paragraphs 56, 66.
Kinwun Mingi's Digest, Volume II, Marriage, section 254.
Manukyè XII, 3.
Spark's Code, section 25, and paragraph 10 of introduction.
Wagaru, section 44.
Wunnana, section 170.
2, U. B. R., 1897—1901, Divorce, page 39.

DURING the pendency of this appeal the original respondent, Maung Kan Gyi, died, and his two widows and children as his legal representatives have been entered on the record in his place.

The undisputed facts are that appellant was the wife of Maung Kan Gyi; that neither of the parties had previously been married; that Maung Kan Gyi was the adopted son of the Pakan Mingyi Kadaw and inherited her estate on her death in 1895; that after an unhappy union appellant obtained a divorce from Maung Kan Gyi in 1897 on the ground of cruelty, and that under a special ruling of this Court she has permission to bring this suit for partition of Maung Kan Gyi's property.

It is urged that Maung Kan Gyi was involved in litigation and really did not perfect his title to the Pakan Mingyi Kadaw's estate until 1899, and that quarrels and separate living had begun before the Pakan Mingyi Kadaw's death in 1895. These points are immaterial. It is not denied that Maung Kan Gyi has been in possession of the estate since 1895, and it is clear that he inherited the estate during the subsistence of his marriage with appellant.

The divorce was granted on the ground of cruelty, but partition is not sought in accordance with the law that governs the case where the husband is the offender and where the husband would be sent away with only the clothes on his person, but in accordance with the milder form of remedy described in section 393, *Attathankepa*, which is equivalent to partition in the case of a divorce by mutual consent.

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There is no *hnitpazon* property, and appellant's claim as preferred in this appeal is to one-third of the property inherited by Maung Kan Gyi from the Pakan Mingyi Kadaw, during coverture.

The extent and value of that property has not yet been determined. The District Judge found it unnecessary to decide that question, because he held that the property was the separate property of Maung Kan Gyi, and that there could be no partition on divorce of the separate property of either party, but only of the joint property of both.

The question to be decided in this appeal, therefore, is whether property inherited by one of the parties to a marriage during coverture is liable to partition on a divorce as by mutual consent, and, if so, to what share of it the other party to the marriage is entitled.

I may first dispose of Major Sparks' Code (section 35), which has been strongly relied on as an authority that only joint property is liable to partition. Major Sparks was not only a commentator, but he occasionally attempted to be a legislator, and in paragraph 10 of his introduction he candidly admits that he has tampered with the law of partition on divorce. "The chapter of the *Dhammathat* cited," he says, "lays down that each party shall take two-thirds of his or her separate property; but as this appears uncalled for when the divorce is by mutual consent, and as in such cases the parties usually make their own arrangements regarding the partition of the property, it has not been deemed necessary to adhere to the *Dhammathat* on this point and the more natural division, namely, each to take his or her own separate property and divide the remainder equally, has been substituted."

Manukyè XII, 3, provides the following mode of partition on the separation of husband and wife as by mutual consent:—

"If there is any property that was acquired by the husband alone, or by the wife alone, let that party who separately acquired it have two shares and the other one."

and near the end of the section:—

"There are two kinds of property acquired during marriage, which are these: property or debts inherited by either party from their parents, and property acquired or debts incurred by them mutually and conjointly. Of these, if the husband have inherited property or debts from his parents, it his more immediately his; let him have two shares of the property or bear two shares of the debts: if it be on the wife's side let her in the same manner receive and pay."

The *Attathankepa* is as definite. Section 391 gives the law of separation with mutual consent, between a husband and wife, neither of whom has been married before. After providing for the wearing apparel, it goes on to say:—

"Further, as regards the three kinds of property, namely, property brought at the time of marriage, property given by the King, and property acquired through one's own skill or industry, let the party who brought or acquired it take two shares, and the dependent one share; but if the relative position of husband and wife in the acquisition of such property be equal, let the said three kinds of property be equally divided between them."

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Section 170 of *Wunnana* provides that in a divorce by mutual consent the division shall be into two-thirds and one-third between the husband and wife according to their relation as supporter or dependent, and it is only where they contracted matrimony on terms of equality that they each take out their original property and divide the remainder. The meaning is not altogether beyond doubt, because the property referred to is not clearly defined.

The *Wagaru*, section 44, provides that if a husband and wife wish to separate by mutual consent, and the wife is solely dependent on her husband for her livelihood, the property shall be divided into three parts, of which the husband shall get one. Here also the property is not defined.

It must be admitted, however, that in the *Kinwun Mingyi's* Digest, Volume II, Marriage, section 254, which is headed "Divorce by mutual consent between husband and wife neither of whom has been previously married" a different interpretation appears to be put on these texts. The *Manukyè* for instance is interpreted as follows:—

"If the husband and wife both belong to the official class and if they mutually desire to separate, each shall take his or her official badges and insignia and other personal clothes and ornaments of the rest of the animate and inanimate property whoever supplies the greater part of the capital, by the employment of which property is acquired shall receive two-thirds of the property so acquired. The remaining one-third shall be taken by the person who supplies the rest of the capital. If both contribute equally towards the capital they shall divide the property equally."

This would seem to imply that only the profits on the capital are to be divided, and nothing is said as to the disposal of the capital itself. The *Wunnana* is interpreted in the same way. The profits acquired from the capital property are to be divided between the supporter and the dependent in the proportion of two to one, and the capital is to be obtained by its respective owner. As regards the *Wunnana*, as I have said, there is room for doubt, but the *Manukye* is very clear and I hardly think that it can bear the interpretation which the *Kinwun Mingyi* has assumed. As has been shown Major Sparks regarded it as an authority for the inclusion of the separate property in the division on divorce. Mr. Jardine, in his first note on marriage—its incidents, page 2, draws a distinction between inheritance and divorce, and holds that the definition of jointly acquired property given in *Manukye XII*, 3, and which, as has been pointed out, includes the property inherited by either party from their parents, is a definition which applies only to the law of divorce and not to the law of inheritance. It is rather surprising to find that the *Kinwun Mingyi*, who is the compiler of the *Attathankepa*, the strongest authority for holding that separate property is divisible on divorce, should have in his digest restricted the meaning of the *Manukye* so as to exclude separate property.

I will now turn to the recorded decisions in Upper and Lower Burma on the subject. In *Maung Kyin* v. *Maung Saung**

* Chan Toon's Leading Cases on Buddhist Law, page 5.

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Standford, J., *held* that where a woman lives and has an establishment separate from her husband, and where she takes no share either in the management of his business or in his household affairs, the property is to be regarded as the separate property of the husband, which he is entitled to take back on divorce, even where the divorce is against the wish and not owing to any fault on the part of the wife. In Mr. Jardine's note on the incidents of marriage, quoted above, he strongly dissents from this ruling. In paragraph 56 he states that if the separate living is by the husband's license or desire there would seem to be no reason in equity why it should deprive the wife of any advantage belonging to the status of wife, and in paragraph 66 he states that he can find no authority in the *Dhammathat* for holding that the faultless wife is, on divorce, to be deprived of any share whatever in what may be the only property in the establishment. *Maung Shwe Ngon* v. *Ma Min Dwe** is quoted by the learned Additional District Judge. It is a case of inheritance and not of divorce and is the case in which Jardine, J., discriminates between the definition of jointly acquired property for the purposes of divorce and for the purposes of inheritance. Otherwise it has no bearing on the present case. I am taking the cases in chronological order. *Maung Tha Dun Aung* v. *Ma Min Aung* † is a case not quoted by the Additional District Judge in which Burgess, J., *held* that on divorce a husband was entitled to one-third of the separate ancestral property of the wife on the authority of *Manukye XII, 3*. *Ma Sein Myo* v. *Ma Kywe*,‡ *Maung Chit Kywe* v. *Maung Pyo* § and *Ma Ein Si* v. *Maung Wa Yon* ‖ are quoted by the Additional District Judge, but are all cases relating to inheritance and have no bearing on the subject of divorce. In *Ma Ngwe Bwin* v. *Maung Lu Maung* ¶ Aston, J., *held* that as between husband and wife property inherited by the wife during coverture is viewed as *lettetpwa* and not *payin* when a partition of property is made between husband and wife on divorce, but that it does not follow that such property is to be viewed as joint property of the husband and wife, if on the wife or the husband dying during coverture, the estate of the deceased is distributed among the heirs. It was held that on a partition at divorce the husband was entitled to a share of ancestral property inherited by the wife during coverture, the divorce being one by mutual consent. In *Maung Po Sein* v. *Ma Pwa* ** Hosking, J., asserted the same principle. In *Maung Yin Maung* v. *Ma So*, †† a case not quoted in the Lower Court, Burgess, J., *held* that an adulterous wife forfeited not only her joint property, but her separate property as well, and finally in *Ma E Mun* v. *Maung Tok Pyu* ‡‡

* Chan Toon's Leading Cases on Buddhist Law, page 195.
† Chan Toon's Leading Cases on Buddhist Law, page 84.
‡ Chan Toon's Leading Cases on Buddhist Law, page 369.
§ Chan Toon's Leading Cases on Buddhist Law, page 391.
‖ Chan Toon's Leading Cases on Buddhist Law, page 463.
¶ Chan Toon's Leading Cases on Buddhist Law, page 74.
** Chan Toon's Leading Cases on Buddhist Law, page 143.
†† Chan Toon's Leading Cases on Buddhist Law, page 133.
‡‡ 2, U.B.R., 1897-1901, Divorce, 36.

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White, J., *held* that in the case of a husband and wife not previously married, a wife who obtains a divorce from her husband on the ground of his misconduct, such divorce being in the way of mutual consent, is entitled to one-third of the separate property of the husband.

It appears to me therefore to be quite clear that in the case of a divorce obtained by the wife on account of the misconduct of the husband, as by mutual consent, where the husband and wife have not been previously married, the wife is entitled on partition to one-third of property inherited by the husband during coverture. This principle is clearly stated in the *Manukye*, and strongly affirmed in the *Attathankepa*. The same meaning may be attributed to the passages in the *Wunnana* and *Wagaru*. It has been admitted by Sparks to be the law, though he attempted to legislate to the contrary. The principle has been accepted by Jardine in his note on Buddhist law, and it has been confirmed by the rulings of the High Courts in both Upper and Lower Burma.

The decree of the District Court is set aside and it is determined that the appellant is entitled to one-third of the estate inherited by the late Maung Kan Gyi from the Pakan *Mingyi Kadaw*. The case will be returned to the Lower Court for determination of the extent and value of this share and for final adjudication on the merits. This is a pauper appeal, but no order need be passed as to the recovery of the stamps, because in any case the appellant would be entitled to a refund under the provisions of the Court Fees Act.

The costs of this appeal will be treated as costs of the suit.

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Civil Appeal No. 70 of 1902.

Before H. Adamson, Esq.

MAUNG PYE *v.* MA ME.

Mr. *C. G. S. Pillay*—for Appellant. | Mr. *S. Mukerjee*—for Respondent.

The rule laid down in *Ma Gyan* v. *Maung Su Wa* (2, U.B.R., 1897-1901, Buddhist Law—Divorce, page 28) that under Buddhist Law a suit for bare divorce without partition of property will not lie, discussed, modified and partly dissented from.

Held—that misconduct on the part of a husband, which may not in itself be sufficient to entitle a wife to divorce under the rule of separation where the husband is the offender, may nevertheless be sufficient to entitle her to insist on a divorce as by mutual consent.

References:—

2, U. B. R., 1897-98, Buddhist Law—Marriage—Divorce, page 1.
P. J. L. B., 1900, Vol. I, Part I, page 7.
S. J. L. B., 1872—92, page 607.
Attathankepa Wunnana—393.
Manukyè V—18, 24.
Manukyè XII—3.
Wini Saya Paka Thani—54.
Jardine's Notes on Buddhist Law, Appendix, page viii.

THE respondent sued the appellant for divorce on the ground of cruelty. The union was an unhappy one. The chief causes of disagreement were that appellant accused his wife of infidelity and that she was unwilling to live in the house of her husband's parents. The evidence shows that appellant beat respondent three or four times severely enough to leave bruises on her body, that he accused her of adultery, that she left the house and returned to her parents, that he brought a suit for restitution of conjugal rights in which he was successful, that in accordance with the order in that suit she returned to him, that she went out after staying a few minutes when he followed her and pulled her hair and pushed her and allowed his sister to join and slap her face. The Township Judge dismissed the suit on the ground that appellant's conduct did not amount to cruelty of such a nature as would entitle the respondent to a divorce under Buddhist Law. The District Judge held that such petty squabbles as were proved were not to be magnified into acts of cruelty entitling respondent to a divorce. But in the District Court the respondent put forward a plea that had not been mentioned in the Township Court, namely, that she was willing to relinquish all rights in the property and the District Judge holding that if one party to a marriage insisted on a divorce against the wish of the other and consented to forego all the property a divorce could not be refused, gave a decree for divorce.

Against this decree the appellant has come up in second appeal. The questions raised present considerable difficulty and in two of the

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points concerned there have been conflicting rulings of the Courts in Upper and Lower Burma.

The respondent sued for a bare divorce without partition of property. It is alleged that, under the ruling of my late learned predecessor Mr. Burgess, in *Ma Gyan* v. *Maung Su Wa*,* such a suit does not lie. This ruling has been dissented from by the Chief Court of Lower Burma in *Maung Tha Chi* v. *Ma E Mya*,† where it has been held that partition of property is not an essential feature of a divorce, that the termination of the marriage status is in itself a sufficient cause of action and that till that cause is settled the grounds for partition do not arise and may vary according as the decree for divorce is based on findings of fact as to which party is in fault. Custom is on the side of the Lower Burma Ruling, for there can be no doubt that in both Lower and Upper Burma, from the time of the English occupation of both, suits for divorce without a prayer for division of property have been freely entertained by Civil Courts. I can find no authority for Mr. Burgess' dictum that without dealing with the property there can be no divorce in Buddhist law. It appears to be in conflict with the following passage in the *Manukyè XII*, 3 :—

"If, after the husband and wife had been divorced, there be no final settlement as regards the property, animate and inanimate, let it be divided according to the division that has been already laid down, and the husband cannot be said to have no right to take unto himself another wife on account of no settlement having been effected as regards the property and the debts, but let him have the right to take such wife and let the wife also have the right to take unto herself another husband.'

But *Ma Gyan* v. *Maung Su Wa*‡ does not, in my opinion, extend so far as it would appear to do from the head-note, which is "under "Buddhist Law a suit for bare divorce without partition of property will "not lie." In that case the wife brought a suit for divorce. The property was in the possession of the husband. The divorce was sought on the ground of cruelty repeated after the husband had made a written engagement to abstain from ill-treatment. If this ground were proved the wife would be entitled to a divorce in accordance with the rule of separation where the husband is the offender, *i.e.*, the wife would get the whole of the property. But the wife sued only for bare divorce, and having obtained it she brought a subsequent suit for the property. It was held that this separation of suits was contrary to the provisions of section 42, Civil Procedure Code, which requires that every suit shall, as far as practicable, be so framed as to afford ground for a final decision upon the subjects in dispute, and so as to prevent further litigation concerning them. The first suit therefore barred the second, and the effect of the decree for divorce was to leave all the property to the husband to whom the wife had abandoned it, quite a different result from that aimed at. The final order was that the wife was permitted to withdraw with liberty to bring a fresh suit for divorce and property.

*2, U. B. R., 1897—1901, Buddhist Law—Divorce, page 28.
† P. J. L. B., 1900, Vol. I, Part I, page 7.
‡ 2, U. B. R., 1897—1901, Buddhist Law—Divorce, page 28.

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It was also pointed out that the first suit would be superfluous unless the husband was unwilling that the wife should withdraw from the union by forefeiture of the property. The result therefore is not as stated in the head-note that a suit for bare divorce without partition does not lie, but it is that such a suit would bar a subsequent suit for partition of property, and that such a suit might be unnecessary and superfluous if the husband did not object to divorce without partition.

There is nothing in *Ma Gyan* v. *Maung Su Wa*,* from which it can be inferred that the present suit does not lie. No question of property has been raised by either party, and for all that appears on the record, there may be no joint property whatever. The dissolution of marriage is a cause of action, and it is the only cause of action that appears on the record. Nor can the suit be held to be superfluous, for the appellant absolutely declines under any circumstances to allow a divorce. Whether a subsequent suit for partition might or might not be barred by the present suit for divorce is a question which it is not necessary to discuss for the purposes of the present case.

The District Judge was wrong in allowing respondent to set up a new cause of action in the Appellate Court. The respondent there offered to relinquish all right to the property. But it is not shown what the property is, or in whose possession it is, and if it be in possession of respondent the decree of the District Court, which is simply for divorce, does not admit of execution by appellant by proceeding against any property that may be in respondent's possession which would be the logical result of respondent's admission.

The District Judge should have decided the appeal on the material contained in the record of the Court of First Instance. I may add, however, that it is by no means clear that mere willingness by one party to surrender the whole of the joint property can be treated as a ground for divorce. In Lower Burma in *Mi Pa Du* v. *Maung Shwe Bauk*† it was held that this is not a ground for divorce. In the Upper Burma case quoted above it is stated that the proposition that there is any insuperable legal bar to divorce against the party desiring it if that party is prepared to surrender all claim to the property to which he would otherwise be entitled is one for which there is apparently no sufficient or satisfactory authority to be found in the Buddhist Dhammathats and one to which it is doubtful whether Burmans in general would assent. Whichever opinion may be right it is clear that the District Judge has erred in disposing of the case on considerations of this nature, and that the decree for divorce cannot stand on the ground for which it has been granted by the District Judge.

It remains to consider whether on the grounds of cruelty proved in the Township Court and which have been recited in the first paragraph of this judgment, respondent is entitled to a divorce. The lower

* 2, U. B. R., 1897—1901, Buddhist Law—Divorce, page 28.
† S. J., L. B., 1872—1901, page 607.

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Courts have lost sight of the fact that in Buddhist law the wife can insist on divorce as by mutual consent though the husband has been guilty of less than the full tale of ill-treatment that would entitle her to divorce under the rule where the husband is the offender. This fact has been very clearly indicated in *Ma Gyan* v. *Maung Su Wa** as follows:—

"The general effect of the several texts on the subject seems to be this, that where a husband is guilty of misconduct, a *locus penitentiæ* should be given before he is to be treated as a matrimonial offender. In *Manukyè V, 18*, it is provided that he is to be given three such opportunities of amendment by entering into a bond to behave better in the presence of *Pinya thamadis* which is translated 'scientific and moral good men.' But on the other hand it is equally clear that the wife is not bound to give her husband another chance. She can insist on her claims to divorce at once. If she takes the latter course, she has a right to a half share to the property while if she prefers the former, and her husband offends again, she gets the whole of it. And this is the rule even although the misconduct of the husband may be of wild type."

The following texts may be quoted in support of the proposition that a wife is not bound to give a second chance to a husband who has ill-treated her:

Manukyè V, 2.—It is not only when the one has taken a paramour or the other a lesser wife, or uses violence towards the other, that there is the right to separate, and though the person whose habits are bad should say that he does not wish to separate it shall be considered a separation by mutual consent.

Manukyé XII, 3.—If, under the same circumstances, the husband having taken a lesser wife, shall abuse and beat his first, and it be proved that he has in any way oppressed her, let them go together again and live on good terms. If, after having gone together again, the husband shall behave in the same way, let him leave the house with only one cloth. But if the wife says she does not wish to remain with him any longer, that she wishes to separate, let them do so, let the property belonging to both be equally divided between them. And though the husband declare his unwillingness to separate, let the divorce be made as if both were consenting.

Attatankepa Wunnana, section 393.—It does not necessarily follow that a decree for separation should be given on account of a single act of ill-treatment of the wife, by the husband. On the contrary they should live together as man and wife as usual, a definite bond being executed by the husband to abstain from the repetition of such ill-treatment. But if the wife refuse to continue to live with her husband, let separation be in the mode of mutual consent.

Wini Saya Paka Thani, section 54.—If the wife alleges that she is oppressed and ill-treated by her husband, by means of harsh language and beating, and if the husband denies the truth of the statement, the wife must prove it. If the evidence shows that the husband was heard abusing and scolding his wife, but was not seen beating her and striking her with the elbow, although the evidence does not show that the husband was seen striking his wife, if marks are found on the wife's body, the statement being corroborated by the facts of the marks found on the wife's body, it is to be presumed that the statement of the wife is true.

The husband shall be admonished to live on good terms with his wife and a written bond shall be entered into that the husband will not do the like again on peril of leaving the house with only the dress on his person. Nevertheless, in spite of this decision, if the wife claims a divorce because she does not wish to live with him, a divorce may be given as if the consent were mutual.

Mahayaza that kyi (page VIII of Appendix of Jardine's note on marriage).—If a wife proves that her husband has abused, struck, and opposed her although she has not done any fault, the Judge may admonish the husband if this is the first offence. But if the wife persists in saying that she wishes to divorce her husband

* 2, U. B. R., 1897—1901, Buddhist Law—Divorce, page 28.

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as he is a severe master to her, and if the husband begs to cohabit with his inexorable wife, whom he promises to regard as his dear wife in future, a divorce may be given and their assets and debts should be divided equally between the two.

I have quoted only the portions relevant but all these texts go on to provide that if the wife adopts the milder alternative and the husband offends again he will be liable to divorce with surrender of all the property.

I will now apply these principles to the present case. There can be no doubt that appellant did ill-treat the respondent. On one occasion he beat her so severely as to leave bruises on her body. In the days of the Indian Penal Code such conduct cannot be justified notwithstanding any license that may be given in the Dhamathats. On the last occasion after the decree for restitution of conjugal rights he again pushed her and pulled her hair and allowed his sister in his presence to slap her. And he accused her of infidelity on inadequate grounds. The appellant has not proved any act of misconduct on the part of respondents. Though these acts of cruelty on the part of appellant may not, as found by the Lower Courts, be sufficient ground under the Dhammathats for granting a divorce against appellant in accordance with the rule of separation governing the case where the husband is the offender, yet it is clear that, under the provisions of the texts which I have quoted, they afford ample ground for the respondent to insist on a divorce as by mutual consent. The decrees of the Lower Courts must therefore be set aside and the respondent will get a decree for divorce as by mutual consent against appellant, who will also pay the costs in all Courts.

Buddhist Law—Divorce.

Before H. Adamson, Esq., C.S.I.

Civil Revision No. 84 of 1902. February 20th.

MAUNG THA SO *v.* MA MIN GAUNG.

Mr. *J. C. Chatterjee*—for Applicant. | Mr. *C. G. S. Pillay*—for Respondent.

Held—that when under Buddhist Law a suit has been brought for divorce without partition of property, a subsequent suit for partition of the joint property is maintainable.

References:—

Chan Toon's Leading Cases, Vol. II, page 31.
U. B. Rulings, 1897—1901, page 28.
U. B. Rulings, 1902, Buddhist Law, Divorce, page 6.
I. L. R., 22 Madras, page 24.

Applicant and Respondent, who are Buddhists, were a married couple. Respondent sued for divorce and obtained a decree for divorce as governed by the rule of mutual consent. She then brought a suit, which is the subject of the present application, for a half share of the joint property. She succeeded in both of the Lower Courts, and the applicant has now come up in revision, chiefly on the ground that because respondent did not sue for partition of the property in the first suit, her claim is now barred by the provisions of sections 42 and 43, Civil Procedure Code.

The question has been touched on in three rulings of the Upper and Lower Burma Courts. In *Ma Gyan* v. *Maung Su Wa** Mr. Burgess was of opinion that a suit for divorce without partition of property did not lie. This was dissented from in Lower Burma in *Maung Tha Chi* v. *Ma E Mya*, † where it was held by the Chief Court that the dissolution of the marriage status was itself a sufficient cause of action. In *Maung Pye* v. *Ma Me* ‡ the Chief Court ruling was followed and it was held that divorce alone was a substantial cause of action, but it was doubted whether the ruling in *Ma Gyan* v. *Maung Su Wa* implied more than that a suit for divorce would bar a subsequent suit for partition of property. For where there is a cause of action in the first suit, sections 42 and 43, Civil Procedure Code, can govern only the second suit. Whether the second suit would be barred was a point that was not necessary for the determination of *Maung Pye* v. *Ma Me*, and it was left as an open question.

That question now arises and has to be determined.

Unfortunately the arguments have not thrown much light on the matter, and they have not been supported by any rulings except those quoted above. Section 42, Civil Procedure Code, is as follows:—

"Every suit shall, as far as practicable, be so framed as to afford

* U. B. Rulings, 1897—1901, page 28.
† Chan Toon's leading cases, Volume II, page 31.
‡ U. B. Rulings, 1902, 3rd Quarter, Buddhist Law, Divorce, page 6.

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ground for a final decision upon the subjects in dispute, and so to prevent further litigation concerning them."

I am unable to see how this section can be a bar to the present suit, unless the partition of the property was a subject in dispute when the first suit for divorce was instituted. It cannot be assumed that when a suit for divorce is brought, any question has arisen as to the division of the property. The right to division of the property does not arise until the divorce has been decreed, and it may vary according to the nature of the divorce. Buddhist law lays down clearly what follows with regard to the property when for instance a divorce as by mutual consent is decreed. Each takes half. Is the plaintiff to assume that the defendant will refuse to comply with this plain provision of law, and that it is therefore necessary to sue for the property while suing for the divorce. Let us take the case of a married couple whose joint property consist of a lakh of rupees invested in Government funds. There is no room, we shall say, for dispute either as to the amount of the property, or as to its joint nature. The husband misbehaves and the wife sues for a divorce. The matter in dispute between them is simply and solely the conduct of the husband. Why should she be compelled to sue not solely for divorce, which is the remedy she wants but also to burden her suit with a costly claim for Rs. 50,000, which has never been in dispute, and which in all probability never could be disputed, when she had once established her legal right to it by obtaining a divorce. Let us suppose that under these circumstances she sues for a bare divorce and obtains it and that the husband thereafter retains and refuses to give up her half share of the property. Her cause of action as regards the property then arises, and is she to be barred from asserting it, because she did not sue for it when she had no idea that it would be disputed. Or again let us suppose that she sues at first for divorce and Rs. 50,000. The husband contests the suit on the ground that his conduct has given no cause for divorce, but at the same time he pleads that he does not content and never has contended that the plaintiff will not be entitled to receive Rs. 50,000 if she obtains a divorce, and that therefore whatever the results of the suit may be, he should not be held liable for costs on the Rs. 50,000 which has been quite unnecessarily sued for. That, it appears to me, would be a valid defence with regard to the costs.

The relevant portion of section 43 is as follows :—

> "Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action.
>
> "If a plaintiff omit to sue in respect of any portion of his claim he shall not afterwards sue in respect of the portion so omitted."

"Cause of action" has been held to mean every fact which it is material to prove to entitle the plaintiff to succeed, and every fact which the defendant would have a right to traverse. A test in

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deciding whether the cause of action in two suits is the same is whether the same evidence would support both. In a suit for divorce the cause of action is concerned with the conduct of the parties, and not with the property. In a suit for partition of property the cause of action and the evidence would be entirely different. There therefore does not appear to be anything in this section which would render a suit for divorce a bar to a subsequent suit for partition.

I have not succeeded in getting much assistance from rulings of the Indian High Courts. I have not found any case that is exactly parallel. In *Narayana Kavirayan* v. *Kandasami Goundan* * the defendant having agreed to sell land to the plaintiff failed to execute a conveyance and the plaintiff sued for specific performance and obtained a decree, and the Court executed a conveyance of the land to him. He then sued for possession. It was held that the right to possession arose coincidently with the right to the execution of a conveyance by the defendant. Both rights are declared under section 55 of the Transfer of Property Act, and the contract of sale created in the purchaser a right of possession. The second suit was therefore not maintainable. This ruling might be taken at first sight to be an authority against the proposition that a suit for division of property is maintainable after a suit for divorce. But when examined more closely it appears to be really an authority in favour of the proposition. For it implies that had the right to possession arisen from the execution of the conveyance and not prior to it, the second suit would have been maintainable. This is exactly the situation in the present case. The right to division of property arose from the decree of divorce and not prior to it. The same principle governs the cases in which it has been held that a plaintiff cannot bring one suit for a title deed and another for possession. The principle is that the right to possession arises not by virtue of the title deed, but that the right to possession accrues at the same time as the right to the title deed. In the present suit the right to partition does not arise at the same time as the right to divorce. It accrues by virtue of the divorce and does not accrue until the divorce has been obtained. On these grounds, I hold that neither section 42 nor section 43 of the Civil Procedure Code renders a suit for divorce a bar to a subsequent suit for partition of property.

The only other question in this case is whether cattle that are the offspring of cattle that were brought to the marriage by each party over twenty years ago, are to be regarded as *lettetpwa* or *payin*. Having regard to the definition of *lettetpwa* in Section 3, Book 12 of the *Manukye* it cannot be doubted that they are *lettetpwa*.

There is therefore no ground for interference and the application for revision must be dismissed with costs.

* I. L. R., 22, Madras, 24.

Buddhist Law—Ecclesiastical.

Civil Second Appeal No. 246 of 1901 December 16th.

Before H. Adamson, Esq.

(1) U WAYAMA, (2) U THUYEINDA, (3) U KATHALA
v. U AHSAYA.

Mr. *H. N. Hirjee*—for Appellants. | Mr. *R. C. J. Swinhoe*—for Respondent.

Civil Courts should abstain from deciding points which fall within the sphere of Ecclesiastical jurisdiction.

The suit was for full control by the first appellant in trust for the other two appellants and respondent, of certain property, consisting of tari-trees situated in the premises of the Theinkyaung Taik monastery in Kyawsi village, on the ground of the first appellant's superior ecclesiastical position. This is what the Court of First Instance decreed. The Lower Appellate Court held that the suit was one for decision by the ecclesiastical authorities and reversed the decision of the Lower Court. In second appeal it was argued that owing to the death of the *Thathanabaing* and the non-appointment of a successor there was no recognized head of the Buddhist Church.

Held—that the question in dispute was purely an ecclesiastical matter and that the ruling in force, namely, that the Civil Courts are bound by the decisions of the Buddhist ecclesiastical authorities in matters within their competence and that they should also abstain from deciding points which fall within the sphere of ecclesiastical jurisdiction, should have been followed.

The question of law cannot be affected by the fact that there is a probably temporary absence of the head of the Church.

References:—

2, U. B. R., 1892—96, pages 59, 72.
2, U. B. R., 1897-98, Buddhist Law, Ecclesiastical, page 1.
U. B. R., 1899, Buddhist Law, Ecclesiastical, page 5.

THIS suit concerns a number of *tari*-trees situated in the premises of the Theinkyaung Taik monastery in Kyawsi village. The appellants claim joint ownership with the respondent in these trees. The original plaint sued for partition of the property, but after the written defence had been filed, the appellants with the permission of the Court amended the plaint into a suit for partition or full control by the first appellant of the property. The amendment was due to the fact that they had discovered that the property being *garubhan* was impartible. The amendment was not consistent with the case as originally laid and completely altered the nature of the suit. But I am unwilling to deal with the case on this point alone, as a decision on this point alone might only lead to further litigation.

The suit on the amended plaint (dropping altogether the question of partition, as the plaintiffs did from that point) is for full control by the first appellant in trust for the other two appellants and respondent, of the property, on the ground of the first appellant's superior ecclesiastical position. And this is what the Court of First Instance decreed. Now, it is manifest that if the appellants and respondents had been laymen and not *pongyis*, jointly owning an estate, no such decision giving one preference over the other could have been given.

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The question as to which of the four interested *pongyis* (assuming that there is joint ownership as appellants allege) shall control the property is evidently a purely ecclesiastical matter, and the Court of First Instance should have followed the ruling in *U Thatdama and another* v. *U Meda and another*, * namely, that the Civil Courts are bound by the decisions of the Buddhist Ecclesiastical authorities in matters within their competence and that they should also abstain from deciding points which fall within the sphere of Ecclesiastical jurisdiction. The learned advocate for appellants has reviewed all the judgments passed by this Court in Buddhist ecclesiastical matters since the leading case quoted, page 59 of the Upper Burma Rulings for 1892—96. I understand him to admit the propriety of the decision in the leading case, but to question those that follow, when, by the death of the *Thathanabaing* and the non-appointment of a successor, there was no recognized head of the Budhhist Church. But granted the leading case I think the others (page 72, Upper Burma Rulings, 1892—96, Volume II, Ecclesiastical Jurisdiction, page 1, 1897-98, page 5, 1st Quarter, 1892) are natural corollaries, and the question of law cannot be affected by the fact that there is a probably temporary absence of the head of the Church.

The argument of the Subdivisional Judge that his decision merely gives effect to the order of the Shagaing *Sayadaw* is not to the point. Appellants did not sue on that order, and the parties to the suit were not parties to that order. On these grounds I am of opinion that the decision of the District Court is correct. The suit is not one that can be determined by the Civil Courts. The appeal is dismissed with costs.

* 2, U. B. R., 1897-98, Buddhist Law—Ecclesiastical, page 1.

Buddhist Law—Gift.

Before H. Adamson, Esq.

Civil Appeal No. 320 of 1901, March 24th, 1902.

MA PWA SWE *v.* MA TIN NYO.

Mr. *J. C. Chatterjee*—for Appellant. | Mr. *H. N. Hirjee*—for Respondent.

Held—that ordinarily Buddhist Law is not applicable to gifts.

Held also—that Buddhist Law is applicable to death-bed gifts.

References:—

2, U. B. R., 1892—96, page 400.

Manu Wunnana Dhammathat, section 344.

Manusara Shwe Myin Dhammathat, Chapter I, section 68.

Manukyè Dhammathat, Chapter X, section 81.

* * * * *

The finding on the fifth issue was that, if exhibit B is a gift, it is invalid, because it was not followed by delivery of possession in accordance with the tenets of Buddhist Law. But it is argued that Buddhist Law should not be applied to gifts, and that under section 25 (*1*) of the Contract Act exhibit B is a valid agreement notwithstanding that it is made without consideration, because it is expressed in writing and registered, and is made, as it purports to be, on account of natural love and affection between parties standing in a near relation to each other, namely, husband and wife. The question as to what law is applicable to gifts was fully discussed in *Maung At Gyi* v. *Ma U Me*, *and it was held that, as gift is not a question of succession, inheritance, marriage, caste or religious usage or institution, the Buddhist Law could not be held to be applicable. It would therefore appear that a promise to give for no consideration would be valid in Burma without delivery of possession, provided that, in other respects, it fulfilled the conditions specified in section 25 (*1*), Contract Act. But there is a further matter to be considered with regard to the gift now under discussion. It was a death-bed gift, and, it is to be considered whether, as such, it should not be held to be a question of inheritance, to be decided in accordance with Buddhist Law. It has been ruled that the idea of a will to take effect after death upon property is foreign to Buddhist Law, and that no will can cause the devolution of property contrary to the law of inheritance. If a registered deed of gift made on a death-bed, without delivery of possession, were held to be valid it would enable a Buddhist to defeat his own personal law, and practically to dispose of his property by a method which would be, in all essentials, equivalent to a will. The Dhammathats guard against a death-bed disposal of property, to the exclusion of one heir

* 2, U. B. R., 1892—96, page 400.

Buddhist Law—Gift.

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in favour of another. Thus, in *Manu Wunnana Dhammathat*, section 344, "When parents are lying or stricken down never to rise again, while on their death-bed, if either of them give their property to another person, such a gift of the property is invalid, and it shall be divided and shared as inheritance." And there are similar provisions in the *Manusara Shwe Myin Dhammathat*, Chapter I, section 68, and in the inheritance chapter in the *Manukyé Dhammathat*, Chapter X, section 81. A principle which the Dhammathats have specially provided as a safeguard of the law of inheritance, and without which the law of inheritance might be rendered inoperative, must obviously be held to be included in, and to be part of, the law of inheritance. Hence, it follows that whatever law may be applied to ordinary gifts, a death-bed gift must be held to be a question of inheritance, to which Buddhist Law is applicable. On these grounds I must hold that exhibit B is invalid.

* * * * *

Buddhist Law—Marriage.

Before H. Adamson, Esq.

Civil Appeal No. 254 of 1901. January 3rd, 1902.

MAUNG BA *v.* MA ÔK.

Mr. *J. C. Chatterjee*—for Appellant. | Mr. *N. N. Ghosh*—for Respondent.

Ante-nuptial contracts—not the usual incidents of a Buddhist Marriage—to be proved by clear evidence that marriage was the consideration of the promise.

Reference :

Chan Toon's Leading Cases on Buddhist Law, page 140.

THIS is a suit for Rs. 528-12-0 on an ante-nuptial contract. Respondent alleges that appellant promised to pay her over Rs. 500 if she would marry him. The marriage took place, and after marriage the amount was defined to be Rs. 528-12-0. Some time after the marriage appellant deserted her and took another wife. She has obtained decree for the amount claimed.

The grounds of appeal are—

(1) That there was no marriage.
(2) That there was no ante-nuptial contract.
(3) That under Buddhist Law a suit cannot be maintained by a wife against a husband to recover property so long as the marriage subsists.

The contention in the third issue is untenable. Buddhist Law recognizes certain property as the separate property of the wife. It is called "*thinthi*" and includes what belonged to the wife before marriage and what has been given specially to her since marriage. It is distinguished from "*kan win*," which is property set apart at the time of marriage for the joint purposes of the married pair, and from "*hnit pasôn*," which is property acquired jointly after marriage. There are no grounds for holding that a suit does not lie by a wife regarding her separate property, and there is a decision of the Recorder of Rangoon (*Ma E* v. *Maung San Da*)* in circumstances similar to the present in which a suit was allowed by the wife against the husband on an ante-nuptial contract.

As regards the first ground of appeal I agree with the learned Additional District Judge that the marriage has been proved. Appellant and respondent were photographed together. They eloped and went to Maung Tha Dun's house. Appellant consulted a *pôngyi*, whose pupil he is, as to a lucky day for the marriage. He invited the *pôngyi* to an entertainment for the purpose of the marriage, a "*minglasun*," *i.e.*, an entertainment in which rice is given to *pôngyis* on the occasion of a marriage. At the entertainment three *pôngyis* were present and a number of other people including the appellant and respondent. The headman of the quarter was invited to the marriage.

* Chan Toon's Leading Cases on Buddhist Law, page 140.

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He was absent and his wife went. She regarded it as a marriage. There were about ten persons present. Gifts, as is customary on such occasion, were given to the headman and his wife. There was stone-throwing, a common feature of Burman weddings. Appellant bore the costs. Tea was eaten. And subsequently the appellant and respondent lived together in Maung Tha Du's house, and ate together. On this evidence there can be no doubt that there was a valid marriage, a marriage contracted by mutual consent, the third kind of marriage recognized by the *Manukyè Dhammathat*, namely, when a man and a woman come together by mutual consent and live and eat together.

There remains the second ground of appeal, namely, that there was no ante-nuptial contract. The evidence produced concerns (1) the contract before marriage and (2) the ratification of it by the appellant after marriage.

The evidence is as follows:—

Ma Ôk (*respondent*).—About a year before our marriage Maung Ba promised that, if I would marry him, he would give me Rs. 500 after our marriage. Maung Po Thaung and the *pôngyi* were present when he promised. I did not hear Maung Ba say this himself, but the *pôngyi* said so. Maung Ba said so to me on another occasion in my house when we were alone. We did not marry till three years after the promise, because Maung Ba could not pay Rs. 500. I did not demand Rs. 500 before marriage. He promised it. All he has done since marriage is to give me a document for Rs. 350 and promised that he would give me Rs. 150 and 2¼ tickals of gold. He handed over the document two or three days after marriage and promised to give the 2¼ tickals about a month after marriage. Tha Du and Ma Sein were present when he gave the document and promised to pay Rs. 150 and 2¼ tickals.

Ma Sein.—Two or three days after marriage Ma Ôk demanded money from Maung Ba according to his promise. She did not say how much. It was money promised to be paid on the marriage. He said he would pay it. I saw a document for Rs. 350 given by Maung Ba to Ma Ôk. Two or three days after this when Ma Ôk wanted money to buy and sell in the bazaar Maung Ba promised to pay Rs. 100 and 2¼ tickals of gold.

Maung Tha Du.—The document was given back by me to Maung Ba, and I saw him give to Ma Ôk. He told her to keep it. She demanded some money for her use, and as Maung Ba had no money by him, he gave her the document. I also heard Ma Ôk say to Maung Ba that she did not like some gold, which she brought and showed to Maung Ba. Maung Ba said he had 2¼ tickals and would give it. I heard Maung Ba say, both before and after marriage, that he would give Rs. 500 to Ma Ôk. I heard it three or four times. Maung Ba said to me before marriage that he would pay Rs. 400 or Rs. 500 to be the principal for trading. He did not say it before *lugyis*.

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U Nandima (*the* pôngyi *whose pupil appellant is*).—In 1262 Maung Ba said to me that he was going to give money to Ma Ôk for use as he loved her.

Maung Po Thaung.—Maung Ba said to me before his marriage that he would give Rs. 500 to Ma Ôk to be the principal for trading. It was to open a shop he said. The money would be joint property of the two for their joint shop. In 1261 Maung Ba and Ma Ôk used to sometimes sleep in Maung Saung's house. It was then I heard Maung Ba say to Ma Ôk "Do not be dispirited. I will give Rs. 500 to trade with."

Maung Sin.—The document was produced by Maung Ba and Ma Ôk and they demanded Rs. 350 from me. Ma Ôk brought the document out and when I had looked at it I gave it back. I asked them to wait and they agreed. Maung Ba said the money was to be given to Ma Ôk.

Of these witnesses U Nadima and Po Thaung are disinterested. The argument of appellant's Advocate has not convinced me that Maung Sein is in any way interested. But Maung Tha Du and Ma Sein are not altogether disinterested. They have supported Ma Ôk for eight months, and they expect payment if she succeeds in this case. It also appears from Ma Sein's evidence that they have partially financed the litigation. But even assuming that the evidence recorded above is reliable, is it sufficient to prove an ante-nuptial contract? A promise made on account of love and affection would not be a contract unless there was a consideration, and it would not be enforceable except on the conditions specified in section 25 of the Contract Act, which do not exist in this case. Marriage is a good consideration, and the question is whether marriage was the consideration of the promise.

In the first place it must be noticed that the promise was not made at any definite time or with any formality. On the first occasion respondent was not even present herself. The *pôngyi* told her that appellant had said he would give Rs. 500. Subsequently at an indefinite time appellant said to her that he would give Rs. 500. The remaining evidence is simply to the effect that appellant said three or four times that he would give Rs. 500. Respondent says that appellant promised to give her Rs. 500 if she would marry him and that the marriage was delayed for three years because he had not the money. There is not a particle of evidence in corroboration of this statement. In fact there is no evidence on the record, except the respondent's own, to show that marriage was the consideration for the promise.

Another noticeable fact is that the witnesses do not agree as to the nature of the promise. Maung Po Thaung says that the money was to be given as the joint property of the two, for the purpose of opening a joint shop. Maung Tha Du also says that it was to be given as principal for the purpose of trading. If so, the money would be joint property, which is not the contention in this suit, and probably a suit would not lie for it during the subsistence of the marriage.

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MAUNG BA v. MA OK.

Assuming that the document for Rs. 350 was given by appellant to respondent after marriage, a point on which the parties differ, it may be that it was given on account of love and affection, and in continuation of the intentions that appellant had expressed before marriage, and that it was not given because he was compelled by contract to give it. As regards the further sum of Rs. 150 and 2¼ tickals of gold, there is little but respondents' own statement to connect them with a promise before marriage.

And indeed all the evidence tendered by respondent (with the exception of a small portion of her own) is not inconsistent with the same hypothesis. A love-sick youth is apt to boast of his kind intentions towards the object of his affections. And after marriage while he is still enthralled by love he is lavish with his gifts. Disenchantment follows, and his intentions melt into air. I dare say there are many wives who could bring forward as good evidence as there is in the present case to prove promises made before marriage and unfulfilled after. But something more is required for an enforceable ante-nuptial contract. It must be proved by clear evidence that, marriage was the consideration of the promise. And it is obvious that, on grounds of public policy, ante-nuptial contracts, which are not the usual incidents if a Buddhist marriage, must be admitted with caution and only on strict proof. If the Court were to enforce promises made before marriage, on the assumption without proof that marriage is the consideration for such promises, they would introduce startling innovations in the Buddhist Law of marriage, and their decisions would be contrary to the usages of the people.

On the ground that an ante-nuptial contract has not been proved I set aside the decree of the Lower Court. Respondent must bear the costs.

Buddhist Law—Marriage.

Civil Appeal No. 274 of 1901. January 16th.

Before H. Adamson, Esq.

MA THAING *v.* MAUNG THA GYWE.

Mr. *H. N. Hirjee*—for Appellant. | Mr. *R. C. J. Swinhoe*—for Respondent.

Decree passed against a wife alone—Husband and wife being Buddhists—Attachment by actual seizure of joint property to the extent of the wife's interest lawful.

(*See* Execution of decree, page 1.)

Burden of Proof.

Before H. Adamson, Esq., C.S.I.

Civil Appeal No. 127, 1903. July 27th.

MAUNG TUN
MAUNG AUNG BAW,
MAUNG AUNG GYI } *vs.* MAUNG PAW U.

Mr. *H. N. Hirjee*,—for Appellants. | Mr. *C. G. S. Pillay*,—for Respondents.

Defendant in possession of land there being no wrongful dispossession of plaintiff—plaintiff asserts permissive occupation by defendant—defendant asserts possession of land by gift outright—burden of proof on plaintiff.

[*See* Evidence, page 7.]

Civil Procedure—11.

Before H. Adamson, Esq.

Civil Second Appeal No. 282 of 1901. January 24th.

MAUNG NYUN *v.* (1) MAUNG PAW, (2) MAUNG KYWE.

Mr. *C. G. S. Pillay*,— for Appellant. | Mr. *J. C. Charterjee*—for Respondents.

Held—that a suit for rent of State land is not recognizable by the Civil Courts.

References :—

2, U. B. R., 1892-96, page 634.
2, U. B. R., 1897-98, Civil Procedure, page 25.
2, U. B. R., 1897-98, Civil Procedure, page 41.

THIS is a suit for rent of land, and the land is State land. This is clear from the judgment of the Lower Appellate Court, and is admitted by both appellant and respondents and is beyond doubt.

The question whether a Civil Court has jurisdiction to try a suit for rent of State land has not been raised in the Lower Courts. But it has been raised in this Court, and must be settled, as it is a plea in bar of jurisdiction.

Section 53 (*2*) (ii), Upper Burma Land and Revenue Regulation provides that a Civil Court shall not exercise jurisdiction over any claim to the ownership, or possession of any State land, or to hold such land free of land revenue, or at a favourable rate of land revenue, or to establish any lien upon, or other interest in, such land, or the rents, profits or produce thereof. And Financial Commissioner's Notification No. 8, dated the 8th July 1889, as amended by Notification No. 14, dated the 20th April 1899, provides that claims to establish any lien upon, or other interest in, State land, or the rents, profits or produce thereof, shall be tried by Collectors where the claims are as against the State, and by Collectors or Assistant Collectors where the claims are between private individuals.

The language of these provisions is quite clear and unmistakeable and shows that a suit for rent of State land is not cognizable by the Civil Courts.

In support of the view that Civil Courts have cognizance in such cases the ruling at page 634, U. B. R., vol. ii, 1892-1896, is referred to. That was a suit for rent very much the same as the present, and it was held that questions as to land being State land or private should not be raised when they are unnecessary for the decision of claims between the parties themselves. This case was decided by the late Mr. Burgess, and his view was that, as long as it was not a question of title between the parties and the State, the provisions of the Upper Burma Land and Revenue Regulation did not prohibit the Civil Courts from deciding the rights of the parties as between themselves. But in later judgments Mr. Burgess did not follow the principles enunciated

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in this case. *Maung Tha Aung* v. *Maung San Ke** was a suit for redemption of State land, that had been mortgaged. It was a suit between private individuals. Mr. Burgess held that as it was a suit for possession of State land, it was barred in the Civil Courts. A similar decision was given in *Maung Nat and Maung Bwin* v. *Ma Mi*.†

When these suits were decided the Financial Commissioner's Notification above quoted in its amended form in which it discriminated between suits as against the State and suits as between private individuals, had not yet been issued. And, in fact, it was in consequence of the decision of this Court, that suits for possession of State land between private individuals were not cognizable by Civil Court, that the notification was amended into its proper form.

In section 53, Upper Burma Land and Revenue Regulation, claims to possession of State land and claims to establish an interest in the rents, profits or produce of such lands are put in exactly the same category, and it follows logically that if a suit for possession is excluded from the Civil Courts a suit for rent must also be excluded. All such suits are cognizable by Revenue Officers only.

On these grounds the decrees of the Lower Courts must be set aside and the suit dismissed. But as the plea in bar of jurisdiction was not raised in the Lower Courts the parties will bear their own costs.

* 2, U. B. R., 1897-98, Civil Procedure, page 25.
† 2, U. B. R., 1897-98, Civil Procedure, page 41.

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Civil Miscellaneous No. 24 of 1902. December 22nd.

Before H. Adamson, Esq.

(1) MA MYIT; (2) MA ON CHEIK, A MINOR, BY HER GUARDIAN MA MYIT; (3) MA HLA WIN; (4) MA TA I, A MINOR, BY HER GAURDIAN MA HLA WIN. } v. KIN KIN GYI.

Messrs. *Chan Toon and Darwood* and Mr. *C. G. S. Pillay*—for the Applicants.

A review of judgment cannot be admitted for the purpose of re-arguing a case on previous material.

Error of law can be a good ground for review only where the law is definite and capable of distinct ascertainment.

References :—

8, Agabeg, part I, page 24.

Chan Toon's Leading Cases on Buddhist Law, page 84.

——————————————— 74.

——————————————— 143.

——————————————— 133.

——————————————— 5.

I. L. R., 7 Mad., 307.

2, U. B. R., 1892—96, pages 153, 287.

2, U. B. R., 1897—1901, Divorce, page 39.

U. B. R., 1902, Buddhist Law, Divorce, page 1.

W. W. R., 143.

THIS is an application for review of the judgment of this Court in Civil Appeal No. 54 of 1902.*

The question in that case was whether property inherited by one of the parties to a marriage during coverture when the parties have not been previously married, is liable to partition on a divorce as by mutual consent. It is an intricate and difficult question in Buddhist law and it was argued at great length by advocates on both sides.

The decision was that such property is liable to partition. The application for review is based solely on the ground that this decision is wrong. In the application for review there is not a single ground given, which was not fully argued in the appeal. The bearing of section 3, Book XII, of the *Manukyè*, the mistranslation of part of that section in Richardson's edition (but not the part quoted in the judgment), the effect of the sections 391 and 395 of the *Attathankepa*, and the reliance to be placed on section 254 of the *Kinwun Mingyi's* digest, were all argued at length. The learned advocate, who supported the application, has not indicated a single authority that does not appear in the judgment, except *Maung San Shwe* v. *Maung Po Thaik*,† in which I cannot find that the question was either raised or decided.

* U. B. R., 1902, Buddhist Law, Divorce, page 1.

† 8, Agabeg, Part I, 24.

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It therefore appears that if a review were admitted, its only effect would be to re-argue the matter on the same grounds.

The circumstances under which a review is admissible have been discussed at length in two rulings of this Court, *Ma Hlaing* v. *Ma Shwe Ma* and *Ma Chit* v. *Maung Pyu.** In both of these cases review was sought on the ground of error in a decision of Buddhist law. It was held that a review could not be granted for the purpose of re-arguing a case on previous materials, in the mere hope of inducing the same Court to take a different view. And it was also held that if review were sought on the ground of an error in law, the law on the question ought to be sufficiently settled and determined to permit of this definite ascertainment. From the latter ruling I quote the following passage as applicable to the present case:—

"The law referred to in both these *cases* † was definite positive law laid down in enactments or rulings of competent Courts and susceptible of distinct ascertainment, whereas here the law is the indefinite body of Buddhist law composed of the conflicting and contradictory rules which have not yet been reduced by the Courts to fixed and established principles. No other authority has been brought forward on the point in question and though it is quite arguable that the rules of Buddhist law have been wrongly applied in this instance, it is also equally arguable that they have been rightly applied. The result of the arguments of the learned advocate for applicant might be to convince the Court that its former view was wrong, but there would be no kind of guarantee that the second view was not the wrong, and the first the right one."

The learned advocate for applicant urges that the law is absolutely certain and ascertained, and that it is on divorce one party to the marriage cannot obtain any part of the separate property of the other even in the case of divorce on account of misconduct, however gross. I am unable to hold that there is any such distinct and ascertained law in the conflicting passages of the *Dhammathats* that have been quoted in the judgment, whereas no ruling to that effect has been indicated in either Upper or Lower Burma, and it is certain that the following rulings in Upper and Lower Burma are directly to the contrary:—*Maung Tha Dun Aung* v. *Ma Min Aung*, ‡ *Ma Ngwe Bin* v. *Maung Lun Maung*, § *Maung Po Sein* v. *Ma Pwa*, ¶ *Yin Maung* v. *Ma So*, ‖ *Ma E Nyun* v. *Tok Pyu.*, ** Consequently, what I am asked to do in the present application is to admit a review, not only for the purpose of re-arguing on the same materials the indefinite rules of the *Dhammathats* but also for the purpose of dissenting from every recorded decision of the High Courts of both Upper and Lower Burma, where the question has been directly in issue. I say every decision because the only one case in which an apparently

* 2 U. B. R., 1892—96, pages 153 and 287.
† 10 W. R., 143, and I. L. R., 7 Mad., 307.
‡ Chan Toon's Leading Cases on Buddhist Law, page 84.
§ Chan Toon's Leading Cases on Buddhist Law, page 174.
¶ Chan Toon's Leading Cases on Buddhist Law, page 143.
‖ Chan Toon's Leading Cases on Buddhist Law, page 133.
** 2 U. B. R., 1897—1901, page 39.

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different decision has been arrived at, *Maung Kyin* v. *Ma Saung*,* was decided on the rules of the *Dhammathats* that apply to the case where both parties have been married before, and is therefore distinguishable from the present case. Further, it has been urged that evidence should be taken of the views of Burmans on the subject, but that course could not be adopted with propriety at this stage of the case.

Therefore on the grounds that a review of judgment cannot be admitted for the purpose of re-arguing a case on previous materials, and that error of law can be a good ground for review only where the law is definite and capable of distinct ascertainment I must hold that this application for review is inadmissible, and reject it.

* Chan Toon's Leading Cases on Buddhist Law, page 5.

Civil Procedure—42, 43.

Before H. Adamson, Esq., C.S.I.

MAUNG THA SO v. MA MIN GAUNG.

Mr. *J. C. Chatterjee*—for Applicant. | Mr. *C. G. S. Pillay*—for Respondent.

Held,—that when under Buddhist Law a suit has been brought for divorce without partition of property, a subsequent suit for partition of the joint property is maintainable.

See Buddhist Law, Divorce, page 12.

Civil Procedure—295.

Before H. Adamson, Esq., C.S.I.

NARAYANEN CHETTY, Appellant *v.* A. K. A. M. ANNAMALLE CHETTY, Respondent.

Civil Second Appeal No. 280 of 1902. June 24th.

Mr. *H. N. Hirjee*—for Appellant. | Mr. *S. C. Dutta*—for Respondent.

Held—that a decree holder who attaches and sells moveable property of his judgment-debtor, on which a third party has a lien, is liable to that third party for the loss that he sustains by having his lien destroyed or impaired.

Reference :—

14, Weekly Reporter, page 120.

Three Chulias borrowed Rs. 2,000 from Appellant and by a deed of hypothecation mortgaged as security for the loan all the property contained in their shop or to be brought there in future from Rangoon. The property in the shop was subsequently attached in execution of a decree obtained by Respondent against the three Chulias.

Appellant then in Civil Miscellaneous Case No. 12 of 1901 of the Township Court, Pyinmana, applied under the provisions of section 295 (*b*), Civil Procedure Code, that the property attached might be sold free from the mortgage, reserving to him the same right against the proceeds of the sale, as he had against the property. This application was refused on the grounds (1) that he held no decree against the Chulias, and (2) that he had not proved that the property attached was the property mortgaged to him.

Appellant then proceeded to strengthen his position by suing the three Chulias. This he did in Civil suit No. 11 of 1901 of the Subdivisional Court, Pyinmana. He sued for his debt and for a declaration that it was chargeable on the property hypothecated. The Subdivisional Judge made an extraordinary series of errors in this case. The judgment states that he gave the relief prayed for, but the decree is a simple money decree, which was not the relief prayed for. Appellant applied for a review of judgment. The judge erred again by granting a review without notice to the defendants. In review he amended the judgment by making the decree chargeable on the hypothecated property, and he erred again by neglecting to amend the decree in terms of the amended judgment.

Meanwhile the property had been sold, and the proceeds Rs. 217 had been paid out to respondent in satisfaction of his decree.

The Appellant in the present suit sues the Respondent for this amount Rs. 217.

The District Judge thinks that owing to the irregularities committed by the Subdivisional Judge, the decree of his court cannot be held to be a valid decree so far as it makes a charge on the property. I think it would be very hard if the errors which are due solely to the Judge and not to the Appellant, prevented the decree from being what

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Appellant consistently asked for, and what he was clearly entitled to and what the Judge intended to give him, namely, a decree on the property. But the point is immaterial. The decrees against the Chulias makes no difference to Appellant's position. The questions for determination simply are—

(1) Had Appellant a valid lien on the property attached and sold,

(2) Is he entitled to proceed against the sale proceeds.

As regards the first question, the Respondent's contention is that part of the property attached was bought from Toungoo, and was under the terms of the deed, not included in the mortgage. Both Courts have found that the Appellant has failed to prove that all the property in the shop was brought from Rangoon. But they have laid the burden of proof on the wrong shoulders. *Primâ facie* Appellant had a lien on all the property in the shop. It was for the Respondent to prove that he was entitled to exclude some of it. There is absolutely no proof that any of it was brought from Toungoo or should be excluded. And in fact the contention with regard to Toungoo is a mere quibble. The custom is for traders in Pyinmana to buy their goods from Rangoon, and on that account the deed which was undoubtedly intended to hypothecate all the goods then in the shop, and subsequently to be brought to it, described future goods as goods brought from Rangoon. The respondent has failed to prove that any of the goods in the shop were not subject to the charge, and I must therefore hold that the hypothecation extended to all the goods that were sold in satisfaction of Respondent's decree.

The next question is whether Appellant is entitled to his remedy against the sale proceeds. Is a decree-holder who attaches and sells moveable property of his judgment-debtor, on which a third party has a lien, liable to that third party for the loss that he sustains by having his lien destroyed or impaired? It has been argued that as the auction purchaser buys only the right title and interest of the judgment-debtor, the lien is not impaired and the Appellant has his remedy against the purchaser. This would no doubt be the case where immoveable property subject to a mortgage is sold to a third person. The property would be still there and would remain subject to the mortgage. And no doubt moveable property could be followed in the same way. But in the present case the property consisted of goods in a shop. They have been dispersed and sold to various persons, and it would probably be impossible now to follow the property. The very fact of the sale has impaired the lien. In *Kanaye Pershad* v. *Hurchand Manoo** it was held that a decree-holder who has caused the sale of moveable property, not belonging to his judgment-debtor, though he has done so in perfect good faith, is liable to make good the value of that property to its rightful owner. In that case it was held

*14 Weekly Reporter, page 120.

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that though the owner might follow the property in the hands of the purchaser, this was not his sole remedy. He also had his remedy against the decree-holder. The present case appears to me to be parallel. The Respondent has committed a wrong on the Appellant. He has dispersed the property on which Appellant had a lien, and has destroyed or impaired the Appellant's lien and the Appellant is entitled to hold him responsible for the loss that he has sustained.

The decree of the District Court must therefore be set aside, and that of the Township Court restored with all costs.

Civil Procedure—11.

Before H. Adamson, Esq., C.S.I.

Civil Second Appeal No. 173 of 1903. August 19th.

MAUNG PO NWE v.
1. MAUNG THA E.
2. MAUNG TALOK PYU.
3. MAUNG KYWE.
4. MAUNG THA ZAN.
5. MAUNG SAN HLA.
6. MAUNG SHWE YWET.
7. MAUNG PO TE.
8. MAUNG THA OK.
9. MAUNG TUN AUNG.

Mr. *J. C. Chatterjee*—for Appellant. | Mr. *C. G. S. Pillay*—for Respondents.

Held,—that in revenue proceedings of a judicial nature, a Revenue Officer has inherent power to execute his own orders. Section 53 (*1*) of the Upper Burma Land and Revenue Regulation provides that a Civil Court shall not have jurisdiction in any matter which a Revenue Officer is empowered under the regulation to dispose of. A suit will not lie in a Civil Court to execute the order of a Revenue Officer, whether by restitution or otherwise.

The appellant was the tenant under the state of certain State land. The respondents were his sub-tenants. The appellant ejected the respondents, and they applied to the Collector to be re-instated. The Collector re-instated them, and appellant appealed to the Commissioner. The Commissioner confirmed the order of re-instatement and further directed that appellant should get two-thirds of the produce and respondents one-third. Appellant appealed to the Financial Commissioner, who reversed the orders of the Collector and the Commissioner, and directed that appellant should retain possession of the land and be allowed to make his own arrangements for subletting the land to whom he pleased. Meanwhile appellant, who had obtained all the crop on the land, carried out the Commissioner's order by paying one-third of the crop to the respondents.

As the Commissioner's order was reversed by the Financial Commissioner, the appellant now sues to obtain restitution of the one-third produce which he paid to respondents under the Commissioner's order.

It is very clear that in bringing this suit in a Civil Court he has adopted the wrong remedy. Section 53 (*1*) of the Upper Burma Land and Revenue Regulation provides that a Civil Court shall not have jurisdiction in any matter which a Revenue Officer is empowered under the Regulation to dispose of. There can be no doubt that a Revenue Officer has power to execute his own orders. What is really sought in this case is execution of the Financial Commissioner's order, by restitution of property, which the appellant made over in accordance with the Commissioner's order, before it had been reversed by the Financial Commissioner. The provisions of the Code of Civil

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Procedure apply to Revenue cases, and the provision that applies in this case is section 583, Civil Procedure Code. The appellant should have applied to the Collector to execute the Financial Commissioner's order, by restitution of the produce that he had made over to the respondents under the Commissioner's order, which had been reversed.

I must hold that the Civil Courts have no jurisdiction in this matter and dismiss the appeal with costs.

Civil Procedure—283—561.

Before H. Adamson, Esq., C.S.I.

Civil Second Appeal No. 45 of 1903. September 28th.

VALLEAPPA CHETTY *v.* (1) MAUNG KE. (2) MA THIT. (3) MA HMI.

Mr. H. N. Lütter—for Appellant. | *Mr. C. G. S. Pillay*—for Respondents.

Held,—that a deed of conveyance of property to one creditor with the object of defeating another creditor is not void provided that it is *bona fide, i.e.*, if it is not a mere cloak for retaining a benefit to the grantor.

Held also,—that a civil appeal should ordinarily be fixed for hearing so as to allow at least an interval of a month between the date of serving the notice and the date of hearing the appeal.

Reference :—

Shirley's Leading Cases, page 330.

The house and the land in the suit were mortgaged to plaintiffs-respondents by two deeds. The condition of both is that the debt shall be payable in six months. and in the deed relating to the land there is a further condition that the land shall be forfeited if the debt be not paid within six months. These deeds, however, were not registered. The six months expired with regard to both on 8th May 1902, and on both deeds conveyances are endorsed purporting to be executed on that date, transferring outright the property to the respondents in satisfaction of the debts. These conveyances were subsequently dealt with by the Collector under the provisions of the Stamp Act, and were registered. On 9th June 1902 the defendant-appellant instituted suits against the transferors of the property for money debts. On 12th June the property was attached by temporary injunction. On 17th June the appellant obtained decrees and attached the property in execution.

On 23rd July respondents made application for removal of attachment which was unsuccessful, and under section 283, Civil Procedure Code, they have brought the present suit for declaration of their rights.

Appellant's defence is that the conveyances of 8th May are void because they were executed in fraud of appellant who was a creditor, with the object of obtaining a fraudulent preference.

The burden of proving fraud lies on appellant. It is not denied that the conveyances were executed for consideration, or that the consideration, which was the money lent on the property with interest for six months, is adequate. Nor is it denied that the conveyances were executed prior to the temporary attachment of the property, as that fact is clear from the thugyi's evidence as to the date of mutation of names. But it is urged that the conveyances were executed at a later date than 8th May, and it is also denied that one of the alleged executants Ma Shwe Ma executed them at all. As

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VALLEAPPA CHETTY v. MAUNG KE.

regards the latter contention Ma Shwe Ma admits that she went, with respondent Maung Ke to the thugyi to effect the mutation and in view of this fact, it is clear that her denial of execution is untrue. As regards the former contention no direct evidence of any value is brought to show the conveyances were not executed on 8th May, but certain suspicious facts are indicated, *viz.*, that the conveyances were not written on stamped paper, but were endorsed on the previous mortgage-deeds, that no attempt was made to register them till 19th June, and that they purport to have been written on the very day that the six months expired. These facts it is urged indicate that the documents were antedated and they could have been antedated only for the purpose of making it appear that they were executed without any reference to appellant's claim, and that the object was to give a fraudulent preference to the respondents.

The Lower Courts, however, have found concurrently that the conveyances were executed on 8th May. Their finding is based on a considerable amount of direct evidence, and I am bound to accept it.

It is urged that the conveyances were made with the intent of defeating the appellant, who was a creditor, and that therefore they are void even although made for adequate consideration. The authority given for this proposition is that known as Twynes' case, an account of which will be found in Shirley's Leading Cases in the Common Law, page 330. A farmer named Pierce got deeply into debt and among his creditors were two persons named Twyne and Grasper. To the former he owed £400 and to the latter £200. After repeatedly dunning Pierce in vain, Grasper went to law and had a writ issued. As soon as Pierce heard of this, he took the other creditor Twyne into his confidence, and in satisfaction of the debt of £400 made a secret conveyance to him of everything he had. In spite of this deed Pierce continued in possession, sold some of the goods, and in every way acted as if he were absolute owner. The evidence showed various indications of secrecy and fraud, and it was held that though the conveyance was for valuable consideration, it was not *bonâ fide*, and was merely the creation of a trust for the benefit of Pierce himself. That case differs widely from the present. There is no suggestion in the present case that the conveyances created a trust for the benefit of the debtors. The transaction was clearly *bonâ fide* so far as the respondents are concerned, entered into with the object of getting payment of their debt. The debtors it is true may have had something to gain by it. If their property must be sold, they preferred that it should be sold to respondents, rather than to a stranger at the instance of the appellant, because they had hopes that if at some future time they found themselves able to repay the purchase money, they might be allowed to redeem it. That is the very utmost benefit that it is suggested that the debtors may have obtained from the sale to respondent. That is a reasonable ground for

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preferring one creditor to another, and there is nothing in law to prevent a debtor from preferring one creditor to another, provided that the transaction is *bonâ fide* and that it is not a mere cloak for retaining a benefit to the grantor.

Of the general facts of the case I entertain no doubt. The respondents had lent on the security of the property a large sum of money an amount which with the interest due on it was equivalent to the value of the property. But they had no security as the documents were not registered. They heard that appellant was about to sue for his debts. They therefore took hasty steps to secure their debt by obtaining a transfer of the property. The debtors willingly acceded, because they thought they would have a better chance of buying back their land and house if it were in the possession of the respondents than if it were sold at the instance of appellant. The appellant at the same time used all the haste that he could in order to forestall the respondents. There was a race between the two competing creditors, as to who should get satisfaction first, and the winner, who has not been guilty of foul play, is not to be disqualified merely because he ran to win.

On these grounds the appeal must fail.

In the memorandum of appeal complaint is made that the District Judge refused Appellant's application for an adjournment to enable his Advocate to argue the appeal. It appears that the appeal was filed in the District Court on 2nd December and an Advocate from Mandalay was engaged. Notices were issued and the appeal was fixed for hearing on 6th December. On that date appellant asked for an adjournment on the ground that his Advocate was engaged in cases in Mandalay, but it was refused. I think in view of the short date that had been fixed that this refusal was harsh. A Mandalay Advocate has his engagements there and allowance might well have been made when he found himself unable to appear in a Court at a considerable distance from Mandalay at so short a notice. Moreover, it is absolutely wrong to fix a civil appeal for hearing four days after the memorandum of appeal is presented and though that is a contention that could not be used by the appellant as a ground for appeal yet so far as the respondent is concerned it gives him no proper opportunity of instructing an advocate and preparing a defence. Section 561 of the Civil Procedure Code contemplates that there shall be at least an interval of a month between the date of serving the notice and the date of hearing the appeal.

The appeal is dismissed with costs.

Civil Procedure—283.

Before A. M. B. Irwin, Esq.

Civil Second Appeal No. 204 of 1903. December 22nd.

RAM CHANDRA *v.* SHEUDUT ROY.

Mr. S. Mukerjee,—for Appellant. | *Mr. H. N. Hirjee*,—for Respondent.

A Township Court has jurisdiction to try a suit brought under section 283, Civil Procedure Code, to assert the same right which a Subdivisional Court had disallowed under section 281. In such a suit the jurisdiction of the Court is determined by the amount in dispute, and not by the amount of the decree in execution of which the property had been attached.

Reference :—

I.L.R., 15 Cal., page 104 (1887).

Respondent attached 50 head of cattle in execution of a decree against Gokal for Rs. 682. Appellant applied for removal of attachment on the ground that the cattle were mortgaged to him for Rs. 340. The Subdivisional Court dismissed the application. Appellant then instituted the present suit in the Township Court, after the sale, praying for an order that the sale proceeds were subject to his lien of Rs. 445 principal and interest, and for a decree for that amount. The Township Court gave him a decree for Rs. 375-4-0 and costs.

On appeal to the District Court, besides several objections on the merits, respondent alleged (*a*) that the Township Court had no jurisdiction as the suit was practically one to set aside an order passed by a superior Court, *i.e.*, the Subdivisional Court, and (*b*) that the value of the suit was beyond the pecuniary jurisdiction of the Township Court. The learned Judge of the District Court considered the ruling of the High Court at Calcutta in *Modhusudun Koer* v. *Rakhal Chunder Roy*, (*) namely "the amount which is to settle the jurisdiction of the Court is the amount which is in dispute," and interpreted this to mean "the amount in dispute between the original parties, or, in other words, the amount due to the execution creditor, and not the amount subsequently claimed by a third party." He was clearly driven to this construction by the consideration," otherwise we should have cases like the present one, in which a Lower Court reverses the order of a higher one." The execution proceedings being for Rs. 682-13-0, the learned Judge held that the Township Court had no jurisdiction, and dismissed the suit.

This decision is admitted by respondent's Advocate to be wrong. It was based on a fallacy. The decree of the Township Court does not reverse the order of any Court. The order of the Subdivisional Court was merely a summary one, and not final. Section 283 expressly allows the institution of a suit to assert the same right which the Subdivisional Court has disallowed, and the summary order bears the same relation to the regular suit that an order under section 145(6), Code of

(*) I.L.R., 15 Cal., page 104 (1887).

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Criminal Procedure bears to a civil suit for possession of immovable property.

The amount in dispute in the present case is Rs. 445. That is all that the plaintiff would obtain if he succeeded. The remainder of the sale proceeds of the cattle would be paid to defendant so far as this suit is concerned. The suit is clearly one within the jurisdiction of the Township Court.

I therefore reverse the decree of the District Court, and remand the appeal for disposal on the merits. A refund order for the fee on the memorandum of appeal will be issued under section 13, Court Fees Act, and the respondent will pay the rest of appellant's costs.

Contract—239.

Before H. Adamson, Esq.

MA KO *v.* MAUNG MAUNG AND MA NYUN.

Civil Second Appeal No. 214 of 1901. December 18th.

Mr. *J. C. Chatterjee*—for Appellant. | Maung *Kan Baw* and Mr. *S. Mukerjee*—for Respondents.

Marriage under Mahommedan Law not a partnership as defined under the Act.

(*See* Mahommedan Law, page 1.)

Contract.

Before H. Adamson, Esq.

MAUNG BA *v.* MA ÔK.

Civil Appeal No. 254 of 1901. January 3rd, 1902.

Mr. *J. C. Chatterjee*—for Appellant. | Mr. *N. N. Ghosh*—for Respondent.

Ante-nuptial contracts—to be proved by clear evidence that marriage was the consideration of the promise– not the usual incidents of a Buddhist marriage.

(*See* Buddhist Law—Marriage, page 1.)

Contract—23, 257.

Before H. Adamson, Esq., C.S.I.

Civil Appeal No. 251 of 1902. January 14th.

LEON GRIN *v.* AGA ALLY AKBAR SHEERAZEE.

Mr. *H. M. Lütter*—for appellant. | Mr. *H. Broadbent*—for respondent.

Held—that a secret agreement between two partners that implies a civil injury to a third partner is an agreement with an unlawful object, and is void.

Reference.—Pollock's Principles of Contract, pages 264 and 362.

APPELLANT and respondent and Captain Donnan were in partnership to work a plumbago mine. In May 1901 they contemplated dissolving the partnership. At this time Rs. 2,000 was due to Captain Donnan. It is important to observe that there was not an indefinite sum, such as might have been ascertained on a settlement of accounts, due to Captain Donnan. Respondent clearly states in his plaint that the amount due to Captain Donnan was Rs. 2,000.

On the 15th May 1901, appellant and respondent entered into the agreement, Exhibit A. The agreement contemplates that the appellant shall induce Captain Donnan to accept, in settlement of his debt, something less than the full amount, Rs. 2,000, and that whatever is thus saved on the transaction shall be equally divided between the appellant and the respondent, and that in the event of no such settlement being come to between the appellant and Captain Donnan within a year, the appellant shall pay to the respondent Rs. 1,000.

This is the agreement now sued upon.

I need not deal with the other arguments raised in appeal because it is sufficient for a decision in this case to explain the grounds on which I hold, without any doubt, that the agreement, Exhibit A, is an unlawful agreement and is therefore void. Section 23 of the Contract Act provides that the object of an agreement is unlawful if it is fraudulent, or if it involves or implies injury to the property of another, and that every agreement of which the object is unlawful is void. The parties to this case and Captain Donnan were partners, and section 257 of the Contract Act prescribes the relations that must exist between partners. "Partners are bound to carry on the business of the partnership for the greatest common advantage, to be just and faithful to each other, and to render true accounts and full information of all things affecting the partnership, to any partner or his legal representative." Now it is clear that the other partners did not inform Captain Donnan of the existence of the agreement, Exhibit A. Appellant states that he did not inform Captain Donnan, and it is not suggested that respondent informed Captain Donnan, and it is absolutely certain from the nature of the agreement that Captain Donnan could not have been informed. There was therefore in the agreement a breach of the law that binds partners as between themselves. It is also clear on the face

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of the agreement that it implies injury to Captain Donnan. The only way in which Captain Donnan could have been induced to take less than the full amount of his debt was by persuading him to compound it because the full amount was not available. But the agreement implies that the full amount was available and that what Captain Donnan might me persuaded to forego would be divided among the other partners. An agreement will be illegal though the matter of it may not be an indictable offence, and though the formation of it may not amount to the offence of conspiracy, if it contemplates any civil injury to third persons (Pollock's Principles of Contract, page 264). I can have no doubt that the agreement contemplated a civil injury to Captain Donnan, because (1) its secrecy was a breach of the partnership agreement by which both appellant and respondent were bound to Captain Donnan, and (2) it implied that Captain Donnan should be deceived and persuaded by some means or other to take less than what was his due, and less than what was available to pay him.

It has been urged for the respondent that the appellant is pleading his own fraud. But the principle proper to this class of cases is that persons who have entered into dealings forbidden by the law must not expect any assistance from the law save so far as the simple refusal to enforce such an agreement is unavoidably beneficial to the party sued upon it. The matter has been clearly put by Lord Mansfield in *Holman* v. *Johnson*:*

"The objection that a contract is immoral or illegal as between plaintiff and defendant sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed, but it is founded in general principles of policy, which the defendant has the advantage of contrary to the real justice as between him and the plaintiff, by accident, if I may say so. The principle of public policy is this: *Ex dolo malo non oritur actio.* No Court will lend its aid to a man who founds his cause of action upon an immoral of an illegal act. If from the plaintiff's own stating or otherwise the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, there the Court says he has no right to be assisted. It is upon that ground the Court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally in fault, *potior est conditio defendentis.*"

On these grounds I must hold that the agreement sued on is unlawful and therefore void. I set aside the decree of the District Court and dismiss the original suit. But as both parties are tarred with the same brush, each will bear his own costs in both Courts.

* 1775 Cowp., 341 (Pollock's Principles of Contract, page 362).

Contract—23.

Before H. Adamson, Esq., C.S.I.

Civil Appeal No. 66 of 1903. July 29th.

MAUNG AUNG GYI *v.* MAUNG THA GYAN.

Mr. *C. G. S. Pillay*—for appellant. | Mr. *J. C. Chatterjee*—for respondent.

Held,—that an agreement by which a village headman transfers his official duties to another person who, in consideration of performing them, is to obtain a proportion of the commission, is one of which the consideration and object are unlawful and opposed to public policy, and which should not be enforced by a Court of Justice.

Appellant is a village headman. He and respondent entered into a contract, of which the following is a translation :—

"On the 11th, Lazan Nayon 1257, at Kanni, Twin Headman Maung Aung Gyi, and Maung Tha Gyan entered into this agreement. Twin Headman, Maung Aung Gyi, being ill and unable to carry on his duties, asks Maung Tha Gyan to carry on in his place the official duties of headman, small and great, the terms being as follows :—For travelling expenses and other contingencies in carrying on the duties, Maung Tha Gyan will take one-third of the commission. Of the balance two-thirds, Maung Tha Gyan will take one-third and Maung Aung Gyi one-third. If in future Maung Aung Gyi, in breach of the agreement take the whole of the commission, without any fault on the part of Maung Tha Gyan, he Maung Aung Gyi must pay to Maung Tha Gyan 100/— for breach of the agreement. If Maung Tha Gyan does not wish to carry on the duties according to the agreement, he must pay 100/—to Maung Aung Gyi for breach of the agreement."

This agreement was acted on for five years, and then the respondent Maung Tha Gyan sued the appellant for 100/—for breach of the agreement, alleging that the appellant had prevented him from performing the duties of headman.

Neither the township judge, nor the district judge, considered that there was anything unlawful in this agreement, and in both Courts respondent has got a decree for the amount claimed. There can however be no doubt that the contract sued on, is one of which the consideration and object are unlawful, under the provisions of section 23, Contract Act, on the grounds that they are opposed to public policy. The contract is one by which a headman gives over entire control of his official duties to another person, who in consideration of performing these duties is to receive two-thirds of the headman's commission. It is opposed to section 3 of the Upper Burma Village Regulation, which provides that the Deputy Commissioner is the only person who can appoint a headman. It is opposed to section 16B of the Regulation, which provides that an assignment of or an agreement to assign the emoluments of a headman, shall be void. It is opposed to the whole policy of village administration, a cardinal point of which is that only a person approved of and appointed by Government shall perform the responsible duties of head of a village, and stand between the villagers and the Government. If such an agreement were sanctioned by Courts of Justice as valid, the practical result would be that

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the office of headman could be bought and sold, a result which is contrary to the spirit of the existing system of village administration, and which would be fraught with the greatest danger to the country. I am surprised that the District Judge, who is himself a Deputy Commissioner, should have lost sight of considerations that are so obvious.

I must hold that the agreement is unlawful and therefore void, and I set aside the decrees of the Lower Courts, and dismiss the original suit with costs.

Before H. Adamson, Esq., C.S.I.

Civil Second Appeal No. 68 of 1903. July 31st.

MA SHWE KHAN
MAUNG PYAN } *v.* { MAUNG KHAN.

Mr. *J. C. Chatterjee*—for appellants. | Mr. *S. Mukerjee*—for respondent.

The first defendant borrowed a cart and bullocks from appellants, went to respondent's house, and there gambled and lost, and to raise money pledged the cart and bullocks to respondent. Appellants demanded the cart and bullocks which respondent refused to return, and only on executing a bond for repayment of the amount for which they had been pledged, were they permitted to take them back.

In a suit by respondent on the bond it was

Held—that whether the consideration was the return of the cart and bullocks which the respondent was bound by law to return, or whether it was the screening of first defendant from the consequences of his criminal act, the consideration was unlawful and the bond was void against the appellants.

References:—

Pollock's Principles of Contract, page 174.
Chitty on Contracts, page 574.

There can be no doubt as to the facts of the case. The first defendant borrowed a cart and bullocks from the second and third defendants-appellants, with the object of conveying himself to plaintiff-respondent's village. He went with the cart and bullocks to respondent's house, and there gambled and lost, and in order to raise money pledged to respondent the appellants' cart and bullocks. After a day the appellants became anxious about their property, and went in search of first defendant, whom they found in respondent's house. There they heard that their cart and bullocks had been pledged. They were naturally indignant, and demanded that they should be returned. This the respondent refused to do. Eventually a bond was drawn up, by which the appellants and the third defendant made themselves liable to the respondent for the amount for which the cart and bullocks had been pledged. All three executed this bond, and the cart and bullocks were returned.

The respondent sued the appellants and the third defendant on the bond. The Township Judge gave decree against the third defendant alone, holding that the appellants were ignorant persons who executed the bond without knowing its contents. In appeal the Additional District Judge rejected this finding, and held rightly that the appellants having executed the bond could not shelter themselves behind a pretended ignorance of its contents. Decree was given against all three.

There can be no doubt that if the bond is valid the appellants are liable on it. The question is whether it is valid. It is not valid against the appellants unless it was executed for lawful consideration on their part. The obvious consideration was the return of the cart

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and bullocks. But the first defendant had committed criminal breach of trust with regard to the cart and bullocks, which at the time were in fact stolen property as defined in section 410, Indian Penal Code. The appellants were entitled to the cart and bullocks without consideration, and the respondent was bound by law to return them. The doing of a thing is not good consideration if it is a thing which the party is already bound by law to do (Pollock's Principles of Contract, page 174). It is suggested by respondent's learned Advocate that the consideration was to save their friend the first defendant from the consequences of his criminal act. This would also be an unlawful consideration as it would amount to the compounding of a non-compoundable offence. In this view the case would be similar to *Williams* v. *Bayley*, quoted at page 574 of Chitty on Contracts, where a son forged his father's name as indorser to notes, and the forgery having been discovered, the father agreed to mortgage his property to the holders in consideration of the notes being given up, and it was held by the House of Lords that the agreement was void.

From whatever point of view therefore the case be regarded, it must be held that the bond was executed without any lawful consideration on the part of the appellants and therefore it is void as against them.

The appeal must therefore be allowed. The decree of the District Court is set aside, and that of the Township Court restored, and the respondent must bear the costs in this Court and in the Lower Appellate Court.

Contract—240.

Before A. M. B. Irwin, Esq.

KALOO RAM *v.* P. M. A. VENKATECHELLUM CHETTY.

Civil Revision No. 67 of 1903. December 14th.

Mr. *J. C. Chatterjee*,—for applicant. | *Mr. H. M. Lutter*,—for respondent.

Held—that when one person advances money to another to enable him to take contracts, the fact that the former is remunerated by a share of the profits does not of itself constitute a partnership.

References:—

I. L. R. 4 All., page 74.

U. B. R. 1901, Execution, page 11.

Respondent obtained a decree against Muhammad Azim, and attached a debt due to him by the Executive Engineer, Kyauksè. Plaintiff objected to the attachment, and his objection failing, he instituted this suit to establish his claim.

The plaint is very badly drawn, and does not state the basis of plaintiff's title to the money, but it appears from the evidence that plaintiff's claim is that he entered into a partnership with Muhammad Azim to take Public Works Department contracts on the Kyauksè canals, plaintiff supplying the capital and Muhammad Azim doing the work, the profits to be divided, 10 annas to Muhammad Azim and 6 annas to plaintiff. Plaintiff claims that as the debt was due to the partners, it could not be attached as a debt due to a Muhammad Azim, and that if the interest of Muhammad Azim in the debt had been attached, as it might be on the authority of *Nizamuddin* v. *Toor Khan and others* (1) it would still remain to be shown that Muhammad Azim had any interest in it. Plaintiff alleged that he should receive the whole of the Rs. 500 because a large sum of money was due to him by Muhammad Azim on the partnership accounts.

The principal issue was whether plaintiff and Muhammad Azim were partners. For proof of this fact plaintiff relied partly on the records of two civil suits, namely, No. 2 of 1902 in the District Court of Kyauksè, in which plaintiff sued Muhammad Azim for dissolution of partnership and Muhammad Azim admitted that the partnership existed, and suit No. 175 of 1902 of the Court of Small Causes, Mandalay, in which Tulsi Ram sued plaintiff and Muhammad Azim jointly for the value of work done for them on the Kyauksè canals, and plaintiff admitted the partnership and had to pay the decree.

(1) U. B. R. 1901, Execution, page 11

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The Lower Appellate Court held that the admissions made in the two suits above mentioned were irrelevant, and found the other evidence insufficient to establish the fact of the partnership. The decree of the Court of First Instance dismissing the suit was therefore confirmed.

In this Court it is not maintained by the respondent that the records of the former suits are inadmissible in evidence, but it is agreed on both sides that they are not conclusive proof but may be considered for what they are worth.

The oral evidence, if fully accepted, establishes nothing more than that plaintiff advanced money to Muhammed Azim to enable him to take contracts, plaintiff being remunerated by a share of the profits. This is exactly the arrangement described in section 240 of the Contract Act, and does not of itself constitute a partnership. The case of *Bhaggu Lal* v. *de Gruyther* (2) is almost identical with the present case, except that there was a formal deed in which the parties were expressly declared to be partners, while in the present case there is no deed. In that case Sir Robert Stuart said that section 240 of the Contract Act, "puts an end to the contention that plaintiff was "partner of the defendant, even though he is ignorantly called so in "the agreement itself and loosely and vaguely referred to as such in "the pleadings and in the judgments of both the lower Courts." The decision proceeded on this ground, though defendant had never denied that he was a partner. I cannot find that this decision has ever been over-ruled or dissented from, and in fact the language of the section is so plain as to require no authority for its interpretation.

The records of the two suits, both of which were instituted after the attachment, do not in my opinion carry plaintiff's case any further. Assuming that there was nothing collusive in them, they only show that plaintiff and Muhammad Azim believed that the contract between them was one of partnership. It might be a partnership in everyday language, but in order to establish the plaintiff's case it would be necessary to show that it was a partnership in the technical sense in which the word is defined in the Contract Act. This they do not show. Plaintiff was unknown to the Executive Engineer, who gave the contracts to Muhammad Azim alone. Plaintiff did not combine his skill or labour with Muhammad Azim's. Muhammad Azim did not combine his money with plaintiff's. Thus the essential elements of a contract of partnership were lacking.

The application is dismissed.

(2) I. L. R. 4 All., page 74 (1881).

Court Fees II—17 (VI).

Before H. Adamson, Esq., C.S.I.

Civil Revision No. 41 of 1903. July 22nd.

P. J. NARAYAN } v. { MA DAW. MA MA GYI.

Mr. *J. N. Basu*—for applicant. | Mr. *H. N. Hirjee*—for respondents.

Held,—that a suit by a landlord to eject a tenant from his house is governed as regards Court Fees by Article 17, Clause VI of Schedule II of the Court Fees Act.

Also—that when a particular construction of the Court Fees Act, which is a fiscal enactment, in favour of the suitor, has prevailed for many years, a strong presumption in favour of that construction arises, and no other construction, unfavourable to the suitor, should afterwards be put upon the enactment, except for some very cogent reason.

References:—

I. L. R. 15, Allahabad 63.
I. L. R. 15, Allahabad 363.
I. L. R. 8, Calcutta 593.
I. L. R. 8, Calcutta 280.
I. L. R. 8, Bombay 31.
L. B. R. 1902, page 303.
11 Calcutta L. R. page 91.
Punjab Rec. Vol. XXII, No. 1.

The respondent-plaintiff sued for ejectment of the applicant-defendant from a portion of his house. The cause of action as disclosed in the plaint is that the plaintiff leased a portion of his house to defendant at a daily rent, which has always been paid, that he gave defendant the usual notice to quit; and that defendant refused to comply. The question in this application is whether the plaint is properly stamped with a Rs. 10 stamp under article 17 (VI) of the second schedule of the Court Fees Act, or whether the stamp should be *ad valorem* on the value of the portion of the house under section 7 (V) (*c*) of the Court Fees Act.

As the matter is one of difficulty and importance, and as the respondent was unrepresented by Counsel, Mr. Hirjee at my request kindly undertook to support the case for the Respondent, and I am obliged to him for the useful assistance that he has given.

Hitherto in Upper Burma suits of this nature have been treated as coming under article 17 (VI). In Lower Burma as appears from *Mahomed Ebrahim* v. *Bhymea** the rule dating from 1884 has been to treat such suits as coming under Article 17 (VI) where the title of the landlord is not put in issue, and as requiring an *ad valorem* stamp where the title is put in issue. The reason for the latter portion of this rule, which would make the stamp on a plaint dependent on the defence is not easily intelligible. The practice was changed in 1902 by the ruling quoted, in which a full bench of the Chief Court, dissenting from *Bibi Nurjehan* v. *Morjan Mundul* † and *Ram Raj Jewari* v. *Girnandan Bhagat* ‡ decided that the plaint should bear

* L.B.R., 1902, p. 303. | † C.L.R., p. 91. | ‡ I.L.R., 15 All., p. 63.

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an *ad valorem* fee on the value of the property under section 7 (V) (*e*). What the practice of the Indian High Courts may be, I have not been able to ascertain with the same certainty. Indeed the two rulings referred to above, one of Calcutta, and the other of Allahabad, and a further Allahabad ruling *Radha Prasad Singh* vs. *Pathan Ojah* * in which the principle laid down in the former case for the valuation of suits to eject tenants is approved, are the only cases bearing directly on the point, that after a diligent search both by the learned Advocates in the case, and by myself, can be discovered in the Indian Law Reports. By a negative process of reasoning, however, I am inclined to think that such cases have been treated generally in India as coming under Article 17 (VI). Suits of this nature must be common enough everywhere, and perhaps the commonest form is where a landlord has to deal with an impecunious tenant, who is unable to pay rent, and yet refuses to quit, in the hope that extreme measures will not be taken. If the subject matter of a suit by the landlord to eject such a tenant, is taken to be the house, and the landlord in order to get rid of the tenant is obliged to go to the enormous expense of stamping the plaint with an *ad valorem* fee, knowing full well that owing to the impecuniosity of the tenant he can have no hope of recovering either his rent or his costs, such a state of affairs would be regarded by the public as an intolerable hardship. And seeing that two of the Indian High Courts have already pronounced the dictum that the subject matter of such a suit is not the house, it is hardly conceivable that if a practice requiring an *ad valorem* fee were in existence such practice would not have been contended on the strength of these rulings. If such a practice is in existence, one would certainly expect in a case of so much importance to the public, to find these rulings dissented from in the Indian Law Reports. But I am unable to find that they have ever been questioned, and therefore I think that there are strong grounds for inferring that they have generally been accepted in India, and that the practice there accords with them.

It thus appears that in Upper Burma since the annexation, in Lower Burma from 1884 to 1902, and probably always in India, suits by a landlord for ejectment of a tenant from a house have been regarded as coming under Article 17 (VI). I have dealt at some length with the historical question, because the Court Fees Act is a fiscal enactment, and the history of its construction is an important guide towards its interpretation. For authority on this point I refer to two rulings of the Calcutta High Court, *viz.*, *Kishori Lall Roy* v. *Shurut Chunder* † and an *Anonymous case.*‡ The first is under the Court Fees Act and the second under the Stamp Act. In the first it was found that a particular construction in favour of the suitor had prevailed for nine years and it was therefore assumed that the Govern-

*I.L.R. 15, All., p. 363. | † I.L.R. 8 Cal., p. 593. | ‡ I.L.R. 10 Cal., p. 280.

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ment must have been well aware of the construction, and if being aware of it they had desisted for all that time from any legislative action to change the practice, it was a strong reason for believing that they considered the practice to be in accordance with the intentions of the legislature and it was held that a Court of Justice ought to be very slow in changing that interpretation to the prejudice of the suitor. In the second it was held that when a particular construction has for some years been put upon a fiscal enactment in favour of the public, and that construction has been generally acted upon and acquiesced in by the Government, a strong presumption arises in favour of that construction, and no other construction, unfavourable to the public should afterwards be put upon the enactment, except for some very cogent reason indeed.

I have given the closest attention to the judgment of the Chief Court of Lower Burma, and I respectfully venture to think that the Honourable Judges have, in their endeavours to define "possession" lost sight of the real difficulty in the opening clause of section 7 (V), Court Fees Act, which is not "possession" but "subject matter." The judgment first dicusses the nature of a suit for ejectment and holds that a suit for ejectment is a suit for possession, and that it is governed by clause V of section 7, Court Fees Act. So far I am in accord with the judgment. But next it is assumed, and I am unable to agree in the assumption, that a suit for possession under clause V must fall within one or other of the sub-clauses (*a*) (*b*) (*c*) (*d*) or (*e*) of that clause. On the contrary I think that there may be suits for possession of immovable property in which the corporeal thing to which the suits relate, *i.e.*, the immovable property, is not the subject matter of the suit and that such suits would be governed for the purposes of Court Fees by the opening words of clause V, *viz.*, "In suits for the possession of land, houses and gardens, according to the value of the subject matter," independent of the sub-clauses (*a*) (*b*) (*c*) (*d*) and (*e*) that follow, and this is in effect the ruling in *Ram Raj Tewari* v. *Giranadan Bhagat*.*

On this view the only real and pertinent question is, what is the subject matter in a suit by a landlord for ejectment of a tenant from a house. If the subject matter is the house, then undoubtedly the plaint must be stamped with an *ad valorem* fee under clause V (*e*). But if the subject matter is something else, then the plaint must be stamped according to the value of that subject matter under the opening words of clause V, or if the value is indeterminable, it must be stamped in accordance with article 17 (VI) of the second schedule.

"Subject matter" is not defined in the Court Fees Act, or so far as I am aware in any other enactment. The true measure of the subject matter is, what is sought, not what the suit is about in a wide or

* I. L. R., 15, All., 63.

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vague sense *Lakshman* v. *Babaji.** The Punjab Chief Court has repeatedly held that the corporeal thing to which the suit relates is not necessarily the subject matter, and their remarks in *Harnam Singh* v. *Kirpa Ram* † are worth quoting at some length :—

"We are of opinion that speaking generally the subject matter of a suit comprises the particular matters advanced by the plaintiff for the determination of the Court for the purpose of obtaining relief, and also the relief prayed for expressly or by implication. We do not think that either the relief alone, apart from such particular matters or such matters alone, apart from the relief matter sought, can be held to be the subject matter for the purpose of valuation. Still less in our opinion can the subject matter be held to be the corporeal thing to which the suit relates in the case of suits relating to such things. The reasons for this view are briefly these. In every suit the plaintiff must disclose some ground for resorting to the Court for aid, and must also claim some relief as being legally due to him, if the particular ground advanced be established. In every suit therefore the plaintiff advances two matters for the determination of the suit, namely, whether such ground exists, and whether, if it does, the relief claimed is due. It seems to us impossible to hold that either of these matters alone is the subject matter of the suit, to the exclusion of the other, since each alike is matter necessary to be determined in the suit before a decree can be granted to the plaintiff. Further we think that in suits relating to corporeal things, the corporeal thing to which it relates is not necessarily the subject matter of the suit, for the purpose of determining the value, because it seems undeniable that there may be many different suits all relating to the same corporeal thing, which may obviously be of different values. If a person alleging that he has become owner of a house by purchase on payment of Rs. 10,000, sues the vendor for delivery of possession of the house, the subject matter of the suit would, according to our view, be possession of the house as owner. But if the plaintiff alleging that he has been granted a lease of a similar house by the owner for a term of one month at a specified rent, sued for possession of the house as such tenant, the subject matter of the suit would according to our view, be possession of the house as tenant for one month. In both suits the subject matter is in one sense the house, and in both the plaintiff seeks possession of the house. But we think it would obviously be wrong to conclude for either of these reasons that the suits were suits of the same value. This view loses sight of the circumstance that in one case the plaintiff seeks possession with an absolute interest, and in the other with a limited interest, a circumstance which seems to us not only material, but essential in relation to the valuation of the suit."

If the general principle thus laid down be correct, it remains to apply it to a suit by a landlord against his tenant for ejectment. We must look (1) to the particular matters advanced by the plaintiff for the determination of the Court for the purpose of obtaining relief, and (2) to the relief sought. These combined determine the subject matter. The particular matters advanced by the plaintiff are that he is already in possession as owner through his tenant who by the circumstances of his holding is not in a position to put in issue his landlord's title, and the relief sought is to free the house from the limited interests which, assuming that the particulars advanced in the plaint are true, still remains with the tenant. The subject matter and the valuation in such a suit are surely very different from what they would be in a suit for possession as owner.

* I. L. R., 8, Bom., p. 31. | †1887 Punj. Rec. No. 1.

Court Fees II—17 (VI).

I am fortified in this opinion by the statement of the Objects and Reasons for the Court Fees Act of 1870. I am not forgetting that it is inadmissible to construe Acts by the proceedings of the legislature but these proceedings are instructive if one has to consider not what the statute says but what the experts who framed it considered to be the meaning of a term that is not defined in it. In the statement of Objects and Reasons I find the following paragraph:—

"The want of some fixed valuation applicable to certain classes of suits as, for example, suits instituted between landlord and tenant, to recover a right of occupancy, or to enforce ejectment, or suits for maintenance or an annuity, the subject matter of which, though not absolutely indeterminable, is certainly not susceptible of ready determination, has given rise to much uncertainty and variety in the procedure adopted by the several Courts in such cases, and the amendment of the existing law in this respect is felt to be urgently called for."

These remarks show unmistakeably that the experts who framed the Act regarded a suit by a landlord against a tenant to enforce ejectment as a suit of which the subject matter was not the house from which it was sought to eject the tenant, but as a suit which from the indeterminability of the value of the subject matter, was one which they wished to provide for by a fixed valuation.

It appears to me therefore that there is ample authority for three propositions, *viz.*:—

(1) That in a suit by a landlord to eject a tenant from a house the house is not the subject matter of the suit.

(2) That such a suit is governed as regards Court Fees by the first clause of section 7 (V), independent of the subsidiary clauses that follow.

(3) That the value of the subject matter is indeterminable.

As regards the first, there is the authority of the High Courts of Calcutta and Allahabad, and the Chief Court of the Punjab, in the rulings quoted, and there is the expert opinion of the framers of the Court Fees Act. As regards the second there is the authority of the High Court of Allahabad, subsequently approved, and never so far as I can find dissented from. And as regards the third there is the authority of the High Court of Calcutta, the expert opinion of the framers of the Act, and the patent fact that there is no means of valuing such a suit when it relates to a house. And finally this construction appears to me to be reasonable on the language of the Court Fees Act, and in view of the fact that the Act is a fiscal enactment and that it has been construed in this manner in favour of the suitor for many years in this province such construction is, in my opinion, one that should not be lightly departed from to the prejudice of the suitor.

On these grounds I must dissent from the Ruling of the Chief Court of Lower Burma, and hold that the practice in force hitherto should not be changed, and that a suit by a landlord for ejectment of his tenant from a house is as regards Court Fees governed by Article 17 (VI) of the second schedule of the Court Fees Act. The application is therefore dismissed with costs.

Evidence—92.

Before H. Adamson, Esq.

MAUNG LU GYI AND MA KYÈ HMÔN *v* MAUNG HLA PYU AND MA SHWE BWIN.

Mr. *H. N. Hirjee*—for appellants. | Mr. *S. Mukerjee*—for respondents.

Civil Second Appeal No. 85 of 1902. July 16th.

Held,—that when a party sets up a contemporaneous oral agreement, as showing that an apparent deed of sale was really a mortgage, unless it appears from the conduct of the parties and from collateral circumstances that the transaction was intended to be and was treated by them as a mortgage, mere verbal evidence of the contemporaneous oral agreement is insufficient.

Held also,—that, under the same circumstances, such evidence is not admissible as against an innocent purchaser without notice of the existence of the mortgage, who merely bought from a person who was in possession of the title-deeds and was the ostensible owner of the property.

References:—
5, W. R., 68.
I. L. R., 4, Bom., 594.
I. L. R., 16, Mad., 80.
I. L. R., 9, Cal., 898.

APPELLANTS mortgaged a piece of land to first respondent, and a few months later converted the mortgage into a sale, by a written document which was registered. The land was in first respondent's possession, and after the lapse of two years he sold it to the second respondent. Appellants sued the first and second respondents for redemption and possession of the land, alleging as their ground of action that at the time of the sale to first respondent there was an oral agreement that the land should be redeemable at option.

The Subdivisional Judge, after hearing all the evidence tendered, held that the oral agreement was not proved, and expressed a doubt as to whether parol evidence was admissible under section 92, Evidence Act, to vary the terms of the deed of sale. On appeal the District Judge held that evidence was not admissible to prove the alleged contemporaneous oral agreement.

There can be no doubt that, under certain circumstances, parol evidence may be given to prove that a deed, which is apparently a sale, is in reality a mortgage, but this can be done only under limitations. In the leading case *Casheenath Chatterjee* v. *Chandy Churn Banerjee** it was held that though the parties cannot show by mere verbal evidence that what they expressed at the time of the agreement by their words to be an actual sale was intended by them to be a mortgage only, yet parol evidence is admissible to show from the collateral circumstances of the case what the real intention of the parties was. The Court will look to the surrounding circumstances and the acts and conduct of the parties in order to ascertain whether a document which

* 5, W. R., 68.

Evidence—92.

MAUNG LU GYI v. MAUNG HLA PYU.

appears on the face of it to be an absolute sale was intended to be, and in fact was, treated by the parties as a conditional sale only. In *Baksu Lakshman* v. *Govinda Kanji** Mr. Justice Melvill, after pointing out that oral evidence may be received, indicates the manner in which it should be received in the following words:—

"The rule which, on a consideration of the whole matter, appears to be most consonant both to the statute law and to equity and justice is this, namely, that a party, whether plaintiff or defendant, who sets up a contemporaneous oral agreement, as showing that an apparent sale was really a mortgage, shall not be permitted to start his case by offering direct parol evidence of such oral agreement. But if it appear clearly and unmistakeably, from the conduct of the parties, that the transaction has been treated by them as a mortgage, the Court will give effect to it as a mortgage and not as a sale, and thereupon, if it be necessary to ascertain what were the terms of the mortgage, the Court will, for that purpose, allow parol evidence to be given of the original oral agreement."

Perhaps, as held by Muttusami Ayyar, J., in *Rakken* v. *Alagappudayan*† the rule here is stated too broadly, and the absence of corroborative evidence in the shape of subsequent possession and conduct and other circumstances is an objection that ought to go to the credit due to the parol evidence, rather than to its admissibility at any stage of the case. There is another modification of the rule that, under certain circumstances, parol evidence is admissible to prove that a deed, which is apparently a sale, is in reality a mortgage. It is laid down in *Kashinath Das* v. *Hurrihur Mukerjee*‡ and *Rakken* v. *Alagappudayan*†. The rule turns on the fraud which is involved in the conduct of the person who is really a mortgagee, and who sets himself up as an absolute purchaser. The rule of admitting evidence for the purpose of defeating this fraud would not apply to an innocent purchaser without notice of the existence of the mortgage, who merely bought from a person who was in possession of the title-deeds and was the ostensible owner of the property.

Now, in the present case, there are no collateral circumstances which indicate that the transaction was a mortgage and not a sale. In fact the indications are all in the opposite direction. There was no need to convert the prior mortgage into a sale, and to bring it back to its old status of a mortgage by a contemporaneous oral agreement. The clumsy arrangement, if actually made, simply left matters as they formerle stood. The deed of sale recites that the appellants do not wish to redeem the land, which is inconsistent with the alleged oral agreement. As regards the conduct of the parties, the first respondent proceeded to dig a well at a considerable cost and to make improvements which it is not likely that he would have done had he been only a mortgagee, and the appellants sat by, and allowed him, without a word, to expend money on the property, and finally the first respondent sold the property to the second respondent, who, there is no reason to doubt, bought it in good faith, and it was not till after this sale that the appellants asserted thair rights to the property. The appellants have not alleged a single circumstance that would indicate that the agreement was

* I. L. R., 4, Bom., 594. | † I. L. R., 16, Mad., 80. | ‡ I. L. R., 9, Cal., 898.

Evidence—92.

other than it purported to be, but they have called two witnesses, who state that they were present when the deed of sale was executed, and that they heard first respondent agree that the land might be redeemed when desired. This evidence for the reasons stated above is not sufficient as against the first respondent for the purpose of proving that the transaction was a mortgage, and it is not admissible against the second respondent, who is an innocent purchaser from the person who held the title-deeds and was the ostensible owner of the property.

The appeal is dismissed with costs.

Evidence—92 (4).

Before H. Adamson, Esq.

Civil Second Appeal No. 92 of 1902 November 12th.

ABDUL RAHMAN } *v.* { ASGAR ALI. THANDA MIAH. MOBARAK ALI. MOSHAN ALI.

Mr. *H. N. Hirjee*—for appellant. | Mr. *A. C. Mukerjee*—for respondents.

Held,—that when a partnership has been constituted by a registered deed, proviso 4 to section 92 of the Evidence Act does not bar it from being dissolved by an oral agreement.

Reference :—

I. L. R., 14, Bom., 472.

THE sole question argued in this appeal is whether a partnership which has been constituted by a registered deed can be dissolved by an oral agreement. For the respondents it has been urged, and both of the lower Courts have decided, that proviso 4 to section 92 of the Evidence Act bars the admission of evidence of an oral agreement to dissolve the partnership.

The proviso as it applies to the case is as follows :—

> The existence of any distinct subsequent oral agreement to rescind * * * such contract, may be proved except in cases in which such contract * * * has been registered according to the law in force for the time being as to the registration of documents.

I may first dispose of the argument that the oral agreement was admissible because the registration of a partnership deed is not compulsory. Registration of such a deed is optional under the Upper Burma Registration Regulation, and so far as section 92 of the Evidence Act is concerned, it is immaterial whether registration was compulsory or not. The deed was registered according to the law in force.

But was the alleged oral agreement an agreement to rescind the partnership deed? To rescind means to annul or destroy. But appellant does not assert that the partnership deed was annulled and made void. On the contrary he admits that it was in operation as it stands for nearly two months, and that then on account of losses and disagreement among the partners, a fresh agreement was entered into orally between the partners dissolving the partnership. This was a new transaction entirely distinct from the original agreement, which it was perfectly competent to the parties to enter into. It was not an agreement to rescind the original transaction, and proviso 4 to section 92 of the Evidence Act is not a bar to an inquiry into the merits of this defence.

Evidence—92 (4).

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The case is very similar to *Herambder* v. *Kashinath** where it was held that when a grant had been made by a registered deed, and it was alleged that a re-grant had been made by an oral agreement, the alleged re-grant was a transaction entirely distinct from the original grant, and therefore not one falling under proviso 4 to section 92 of the Evidence Act.

The appellant must therefore be allowed to prove the defence set up by him. The decrees of the lower Courts are reversed, and the case is remanded for re-hearing. Costs to abide the result.

* I. L. R., 14, Bom., 472.

Execution of decree.

Civil Appeal No. 274 of 1901. January 16th.

Before H. Adamson, Esq.

MA THAING *v.* MAUNG THA GYWE.

Mr. *H. N. Hirjee*—for appellant. | Mr. *R. C. J. Swinhoe*—for respondent.

Held,—that when a decree is passed against a wife alone, the husband and wife being Buddhists, attachment by actual seizure of joint property to the extent of the wife's interest is lawful.

Held also,—that when a decree-holder exercises his right to attach the property of the judgment-debtor, malice cannot be inferred from surrounding circumstances unless it is shown that the attachment was made in an unreasonable and improper manner.

References:—

Chan Toon's Leading Cases, pages 2, 20, 53, 105.
2, U. B. R., 1892—1896, page 209.

APPELLANT is the mother-in-law of respondent. Appellant obtained on 5th February 1901 in the Subdivisional Court of Kyauksè a decree against her daughter, the wife of the respondent, for Rs. 900, which with costs, and costs in appeal, amounted to Rs. 1,071-8-0. The decree was transferred to Mandalay for execution, and on 6th May 1901 appellant applied for execution by attachment of property consisting of furniture, ponies and carriage, and in accordance with the order of the Court the bailiff attached the property. Respondent applied for removal of attachment on the whole property or in the alternative on the half, it being admitted that the property was the joint property of respondent and his wife the judgment-debtor. The Additional District Judge (Mr. Arnold) removed the attachment to the extent of one-half of the interest in the property.

Respondent then instituted a suit in the District Court, Mandalay, against appellant and her son Maung Po Hla, and claimed damages Rs. 1,000 for the injury caused to him by the wrongful attachment of his property. The grounds alleged were that the attachment by actual seizure was illegal; and that it should have been made by prohibitory order under the provisions of section 268, Civil Procedure Code, that the defendants though professing to exercise a right were not acting *bonâ fide* in the exercise of that right, but that they acted maliciously and without reasonable cause with the object of causing damage, and that by reason of the attachment the plaintiff suffered pain of mind, and was injured in his credit, and incurred expense in obtaining the release of his property from attachment. The suit was eventually tried by the Additional District Judge, Mr. McKerron, who dismissed the suit against Maung Po Hla and found for the respondent on all these points and gave decree for Rs. 1,000 damages against appellant.

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MA THAING v. MAUNG THA GYWE.

The present appeal is against that decree. The grounds urged in appeal are—

(i) that the Additional District Judge erred in holding that attachment by actual seizure was illegal;

(ii) that malice was not proved, and that in fact the evidence disproves any malicious intention, and that no malice could be presumed or inferred where the appellant acted in the exercise of her right to attach the property of her judgment-debtor.

It is admitted, however, on behalf of appellant that there was a tort, inasmuch as the respondent's interest in the property was wrongfully attached, and it is admitted that respondent is entitled to damages on this account, but it is alleged that the amount awarded is excessive and extortionate and out of all proportion to the injury done.

As regards the first ground of appeal the contention for respondent is that the joint property of a Buddhist husband and wife is in the possession of the husband, and not of the wife, and that under section 268, Civil Procedure Code, the attachment should have been by an order in writing prohibiting the husband from giving it over to the wife. The learned advocate for the respondent, who has practised for many years in the Courts of Upper Burma, has had to admit that he has never heard of a decree being executed against a wife in this manner, and I must observe that such a mode of execution would not appear to be likely to produce any effective result. To establish the contention that the husband is in sole possession of the joint property, the following rulings are adduced :—

Maung Ko and another v. *Ma Me and others.**
Maung Kan Za v. *Mi Le.*†
Ma Thu v. *Tha Bu.*‡
Maung On Sin v. *Ma O Net.*§

In the first case it is held that the Buddhist Law recognizes the husband as lord of his household; that the wife cannot retain possession of joint property in opposition to her husband, and that so long as marriage subsists the Courts cannot decree an absolute dominion over it to either husband or wife, but the husband rather than the wife is entitled to retain possession of it in trust for both. In the second it is held that so long as the marriage subsists the wife cannot claim exclusive possession of the joint property. In the third it is held that a husband cannot sell or alienate joint property without the consent or against the will of the wife. In the fourth it is held that property jointly owned by a Burmese husband and wife should ordinarily be deemed to be in the possession of the former and that under ordinary circumstances the presumption would be that a sale of cattle by a Burman is made with the assent of his wife and is valid if made to a *bonâ fide* purchaser and cannot subsequently be challenged by the wife.

* Chan Toon's Leading Cases, page 2.
† Chan Toon's Leading Cases, page 20.
‡ Chan Toon's Leading Cases, page 53.
§ Chan Toon's Leading Cases, page 105.

Execution of decree.

These rulings certainly do not bear the interpretation that the husband is in possession to the exclusion of the wife. Their manifest meaning is that the husband and wife are not only joint owners, but joint possessors, and that for ordinary purposes the husband is generally to be deemed the managing partner. The position of Burman husband and wife has been thus stated by the late Mr. Burgess in his judgment in *U Guna* v. *U Kyaw Gaung*.* "The property which is acquired together by a husband and wife during coverture belongs, according to Buddhist Law, to each equally, and there is joint possession, but it seems to be held on the principle of a tenancy in common, and not on that of a joint tenancy. It is not only enjoyed equally, but each is entitled a half of the principal, and can take that half in the event of a divorce."

I must therefore hold that the attachment by actual seizure was not illegal so far as concerned the interest of the judgment-debtor in the joint property.

I turn now to the second ground of appeal, which concerns the question of malice. And here I may at once say that the conversation between Maung Po Hla and Mr. Dias, and between Maung Po Hla and Maung Palaung, and the attempt to seize the earrings at Kyaukse are quite irrelevant, and even if relevant they would only show that the litigants in this case are not on friendly terms, a thing which may be safely predicated as between litigants in ninety-nine cases out of a hundred. The point for determination is simply whether appellant, who had an undoubted right to execute her decree against her judgment-debtor, did so in a proper and reasonable manner, or whether in professing to exercise her right, she acted maliciously and without reasonable cause with the object of causing damage to the respondent. It must be observed in the first place that the decree was a money decree for a sum of less than Rs. 1,000. It was passed on 5th February 1901. Immediate execution of such a decree may be given on oral application at the time of passing the decree under section 256, Civil Procedure Code. Of course, that could not have been done in the present case as the property to be attached was not within the limits of the jurisdiction of the Court. But though the Code sanctions immediate execution in the case of such a decree, appellant took out execution only on the 6th May 1901, that is after a lapse of three months. It is therefore clear that she allowed ample time for the judgment-debtor to satisfy the decree before taking action. The action that she took was to attach office and house furniture, ponies and gharries. It has been urged that the very fact of her having selected these items of property for attachment shows malice, as she must have known that they were peculiarly in use by respondent and not by his wife, the judgment-debtor. But it is as reasonable to suppose that these articles were selected because they were the best suited for ready realization of price. And in any case the respondent has not

* 2, Upper Burma Rulings, 1892—96, page 209.

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attempted to prove that there were other articles which it would have been more reasonable and proper under the circumstances to attach. The bailiff has proved that the attachment was conducted quietly without any public demonstration, and that the respondent was put to as little inconvenience as possible, the property not even being removed, but left as it was in his possession. I am unable to see the slightest evidence of malicious intention in appellant's action. She held a decree and she had a right to execute it. She allowed ample time to the judgment-debtor to satisfy it, and finally as the amount was not paid, she attached sufficient property to satisfy the decree, and had the attachment conducted in a quiet and undemonstrative way, and left the property in the respondent's possession so as to interfere as little as possible with his comfort. With the exception of the fact that she attached the whole interest in the property instead of the half interest which appertained to the judgment debtor, there is nothing in the conduct of the attachment that would have rendered appellant liable to damages, or that can be considered in any way unreasonable or improper.

There now remains to consider what damages should be awarded for the tort that has been admitted, namely, the attachment of respondent's interest in the property. It is not alleged that the value of the property attached exceeded the interest of the judgment-debtor in the whole of the joint property. So that no real pecuniary loss could have been caused to respondent even if the attachment had stood. He had the trouble and expense of removing the attachment. Appellant's advocate admits that Rs. 50 would be reasonable compensation and that sum I consider ample. I will accordingly give decree for that amount, though with some reluctance, as I consider that the claim for Rs. 1,000 damages in this case was most unreasonable and preposterous. I set aside the decree of the District Court and give decree to respondent for Rs. 50 and costs on that sum in both Courts. Respondent must pay appellant's cost in both Courts on the amount disallowed, Rs. 950.

Execution of decree.

Civil Revision No. 66 of 1902. September 15th.

Before H. Adamson, Esq.

MAUNG MYAING *v.* ANAMALI CHETTY.

Mr. *C. G. S. Pillay*—for appellant. | Mr. *B. K. Haldar*—for respondent.

Held,—that a Court to which a decree has been sent for execution has not jurisdiction to execute such decree when it is in excess of the limits of its pecuniary jurisdiction as an original Court.

References:—

I. L. R., 7, Mad., 397.
I. L. R., 17, Mad., 309.
I. L. R., 12, Bom., 155.
I. L. R., 16, Cal., 457 and 465.
Punjab Record, Vol. XXXVI, page 35.

THERE have been conflicting rulings in the Indian High Courts as to whether a Court to which a decree has been sent for execution has jurisdiction to execute such decree when it is in excess of its pecuniary jurisdiction as an original Court. In Madras it has been held that it has jurisdiction: *Narasayya* v. *Venkata Krishnayya*,* *Shanmuga Pillai* v. *Ramanathan Chetti*.† In Bombay and Calcutta the opposite view has been taken: *Shri Sidheshwar Pandit* v. *Shri Harihar Pandit*,‡ *Gokul Kristo Chunder* v. *Aukhil Chunder Chatterjee*, § *Durga Charan Majumdar* v. *Umatara Gupta*. ‖ The various decisions have been reviewed in *Khan Bahadur Nawabzada Shamshere Ali* v. *Mussammat Ahmad Allahdi Begam*¶ by the Chief Court of the Punjab, and it was held that the Court had not jurisdiction. This is now the accepted view as appears in the notes on the new Civil Procedure Code now under the consideration of Government.

The District Judge therefore erred in transferring the decree for execution either to the Township Court, Pyinmana, or to the Subdivisional Court, Pyinmana. The District Judge will now have to recall the execution proceedings to his own Court. But there is no reason why the District Judge, if he desires, should not direct that the proceedings in execution be held by the additional Judge of his own Court, who is the Subdivisional officer of Pyinmana.

The question arises as to what should be done with regard to the orders of attachment which have already been passed by the Township Judge. As he had no jurisdiction they are *ultra vires* and illegal. This may be an important question in future proceedings. For instance, if an application for removal of any of these orders of attachment is refused and a regular suit is brought under section 283, Civil Procedure Code, it may be pleaded in that suit that the attachment was illegal *ab initio*.

* I. L. R., 7, Mad., 397. | § I. L. R., 16, Cal., 457.
† I. L. R., 17, Mad., 309. | ‖ 1 I. L. R., 6, Cal., 465.
‡ I. L. R., 12, Bom., 155. | ¶ Punjab Record, Vol. XXXVI, page 35.

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MAUNG MYAING v. ANAMALI CHETTY.

To save complications of this nature I must rule that the execution proceedings and orders in the Township and Subdivisional Courts are all null and void as being *ultra vires*, and that execution proceedings must be commenced afresh in the District Court.

As the respondent is not responsible for the transfer of the proceedings by the District Judge, each party will bear his own costs in this Court.

Evidence—110.

Civil Appeal No. 127 1903. July 27th.

Before H. Adamson, Esq., C.S.I.

MAUNG TUN,
MAUNG AUNG BAW,
MAUNG AUNG GYI } *v.* MAUNG PA U.

Mr. *H. N. Hirjee*,—for appellants.

Mr. *C. G. S. Pillay*,—for respondent.

Held,—that where the defendant is in possession of land, and there has been no wrongful dispossession of the plaintiff, and the plaintiff asserts that he gave the defendant permissive occupation, and the defendant asserts that he obtained the land by gift outright, the burden of proof lies on the plaintiff to show that he gave permissive occupation, and that he has a subsisting title.

References:—

2, Upper Burma Rulings, 1892—96, page 371.
2, Upper Burma Rulings, 1897—01, page 421.

Respondent has been in possession of the land in suit since 1255, So far the evidence on both sides agrees. Appellant does not assert that respondent obtained possession through him. On the contrary he says that respondent entered upon the land, which was lying unoccupied, of his own accord. There is no allegation of wrongful dispossession of the appellant.

Respondent was in possession when in 1258 he went to Arakan and saw appellant. There some transaction happened with regard to the land, but what it was it is impossible to say, because it was embodied in an agreement in writing, which was not registered, and which therefore cannot be proved.

Respondent, however, made an admission in his written statement that appellant had given him the land outright. It is argued that this admission shifts the burden of proof, that it is in fact an admission that appellant was in 1258 the owner of the land, and that it is incumbent on respondent to prove that he got the land outright.

This contention is not in accordance with the accepted rulings of this Court. In *Maung Myo* v. *Maung Hme*,* where the plaintiff alleged a temporary gift and the defendant an outright gift, it was held on the authority of section 110 of the Evidence Act, that the defendant being in possession was entitled to retain the land and that as there was no trustworthy evidence adduced by the plaintiff that the defendant was not the owner of the land in question, the defendant was not called upon to make out a title of his own. The rulings on the subject were fully discussed in *Maung Min Din* v. *Maung On Gaing*† and it was held that where there was no wrongful dispossession, mere

* 2, Upper Burma Rulings, 1892—96, page 371.
† 2, Upper Burma Rulings, 1897—1901, page 421.

Evidence—110.

MAUNG TUN
v.
MAUNG PA U.

proof of ownership at some previous time would not throw the burden of proof on the defendant, but that the plaintiff was bound to prove a subsisting title.

There can be no doubt therefore that the burden of proof lies on the appellant, and this practically settles the matter, for it is abundantly clear that he has brought no sufficient proof either that the land was given temporarily to respondent, or that the two payments of Rs. 4 and Rs. 10 by the respondent were payments as rent.

The appeal is dismissed with costs.

Mortgage.

Before H. Adamson, Esq.

Civil Second Appeal No. 85 of 1902. July 16th.

MAUNG LU GYI AND MA KYÈ HMÔN *v.* MAUNG HLA PYU AND MA SHWE BWIN.

Mr. *H. N. Hirjee*—for appellants. | Mr. *S. Mukerjee*—for respondents.

Mere verbal evidence of contemporaneous oral agreement, showing that an apparent deed of sale was really a mortgage, insufficient—Such evidence not admissible against an innocent purchaser without notice of the existence of the mortgage.

[*See* Evidence, page 1.]

Jurisdiction.

Before H. Adamson, Esq.

MAUNG NYUN *v.* (1) MAUNG PAW, (2) MAUNG KYWE.

Civil Second Appeal No. 282 of 1901. January 24th.

Mr. *C. G. S. Pillay*—for appellant. | Mr. *J. C. Chatterjee*—for respondents.

Suit for rent of State land not cognizable by the Civil Courts.

See Civil Procedure, page 1.

Mahommedan Law.

Before H. Adamson, Esq.

Civil Second Appeal No. 214 of 1901. December 18th.

MA KO *v.* MAUNG MAUNG AND MA NYUN.

Mr. *J. C. Chatterjee*—for appellant. | Maung *Kan Baw* and Mr. *S. Mukerjee*—for respondents.

Property acquired during marriage under Mahommedan Law not regarded as partnership property—Essentials of partnership as defined in the Contract Act.

Maung Ba and Ma Chit were Zairbuddi Mahommedans, man and wife. Maung Ba died and soon afterwards Ma Chit died. The respondents-plaintiffs are the maternal uncle and aunt of Maung Ba and the appellant-defendant is Ma Chit's mother. The suit concerns the estate of Maung Ba. The Additional District Judge found that, after deducting the funeral expenses, the estate consisted of Rs. 100 in cash, and jewellery of which the value was not sworn to, and he gave a decree to the respondents for three-fourths, namely, Rs. 75 cash and three-fourths of the jewellery.

The grounds of appeal were—

(1) That Ma Chit was entitled in her own right to one-half of the property possessed by her husband and herself, and that only the remaining half of that property should have been divided in accordance with the rules of inheritance of Mahommedan Law.

(2) That the jewellery was the separate property of Ma Chit belonging to her exclusively and should not have been included in the estate of Maung Ba.

The Additional District Judge found that the property was jointly acquired by Maung Ba and Ma Chit during their marriage, and it was argued that Maung Ba and Ma Chit were in partnership and constituted a firm under section 239 of the Contract Act.

Held,—after referring to all the leading text-books on Mahommedan Law, that property acquired during marriage cannot be regarded as partnership property.

Held also,—that there was no partnership as defined in the Contract Act between Maung Ba and Ma Chit.

References:—

Ameer Ali's Mahommedan Law, Volume II, page 17.
Baillie's Digest of Mahommedan Law.
Macnaghten's Principles and Precedents.
Wilson's Digest of Mahommedan Law.

MAUNG BA and Ma Chit were Zairbuddi Mahommedans, man and wife. Maung Ba died and soon afterwards Ma Chit died. The respondents-plaintiffs are the maternal uncle and aunt of Maung Ba, and the appellant-defendant is Ma Chit's mother. The suit concerns the estate of Maung Ba.

The Additional District Judge found that, after deducting the funeral expenses, the estate left by Maung Ba and Ma Chit consisted of Rs. 100 in cash, and jewellery of which the value was not sworn to, and he gave a decree to the respondents for three-fourths, namely, Rs. 75 cash and three-fourths of the jewellery.

Mahommedan Law

MA KO
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There are two grounds of appeal—

(1) That Ma Chit was entitled on her own right to one-half of the property possessed by her husband and herself, and that only the remaining half of that property should have been divided in accordance with the rules of inheritance of Mahommedan Law.

(2) That the jewellery was the separate paraphernalia of Ma Chit, belonging to her exclusively and should not have been included in the estate of Maung Ba.

The claim in the first ground of appeal has only an incidental bearing on Mahommedan law. It is a claim of partnership under the Contract Act. It is argued that a Mahommedan wife after her marriage does not lose her individuality, that her property remains hers in her individual right, and that as regards her property she can continue to exercise, after she has passed from her father's house into her husband's home, all the rights which the law gives to men. This is a general principle of Mahommedan Law as stated in Ameer Ali's Mahommedan Law, Volume II, page 17. The Assistant District Judge has found that the property was jointly acquired by Maung Ba and Ma Chit during their marriage in the course of their business. Assuming this fact, and considering the status of a Mahommedan wife, as related above, it is argued that Maung Ba and Ma Chit were in partnership and constituted a firm as defined in section 239, Contract Act, that the property acquired was partnership property, that on the dissolution of the partnership by death, the representatives of each partner are entitled to one-half of the joint property, and that consequently the estate of Maung Ba liable to division under Mahommedan Law is one-half and not the whole of the total estate left. If this contention be true, it might be expected that precedents would be found. Appellant's advocate has not been able to indicate a single case in which the property of deceased Mahommedans has been treated in this way, and after a careful examination of Ameer Ali's Mahommedan Law, Wilson's Digest, Baillie's Digest, and Macnaghten's Principles and Precedents, which are the leading text-books on Mahommedan Law, I have not succeeded in finding a single case in which property acquired during marriage is regarded as partnership property.

Turning now to partnership under the Contract Act, there are two essentials of partnership as defined in the Act—

(1) an agreement between persons to combine their property labour or skill, and

(2) an agreement to share the profits.

In this case there is no evidence of any contract or agreement made between Maung Ba and Ma Chit. There is nothing but the simple fact of marriage, and marriage is not a partnership as defined under the Act. I must therefore find that there was no partnership as defined in the Contract Act between Maung Ba and Ma Chit. The fact

Mahommedan Law.

appears to be that this claim is based on the analogy of Burman husbands and wives who have joint ownership in property acquired during marriage, and to whom Zairbuddis in Burma are said to conform in their habits and customs. But the rights of a Burman wife are not due to any principle of partnership under the Contract Act, but to the special tenets of Buddhist Law, which does not apply to Zairbuddi Mahommedans. The first ground of appeal must therefore fail.

The second ground of appeal, regarding the jewellery being the paraphernalia of the wife, is not supported by evidence. I agree with the Additional District Judge that the meagre evidence tending to show that it was the separate property and the paraphernalia of Ma Chit is unreliable and altogether insufficient. Though its value has not been proved, it appears from the list to amount to a considerable proportion of the total value of the estate. The appeal must also fail on this point.

The appeal is dismissed with costs.

Negotiable Instruments—87.

Before H. Adamson, Esq.

Civil Appeal No. 135 of 1902. September 29th.

MA KIN—appellant. | C. T. L. ADAGAPPA CHETTY—respondent.

Mr. *C. G. S. Pillay*—for appellant. | Mr. *H. N. Hirjee*—for respondent.

Held,—that if a promissory note payable to order runs "I, John Brown, promise to pay" and it is signed by Brown and subsequently before negotiation signed by Smith, Smith is not a co-maker, and the addition of Smith's name is not a material alteration which renders the note void under section 87, Negotiable Instruments Act.

Held also,—that there is no provision in the Negotiable Instruments Act similar to section 56 of the English Bills of Exchange Act, which renders a stranger (*i.e.*, neither a maker nor a holder) who signs a promissory note, liable as an indorser to a holder in due course.

References:—

2, U. B. R. 1892—96, page 593.

Chalmer's Bills of Exchange Act, section 56, and page 267, page 188.

THE respondent obtained a decree for Rs. 1,700 against Ma Kin and Maung Po Hla. They have appealed separately, the appeal of the latter being *in forma pauperis*. The appeals have by consent been heard together.

The suit is based on a promissory note which is as follows:—

On demand, we, Maung Thein and Ma Kin, promise to pay to A. L. V. R. R. M. Soobramanien Chetty, or order, Rs. 1,500 with interest at Rs. 1-4-0 per cent. per month, for value received.

(Sd.) Maung Thein.
(Sd.) Ma Kin.
(Sd.) Maung Po Hla.

Maung Thein and Ma Kin were husband and wife. Maung Po Hla's signature was added after Maung Thein's death. After Maung Po Hla's signature was added the note, as it stands above, was endorsed by Soobramanien Chetty to the respondent.

Appellant Ma Kin contends that she is not liable because—

(1) she signed the note a month after her husband and received no consideration;

(2) the note was materially altered by the addition of Maung Po Hla as a maker, without her consent, and is therefore void under the provisions of section 87, Negotiable Instruments Act.

With regard to the first contention I need only say that I agree with the Additional District Judge that it is altogether groundless. With regard to the second, the addition of a new maker is doubtless a material alteration, but the question arises whether Maung Po Hla's signature adds a new maker to the note. In a similar case *Ko Pe Twe* v. *A. L. V. R. R. M. Venketachellum Chetty* * it was held that if a note runs "I, A, promise to pay" and it is signed by B as well as by A, B is not a co-maker. This conclusion has also the authority of Chalmers at page 267 of his treatise on Bills of Exchange. No authority has

* 2, U. B. R., 1892—96, page 593.

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been quoted to the contrary. I must therefore hold that Maung Po Hla is not a co-maker, that there has been no material alteration of the note, and that there is no ground for exempting the appellant Ma Kin from liability under the note.

The question as to appellant Maung Po Hla's liabilities is more difficult. The Additional District Judge says that he follows the analogy of Ko Po Twe's case, quoted above, and holds that Maung Po Hla signed the note as an acknowledgment of indebtedness. But he has quite misunderstood that case, which does not bear out any such proposition.

Respondent's contention is that Maung Po Hla was in partnership with Maung Thein, that he guaranteed the payment of the amount borrowed on the note, and that though Maung Po Hla is not a co-maker of the note, yet the fact of his signature being on it is evidence of the guarantee.

But putting aside the note, I cannot find on the record a single scrap of evidence to prove that Maung Po Hla guaranteed payment. Nor can I hold that there was a partnership between Maung Thein and Maung Po Hla. In fact I think that Ma Kin's conduct, and her letter, Exhibit 4, negative this idea. All that the evidence shows as regards Maung Po Hla is that he meddled with the estate of Maung Thein after his death. In doing so he may have incurred liability to Ma Kin. But this is not a suit between Ma Kin and Maung Po Hla. So far as the present suit is concerned there is no evidence whatever of Maung Po Hla's liability except the fact that he signed the note, and this is in effect also the finding of the Additional District Judge.

Is then Maung Po Hla liable simply on his signature?

There can be little doubt, I think, that he would be liable under English Law. Section 56 of the Bills of Exchange Act provides that where a person signs a bill otherwise than as drawer or acceptor, he thereby incurs the liability of an endorser to a holder in due course. In Chalmer's Bills of Exchange, page 188, the second illustration under this section is as follows: "A note is made payable to C or order. After issue D adds his signature thereto, to accommodate and guarantee the maker. D is not liable as a new maker, but he is liable as an endorser, even if he write his name on the face of the note" and at page 267 the learned author states his opinion that if a note runs "I John Brown, promise to pay" and it is signed by Smith as well as Brown, Smith though not a co-maker would be liable as an indorser under section 56 of the Act.

But the Indian Act, the Negotiable Instruments Act, differs from the English Act, and contains no provision for the liability of a stranger to the bill or note. Section 15 confines the term "indorser" to the maker or holder of a negotiable instrument, and the note to that section in Chalmers' Negotiable Instruments Act is as follows: "This section represents the English Law as far as it goes, but it is narrower than the English rules according to which, if a person who is not a party

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to a bill or note at all backs it with his signature, he thereby incurs the liability of an indorser." There is no provision for the liability of such quasi-indorser in the Indian Act. I have not succeeded in finding any Indian rulings on the point, which, however, from the language of the Act appears to be perfectly clear. As the Indian Law is applicable I must hold that in the absence of other evidence to prove that Maung Po Hla is liable, his mere signature on the note does not render him liable.

The appeal of Ma Kin is dismissed with costs. The decree against Maung Po Hla is set aside and respondent must pay his costs and must also pay to Government Rs. 110, the court-fees which would have been paid on the memorandum of appeal if the appellant had not been permitted to appeal as a pauper.

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Civil Second Appeal No. 159 of 1902. October 3rd.

Before H. Adamson, Esq.

MAUNG PE *v.* CHELLAPPA CHETTY.

Mr. *H. N. Hirjee*—for appellant. | Mr. *H. M. Lütter*—for respondent.

Construction of a Hundi.

Held,—that there is no privity between the holder of a cheque as such and the banker on whom it is drawn. A having £100 at his banker's draws a cheque on them for that sum in favour of C. The cheque is dishonoured. C has no remedy against the bankers.

Reference:—Chalmer's Bills of Exchange, page 179, section 53.

THE respondent is a chetty residing at Pyinmana. Maung Pe Maung presented to him for payment, an instrument which is written in Tamil and which is called by the parties a hundi. Maung Pe Maung did not want payment in full, and by an arrangement between him and respondent two sums of Rs. 20 and Rs. 30 were paid to him. The payments were indorsed on the document and the document was returned to Maung Pe Maung. Thereafter Maung Pe Maung went to respondent and said that the hundi had been lost and asked him to stop payment.

Soon after, the hundi was presented to respondent for payment by appellant. Appellant alleged that he got the hundi from Maung Pe Maung for consideration, but respondent refused payment. Hence this suit, which is brought by appellant against the respondent for Rs. 450, the amount still due on the document.

The document, which is in Tamil, has been admitted on the record without a translation, which was very wrong. A translation has now been produced, which is accepted by the advocates of both parties.

It is as follows:—

Mandalay Rs. 500

No. 5.
V. A. R.

On demand.

18th October 1901, at Mandalay.

Credit from O. A. firm, debit to V. A. R. firm, Rs. 500.

The said rupees five hundred to be paid on demand to the bearer of this, by Chellappa Chetty of our firm at Pyinmana, and to be debited.

Pilava year.
Arpigay month
2nd day.

(Signed) V. A. R. Subramanyan Chetty,
Agent.

The indorsements are— on a one anna stamp.

Seal of V. A. R. firm, Mandalay. Signed O. A.

Paid Rs. 20 on 19th October.
Paid Rs. 30 on 20th October.

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The Township Judge dismissed the suit for reasons that are not very clear. The Additional District Judge dismissed the appeal on the ground that a suit does not lie against respondent, and that it should have been brought against Subramanyan Chetty, the drawer of the bill or Maung Pe Maung, through whom the appellant claims to possess the bill.

In second appeal the points urged are—

(1) If the document is regarded as a bill of exchange the respondent, by making part payment and indorsing the payments thereon, accepted the bill, and is liable thereon.

(2) If the document be regarded as a cheque, it is payable to bearer, and respondent being the banker on whom it was drawn, was not entitled to refuse payment to the bearer on mere representations made by Maung Pe Maung.

The first point is not tenable. Respondent neither signed the bill nor signed the indorsements, and without his signature he cannot be liable as an acceptor.

As regards the second point I have no doubt whatever that the document is simply a cheque drawn by the Mandalay firm of V. A. R. on their Pyinmana agency, and payable to bearer. Omitting the word "credit from O. A. firm, debit to—V. A. R. firm" which are mere verbiage, the document is on the face of it plainly and unmistakeably a cheque. It has not been treated exactly as English bankers treat cheques. It has been part-paid and returned for future presentation at the desire of the holder. But this is probably a matter of custom peculiar to chetty bankers, and does not in any way affect the case.

Respondent has admitted that it was not for want of funds of the drawer that he declined to cash the cheque.

There appears therefore to be only one question for determination.

When a cheque payable to bearer is drawn on a bank, and the bank though it has sufficient funds of the drawer applicable to the payment of the cheque, declines to pay it, is the bank liable in a suit by the holder of the cheque?

The answer to this question is quite clear and beyond doubt. In Chalmers' Bills of Exchange, page 179, the first illustration to section 53 of the Bills of Exchange Act is as follows: "A having £100 at his bankers draws a cheque on them for that sum in favour of C. The cheque is dishonoured. C has no remedy against the bankers." Section 31 of the Negotiable Instruments Act provides that the drawee of a cheque having sufficient funds of the drawer in his hands, properly applicable to the payment of such cheque, must pay the cheque when duly required to do so, and in default of such payment must compensate the drawer for any loss or damage caused by such default. And a note to that section in Chalmers' Negotiable Instruments Act states that there is no privity between the holder of a cheque as such and the banker on whom it is drawn. It is therefore clear that the remedy

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to a holder of a cheque that has been dishonoured is against the drawer and not against the drawee who refuses payment.

What may be the relations between the V. A. R. firm in Mandalay and Chellappa Chetty in Pyinmana it is impossible to say. He is described in the cheque as "of our firm at Pyinmana." But this suit cannot be regarded as one against the V. A. R. firm of Mandalay, simply because Chellappa Chetty is their agent. It does not profess to be such. It is simply a suit against Chellappa Chetty, a banker in Pyinmana, for payment of a cheque which was drawn on him and dishonoured, and it must be held for the reasons stated above that the suit is bad and does not lie.

The appeal is dismissed with costs.

Power-of-Attorney.

Before H. Adamson, Esq.

In the matter of an application by N. N. GHOSH.

Mr. *H. M. Lütter*—for applicant.

Civil Revision No. 25 of 1902. April 1st.

Held—that it is a recognized practice and is not contrary to law, for an advocate who is prevented by sufficient cause such as sickness or engagement in another Court, from appearing and conducting a case, to transfer his brief orally to another advocate.

References:—

Sections 36 and 39, Civil Procedure Code.
I. L. R., 9 All., 613.
I. L. R., 20 Bom., 293.
I. L. R., 2 Bom., 654.
U. B. R. 1900, Power-of-attorney, page 1.

IN a suit in the Small Cause Court, Mandalay, Mr. Dutta, a duly licensed Advocate, was retained for the plaintiff, and he filed a power-of-attorney authorizing him to act. Mr. Dutta was not able to appear on the day fixed for the hearing, and he instructed Mr. Ghosh, another duly licensed Advocate, to hold his brief and to represent him. No objection was raised by either party to the suit, but the Judge refused to allow Mr. Ghosh to appear without filing a separate power from the plaintiff. It was represented that it had been the invariable practice in the Judicial Commissioner's Court and in the Courts subordinate thereto, to allow an advocate who was prevented by sufficient cause, such as sickness or engagement in another court from appearing and conducting a case, to transfer his brief orally to another advocate. The learned Judge, however, ruled that the practice was contrary to law as contained in sections 36 and 37, Civil Procedure Code. He, no doubt, meant sections 36 and 39, which contain the provisions referred to.

The question raised has been fully discussed in *Mataáin* v. *Ganga Bai*,* *Shivdayal* v. *Khetu Gangu*† and *Shidappa* v. *Bin Shetteppa*.‡ In the first case there was a rule of the High Court permitting an advocate to transfer his brief orally under exactly the same circumstances as the present case, and it was sought to declare that rule to be *ultra vires*, because it was inconsistent with sections 36 and 39, Civil Procedure Code. The reported proceedings show that the judges were disinclined to hold that there was anything in the rule inconsistent with sections 36 and 39. But it appeared that the rule was authorized under section 635, Civil Precedure Code, a section which applies only to chartered High Courts, and which provides that "nothing in this Code shall be deemed to interfere with the power of the High Court to make rules concerning advocates, vakils and attorneys." As the High Court had such power, notwithstanding

* I. L. R., 9, All., 613. | † I. L. R., 20, Bom., 293. | ‡ I. L. R., 22, Bom., 654.

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anything that might be contained in sections 36 and 39, this case does not settle the question except in so far as chartered High Courts are concerned.

In the second case * the applicant was one of two defendants in a suit in the Court of Small Causes in Bombay. He and his co-defendant appointed separate pleaders to conduct the case. On the day of hearing the applicant could not attend personally, because he was obliged to appear in the Police Court to answer a complaint lodged against him by one of the plaintiffs. His pleader being also engaged elsewhere requested the pleader of the other defendant to hold his brief and to conduct the case for both defendants. He did so, and a decree was passed against both defendants. The applicant applied for a new trial on the ground that he had not been represented at the hearing. The decision of the High Court was that the applicant's pleader could not delegate his authority, and that the pleader who held his brief had no authority as required by section 39, Civil Procedure Code, to represent him at the hearing, and that, therefore, the decree was *ex-parte*. But this case is clearly distinguishable from the one now under consideration, inasmuch as the applicant did not accept the substituted pleader; and being prevented by an act of the opposite party from attending the court in person, had not an opportunity of objecting. But I observe that in most of the powers-of-attorney filed by advocates in this court there is a special clause enabling the advocate to appoint a substitute, and I doubt whether, in face of such a clause in the power-of-attorney, a party to the suit who had executed that power-of-attorney could raise a subsequent objection, such as was done in the Bombay case referred to.

In the third case † a pleader of a subordinate court appointed another pleader to appear for him, and the Judge refused to recognize the appointment and held that the party was not represented. The decision in the previous cases were reviewed. In this case as in the first, there was a rule of the High Court that a pleader may appoint another pleader in his behalf, and that, in such case, the hearing will proceed unless the Court see reason to the contrary. The contention as in the first case was that the rule was *ultra vires*, as being inconsistent with the provisions of sections 36 and 39 of the Civil Procedure Code. The rule had been framed under section 652, Civil Procedure Code, which provides that any rule framed thereunder must be consistent with the Code. It was held that the rule was not inconsistent with sections 36 and 39. I quote a portion of the judgment of *Farren, C. J.*, not only as showing that the practice is not inconsistent with law, but as indicating the limitations under which it may be reasonably applied:—

"We must now consider whether the rule can stand having regard to sections 36 and 39 of the Code. Section 36 is an enabling section and (omitting reference to authorized agents, with which we are not now concerned) enables any appearance, application or act which is required or authorized to be done by a party

* I. L. R., 20, Bom., 293. | † I. L. R., 22, Bom., 654.

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to be done by a pleader duly appointed to act in his behalf. Section 39 provides that the appointment of a pleader to make or do any appearance, application or act, shall be in writing and filed in court. The result is that a pleader whose appointment is in writing and filed in court can appear for his client, just as the client can do himself. We cannot see, as the Allahabad High Court could not see, anything inconsistent with that enactment in a rule which authorizes a pleader (without ceasing to be responsible to his client) to ask another pleader to hold a brief for him. This is what the rule does by way of proviso to the section, 'provided that a pleader may appoint another pleader to appear in his behalf, and in such case the hearing will proceed unless the Court see reason to the contrary.' The section regulates the mode in which a party must appoint a pleader. The rule provides how in certain cases the pleader so appointed may, with the leave of the Court, transact the business with which he is so entrusted. The rule was passed to facilitate the work of the Court, and to obviate the unnecessary postponement of cases, and is one which has, we believe, worked well. For many years it has been in existence without objection being made to it. As to the objections now made to it by the District Judge, they refer more to its possible abuse than to its legality; with reference to them it must be remarked that the rule is merely permissive with the leave of the Court. If a client objected the Court would doubtless see reason to the contrary, and so if it considered that the rule was being abused. It was certainly never intended to allow experienced pleaders to transact their client's business by the agency of inexperienced juniors, but only to avoid unnecessary adjournments in unimportant matters, when the pleader engaged by the party is temporarily absent."

It has thus been authoritatively ruled that there is nothing inconsistent with the provisions of the Civil Procedure Code in permitting one advocate to hold the brief of another. If the practice were prohibited in Upper Burma it would cause infinite inconvenience. The bar in Upper Burma is limited, and first-class advocates are scarcely to be found elsewhere than in Mandalay. They have to accept briefs to appear in distant places, and I have no doubt that they have often to leave at so short a notice as to render it impossible to communicate with their clients, who may be living any where in Upper Burma. What is to happen when these clients appear on the days fixed for their cases; are they to be left to fight their own cases without the assistance of an advocate, or are the Courts to be inconvenienced by the postponement of cases until the proper advocate returns? Or suppose an advocate is engaged in one court while a case of his called in another. Is his case to be dismissed or decided *ex-parte* because he is not present himself, as would be the necessary consequence of his absence if he is prohibited from instructing another advocate to act for him or even to move an adjournment for him. Such a condition of affairs would be intolerable and, I venture to say, has never been acted on in any judicial system. It has been ruled by my learned predecessor in *Maung Lat* v. *Maung Tôk** that it is not the practice of this court, and should not be the practice of any subordinate court, to allow advocates to expect cases to be adjourned as a matter of course merely because they are unable to attend, being engaged elsewhere, and that it is ordinarily the duty of an advocate to be present, or to make suitable arrangements for the conduct of the case. The only manner in which he can usually do so

* U. B. R., 1900, Power-of-attorney, page 1.

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is to transfer his brief to another advocate. Such has been the practice in this court and in the courts in Upper Burma since they were first constituted, and I am informed that it has also been the invariable practice in Lower Burma. It has been shown that it is not inconsistent with the Civil Procedure Code, and that as regards the convenience of all concerned—judges, advocates and litigants—it is a necessary practice. As such, the practice should continue to be permitted by all Courts in Upper Burma, subject, of course, to the limitations that may be necessary to prevent its abuse. But for my own part I have seen no indication that the practice is abused in Upper Burma.

I find that the learned Judge of the Small Cause Court exercised his discretion unsoundly in refusing to permit Mr. Ghosh to appear for Mr. Dutta.

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Before H. Adamson, Esq.

EBRAHIM MAHOMED PATAIL (BY HIS ATTORNEY MULLA ABDUL RAHIM)
v. S. R. M. M. ARUNACHELLUM CHETTY.

Civil Appeal No. 56 of 1902.
July 7th.

Messrs. *Cowasjee and Hirjee*—for Appellant. | Messrs. *Lowis and Lütter*—for Respondent.

Power-of-attorney—Construction of—Six general principles—Effect of fraud on the part of the persons dealing with the agent.

Held,—that the principles applicable to the construction of all powers-of-attorney are—

(1) Language, however general in its form, where used in connection with a particular subject-matter, will be presumed to be used in subordination to that matter, and is to be construed and limited accordingly.

(2) Powers-of-attorney must be construed strictly, *i.e.*, where an act purporting to be done under a power-of-attorney is challenged as being in excess of the authority conferred by the power, it is necessary to show that, on a fair construction of the whole instrument, the authority in question is to be found within the four corners of the instrument, either in expressed terms or by necessary implication.

(3) When one is dealing with an agent, it is his duty to ascertain the extent of the agent's power. Where he knows that there is a power-of-attorney, he is liable for ignorance of its contents.

(4) If the act of the agent is by express terms or by necessary implication authorized in the power-of-attorney, it will bind the principals as against persons dealing with the agent in good faith, notwithstanding that the agent may have acted fraudulently.

(5) Where the power is given to an agent to sign promissory notes or to accept bills for a special purpose, persons dealing with the agent must see that it is done only for that purpose.

(6) General powers are not to be construed in such a way as to give a power of borrowing, if that power is not expressly stated.

References:—

7 Barnwell and Cresswell, 278.
5 Moore's Indian Appeals, 1.
I. L. R., 8 Cal., 934.
I. L. R., 10 Cal., 901.
Appeal Court, Chancery Appeal Cases (1893), 170.
Appeal Court, Chancery Appeal Cases (1901), 179.
L. R. Chancery Division, 261 (1901).
L. R. 5, Q. B., 422.
I. L. R., 8 Cal., 951.

THE respondent sued for principal and interest on a promissory note for Rs. 35,000. The promissory note is signed by Ismail Mahomed Patail thrice, first for himself, second for his brother, the appellant, under a power-of-attorney, and third for Fatima Bee, under a power-of-attorney. The suit was brought against Ismail Mahomed Patail appellant, and the representatives of Fatima Bee, who is dead. Appellant is a student in England, and before leaving this country he executed a power-of-attorney in favour of his brother Ismail Mahomed Patail. The latter has absconded, and it is not denied that in borrowing the money he committed a fraud on appellant.

Appellant's defence, as disclosed in his written statement, is that the power-of-attorney gave no authority to Ismail Mahomed Patail to

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raise a loan; that appellant received none of the money, and that Ismail Mahomed Patail, in executing the promissory note for him, acted fraudulently.

The Additional District Judge gave decree for the respondent on the ground that the power-of-attorney authorized Ismail Mahomed Patail to sign promissory notes for the appellant; that the respondent dealt in good faith with Ismail Mahomed Patail, and that, therefore, as regards the respondent, the appellant is bound by the promissory note, notwithstanding the fact that Ismail Mahomed Patail betrayed his trust.

The power-of-attorney contains 19 clauses, and, put briefly, the powers given are—

(1) to manage the principal's movable and immovable property;
(2) to let houses and land;
(3) to accept surrender of leases and make arrangements with tenants;
(4) to repair and build houses;
(5) to insure houses;
(6) to appoint agents and servants for the management of the property and to pay their wages;
(7) to collect income, rents and dividends;
(8) to sell property, including Government promissory notes;
(9) to invest all monies in the purchase of immovable property in Rangoon or of shares of bazaar companies in Rangoon;

(Then comes the clause on which the respondent relies and which I quote in full.)

(10) to operate on my account with the Bank of Bengal, Rangoon, and to sign, endorse and negotiate all hundis, cheques, drafts, bills and other mercantile documents;
(11) for any of the above purposes to sign agreements, leases, conveyances and other documents;
(12) to register deeds;
(13) to act in proceedings before the Registrar of Town Lands;
(14) to sue and defend suits;
(15) to compromise suits and submit to arbitration;
(16) to deal with insolvent debtors;
(17) to appoint advocates;
(18) to verify plaints and to sign documents;
(19) to appoint substitutes.

Respondent contends that clause (10) gives power to sign promissory notes, and therefore to borrow money at large, while appellant asserts that the words "to sign, endorse and negotiate all hundis, cheques, drafts, bills and other mercantile documents" must be construed as subordinate to the first words of the clause "to operate on my account with the Bank of Bengal, Rangoon," and as subordinate to the general object of the power, which is simply to manage the principal's property, and that they do not authorize the agent to raise loans.

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There are three principles applicable to the circumstance of this case which admittedly apply to the construction of all powers-of-attorney: (1) language, however general in its form, when used in connection with a particular subject-matter, will be presumed to be used in subordination to that matter and is to be construed and limited accordingly; (2) powers-of-attorney must be construed strictly, *i.e.*, where an act purporting to be done under a power-of-attorney is challenged as being in excess of the authority conferred by the power, it is necessary to show that, on a fair construction of the whole instrument, the authority in question is to be found within the four corners of the instrument either in express terms or by necessary implication; and (3) when one is dealing with an agent, it is his duty to ascertain the extent of the agent's power. Where he knows that there is a power-of-attorney he is liable for ignorance of its contents.

The following cases have been quoted and discussed as having a bearing on the present case.

Attwood v. *Munnings*.* This case gives only the assistance of enunciating the general principles stated above.

Bank of Bengal v. *Macleod*.† The payee of promissory notes of the East India Company, by a power-of-attorney authorized his agent at Calcutta to "sell, endorse, and assign" the notes. The notes were transferable by endorsement payable to bearer. The agent borrowed money from the Bank of Bengal, and, in fraud of his principal, endorsed the notes as attorney for the principal and deposited them with the Bank as collateral security, at the same time authorizing the Bank in default of payment to sell the notes and recoup themselves.

The agent became insolvent and made default, and the Bank sold the notes. It was held that the endorsement of the notes by the agent of the payee to the Bank was within the scope of the authority given to him by the power-of-attorney, and that the payee could not recover in detinue against the Bank.

Watson v. *Jonmenjoy Coondoo*.‡ This is a case somewhat similar to the last. The agent acted in fraud of the principal. The power-of-attorney gave authority to "negotiate, make sale, dispose of, assign and transfer" certain Government securities standing in the plaintiff's name. The agent pledged the securities for an advance of Rs. 19,000, and at the same time, as attorney for the plaintiff, executed a promissory note for the amount of the loan In a suit to recover the Government securities, it was held that the power-of-attorney gave no authority to plege, and that the plaintiff was entitled to a decree. The case was distinguished from *the Bank of Bengal* v. *Macleod*, inasmuch as the power-of-attorney did not contain in express words power to endorse.

Bryant, Powis and Bryant, Limited v. *La Banque du Peuple*.§—The power-of-attorney authorized the agent to enter into contracts or

* 7, Barnwell and Cresswell, 278. | † 5, Moores's Indian Appeals, 1

‡ I. L. R, 8 Cal., 934, and the Privy Council appeal in the same case, I. L. R. 10 Cal., 901.

§ 1893 A. C., 170.

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engagements for three specified purposes: (1) the purchase or sale of goods, (2) the chartering of vessels, and (3) the employment of agents and servants, and, as incidental thereto or consequential thereon, to do certain specified acts and other acts of the same kind as those specified. Among these was included the power to endorse bills, but not the power to borrow money. The agent in fraud of the company borrowed money from the Bank, and, as collateral security, deposited promissory notes drawn by a third party in favour of the company, and endorsed *per procuration* by the agent. Before they became due the company gave notice to the bank disclaiming liability. In an action by the Bank decision was given in favour of the company on the ground that, if the instrument be read fairly, it does not authorize the agent to borrow money on behalf of the company.

Bryant, Powis and Bryant, Limited, v. *Quebec Bank*.*—This case is concerned with the same power-of-attorney. The action was brought upon two bills of exchange endorsed in the name of the company by the agent *per procuration*, and discounted by the Bank in the ordinary course of business. The company was held to be liable on the ground that the power-of-attorney gave the agent authority to endorse bills, and that abuse of authority and betrayal of trust by the agent cannnot affect *bonâ fide* holders for value of negotiable instruments endorsed by the agent apparently in accordance with his authority.

Jacobs v. *Morris*.†—Here also the agent acted fraudulently. The plaintiff gave to the agent a power-of-attorney to buy goods for him in connection with his business either for cash or on credit and "where necessary in connection with any purchases made on my behalf as aforesaid or in connection with my said business," to make, draw, sign, accept or endorse any bills of exchange or promissory notes. The agent purchased from the defendant cigars to the value of £1,070, in payment of which he gave bills of exchange accepted by him for the plaintiff. The agent also borrowed £4,000 from the defendant purporting to act on behalf of the plaintiff, and accepted bills of exchange to that amount in his own name *per pro* the plaintiff. The action was for an injunction to restrain the defendant from negotiating the bills for £1,070 and £4,000. It was held on the construction of the power-of-attorney that plaintiff was liable for the bills of exchange for £1,070 given in payment of goods, but not for the bill for £4,000 given in order to raise a loan.

The gist of these cases may be stated briefly as follows: In *Bank of Bengal* v. *Macleod* the act of the agent was within the scope of the power-of-attorney, and therefore it could not be held to depend on the purpose for which the agent performed the act. In *Watson* v. *Jonmenjoy Coondoo* the act of the agent was not within the scope of his authority, and was therefore held to be invalid. In *Bryant, Powis and Bryant* v. *La Banque du Peuple* the act of the agent in endorsing the notes was within his authority, but he had no authority to

*1893 A. C., 17. | †1901 L. R. Chancery Division, 261.

Power-of-Attorney.

borrow, and the Bank was not entitled to hold the notes as security for a loan. The agent's action was therefore held to be invalid. In *Bryant, Powis and Bryant* v. *Quebec Bank* the power-of-attorney authorized the agent to endorse the notes and discount them, and his act was held to be valid. In *Jacobs* v. *Morris* there was authority to give bills for a particular purpose. In the case where they were given for that purpose the agent's act was held to be valid. But in the case in which they were given for another purpose it was held to be invalid. Moreover, throughout these cases there runs the underlying principle that general powers will not be construed in such a way as to give a power of borrowing, if it is not expressly stated. And indeed in *Jacobs* v. *Morris* I find this enunciated by Farwell, J., as a general principle, on the authority of *Harper* v. *Godsell*.* I have referred to this case and I think that the learned Judge has given a wrong reference, but I have no doubt that the principle enunciated by him is correct

From these cases, in addition to the three general principles already stated as applicable to the construction of powers of attorney, three further principles may be deduced, *viz.*—

(4) If the act of the agent is by express terms or by necessary implication authorized in the power-of-attorney, it will bind the principal as against persons dealing with the agent in good faith, notwithstanding that the agent may have acted fraudulently.

(5) Where power is given to an agent to sign promissory notes or accept bills for a special purpose, persons dealing with the agent must see that it is done only for that purpose.

(6) General powers are not to be construed in such a way as to give a power of borrowing, if that power is not expressly stated.

I will now endeavour to apply these principles to the present case. To begin with, it may be noted that the question discussed in the judgment, as to whether respondent saw the power of attorney, is quite irrelevant. He is bound equally whether he saw it or not. This is the third principle enunicated above. The clause on which the respondent relies as the authority for signing the promissory note is clause 10. If this clause be omitted, there is not a single clause in the whole document that can bear any construction except that the agent was appointed merely for the purpose of managing the estate of the principal. And with regard to the income of the estate he is bound down to safe investments, the only ones allowed being immovable property and shares of bazaar companies in Rangoon. He is allowed to sell property, as no doubt would be absolutely necessary in the long absence of the principal, but he has no power to buy property with the exception of the investments mentioned above, and those only with the income of the estate. In fact the tenor of the whole document is to give the agent powers to manage the property as a prudent trustee would do, and to invest the income in a safe and unspeculative manner. Clause 10 gives power " to operate on my account with

* L. R., 5 Q. B., 422.

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ABB EBRAHIM MAHOMED PATAIL v. S. R. M. M. ARUNACHELLUM CHETTY.

the Bank of Bengal, Rangoon, and to sign, indorse and negotiate all hundis, cheques, drafts, bills and other mercantile documents."

There has been some discussion as to the meaning of the term "operate with the bank." In my opinion the only meaning that can be assigned to it is to carry on the ordinary incidents of a banking account. It is contended for respondent that it has a wider meaning, and that it authorizes the agent to enter into speculations in which he would be financed by the Bank. If this meaning be accepted, it appears to me that it makes the case all the stronger for the appellant, for, if the power expressly authorizes as between the principal and agent the raising of loans from a particular bank, it by implication prohibits the raising of loans elsewhere, and the words "sign, endorse, and negotiate all hundis, cheques, drafts, bills and other mercantile documents" which in themselves are applicable to transactions with the bank, cannot be held to give a power to go past the bank and raise loans by these instruments at large. This is the first of our six principles. But I can see no reason for straining the phrase "operate with the bank" by importing into it any powers of speculation, and I think that there can be no doubt that it simply means to keep a banking account for the principal, and that it is consistent with and similar to all the other prudent powers given in the document. Accepting this interpretation, is it to be assumed that in a document of nineteen clauses, eighteen and a half of which bind the agent by the most cautious and judicious powers for the management of the estate, the words "sign, endorse, and negotiate all hundis, cheques, drafts, bills and other mercantile documents" in the remaining half clause are to render nugatory the precautions elaborated in the rest of the document, and enable the agent to dissipate the whole estate by a stroke of his pen, as he has probably done in the present case. That would, in my opinion, be a most unfair, and, in view of the rest of the document, an impossible construction of the clause. The words are in themselves interpretable as authorizing transactions necessary in dealing with the management of an estate, and for that purpose keeping a banking account, and it appears to me that, on a fair construction of the power-of-attorney, they cannot be held to authorize the signing of promissory notes for the purpose of raising loans. The words in question do not give powers at large but powers to carry into effect the declared purposes of the power-of attorney, and following *Jacobs* v. *Morris* and the second, fifth and sixth principles enunciated above, the appellant cannot be held to be liable on the promissory note.

These reasons alone would be sufficient for a decision. But as regards the greater part of the amount sued for, the present case also rests on a broader ground. In all the cases quoted the good faith of the person dealing with the fraudulent agent has been assumed. But if that person were also a party to the fraud, there can be no doubt as to what the result would be. It was expressed by Garth, *C. J.*, in a case quoted above, *Watson* v. *Jonmenjoy Coondoo*.* In that case it

* I. L. R., 8 Cal., 951.

Power-of-Attorney.

was not held eventually that there was a fraud on the part of the defendant, and, as has been shown above, the final decision was based on another ground. But Garth, C. J., had that opinion and he held that the plaintiff had a right to unrip the whole transaction. In the present case, in the arguments in appeal, the good faith of the respondent was impeached, and in reply it was contended for respondent that if fraud be alleged it should have been pleaded as a defence in the written statement. But to this there is a complete answer on face of the record, though it is but fair to say that it was left for me to discover, and was not indicated by the learned advocate for appellant. I also observe, strangely enough, fraud on the part of the respondent is not mentioned in the memorandum of appeal. In the plaint the respondent did not disclose the nature of the transaction. He merely alleged that there was a promissory note unsatisfied. When the written statement was filed appellant had no means, so far as the record shows, of knowing that there had been fraud on the part of respondent. It was not till the respondent himself stepped into the witness-box and in cross-examination revealed the whole transaction that the knowledge of his fraud arose. Then it appeared that it was not a simple case of borrowing Rs 35,000 and giving a promissory note for it. On 5th December 1899 the agent borrowed Rs. 5,000 from respondent on his own account and on his own signature. Similarly, on 5th February 1900 he borrowed another sum of Rs. 15,000. He wanted more money and respondent said that he could not have more without security. Then the promissory note in this suit was executed. Though it was for Rs. 35,000 only Rs. 15,000 (or rather Rs. 14,700, for something was deducted for interest on the former loans) was paid. But the previous private debts of the agent, Rs. 5,000 and Rs. 15,000, were cancelled. So what the respondent really did was to lend Rs. 14,700 nominally to the appellant and to take a note rendering him responsible for Rs. 35,000. Was this an honest transaction on the part of respondent, or was it a fraud perpetrated on appellant by both the agent and respondent? The learned Additional District Judge exonerates the respondent on the ground that he was only looking after his own interests. The same may be said of any fraud. I cannot regard the transaction in this light. I think that there can be no doubt that it was a fraud on the part of both and that at least as regards the money not actually paid on the note, namely, Rs. 20,300, the transaction is a nullity from beginning to end.

On these grounds I hold that, on the construction of the power-of-attorney, the promissory note is void *in toto* as against appellant, and on the broader ground of the bad faith of the respondent it is void to the extent of Rs. 20,300.

The decree of the District Court so far as it concerns appellant is set aside, and the original suit as against him is dismissed with all costs.

Probate and Administration.

Civil Second Appeal No. 19 of June 2nd.

Before H. Adamson, Esq.

MA HMYIN
MAUNG PO KIN } *v.* { MA ÔHN GAING.
MAUNG YAN AUNG.
MA THAIK.
MAUNG THA DUN ZAN.
MA CHU ON.
MAUNG SHWE LE.

Mr. *C. G. S. Pillay*—for appellants. | Mr. *S. Mukerjee*—for respondents.

Held—that when letters of administration have been obtained to the estate of an intestate, a co-heir cannot sue the administrator for partition of the estate, but must prosecute his claim in the manner provided by the Probate and Administration Act.

On 11th May 1901 the first respondent obtained letters of administration to the estate of the deceased Ma Sôn. On 31st August 1901 the Appellants, alleging that they and first respondent were co-heirs of Ma Sôn, brought a suit against the first respondent, the administrator, for partition of the estate of Ma Sôn. The Subdivisional Judge dismissed the suit as premature, holding that section 117, Probate and Administration Act, which provides that an executor is not bound to pay a legacy until the expiration of one year from the testator's death, read with sections 77 and 98, applies also to an administrator. The District Judge confirmed the decision, also holding that section 117 applied. There were other grounds given by both Courts for dismissing the suit, the chief being that the suit was not properly framed as a partition suit, but it is unnecessary to discuss them here. In second appeal it is urged that section 117 is not applicable, and that the Lower Courts erred in holding that an administrator could not be sued within one year from the date of taking out letters of administration for a share in the estate of a deceased intestate.

The grounds on which the Lower Courts decided the case, and the arguments in second appeal, show a strange misconception of the principles and scope of the Probate and Administration Act.

Section 117 applies to the payment of a legacy by an executor, and though by section 148 it applies also to an administrator with the will annexed, it has no application whatever to the administrator of the estate of an intestate.

The administrator of a deceased person is his legal representative for all purposes, and all the property of the deceased person vests in him as such (section 4). His powers and liabilities are defined in sections 88 and 89. He may sue in all causes of action that survive the deceased, and he may be sued in all causes of action that existed

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MA HMYIN v. MA OHN GAING.

against the deceased at the time of his decease, except certain personal actions which are expressly excluded These provisions, it will be observed, do not render an administrator liable to be sued for partition of the estate of the deceased, for as no man can be sued for partition of his own estate, this cause of action did not exist against the deceased. The manner in which a co-heir to an estate can prosecute his claims is *provided* later on. After obtaining letters of administration an administrator's duty is to exhibit in Court within six months an inventory of the property and the debts and the credits (section 98). He must collect the property of the deceased and the debts due to him with reasonable diligence (section 100). He must give requisite notice for creditors and others to send in their claims against the estate of the deceased (section 139). In disposing of the effects he must first pay the funeral and death-bed charges (section 101). Next he may deduct the expenses incurred in obtaining letters of administration (section 102). Next he must pay certain wages due for services (section 103). Next he must pay the other debts of the deceased according to their respective priorities (section 103). Next he must distribute the balance of the assets in discharge of lawful claims (section 139). And finally he must exhibit in Court within one year an account of the estate showing the assets that have come into his hands, and the manner in which he has disposed of them (section 98).

So long as an administrator performs these duties properly, a person claiming as heir to the estate can do nothing more than merely present his claim to the administrator, like other creditors and claimants. But after the distribution has been made, if dissatisfied, he may follow the assets in the hands of any person who may have received them (section 139). And if the administrator fails to perform his duties, as for instance, if he omits to exhibit an inventory, or exhibits a false inventory, an heir as a person interested may invoke the intervention of the Court (section 50), and where an administrator has misapplied the estate, or subjected it to loss or damage he may be made personally responsible (sections 146, 147).

The appellants instead of following this procedure have brought a suit for partition against the administrator three months after the issue of letters of administration. Such a suit as I have already indicated does not lie, and it is bad *ab initio*. The appeal is dismissed with costs.

Probate and Administration.

Before H. Adamson, Esq., I.C.S.

MA YA BYAING AND MAUNG HMU *v.* MA MIN HLAING.

Mr. *J. N. Basu*—for appellants. | Mr. *C. G. S. Pillay*—for respondent.

Civil Second Appeal No. 71 of 1902. July 14th, 1902.

A suit for partition was brought against the administrator and other heirs five months after the issue of letters of administration. The administrator admitted that the property had been finally divided between himself and other heirs.

Held,—that it was a suit following the property in the possession of persons to whom it had been distributed by the administrator, and that the fact that only five months had elapsed since the issue of letters of administration did not invalidate the suit.

The estate consisted of certain defined property, and of interests in other undivided property which the administrator had apportioned without actual division of that property.

Held,—that the suit could proceed without joining the other co sharers of the undivided property as parties, but that so far as the undivided property was concerned, the decree should have merely specified the share to which plaintiff was entitled of the deceased's interest in the undivided property, and should not have defined the extent of the deceased's interests, that being a question which should have been left for future determination between the plaintiff and the other co-sharers of the undivided property.

References:—

U. B. R., 1902, Probate and Administration, page 1.
U. B. R., 1902, Buddhist Law—Gift, page 1.

THIS is a suit for partition of the estate of the deceased Tun E. The plaintiff-respondent is Tun E's widow. The defendants-appellants are Tun E's children by a former wife. There was a third defendant, a grandson of Tun E by the former wife, who is not a party to the appeal.

Appellant Maung Hmu obtained letters of administration to the estate of Tun E, and the suit was brought five months after the letters of administration issued. Objection was raised in the Subdivisional Court, not in the written statement, but at a later hearing, that the suit was bad as having been brought before the estate had been fully administered. The same objection was raised in the District Court in appeal. Neither of the lower Courts have dealt properly with this objection. The Subdivisional Judge dismissed the objection on the ground that the administrator had shown animus against the plaintiff, and that she would not be likely to get her rights from the administrator. The District Judge held that a suit for partition could be brought against the administrator during the pendency of administration. The question has been fully discussed in Civil Second Appeal No. 19 of 1902 * of this Court, where it was held that such a suit could not be brought until the administration of the estate had been brought to a conclusion. But the present case may be distinguished from the one quoted. The written statement of the appellant Maung Hmu, who was the administrator, the schedule filed by him, which shows what has been done with each item of the property, and his deposition show that in fact the administration of the estate has been concluded, and that the title to each

* U. B. R., 1902, Probate and Administration, page 1.

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item of the property has been determined. I therefore hold this suit to be one, not against the administrator, but following the property in the possession of persons who have obtained it from the administrator, such persons including, of course, the administrator himself. The estate having been fully administered there is no valid objection to the suit.

The Subdivisional Judge found that the estate consisted of certain items of *atet* property, and certain items of *hnitpazôn* property, and gave respondent a decree for certain shares of each. In appeal the District Judge concurred with the Subdivisional Judge in the findings as to what portions were *atet* and *hnitpazôn*, respectively, but he modified the decree so far as it concerned the shares of each kind of property. Appellant Maung Hmu had alleged a gift of the whole property to him by Tun E before his death, and both Courts found that the gift was not proved. Objections were raised to non-joinder of parties, which were overruled by both Courts.

The grounds urged in second appeal, in addition to the one regarding administration, which I have already discussed, are—

(1) That the suit is bad owing to non-joinder of parties who had interests in *Thibin*, *Samônkan*, and *Tôkvin* lands.

(2) That the Courts should have held that the gift was proved, and that when the donee was already in possession, any further formal delivery of possession was unnecessary to complete the gift.

(3) That the Courts were wrong in holding that there was any *hnitpazôn* property.

As regards the first ground it appeared that Tun E had certain defined property of his own, and that in addition he had rights in other undivided property. The objection is that the co-sharers in this undivided property were not added as parties. Some of these co-sharers have been examined, and there does not appear to be any doubt as to the extent of Tun E's rights in the undivided property. But their admissions cannot bind the co-sharers, who were not examined, and there can be no doubt that the Courts were wrong in defining the extent of Tun E's rights in the undivided property in a suit in which all the co-heirs of that property were not parties. But it does not follow that the present suit is bad owing to non-joinder of these parties. These parties had no concern in Tun E's estate and could not properly be joined in this suit. Where the Courts erred was in defining the extent of Tun E's rights in the undivided property.

There was no necessity for doing so for the purposes of this suit. To take a concrete instance, the Courts instead of finding that two-thirds of *Thibinle* was Tun E's interest in that property and that plaintiff was entitled to one-fourth of two-thirds of *Thibinle*, should have simply found and decreed that plaintiff was entitled to one-fourth of Tun E's interest in *Thibinle*, leaving the extent of his interest to be determined subsequently by arrangement or otherwise between plaintiff and the other co-heirs of *Thibinle*.

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MA MIN HLAING.

The second ground of appeal, namely, the gift, may be disposed of in a few words. Appellant Maung Hmu alleges that the gift was made twice, first before Tun E's marriage with respondent, and second before his death. The evidence regarding it is meagre and conflicting. It is shown that after the date of the first gift Tun E continued to receive rents from some of the lands. There was no mutation of names in the revenue registers after the first gift, notwithstanding the fact that Maung Hmu was the *thugyi*. In applying for letters of administration Maung Hmu entered the property in his list as that of his father Tun E. These facts are inconsistent with the first gift, and as regards the second, even if there were any proof of it, which there is not, it has been ruled by this Court* that a death-bed gift to one heir to the exclusion of other heirs is invalid.

The third ground of appeal may also be disposed of briefly.

There is a concurrent finding by the lower Courts as to the extent of the *hnitpazôn* property. The District Judge has considered the question and has recorded his reasons for accepting the finding of the Subdivisional Judge and he adds that the point was not pressed on appeal. Under these circumstances the appellants are not entitled to question the finding in second appeal. I have, however, read the evidence and I fully agree with the concurrent findings of the lower Courts.

The result is that the decree will be modified. Instead of one-fourth of two-thirds of *Thibinle* and one-fourth of one-third of *Samônkan* and *Tôkyin* that portion of the decree will be for one-fourth of Tun E's interest in *Thibinle*, *Samônkan* and *Tôkyin*. Otherwise the appeal is dismissed with costs.

* U. B. R., 1902, Buddhist Law—Gift, page 1.

Probate and Administration.

Civil Appeal No. 160 of 1903. December 14th.

Before A. M. B. Irwin, Esq., I.C.S.

MAUNG SA SO *vs* { MA PAW. MA SIN.

Mr. *C. G. S. Pillay*—for appellant. | *Maung Kan Baw*—for respondents.

Held,—that when an applicant for letters of administration is entitled to inherit, and is under no positive disqualification, and there is no application by any other person, the application should not be refused.

Living apart from parents and not attending in illness does not of itself rupture family ties or disqualify children from inheriting.

Reference :—

2 U. B. R., 1892-96, page 184.

Appellant applied for letters of administration to the estate of Ma Po Kin, claiming as her step-son, the only other heir being appellant's brother Maung Kya Gyi. Respondents opposed the application on the ground that there is no estate to administer. They say that Ma Po Kin in her lifetime gave part of her property to them, and all that remained she spent on burying her husband and discharging debts to the appellant. They also said that as the step-children lived apart from Ma Po Kin and did not assist in her illness they were not entitled to inherit.

On this last point the Lower Court did not record any finding, as the application was dismissed on other grounds. I am not referred to any authorities by the learned Advocate for the respondent, and I think it is sufficient to refer to the remarks of Mr. Burgess in the case of *Maung Chit Kywe*, vs *Maung Pyo and others*, * namely : —

"Very little attention, if any at all, need be paid to the efforts of contending parties to exhibit the respective superiority of their claims to inherit through their attention to the deceased owner of property in his last moments, and their liberality in the performance of the last obsequies * * * Unless it can be shown that the ordinary duties of affection or kindred have been intentionally and deliberately neglected, so as to raise a presumption of the rupture or interruption of the connecting bond, evidence referring to the particulars of the discharge of obligations of this nature may generally be passed over as of little or no importance."

In these remarks I fully concur. No such presumption as Mr. Burgess describes arises in this case and I find that appellant is entitled to inherit.

The Lower Court found that Ma Po Kin died possessed of some property, but refused letters of administration on the ground that the grant of letters would not benefit the applicant, and might lead to more litigation. It is not alleged that there are any debts due to Ma Po Kin's estate, and no doubt appellant could sue as an heir without

* 2 U. B. R., 1892-96, page 184.

MAUNG SA SO v. MA PAW.

letters of administration, but the learned Judge seems to have overlooked the fact that applicant is not the sole heir, his brother Kya Gyi is apparently also entitled to inherit, and this might embarrass appellant in his suit. On the general point whether, if appellant were sole heir, the refusal to grant letters is based on sufficient reasons, no authority has been cited on either side. The language of the Act seems to give the Court a discretionary power to refuse. In my opinion the reason given is not sufficient. When the applicant is entitled to inherit, and is under no positive disqualification, and there is no application by any other person, I think the letters should be granted.

I therefore reverse the decree of the Lower Court, and direct that letters of administration to Ma Po Kin's estate be granted to appellant on his furnishing such security as the District Court may require.

Respondents to pay appellant's costs in both Courts.

Registration.

Before H. Adamson, Esq., I.C.S.

Civil Appeal No. 225 of 1902. December 10th.

MAUNG TUN AUNG *v.* MAUNG MAUNG LAT AND MA MA LE.

Mr. *J. C. Chatterjee*—for appellant. | Mr. *J. C. Dias* (*Jr.*)—for respondents

Held,—that in Upper Burma a suit lies for a decree directing that a document shall be registered.

THIS was a suit for a decree directing that a deed of sale of immoveable property should be registered. The appellant presented the deed to the Registering Officer within the time allowed for registration. The respondents, who were alleged to have executed the deed, denied execution. The Registering Officer held an inquiry, and it is admitted that his finding was that the deed has been executed by the respondents. Instead, however, of proceeding to register the deed under the provisions of Rule 6 of the Upper Burma Registration Rules, the Registering Officer submitted the deed to the Deputy Commissioner, who, under the designation of Registrar, made an endorsement on it to the effect that the deed should not be registered until the appellant obtained a decree for registration as required by section 77 of the Indian Registration Act, III of 1877.

The Deputy Commissioner apparently failed to notice that the office of Registrar does not exist and that the Act quoted is not in force in Upper Burma.

Appellant then brought the present suit, which has been dismissed, on the preliminary ground that a suit to enfore the registration of a document does not lie in Upper Burma.

For the appellant it is contended that every wrong must have a remedy; that a suit to enforce the registration of a document is not barred by any rule of law, and that there is no means but a Civil suit for obtaining the registration of the deed, without which it would be inoperative. For the respondents it is contended that the order of the Deputy Commissioner is binding on the Registering Officer, and that the proper remedy is an appeal against that order to the Commissioner or the Inspector-General of Registration.

The Indian Registration Act specifies the circumstances under which a civil suit will lie to enforce registration. If a Sub-Registrar refuses registration, the Registrar must be invoked within thirty days; and if he refuses, a civil suit may be brought within a further period of thirty days. But the Upper Burma Registration Regulation and Rules are silent on these points. There is no Registrar and there is no provision for any control over the Registering Officer, and there is no special provision for a civil suit.

Registration.

MAUNG TUN AUNG v. MAUNG MAUNG LAT.

It does not follow, however, that a civil suit to enforce registration is inadmissible. Section 11 of the Civil Procedure Code provides that the Civil Courts shall have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is barred by any enactment for the time being in force. It is not alleged that there is any enactment in force in Upper Burma by which such suits are specially barred. And there can be no doubt that a suit to obtain registration of a document, without which it would be inoperative, is a suit of a civil nature.

It may be that the appellant had another remedy. In the Burma Registration of Deeds Manual a circular of the Financial Commissioner, No. 6 of 1892, is quoted, in which it is stated that the Deputy Commissioner or the Inspector-General of Registration may revise any order passed by a Registering Officer. There may be in a superior officer the inherent power to correct erroneous orders of the Registering Officer. And it is possible that appellant might have obtained a remedy for his grievance by applying to the Commissioner or to the Inspector-General of Registration.

But if such course is open he is not bound to adopt it. In the Indian Registration Act there is a special provision of law prohibiting recourse to the Civil Court until a certain other mode of redress has been resorted to. But though in the Upper Burma Registration Regulation and Rules and the executive instructions issued thereunder there may be another mode of redress open, it is not made compulsory to adopt it. The right to resort to the Civil Court is unfettered, and appellant was entitled to bring a suit to enforce registration from the moment that the Registering Officer refused to register the deed.

The decree of the Lower Court must therefore be set aside and the case returned for decision on its merits. Costs to abide the result.

Upper Burma Registration Regulation—3.

Before H. Adamson, Esq., C.S.I.

Civil Appeal No. 56 of 1903. September 28th.

MAUNG PO HTIN *v.* MAUNG TE and MAUNG THA LAN.

Mr. *K. K. Roy*,—for appellant. | Mr. *C. G. S. Pillay*—for respondents.

Held,—that *tari* palms and cocoanut trees are not "standing timber" as referred to in section 3 of the Upper Burma Registration Regulation, but are immoveable property.

References:—

Wharton's Law Lexicon, page 737.

Stroud's Judicial Dictionary, page 805.

The appellant sued for possession of 46 *tari* palms and two cocoanut trees alleging that they had been sold to him by his grandfather's brother who is now dead. The deed of sale was produced and it is unregistered. The Lower Appellate Court dismissed the suit on the ground that the deed being unregistered could not affect the property.

The ground of appeal is that the trees are standing timber, and that under the provisions of section 3, Upper Burma Registration Regulation, standing timber is not immoveable property. In Wharton's Law Lexicon "timber" is defined as wood felled for buildings or other such like use. In Stroud's Judicial Dictionary it is defined as such trees only as are fit to be used in building or repairing houses. *Tari* palms and cocoanut trees are primarily used for obtaining juice and fruit, and in view of these definitions they cannot be regarded as standing timber.

The distinction has been clearly expressed in a circular of the Inspector-General of Registration, North-West Provinces and Oudh, from which I quote the following:—

> Properly speaking almost every tree being potentially timber, and no tree actually timber, the question whether a tree is for the purposes of any transaction to be deemed to be "timber" must depend upon the way it is regarded and treated in that transaction. If, for example, trees are sold with a view to their being cut down and removed, the sale is one of "standing timber" within the meaning of the Registration Act. If, on the other hand, trees are sold with a view to the purchaser keeping them permanently standing and enjoying them by taking their fruit or otherwise, the sale would not, it is believed on any construction of the Act, be regarded as one of standing timber but would be a sale of immoveable property."

I concur in these remarks, and hold that in the present case the sale is one of immoveable property, and that the deed being unregistered, cannot affect the property."

The appeal is dismissed with costs.

APPENDIX III.

CIRCULAR MEMORANDUM NO. 3 OF 1903.

FROM

THE REGISTRAR,

JUDICIAL COMMISSIONER'S COURT, UPPER BURMA,

TO

THE DIVISIONAL AND DISTRICT JUDGES,

UPPER BURMA.

Dated Mandalay, the 14th July 1903.

The attention of Divisional and District Judges is invited to the following points in connection with the Report on the Administration of Civil Justice in Upper Burma during 1902.

Preliminary examination of parties by the Court.

1. The Judicial Commissioner requests that it may again be brought to the notice of Subordinate Judges that a full and careful examination of the parties is essential to the framing of proper issues and to the prompt disposal of suits. Paragraph 484, Upper Burma Courts Manual, should be brought to the notice of Judges.

Documentary evidence.

2. Rules for the guidance of officers in dealing with documentary evidence are laid down in paragraphs 454 to 471, Upper Burma Courts Manual, but the Judicial Commissioner regrets to observe that the proper procedure is frequently not followed. The attention of Judges should be drawn to these paragraphs.

Defective procedure in *ex-parte* cases.

3. There has been an improvement generally in the disposal of suits *ex-parte*, but several cases have been brought to the notice of the Judicial Commissioner in which the hearing has been proceeded with *ex-parte* without proof of the service of the summons on the defendant. It should be impressed on Judges that a case should not be tried *ex-parte* unless service of summons has been satisfactorily proved. Judges should also remember that the mere absence of the defendant does not justify the presumption that the suit is true; the Court is bound to see that at least a *primâ facie* case is made out.

Compromise of suit.

4. The provisions of section 375 of the Code of Civil Procedure are often overlooked. When a suit has been compromised the agreement arrived at by the parties should be recorded and a decree passed in accordance therewith.

Classification of cases.

5. The classification of cases to be entered in column 19 of Register No. 1, Civil, is not always correctly done. Cases decreed on confession are frequently shown as compromised and cases compromised as withdrawn with leave and *vice versâ*. Opportunity should be taken at inspections to explain the method of classification.

Period of proclamation of sale.

6. The attention of Judges should be drawn to paragraph 550, Upper Burma Courts Manual, regarding the period which should intervene between the date of publishing the proclamation and the date of sale. Failure to proclaim for sufficient time in sales appears to be a very common error.

Durations

7. The remarks recorded in the Circular Memorandum in connection with the Criminal Justice Report regarding the want of system in fixing cases apply also to Civil cases. Dates should be fixed so as not to clash with tours.

Witnesses.

8. The Judicial Commissioner is glad to observe that there has been an improvement in the upkeep of the Witness Register. Although the entire omission of witnesses from the register is not so common as it used to be, the failure to enter each attendance of witnesses has been noticed. The payment of witnesses' expenses is a matter of importance and judging from the number of marks in the signature columns of the Bailiff's Registers it is evident that literate witnesses are often not made to sign with their own hands on receiving expenses.

Proceedings on orders in appeal.

9. The attention of Subordinate Judges should be directed to paragraph 718 (16), Upper Burma Courts Manual. When a case is referred back in appeal to the Lower Court for the trial of a fresh issue or for any other purpose, the proceedings taken on the order in appeal should be filed after the copy of the order in appeal. The Judicial Commissioner not infrequently observes that depositions of witnesses taken on the order in appeal, are filed in a previous part of the record, which causes much inconvenience to the Appellate Court.

Record-rooms.

10. During the course of inspections it has been noticed that the Record-room Rules published in paragraphs 756 to 772, Upper Burma Courts Manual, have not been observed in several districts. Record-rooms should be inspected by the Superintending Officer at least once a month, but this duty appears to be very frequently neglected. The free use of the report-book by the Record-keeper should be encouraged. Unexplained blanks in the Record-room lists are often found. Divisional and District Judges are requested to see that the Record-room Rules are properly carried out. Now that new Record-rooms have been provided at the headquarters of districts many of the difficulties which used to exist have been removed.

By order,

R. B. SMART,

Registrar.

Upper Burma Municipal Regulation, 1887.

Before H. Adamson, Esq., C.S.I.

Civil Second Appeal No. 174 of 1903. August 19th.

THE PRESIDENT, KYAUKSÈ MUNICIPALITY. } *v.* { 1. MA HLA WIN. 2. MAUNG MYIT.

Mr. *H. M. Lutter*—for the appellant.

Held,—that the rules contained in Municipal and Local Department Notification No. 148, dated 11th December 1900, have the force of law.

Rule 4 provides that in certain cases money shall not be received at the Municipal Office for credit to the Municipality, but that when money is presented a chalan shall be prepared and handed to the person desirous of paying money, and that he shall present the chalan and pay the money at the Treasury. When a person from whom money is due to the Municipality alleges that in contravention of this rule he paid the money at the Municipal Office, and it appears that the money was not paid to the Treasury, it is not a valid defence in a suit by the Municipal Committee to recover the money.

Reference :—

Municipal and Local Department Notification No. 148, dated 11th December 1900.

The first respondent bought in March 1900 the right to collect tolls on carts in Kyaukse Municipality for the year 1900-01 for Rs. 2,000, payable in twelve monthly instalments of Rs. 166-10-8. The second respondent was her surety. In April 1902, it was discovered that the last instalment had not been paid into the Treasury. The respondents denied liability, and hence the present suit.

The respondents have attempted to show that the instalment was paid to the late Municipal Secretary. The direct evidence is not of a satisfactory kind. One witness says that payments were occasionally left in the Municipal office. Another states that one payment was made to the late Secretary. The evidence is very vague, and these witnesses do not appear to be worthy of much credit. If money was left with the Secretary for the instalment that has been lost, it does not appear that the first respondent ever demanded from him the chalan as a receipt. On the other hand there are grave errors in the accounts, and the fact that non-payment was not brought to light for a year lends credence to the view that the money was paid. In the demand register, page 189, the full sum of Rs. 2,000 is entered as paid, the last instalment Rs. 166-10-8 being shown under chalan No. 9, dated 7th May 1900. This entry has been erased, and there is no explanation of either the entry or the erasure on the proceedings. The learned Advocate for appellant explains that the erasure was made in April 1902 by the Auditor of Accounts, who has pointed out in a note on the same page, that this payment was made by another person to the account on page 185. It is extraordinary that this entry, dated 7th May 1900, should have been made after an entry,

THE PRESIDENT, KYAUKSÈ MUNICIPALITY v. MA HLA WIN.

dated 6th February 1901, and if the decision of this suit had depended on the question whether the instalment was paid to the late Secretary, as the Lower Courts have assumed, it would have been necessary to return the proceedings to get this point cleared up.

In the judgment of the Lower Appellate Court something has been said about estoppel. But it is quite clear that this is not a case of estoppel. Estoppel, under the provisions of Section 115, Evidence Act, requires the intentional permitting of another person to believe a thing to be true, and it is beyond doubt that the appellant was ignorant that the instalment had remained unpaid, until the fact was discovered by the Auditor in April 1902.

The respondent's liability however, does not, as the Lower Courts have assumed, depend on the question whether the instalment was paid to the late Secretary or not. It is abundantly clear that it was not paid into the Treasury. The rules which will be found in Municipal and Local Department Notification No. 148, dated 11th December 1900, and which so far as the payment of toll licenses is concerned are the same as those in force before that date, have the force of law. Rule 4 provides that money shall not be received at the Municipal office for credit to the Municipality, but that when money is presented, a chalan shall be prepared and handed to the person desirous of paying money, and that he shall present the chalan and pay the money at the Treasury for credit to the Municipality. A payment to the Secretary is therefore not a legal acquittance, and if money were paid to the Secretary, and the Secretary embezzled it, the person who paid it would not thereby be relieved from liability. In the present case, the first respondent has not even the excuse of ignorance. She admits that she has had similar dealings with the Municipality for twelve years, and she paid the former instalments for the year in the manner authorized by law.

As regards the second respondent there is no evidence that he was ever relieved from his liability as surety, and the security bond is still in the possession of the appellant.

Both respondents are clearly liable, and I reverse the decree of the District Court, and restore that of the Township Court with all costs.

APPENDIX.

CIRCULAR MEMORANDUM NO. 4 OF 1903.

FROM

THE REGISTRAR,

JUDICIAL COMMISSIONER'S COURT, UPPER BURMA,

TO

DIVISIONAL AND DISTRICT JUDGES,

UPPER BURMA,

Dated Mandalay, the 19th August 1903.

The following orders regarding the adjournment of cases against sepoys on service in China are issued by the Judicial Commissioner, Upper Burma, for the guidance of Courts.

Long dates should usually be fixed for the cases referred to, and unless the men are represented by properly authorized attorneys, further adjournments *sine die* with leave to either party to move the Court to fix a date, may, if necessary, be granted. The cost of such adjournments should be adjusted according to the circumstances of each particular case. Ordinarily the men concerned would be liable to pay such costs, the adjournments being made solely in their interests.

The attention of Judges is drawn to the provisions of section 465 of the Code of Civil Procedure, regarding the authorization by officers or soldiers of any persons to sue or defend for them.

APPENDIX.

CIRCULAR MEMORANDUM NO. 5 OF 1903.

FROM

THE REGISTRAR,

JUDICIAL COMMISSIONER'S COURT, UPPER BURMA,

TO

DIVISIONAL AND DISTRICT JUDGES,

UPPER BURMA.

Dated Mandalay, the 1st December 1903.

The Judicial Commissioner has noticed that the designations of Civil Courts are not always correctly entered in judicial proceedings, in inspection notes, and other papers.

Divisional and District Judges are requested to see that the designations given in the Civil List, Part XVIIE, and no others, are used.

Upper Burma Land and Revenue Regulation—53(1).

Before H. Adamson, Esq., C.S.I.

Civil Second Appeal No. 173 of 1903.
August 19th.

MAUNG PO NWE *v.*

1. MAUNG THA E.
2. MAUNG TALOK PYU.
3. MAUNG KYWE.
4. MAUNG THA ZAN.
5. MAUNG SAN HLA.
6. MAUNG SHWE YWET.
7. MAUNG PO TE.
8. MAUNG THA OK.
9. MAUNG TUN AUNG.

Mr. *J. C. Chatterjee*—for appellant. | Mr. *C. G. S. Pillay*—for respondents.

Civil Court shall not have jurisdiction in any matter which a Revenue Officer is empowered under the Regulation to dispose of. Suit will not lie in a Civil Court to execute the orders of a Revenue Officer whether by restitution or otherwise.

(*See* Civil Procedure, page 13).

APPENDIX.

CIRCULAR MEMORANDUM NO. 6 OF 1903.

FROM

THE REGISTRAR,

JUDICIAL COMMISSIONER'S COURT, UPPER BURMA,

TO

DIVISIONAL AND DISTRICT JUDGES,

UPPER BURMA.

Dated Mandalay, the 1st December 1903.

The attention of Divisional and District Judges is drawn to the Upper Burma Civil Courts (Amendment) Regulation, No. V of 1903, published at page 419, Part II of the *Burma Gazette*, dated the 21st November 1903, and specially to section 3, whereby section 14 of the Upper Burma Civil Courts Regulation, No. I of 1896, is repealed.

The amending Regulation comes into force on the 1st December 1903.

G. B. C. P. O.—No. 16, J. C., U. B., 26-9-1914—1,000—R. E. R.