UPPER BURMA RULINGS

1907—09

CIVIL

VOLUME II

Published under the authority of the Judicial Commissioner, Upper Burma

RANGOON
OFFICE OF THE SUPDT., GOVERNMENT PRINTING, BURMA
1918

LIST OF AGENTS

FOR THE

SALE OF GOVERNMENT PUBLICATIONS

IN INDIA:

THACKER, SPINK & Co., Calcutta and Simla.
W. NEWMAN & Co., Calcutta.
THACKER & Co., Ltd., Bombay.
HIGGINBOTHAM & Co., Madras.
AMERICAN BAPTIST MISSION PRESS, Rangoon.
* D. B. TARAPOREVALA, SONS & Co., Bombay.
BUTTERWORTH & Co. (India), Ltd., Calcutta.

IN ENGLAND:

HENRY S. KING & Co., 65, Cornhill, E.C.
A. CONSTABLE & Co., 10, Orange Street, Leicester Square, W.C.
KEGAN PAUL, TRENCH, TRÜBNER & Co., Ltd., 68—74, Carter Lane, E.C., and 25, Museum Street, W.C.
BERNARD QUARITCH, 11, Grafton Street, New Bond Street, W.
P. S. KING & SON, 2 & 4, Great Smith Street, Westminster, S.W.
GRINDLAY & Co., 54, Parliament Street, S.W.
T. FISHER UNWIN, Ltd., 1, Adelphi Terrace, W.C.
W. THACKER & Co., 2, Creed Lane, Ludgate Hill, E.C.
LUZAC & Co., 46, Great Russell Street, W.C.
WILLIAM WESLEY & SON, 28, Essex Street, Strand, W.C.
OLIVER & BOYD, Tweeddale Court, Edinburgh.
E. PONSONBY, Ltd., 116, Grafton Street, Dublin.
B. H. BLACKWELL, 50 & 51, Broad Street, Oxford.
DEIGHTON BELL & Co., Ltd., Trinity Street, Cambridge.

ON THE CONTINENT:

ERNEST LEROUX, 28, Rue Bonaparte, Paris, France.
MARTINUS NIJHOFF, The Hague, Holland.

---

* For the sale of official publications excluding those of the Legislative Department of the Government of Burma.

in a suit for sale the Plaintiff, a puisne mortgagee, made the mortgagor and the prior mortgagees parties to the suit, and obtained a decree for sale subject to the prior mortgages of all the Defendant mortgagees, but there was no question of priority or of redemption dealt with in the suit or decree, the claim of one Defendant against another would not be *res judicata* by reason of any decision in the former suit" (referring to *Muhammad* vs. *Visnavatha**).

Kinealy in his notes to section 13, Civil Procedure Code, appears to be misleading where he says "No such adjudication can take place where the Plaintiff's suit has wholly failed." The English authority cited, *Kevan* vs. *Crawford*,† is not available. But *Brojo Bihari* vs. *Kedar Nath* ‡ (1886) and the cases there cited do not support that proposition at all. The ground upon which *Brojo Bihari's* case proceeded appears to have been mainly that the Plaintiff in the second suit was merely a *pro forma* Defendant in the first suit, though it does say that if the suit were barred such a person would be helpless since he could not reopen the case or contest the order by appeal to a higher Court.

That indeed constitutes the apparent hardship of holding the rule of *res judicata* applicable in a case like the present.

But it appears to me that in such a case the Plaintiff is himself to blame.

Here there can be no manner of doubt that the Plaintiff-Appellant was not a *pro forma* Defendant, but a necessary party between whom and the other Defendants the alleged mortgage by him to Defendant-respondent, Mi Kye Gyi, was actively contested.

If he failed to use all his endeavours he acted against his best interest.

What I think he ought to have done, when he found that the other Defendants denied his mortgage, was to move the Court under section 32, Civil Procedure Code, to make him a Plaintiff. The mortgage alleged to have been made by Plaintiffs to him did not directly concern the other Defendants who were not parties to it. He admitted it. The real dispute was between the Plaintiffs and the Defendant, present Plaintiff-Appellant, Thet Tha, on the one side, and the rest of the Defendants on the other, with reference to the alleged mortgage by Thet Tha to Defendant-Respondent, Mi Kye Gyi, and the subsequent transactions.

Those matters were put in issue and evidence was adduced on both sides. I think that on the authority of the decisions above cited the Plaintiff-Appellant must be held to be bound by the finding then arrived at.

That he could not have appealed against an unfavourable decision, even if he had used all his endeavours to prove his case, would have been his own fault for not getting made a Plaintiff.

As a matter of fact the evidence adduced did not prove the mortgage to Defendant-Respondent, and if Plaintiff-Appellant might have adduced better evidence, he must take the consequence of his own remissness here too.

The appeal is dismissed with costs.

* I.L.R., 26 Mad., 337. † 6 C.D., 42, 43. ‡ I.L.R., 12 Cal., 580.

TABLE OF CONTENTS.

CIVIL.

APPENDIX.

TABLE OF CASES.

TABLE OF CASES—*concluded.*

INDEX

TO THE

UPPER BURMA RULINGS

For the years 1907—1909.

CIVIL.

Award.

Before D. H. R. Twomey, Esq.

MI HLA WAING *vs.* NGA KAN.

Mr. *J. C. Chatterjee*—for Applicant.

Civil Revision No. 73 of 1907. March 13th, 1908.

In deciding whether an award of compensation in a seduction case should be enforced or not, the Courts have only to look to the provisions of sections 520 *and* 521, *Code of Civil Procedure, and determine whether any of the grounds mentioned or referred to in those sections is shown against the award. The fact that the subject-matter of an award is not such that it could be a cause of action in a Civil Suit is not necessarily an objection to the legality of the award.*

See Civil Procedure, page 19.

Benami Transactions.

Before D. H. R. Twomey, Esq.

Civil Appeal No. 293 of 1907. September 28th.

FATIMA BIBI BIBI (MINOR) BY HER GUARDIAN *Ad Litem*, FATIMA BIBI. RASSOUL AZIM ALI BAHM *v.* S. N. MAHOMED MOIDEEN.

Mr. *S. Mukerjee*—for Appellants.

Mr. *H. N. Hirjee*—for Respondent.

Held,—that in dealing with a *benami* transaction the question which the Court has to consider is whether the intended fraud has been carried out to the actual detriment of innocent third parties. Where the interests of third parties are not involved the transaction should be treated as a nullity.

* *References* :—

U.B.R., 1897-01, II, 544.
13 M.I.A., 551.
3 L.B.R., 245.
Burma Law Times, I, 157.
Civil Second Appeal No. 219 of 1907.

The Plaintiff-Respondent, Mahomed Moideen, alleging that he was the partner of Ali Bahm, deceased, in a hide business at Mandalay, and that the partnership continued up to the time of Ali Bahm's death on 9th July 1905, sued the legal representatives of Ali Bahm for an account of the partnership and for his share of the assets.

The Defendants admitted that Mahomed Moideen had a share in Ali Bahm's business, but put Mahomed Moideen to the proof of the partnership relation, and pleaded that in any case Mahomed Moideen, on the 1st December 1903, executed a deed releasing Ali Bahm from all claims on the business. During the progress of the case, however, the Defendants admitted that there had been a partnership, but said that it was determined by the deed of release.

Mahomed Moideen admitted execution of the deed of release, but contended that it was only a make-believe, that it was never acted upon or intended to be acted upon, and that its sole object was to prevent creditors of Mahomed Moideen from attaching the partnership property.

The Lower Court decided that the deed of release was a bogus transaction as contended by the Plaintiff, and that the partnership subsisted up to the time of Ali Bahm's death. Mahomed Moideen's account of the terms of the partnership were also accepted by the Court which granted a decree as prayed for.

"It is not denied by Mahomed Moideen that on the 11th August 1904 he swore in a civil suit in the District Court that he bought hides for Ali Bahm, who paid him by commission. He also admits that in insolvency proceedings, in 1904, he entered Ali Bahm's name in his schedule as his creditor for Rs. 14,000. It is also shown that in another civil suit, in 1904, his Advocate definitely informed the Court that Mahomed Moideen was not a partner with Ali Bahm.

FATIMA BIBI v. S N. MAHOMED MOIDEEN.

Finally his own witness, Mapara, states that Mahomed Moideen informed him that he was not a partner with Ali Bahm. This was about a year before Ali Bahm died in 1905. These admissions of the Plaintiff-Respondent go a long way to confirm the genuineness of the release deed of December 1903. On the other hand, the evidence shows that to all outward seeming there was no change whatever in the conduct of the business. Mahomed Moideen took the same leading part in it after December 1903 as before. This seeming continuity would, however, not alone be sufficient to rebut the evidence as to the release and as to Mahomed Moideen's admissions. But there is one piece of evidence which in the Lower Court's opinion settles the question as to the actual duration of the partnership. It is proved by the evidence of the witness, Suleimanji, that in April 1905, two months before Ali Bahm's death, Mahomed Moideen and Ali Bahm entered into an agreement under which arbitrators were to settle their accounts, and the agreement expressly states that Ali Bahm and Mahomed Moideen have been carrying on "joint business (in partnership) in hides at Mandalay since nearly the last two years in the name of Ali Cassim Bahm." This agreement was drafted in Guzerati, and both the parties signed the draft which recited that the agreement should be translated into English and drawn up on a stamped sheet. The parties not only signed the Guzerati draft, but also signed at foot the blank stamp sheet on which the agreement was to be written out in English. Besides the statement of Suleimanji there is evidence that the signatures are in the handwriting of Ali Bahm. The Defendants do not deny that there was a reference to arbitration, but they deny that it has anything to do with the partnership. Its terms, however, clearly relate to the partnership and describe it as existing for two years previously. In the face of this evidence, and in the absence of any evidence to show that as a matter of fact there was any visible change in the conduct of the business after 1903, I think the Lower Court had no alternative but to decide that the release was a fictitious transaction devised as a blind for Mahomed Moideen's creditors, and that Mahomed Moideen's subsequent admissions in Court and elsewhere were a series of lies.

It has next to be considered whether the Plaintiff-Respondent should be permitted to repudiate his solemn deed of 1903. As pointed out by the Lower Court there is a conflict of decisions in Upper Burma and Lower Burma on *benami* transactions. In the Upper Burma Ruling *Ma Me* v. *Maung Sin* (1), (1899), it was held that in cases of this kind, where the fraud though intended is not actually carried out, relief may be given to a party to the fraud where no interest of third parties is involved. The learned Judicial Commissioner remarked that the binding decision of the Privy Council in *Ram S. Singh* v. *Mussamut Pran Peary* (2) goes at least to that extent. In the Lower Burma case, *Ma Le* v. *Po Taik* (3), on the other hand, it was held that the Court should not grant relief in cases of this kind, whether

(1) U.B.R., 1897-01, II, 544. (2) 13 M.I.A., 551.
(3) 3 L.B.R., 245.

the interests of third parties have in fact been injured or not. The learned Judges of the Chief Court appear to have thought it sufficient that the interests of innocent third parties should be threatened, *i.e.*, that they might possibly be robbed of their dues by the transaction. In another recent case of this Court (4) I followed the Upper Burma Ruling and remarked that the Lower Burma Ruling was seemingly in conflict with the Privy Council decision cited above. I am now confirmed in this opinion by their Lordships' remarks in the recent case, *T. P. Petherpermal Chetty* v. *R. Muniandy Serbai* (5), (1908). That was a case in which the Plaintiff sought to recover lands which he had collusively and fraudulently conveyed to another with a view to defeating the claims of a creditor. His suit was allowed, and Their Lordships in dismissing the appeal re-affirmed their previous decisions regarding *benami* transactions and remarked :—

"The plaintiff in suing to recover his property is not carrying out the illegal transaction, but is seeking to put everyone, as far as possible, in the same position as they were in before that transaction was determined upon. It is the Defendant who is relying upon the fraud and is seeking to make title to the lands through and by means of it. And despite his anxiety to effect great moral ends, he cannot be permitted to do this."

It appears therefore that the view taken of this Court in *Mi Me* v. *Maung Sin* (1) is the right one, and that the real intention of the parties should be carried out unless the *benami* transaction has actually operated to the detriment of others. In the present case there is nothing to show that the collusive release of December 1903 has actually operated to the injury of any creditor of Mahomed Moideen and the Plaintiff is merely seeking to put himself and his partner in the same position as if the bogus transaction had never been determined upon, while the Defendants, as legal representatives of Ali Bahra, are seeking to take advantage for their own benefit of the fraud to which he lent himself. I therefore concur in the finding of the Lower Court that the fictitious release is no bar to the Plaintiff's suit.

* * * * *

(4) Civil Second Appeal No. 219 of 1907, *Mi Kaing* v. *Mi Nyan.*
(5) Burma Law Times, I, 157.

Buddhist Law—Ecclesiastical.

Before D. H. R. Twomey, Esq.

Civil Revision No. 110 of 1907. May 27th, 1908.

SHIN KUTHALA, SHIN YEWADA, SHIN GUNAWA, SHIN AHTHABA, SHIN SANDIMA I, SHIN KETHAYA, SHIN WEMALA, SHIN GAWTHITA, SHIN THATHANEINDA THAMANI, SHIN SANDIMA II *v.* SHIN SANDA.

Mr. *J. C. Chatterjee*—for Applicants.

Held—that a Civil Court cannot give effect to an order of the *Thathanabaing* or of any other ecclesiastical authority until such order is confirmed by a judgment and decree of the Civil Court.

Also—that so far as Civil Courts are concerned, the *Sanad* granted by the Local Government is merely an authoritative declaration that for the time being the Taunggwin *Sayadaw* is the ecclesiastic who has supreme control as *Thathanabaing*.

Reference—U.B.R., 1892-96, II, 59.

On the 2nd August 1907 a *pôngyi* named U Gandama presented to the Judge of the District Court, Mandalay, a friendly letter from a Buddhist ecclesiastic, styling himself the Taungbyin Tanagyôk *Sayadaw*, enclosing a document which purports to be a decision with reference to the ownership of a certain *Kyaung* in Mandalay. The document recites that the dispute between certain *pôngyis* as to the ownership of a *Kyaung* was referred by the *Thathanabaing* to the Taungbyin Tanagyôk *Sayadaw* for decision. His decision was to the effect that Shin Sanda (the Respondent) is the owner of the *Kyaung* and that four *pôngyis* who have forcibly occupied the *Kyaung* were to quit it.

The letter to the Judge requested his help in enforcing this decision and ejecting the *pôngyis* who disobeyed it.

The learned Judge thereupon issued a warrant of ejectment directing the Bailiff to put Shin Sanda in possession of the *Kyaung*, and to eject all the other *pôngyis* found in occupation. The Bailiff executed this warrant, but the Taungbyin *Sayadaw* sent another friendly letter to the Judge on the 8th August representing that the *pôngyis* had come back again. Another warrant was then issued coupled with a warning that the *pôngyis* would render themselves liable to punishment for contempt of Court if they disobeyed. This time the Bailiff seems to have been entirely successful in dispossessing the occupants of the *Kyaung* in favour of U Sanda. It appears that the ten applicants are *pôngyis* who were ejected. Their application is based on various grounds. They deny the jurisdiction of the *Thathanabaing*, and plead that they did not agree to his election. They also urge that the decision of the Taungbyin *Sayadaw* was *ex parte* and contrary to the Buddhist Canon law. Finally, they complain of the summary nature of the District Court's proceedings in issuing a warrant without examining the parties or holding any enquiry, and they plead that the Judge acted without jurisdiction.

SHIN KUTHALA
v.
SHIN SANDA.

The District Court's order is as follows :—

"Read application filed by U Gandama. Read *Sayadaw's* judgment as sanctioned by the *Thathanabaing*.

Under paragraph 5 of the *Sanad* and Rule 28 (*a*) I take this matter up.

Issue notice to the Bailiff to eject the *pôngyis* in question under a warrant from this Court and to put the proper owners in possession of the *Kyaung* before 10th August 1907."

It is not clear that the *Sanad* and the *Thathanabaing's* appointment by Government are facts in respect of which the Courts may dispense with formal proof. But it is not necessary to enter more fully into that question, as the Applicants would no doubt admit these facts under section 58 of the Evidence Act. The learned Judge of the District Court, however, certainly errs in supposing that the *Sanad* confers on the Civil Courts any authority which they do not possess under the ordinary law.

The *Sanad* recognizes the Taunggwin *Sayadaw* as *Thathanabaing*. Clause 4 shows that he is supreme in all matters relating to the internal administration of the Buddhist hierarchy in Upper Burma, and Clause 5 undertakes that "the Civil Courts will, *within the limits of their jurisdiction*, give effect to the orders of the *Thathanabaing, Gaingyoks*, etc., in so far as those orders relate to matters which are within the competence of those authorities." It had already been held by this Court in the leading case of *U Teza* * that "the orders and proceedings of the Buddhist Ecclesiastical authorities, so long as they keep within their jurisdiction, cannot be questioned by the Civil Courts," and so far as the Civil Courts are concerned, the *Sanad* is merely an authoritative declaration that for the time being the Taunggwin *Sayadaw* is the ecclesiastic who has supreme control as *Thathanabaing*.

"Rule 28 (*a*)" referred to by the learned Judge is, I understand, one of a set of rules issued by the *Thathanabaing* for the guidance and control of Buddhist monks and novices. It is hardly necessary to say that the rules have not the force of law and that they cannot (any more than the *Sanad*) authorize the Courts to depart from the ordinary course of judicial procedure.

But the District Court in the present case certainly arrogated a jurisdiction which it did not possess. It treated the decision of the Taungbyin *Sayadaw* as if it were a judgment and decree of a Civil Court, and proceeded to execute it for the discomfiture of the Applicants without even giving them an opportunity of showing cause against its execution. The action of the District Court was illegal. On receipt of the *Sayadaw's* letter, the proper course was to reply that U Sanda is at liberty to file a plaint framed and stamped as required by law for the enforcement of the Taungbyin *Sayadaw's* decision, but that a Civil Court cannot give effect to an order of the *Thathanabaing* or of any other ecclesiastical authority until such order is confirmed by a judgment and decree of the Civil Court.

*U.B.R., 1892-96, II, p. 59.

The order of the District Court dated 3rd August 1907 and all proceedings taken in pursuance thereof are set aside, with costs as against the Respondent. Advocate's fee in this Court fixed at two gold mohurs.

It is unnecessary to deal with the various other arguments used in the application and referred to above. If U Sanda files an ejectment suit, and it is contested, the Courts can decide how far those arguments are admissible.

Buddhist Law—Ecclesiastical.

Before G. W. Shaw, Esq., C.S.I.

Civil Appeal No. 280 of 1907. May 19th, 1909.

U THI HA *v.* U THUDATTHANA (1), U KEIKTIMA, U ZAGAYA, U EINDAMA, U THUDATTHANA (2), U EINDA, U SANDAWAYA, U NAGIYA, U WISEIKTA, U KEIKTI, U NANDA (1), U ZAWTA, U ZANEINDA, U THUZATA, U NANDA (2), AND U SANDIMA.

Mr. *S. Mukerjee*—for Appellant.
Mr. *J. C. Chatterjee*—for Respondents.

Nature of a suit to enforce a decision of the *Thathanabaing*. Court-fee payable on the same.

References:
U.B.R., 1892—96, II, 59.
————1907—08, II, B.L., Ecclesiastical, page 1.

THE parties are Burmese Buddhist Monks.

Plaintiffs-Respondents in their plaint alleged that on a dispute between them and the Defendant-Appellant with reference to Defendant-Appellant's occupation of a certain monastery, a decision ejecting him was made on a certain date by the *Anaukpyin tanagyôk Sayadaw* and the *Dakkhina wun taik-ôk Sayadaw*, under the authority of the *Thathanabaing* and his Council. They attached the decision to the plaint, and prayed that it might be "filed in Court and enforced"
(ရုံးတော်တွင်တင်သွင်းအဆုံးဖြတ်ပေး).

On the preliminary examination of the parties before issues were framed, it appeared that the Defendant-Appellant was a party to the proceedings before the *Sayadaws*, that he was examined, and called witnesses who were also examined in his presence, by the *Sayadaws*.

But there was nothing to show that the Plaintiffs-Respondents wished the decision to be treated as an award, still less that they wished it to be understood that they were making an application under section 525 of the Civil Procedure Code, 1882 (corresponding to Schedule II, paragraph 20 of the Code of 1908).

A plaint in a suit to enforce an award, *i.e.*, for specific performance of an award, is liable to court-fees according to the amount or value of the property in dispute, under section 7 (X) (*d*) of the Court-fees Act.

In order to obtain the benefit of section 525, Civil Procedure Code, 1882 (or Schedule II, paragraph 20 of the Code of 1908), an application under that section must purport to be such an application, and not a plaint in a suit for specific performance.

In either case there should have been an allegation that there was a reference to arbitration and an award.

As far as the plaint went, the monastic authorities mentioned might have proceeded wholly without the Defendant-Appellant's concurrence. If he was subject to them and the matter was within their competence, his concurrence would not be necessary, and the decision would be enforceable on the grounds explained in *U Teza* v. *U Pinnya** and later cases. In such circumstances, I think that what

* U.B.R., 1892-06, II, 59.

U THI HA
v.
U THUDATTHANA.

Plaintiffs-Respondents would have had to sue for was possession of the monastery, on the ground of the decision by the monastic authorities. This agrees with *Shin Kuthala* v. *Shin Sanda*,† though I refrain from using the term "ejectment" which appears to be incorrect.

On the face of the plaint it must be regarded as a suit of that character.

But if by reason of the Defendant-Appellant's participation in the proceedings before the *Sayadaws*, it be assumed that there was a reference to arbitration and an award, then in the absence of the particulars necessary to bring the plaint within section 525 of the Civil Procedure Code, 1882 (or Schedule II, paragraph 20 of the Code of 1908), the suit must be regarded as a suit for specific performance of an award.

In either case the court-fee payable was *ad valorem* on the value of the property sought to be recovered from the Defendant-Appellant.

I have therefore had to adjourn the hearing of the appeal under section 12, Court-fees Act, for the deficient court-fees to be paid both on the plaint and on the memorandum of appeal.

On the merits there is little to be said.

The parties are monastics. The monastery is *thingika* (*sanghika*), *i.e.*, property belonging to the monastic body. The right of the *Thathanabaing* and the *Sayadaws* to adjudicate on the matter in dispute is not open to serious question.

The fact that Defendant-Appellant professes to be a schismatic, and to refuse recognition to the *Thathanabaing*, appears to me to be immaterial. If a plea of the kind were admitted the authority of the Buddhist hierarchy and their power to maintain order and discipline would be at an end.

But it is unnecessary to go further into that question, in view of the Defendant-Appellant's having actually attended and taken part in the proceedings as before mentioned. No ground whatever for invalidating the decision has been made out.

Apart from the Defendant-Appellant's attempt to deny the *Thathanabaing's* authority, the only relevant objection he put forward was that the *Sayadaws* who conducted the proceedings were themselves parties. But this was found to be without foundation.

The appeal is dismissed, but the phraseology of the decree will be amended. Defendant-Appellant will pay Plaintiff-Respondent's costs.

† U.B.R., 1907-08, II, Buddhist Law, Ecclesiastical, page 1.

Buddhist Law—Gift.

Before G. W. Shaw, Esq.

Civil Second Appeal No. 53 of 1907. February 27th, 1907.

ABDUL GAFUR, FATIMA BIBI *vs.* DEYAN SINGH, legal representative of NAN SINGH.

Mr. *A. C. Mukerjee*—for Appellants.
Messrs. *J. C. Chatterjee* and *S. Mukerjee*—for Respondent.

Held,—It depends on circumstances whether the Buddhist or Muhammadan Law applies to gifts. Where a gift is not a question of inheritance, succession, religious institution or usage it is governed by the Contract Act.

According to the latest authorities actual delivery of possession is not necessary under Muhammadan Law.

By Muhammadan Law the husband share, where there are children, is one-fourth.

References :

Amir Ali's Muhammadan Law, Vol. I, 64.
Civil Appeal No. 208 of 1905 (unpublished).
I.L.R., 28 All., 147.
S.J.L.B., 30.
U.B.R., 1892—96, II, 400.
————1897—01, II, 62.
————1902—03, II, B.L. Gift 1.

This is a case of some difficulty. Both the Lower Courts gave unusual care and attention to it. But I do not think that they arrived at the right conclusions with respect to Plaintiffs-Appellants' claim to the property.

They alleged a gift by their father, Abdur Rahman, to their mother Mi Bibi. The Subdivisional Court assumed that Muhammadan Law applied to the question of the validity of the alleged gift. The Lower Appellate Court had its attention drawn to this point. But the learned Judge did not deal with it satisfactorily.

Section 4 (1) of the Upper Burma Civil Courts Regulation (or section 13 of the Burma Laws Act, 1898) only refers to cases of succession, inheritance, marriage or caste, or any religious usage or institution. And questions relating to gifts which do not fall under any of those heads must be governed by the Statute Law contained in section 25 of the Contract Act. This has already been held by this Court in regard to gifts by and to Buddhists. See the recent judgment in *Shwe In* vs. *Mi Shan* * where the previous rulings on the subject were referred to. (Extract from judgment attached.)

The Lower Appellate Court also seems to have strangely misunderstood explanation 1 to section 25, Contract Act. The effect of that explanation is that a gift actually made is valid, though it may not have been expressed in writing or registered. It is difficult to conceive how anyone could interpret it in the sense of declaring invalid a gift actually made which was expressed in writing and registered. But the Lower Appellate Court seems to have done this, if its reference to explanation 1 has any application at all. The learned Judge again did not keep distinct the two separate questions

* Civil Appeal No. 208 of 1905 (unpublished).

ABDUL GAFUR v. DEYAN SINGH.

of the gift, and of the inheritance after Mi Bibi's death. Considered separately the gift to Mi Bibi was clearly not a question of succession, inheritance, marriage, caste, religious institution or usage.

Strange to say the applicability of section 25, Contract Act, has not been referred to in argument in second appeal.

The learned Advocate for the Defendant-Respondent has taken up a new line of defence, and has contended that the gift was never intended to be a genuine transaction. I can find no support for this contention in the evidence.

Everything in my opinion points to the conclusion that the gift was intended to be a genuine transaction.

The operative part of the instrument ran thus :—

"Not wishing to take the said house in case I should divorce or live separately from Mi Bibi in consequence of disagreement, I hereby give and make it over to her with effect from this date, to do with it as may seem best to her, together with the site and compound, out and out."

This is plain and free from ambiguity, and is not affected by the succeeding clause which adds that the house, etc., are given to the children Abdul Gafur and Fatima to inherit in the event of Mi Bibi dying, a provision which it is not disputed contravened the Muhammadan Law of Inheritance and was therefore ineffective.

Following on the execution of this document, Mi Bibi's name was substituted in the Revenue Records for Abdur Rahman's, and Mi Bibi mortgaged the house to Nga Than, Abdur Rahman at the time stating that he had no interest in it, having given it to her. She also lived in the house with her children.

The fact that Abdur Rahman continued to live with his wife afterwards—in the house in question—till she died, does not show that he did not intend the gift to be genuine. What he did after Mi Bibi's death is not on the same footing as we shall see presently, but I am unable to see that it affords any indication that he did not intend the gift to be a genuine transaction at the time it was made.

The children were minors, and it was natural that their father should live with them and maintain them. The learned Advocate for Plaintiffs-Appellants has remarked with much force that this would not entitle him to charge the children with the cost of their maintenance by mortgaging their property. It also fails to show that the gift to their mother was a sham transaction from the beginning. Having decided to borrow money by mortgaging the house in question, Abdur Rahman was compelled to get his name substituted for Mi Bibi's, in order to carry out his design, because the mortgagee would not come to terms otherwise. That does not show that the gift was a sham from the beginning.

The document was expressed in writing and registered. The transaction was clearly valid under the Contract Act, apart from delivery of possession.

Considered also from the point of view of Muhammadan Law as interpreted by judicial decisions, it appears to me that the gift was not invalid. That law does not render it impossible for a husband to

make a gift to his wife of the house in which they both live, as the Lower Courts seem to have thought.

The latest decision on the subject appears to be that in *Humera Bibi* vs. *Najmu-n-nisa Bibi** (1905). That was a strong case since the donor was merely an aunt. It was held that "if the parties are present on the premises it is sufficient that an intention on the part of the donor to transfer possession has been unequivocally manifested." This is in accordance with Amir Ali's conclusion based on a full consideration of the original authorities. He says:

"Actual delivery of possession is not necessary. If the character of the possession changes, the mere retention of the subject-matter of the gift in the hands of the donor would not affect the validity of the gift." (Muhammadan Law, Vol. I, page 64.) But in the view which I have taken it is not necessary to go further into the Muhammadan Law on the subject.

The next question is as to the effect of Mi Bibi's death. The Lower Appellate Court without citing any authority declared that assuming the gift to have been valid "the property on Mi Bibi's death reverted by law to Abdur Rahman" and that Plaintiffs-Appellants "cannot inherit while their father is alive." The Muhammadan Law here applies without doubt, and the rule as to a husband's share is stated in paragraph 15 of Macnaghten's first chapter. (On the principles of inheritance.) "The husband takes a fourth of his wife's estate where there are children," etc.

This was the extent of Abdur Rahman's interest in the property in question at the time of his mortgage to Defendant-Respondent, if he had any at all, and he could not transfer more. The Lower Appellate Court must have been thinking of Buddhist Law. It is admitted before me that the Lower Appellate Court was in error in applying the law of estoppel to the Plaintiffs-Appellants who were minors.

And they could not be bound by what their father did with their property unless it was to their interest which, on the face of it, the transaction in question was not.

But the question of inheritance was not gone into in the trial of the case.

It appears from some other proceedings that Mi Bibi lived separately for a time before her death. But there was no evidence on this point.

The case must be remanded to the Subdivisional Court for the determination of the following issues:—

What shares, if any, had (*a*) Abdur Rahman (*b*) the Plaintiffs-Appellants in the property in question as sharers or residuaries of Mi Bibi under the Muhammadan Law of Inheritance.

Incidentally it will be necessary for the Court to find out whether Abdur Rahman was still the husband of Mi Bibi at the time of her death, and what other relatives there were, as may be seen from the chapter of Macnaghten's work already cited.

The case will be resubmitted with the additional evidence, if any, and the findings of the Court before the 8th February next.

* I.L.R., 28 All., 147.

ABDUL GAFUR
v.
DEYAN SINGH.

Extract from Judgment in Civil Appeal No. 208 of 1905.

In regard to the applicability of the Buddhist Law to gifts, I have referred to all the decisions cited. My conclusion is that it depends on the circumstances of each case. In one case the gift may be a matter of religious usage, as was held in *Pan U* vs. *Mi Kyu and others* * where the gift in question was made on the occasion of a *shinbyu* ceremony. In another it may be neither a matter of religious usage nor of inheritance, nor succession, as in *At Kyi* vs. *Mi U Me* and *another*,† where a father gave land to his daughter and her husband on the occasion, as she said of her ear-boring ceremony and betrothal, and after ten years he sought to take back the gift. In a third it may be a matter of inheritance, and was held in *Mi Pwa Swe* vs. *Mi Tin Nyo* ‡ which was a case of a deathbed gift.

And in U Thathana vs. *U Awbatha and others* § it was remarked that where the gift in question is not a matter of religious usage, inheritance or succession, the "Courts would doubtless pay due regard to the Buddhist Law in dealing with cases of the kind from the standpoint of justice, equity and good conscience."

The Subdivisional Court has now found that the alleged divorce is not proved, and that Abdur Rahman's share of the property in question was one-fourth.

The Plaintiffs-Appellants called four witnesses, Mi Yauk (Mi Bibi's mother), Bangyi, a Zerbadi Petition-writer, Mi Lun Bin, mother-in-law of Mi Bibi's brother, and Po Min (husband of Mi Lun Bin), and the Court called Usman, Mi Bibi's brother, and the person who has been acting as the guardian of the Plaintiffs-Appellants.

Mi Yauk, Bangyi and Mi Lun Bin speak to admissions of divorce by Mi Bibi and Abdur Rahman, Po Min to an admission by Abdur Rahman. Mi Yauk and Ban Gyi say that Mi Bibi demanded her dowry and that Abdur Rahman said that he would pay when he was able or that he could not pay (then). Mi Yauk says that Abdur Rahman never visited Mi Bibi when she was ill, did not live with her in the house in dispute, and did not go to see her after she was removed, 15 days before she died, to Mi Yauk's and did not attend the funeral. Mi Lun Bin and Po Min state that Abdur Rahman did not visit Mi Bibi. But Bangyi states that he once met Abdur Rahman near Mi Bibi when she was ill. And Usman states that Abdur Rahman went to her when she was about to die and attended the funeral, and he thinks they were husband and wife at the time of Mi Bibi's death. He knows nothing of the divorce.

It is true that Usman says that he was on bad terms with Mi Bibi and might have not known of the divorce. But in view of his position in the family it is highly improbable that he would not have known; and he admits that in the proceedings for removal of attachment on the property now in question (Civil Miscellaneous No. 4 of 1903) he distinctly stated in evidence that there was no divorce. As the Plaintiffs-Appellants' guardian and the attorney of Mi Yauk in some other proceedings, he was highly interested in establishing the divorce if there was one. Plaintiff-Appellant, Abdul Gafur, alleged a divorce in the miscellaneous proceedings just referred to. It obviously

* S.J.L.B., 30.
† U.B.R., 1892-96, II, 400.
‡ U.B.R., 1902-03, II, B. L. Gift 1.
§ U.B.R., 1897-01, II, 62.

strengthened Plaintiffs-Appellants' claim to the property. It appears to me that if there had been a divorce we should have had more direct and independent evidence in proof of it than the witnesses supply. I think it is quite clear that Mi Yauk is not telling the truth about Abdur Rahman not visiting Mi Bibi before her death, and not attending the funeral. Not only is she contradicted by Usman who is a credible witness, but by Bangyi who is not.

Mi Lun Bin and Po Min's evidence is not all convincing.

If there had been a divorce, I think it would certainly have been brought forward at the outset of the present proceedings.

For these reasons I accept the finding that the divorce is not proved. There is nothing to show that Mi Bibi left any other property. It follows that Abdur Rahman's transfer to Defendant-Respondent was valid only to the extent of one-fourth, and that Plaintiffs-Appellants are entitled to retain possession of the remainder, since Defendant-Respondent has no right in execution of his decree to oust them from more than the one-fourth which he acquired from Abdur Rahman.

The decree of the Lower Appellate Court is set aside.

There will be a decree as prayed in the plaint to the extent of three-fourths of the Southern 4 *kans* in question, and the Defendant-Respondent will pay costs in proportion.

Buddhist Law—Gift.

Before D. H. R. Twomey, Esq.

1. U NAGA, 2. MAUNG SAN PU, 3. MAUNG SHWE ON, 4. MAUNG PAW *v.* MAUNG HLA.

Civil 2nd Appeal No. 329 of 1907 July 27th, 1908.

Mr. *C. G. S. Pillay*—for appellants.
Mr. *A. C. Mukerjee*—for respondent.

Held,—that under Buddhist Law a death-bed gift to a stranger, even if delivery of possession is made, is invalid as against the natural heirs.

References:

U.B.R., 1902-03, II, Buddhist Law—Gift, p. 1.
Kinwun Mingyi's Digest, 75 and 79.
Manu Wunnana, paragraph 344.

Maung Lu O was a childless old man who died at the *pôngyi U* Naga's *kyaung* on the full moon day of *Tasaungmôn* 1268. It appears from the *pôngyi's* own statement that Lu O was brought to the *kyaung* only to die in the odour of sanctity. The *pôngyi* (1st Defendant-Appellant) stated "Lu O said he worshipped me and that he would prefer dying in my *kyaung*, and asked me to take him there." So the *pôngyi* had him carried to his *kyaung* on the 7th Lasan. On the 10th Lasan, *i.e.*, five days before his death, he made over all his property to the *pôngyi* in the presence of the village headman. He did not mention any particular property, but said he gave all his belongings to the *pôngyi*. The list of property filed by the Plaintiff-Respondent consists of five pieces of land, Rs. 28 in cash, and about Rs. 20 worth of grain and cotton received as rent in kind. The list is not disputed by the *pôngyi*. At the time of the gift, Lu O made over certain palm leaf documents, the title-deeds of some of the lands. The 4th Defendant-Respondent is one of Lu O's tenants, and he states that Lu O told him he had given his lands to the *pôngyi*. This was on the day of Lu O's death. The Plaintiff-Respondent, Maung Hla, is a son of Lu O's sister, and it is not disputed that according to the ordinary law of inheritance he is Lu O's heir. He also holds letters of administration to Lu O's estate.

There can be no doubt that as both the Lower Courts have found, Maung Lu O gave all his property to the *pôngyi*, U Naga. The question is whether the gift was a valid one. The Lower Appellate Court has referred to the leading case *Ma Pwa Swe* v. *Ma Tin Nyo** in which it was held that a death-bed gift is a question of inheritance to which the Buddhist law is applicable, and that the Dhammathats guard against a death-bed disposal of property to the exclusion of one heir in favour of another. The passage from the Manu Wunnana Dhammathat (section 344) cited in that judgment refers to the case of parents who are stricken down never to rise again, and declares that in such circumstances a gift of property away from the ordinary heirs is invalid. There was in that case a registered deed of gift but no delivery of possession, and the Lower Appellate Court appears to have been rather doubtful as to whether the same rule should be

*U.B.R., 1902-03, II, Buddhist Law—Gift, p. 1.

U NAGA
v.
MAUNG HLA.

applied, where there has been a technical delivery of possession of part of the property, as seems to have taken place in the present case.

I think it is very doubtful whether Lu O can be said to have made over possession. There was certainly no delivery of the moveable property so far as the evidence shows. As regards the lands, there is the fact that Lu O made over three palm leaf documents concerning them, and told the *thugyi* that he gave all his property to the *pôngyi*. It might perhaps be held that in the case of the lands covered by the documents there was delivery of possession. Assuming that this view is right, I will consider whether the gift away from the natural heir is valid.

The evidence shows clearly that Lu O was on his death-bed. The words of the Dhammathat are wide enough to cover cases in which there has been delivery of possession as well as cases in which there has been no delivery, and in both cases the gift is subject to the same objection, namely, that to hold the gift to be valid "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 concluding part of paragraph 344 of the Manu Wunnana is not given in the judgment in *Ma Pwa Swe's* case. It lays down that in the case of children living with their dying parent the gift is invalid whether possession is given or not, and that the property given must be divided among the co-heirs. This is in accordance with the general spirit of the Dhammathats cited in the Kinwun Mingyi's Digest. Section 79 refers to gifts by parents *in extremis*. It deals only with gifts to children, and it appears from the texts cited that in the case of children living with the parents a gift made *in extremis* is invalid even if delivery of possession is made, while in the case of children not living with the parents the gift is valid. But it appears from the texts cited in section 75 that according to Buddhist law a gift of the entire estate is not valid even though the parent may not be *in extremis*, and though the gift may be accompanied by delivery of possession. Such being the rule as regards gifts to children, it seems to follow *a fortiori* that gifts to strangers would be invalidated in like circumstances. At the present day a gift made when the donor is not *in extremis* would not be governed by Buddhist law, but the rule of Buddhist law on the subject is relevant as showing the general trend of that law in safeguarding the rights of the natural heirs.

The gift in this case is said to have been made with a view to the spiritual benefit of the donor. It was made to help him in attaining *Nirvana*. But it has not been urged before me that this makes any material difference, nor can I find any authority for supposing that a death-bed gift acquires special validity in such circumstances.

It is not suggested that a gift which would be void as against the children of the deceased donor would be any the less void because the next-of-kin entitled to the estate under the Buddhist law happens to be a nephew of the deceased. I therefore concur with the Lower Appellate Court in adjudging the gift to *pôngyi*, U Naga, to be invalid.

The Appellant has in the alternative urged that he should be allowed to set off Rs. 67 spent by him on the funeral, against the

value of the property claimed by the heir, Maung Hla. I do not think that section 111 of the Code of Civil Procedure is a bar to this set off. The suit was for delivery of certain land and moveables, including Rs. 28 in cash, and was therefore in part for recovery of money. The *pôngyi* produced evidence showing that he spent about Rs. 67 on the funeral, but although it is admitted that the expenses were partly covered by contributions from those who were bidden to the funeral feast, no account has been rendered by the *pôngyi* of the contributions so received. On the other hand, the Plaintiff-Respondent has not proved that the expenditure was fully recouped by the contributions. On the whole, I think the equitable course is to absolve the *pôngyi* from the claim on account of moveables which the heir, Maung Hla, values at Rs. 47-4-0 (less Rs. 28 admitted as funeral expenses).

The decree of the Lower Appellate Court is modified as follows :— There will be a decree in favour of the Plaintiff-Respondent for the five pieces of land claimed by him or their value, Rs. 180. The first Appellant, U Naga, will pay the Respondent's costs on this amount only in all Courts.

Buddhist Law—Inheritance—Pre-emption.

Before G. W. Shaw, Esq.

Civil 2nd Appeal No. 1500 of 1906.
May 1st, 1907.

NGA TIN, MI MIN DOK, NGA MYO, NGA TUN AUNG *v.* NGA SHWE ON, MI PA.

Mr. *S. Mukerjeee*—for Appellants.
Mr. *C. G. S. Pillay*—for Respondents.

In a case where the wife has inherited on her husband's death the share which he obtained at a partition in his lifetime with his co-heirs, and her deceased husband's coheirs have sold their shares to a stranger, and she has a son by her deceased husband :—

Held,—that the widow has the right of pre-emption.

References :

I.L.R., 7 All.; 775.
————29 Mad.; 298.
P. J., L. B., 26.
S. J., L. B., 39.
————41.
————76.
U.B.R., 1892-96, II, 121.
————581.
————1897-01, II, 146.
————155.
————162.
————231.
1. L.B.R., 144=2 L. C., 129.
Kinwun Mingyi's Digest, Vol. I, section 309.
Mayne's Hindu Law and Usage, 6th Edition, 296.

Plaintiff-Respondent, Mi Pa's husband Paw Sa, who died some 8 years before suit, and Defendants-Appellants, Nga Tin, Mi Min Dôk and Nga Myo, were brothers and sister and co-heirs. During Paw Sa's lifetime the estate was divided. It consisted of land yielding 2,000 baskets of paddy, and each of the four received a part yielding 500 baskets. Paw Sa and Plaintiff-Respondent, Mi Pa, had a son, now 15 years old. When Paw Sa died Plaintiff-Respondent, Mi Pa, inherited the share he had received. Defendants-Appellants, Nga Tin, Mi Min Dôk and Nga Myo have now sold their shares to Defendant-Appellant Nga Lan, a stranger.

Plaintiff-Respondent, Mi Pa, and her second husband, Plaintiff-Respondent Shwe On, sue the Defendants-Appellants on two grounds (1) They allege that Defendants-Appellants Nga Tin, Mi Min Dôk and Nga Myo, contracted to sell their shares to them and received earnest money from them before they sold to Defendant-Appellant, Nga Lan. (2) They allege that they have (or at least that Plaintiff-Respondent, Mi Pa, has) a right of pre-emption.

The plaint however is badly expressed. The prayer is for "cancellation of a document" (namely, the deed of sale to Defendant-Appellant, Nga Lan) and for a declaration of Plaintiffs-Respondents' right of pre-emption.

The Court Fee originally paid was Rs. 10. The Defendants-Appellants in their written statement pointed out that this Court Fee

NGA TIN
v.
NGA SHWE ON.

was insufficient, but the Subdivisional Court ignored the defects in the plaint and the insufficiency of the Court Fee.

The Lower Appellate Court treated the plaint as amended by the addition of a prayer for consequential relief, and required the Plaintiffs-Respondents to pay the deficient Court Fees, which was done.

It is contended for Defendants-Appellants that this was wrong and that the suit ought to have been dismissed. The case of *Shakka Subbia* v. *Maddali** is relied upon.

The facts of that case are clearly distinguishable, and on the principles explained in *Mwe Zet* v. *Nga Saung* † I am of opinion that it was open to the Lower Appellate Court to amend the plaint, or treat it as amended, under section 53(*c*), Civil Procedure Code.

Obviously what the Plainitffs-Respondents intended was to pray for (1) a decree ordering specific performance of a contract to sell the property in question, (2) for a decree enforcing their right of pre-emption in respect of that property. They were only in possession of Defendant-Appellant Mi Min Dôk's share (as tenants), and a remedy short of one or other of these would not meet their case.

The defects in the drafting of the plaint were plainly the result of ignorance or mistake.

To amend the plaint, or treat it as amended in the way the Lower Appellate Court did, was not to change the suit into one of another and inconsistent character. The only change was in the remedy asked for. The Defendants-Appellants' objection on this point must therefore be disallowed.

As regards the alleged agreement to sell, it is very clear that Plaintiffs-Respondents completely failed to prove anything of the kind. The only witnesses they say were present were near relations of the Defendants-Appellants, who do not support Plaintiffs-Respondents' story. Practically the only evidence they have to corroborate their own statements is the unexplained and unsupported statement of the witness, Tun Min, that Defendant-Appellant, Nga Tin, told him that he had sold "the land" to Plaintiff-Respondent, Mi Pa. I hold this insufficient.

The visits to Toungoo are quite inconclusive They cannot be taken to prove that there were negotiations about the land in suit, still less that Defendants-Appellants, Nga Tin, etc., agreed to sell it to the Plaintiffs-Respondents.

The decision of the case, then, must rest on the question of pre-emption.

The law on the subject was first declared in the Lower Burma cases of *Nga Myaing* v. *Mi Baw*,‡ *Mi Te* v. *Po Maung*,§ and *Mi Ngwe* v. *Lu Bu*.‖ In *Ibrahim* v. *Arasi*¶ pre-emption was held to be an inseparable incident of the Buddhist Law of succession and inheritance. The principles enunciated in these decisions were adopted and applied to Upper Burma in *Shwe Nyun* v. *Mi So*, ** and *Lu Dôk* v. *Mi Po*.†† The gist of these Rulings is that if a person

* I.L.R., 29 Mad., 298.
† U.B.R., 1897-01, II, 231.
‡ S.J., L.B., 39.
§ ———, 41.
‖ S.J., L.B., 76.
¶ P.J., L.B., 26.
** U.B.R., 1897-01, II, 155.
†† ———————, II, 162.

wishes to sell ancestral property whether it has been divided or not, he must offer it to his co-heirs, before selling it to strangers. And a sale to strangers effected without such offer is invalid if the co-heirs promptly assert their rights.

There is only one more recent decision that calls for mention, *Shwe Eik Ke* v. *Tha Hla Aung*,* where it was held that a partition the co-heirs took their particular lots, free from all obligation as regards pre-emption. But the learned Judge did not cite any authority for his opinion, and it does not appear whether his attention had been drawn to *Mi Ngwe* v. *Lu Bu* † which one would have thought was directly in point. In these circumstances *Shwe Eik Ke's* case cannot be held to affect the decisions already cited, which conflict or seem to conflict with it.

No new facts or arguments have been adduced before me to necessitate the re-opening of the question. But as the circumstances of the present case are peculiar, I have thought it advisable to refer to all previous decisions in order to see whether there is anything in them either affirmatory of Plaintiffs-Respondents' claim, or inconsistent with it.

With the same object I have been at some pains to consult all available authorities on the subject of pre-emption in Hindu Law.

The history and nature of pre-emption are exhaustively discussed in *Gobind Dayal* v. *Inayatullah*‡. The only other reference it is necessary to cite is Mayne's Hindu Law and Usage, 6th Edition, page 296. The Hindus who were organized in village communities and joint families apparently had from the earliest days restrictions on alienation by co-heirs. Mayne, while he is of opinion that partition would put an end to further rights within the family, suggests that the restriction on alienation in respect of property that had been divided had their origin in village communal rights. This is a probable explanation of what would otherwise be an anomaly. But the origin of the rule was forgotten, and the Hindus adopted the Muhammadan notion of pre-emption in order to give fuller effect to their object. Pre-emption thus came to be embodied in their customary law, though it finds no place in their recognized text-books. And the Buddhist Dhammathats apparently borrowed the law of pre-emption as applied to divided as well as undivided property from the Hindus. Any how there seems to be no doubt that they contain provisions, from whatever source derived, which give a right of pre-emption to co-heirs in respect of divided as well as undivided property.

I have found nothing, either in the Hindu Law or in the passages of the Buddhist Dhammathats dealing with pre-emption, to support the contention that the right of pre-emption does not extend to the Burmese Buddhist widow who has succeeded to her husband's interest or share in ancestral property. The determination of that point must rest on the legal position of the Burmese Buddhist widow.

What that position is, is indicated with sufficient clearness in *Mi Lan* v. *Shwe Daing*,§ *Nga Waik* v. *Nga Nyein* ‖ and *Mi Min Tha*

* 1 L.B.R., 144=2 L.C. 129.
† S.J., L.B., 76.
‡ I.L.R., 7 All., 775.
§ U.B.R., 1892-96, II, 121.
‖ U.B.R., 1897-1901, II, 146.

NGA TIN
v.
NGA SHWE ON.

v. *Mi Naw*.* She is the heir of her husband whether there are children or not. The eldest son has a right to claim one-fourth on the death of the father, but this fact does not alter the position of the widow.

In *Nga Waik's* case it was held that the widow who died some time after her husband, is succeeded in the absence of children by her relations to the exclusion of the relations of her deceased husband. This rule applies to ancestral property obtained by the husband on partition in his lifetime, the case we have to deal with here. It implies or seems to imply a separation from the family of the deceased husband. But the texts which directly prescribe the rule, all with one exception, declare that the relations of the deceased husband have nevertheless the right of pre-emption. (See section 309, Volume I, Kinwun Mingyi's Digest). I think it must be inferred from that fact that the separation is not complete. Presumably the right of the husband's relations is to be exercised where the widow or her heirs transfer the property to strangers. The object no doubt is, as stated in *Mi Ngwe* v. *Lu Bu*, † to keep the family estate, or what was the family estate, in the family.

In the circumstances of the present case I am unable to distinguish the Plaintiff-Respondent Mi Pa's claim to pre-emption from the right expressly given by the texts in section 309 of the Digest to the relations of the deceased husband. For here all those relations have sold their shares to a stranger, and the Plaintiffs-Respondents, that is the widow and her second husband, seek to pre-empt these shares in order to keep them in the family. As the heir of her husband Plaintiff-Respondent, Mi Pa, would have been a co-heir of Defendant-Appellants, Nga Tin and his brother and sister, if the estate had been still undivided. I am unable to find any authority for the view that her rights as heir are less perfect than those of her husband's co-heirs where division has taken place, and the question of keping the family property in the family has arisen.

Her case seems to me to be strengthened if anything by the fact that she and her deceased husband had a son, now 15 years of age, who has therefore an interest to the extent of one-fourth, and on her death will be entitled to a still larger share of the property.

My conclusion therefore is that it has not been shown that the Lower Appellate Court was wrong in giving the widow the right of pre-emption.

The appeal is dismissed with costs.

* U.B.R., 1892-96, II, 581. † S.J., L.B., 76.

Buddhist Law—Marriage.

Before G. W. Shaw, Esq.

Civil Appeal No. 76 of 1906. June 24th 1907.

KAN GAUNG *vs.* MI HLA CHOK, A MINOR BY HER GUARDIAN, MI THUZA.

Mr. *Tha Gywe*—for Appellant.
Mr. *A. C. Mukerjee*—for Respondent.

Where the circumstances entitle a female minor under the Buddhist Law, to sue for compensation for the breach of a promise of marriage, she can succeed independently of Contract.

See Contract, page 5.

Buddhist Law—Marriage—Joint Property.

Before G. W. Shaw, Esq.

Civil Appeal No. 319 of 1906. October 7th, 1907.

NGA SAN YA *vs.* NGA SAN YA, husband and legal representative of Mi Mè Daing (deceased).

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

Right of a husband or wife to alienate joint property without the other's consent.

Held,—that a mortgage by a wife of her interest in a house and land which was *hnapazôn lettetpwa,* without her husband's consent, was valid.

Mi Shwe U vs. *Mi Kyu* followed and the rules applied to all nations by the wife.

References :

3. L.B.R., 66.
U.B.R., 1892-96, II, 45, 204.
———1902-03, II, Ex. of decree, 1.
1904-06, Buddh. Law, Divorce, 1.

There is practically no dispute about the facts of this case. Plaintiff-Appellant sued the Defendant-Respondent as legal representative of his deceased wife, Mi Mè Daing, for Rs. 100, and prayed for a mortgage decree against the house and land which Mi Mè Daing had mortgaged. There was no claim against Defendant-Respondent personally. The plaint is quite clear and was properly drawn. It was admitted that the property mortgaged (without possession) was *hnapazôn lettetpwa* of the mortgagor and Defendant-Respondent, her husband : and Plaintiff-Appellant said in his preliminary examination that Mi Mè Daing mortgaged the half of the house (and land) that belonged to her (ပေထ်တိုင်ပိုင်အိမ်တဝက်). The mortgage deed was quite clear on this point too. What it said was "I mortgage as security my interest in the house which is *hnapazôn* property of myself and my husband, San Ya, * * * and the land on which it is built" ကျွန်ုပ်နှင့်လင်မောင်စံရတို့နှစ်ပါးစုံပိုင်သောအိမ်နှင့်၎င်းအိမ်ဆောက်ထားသောမြေကျွန်ုပ်ပိုင်တိုအပေါ်ငွေအဖြစ် အာမခံထားပါသည်။. By Defendant's account his sister, Mi Pu, was allowed to occupy half of the house free of rent, his wife sued his sister to eject her and was successful : then Mi Pu sued him and his wife for money she said they owed her, and obtained a decree against him, but not against his wife ; then his wife brought a (criminal) case of assault against him and his niece and they were fined, and in all these cases Advocate, Maung Po Yi, appeared for Mi Mè Daing, and he did not pay the Advocate's fees. He also admitted that he and his wife lived together till she died. It was shown by the evidence of three witnesses who attested the mortgage deed, that Mi Mè Daing then and there paid Rs. 80, out of the Rs. 100 she borrowed from Plaintiff-Appellant, to Maung Po Yi on account of fees.

The Judge of the Township Court framed the proper issues, but went astray in his judgment. He found that Mi Mè Daing was not at all at liberty to mortgage the *hnapazôn* property without her husband's knowledge, and that Defendant-Respondent was not personally liable, but that if there was any property belonging to Mi Mè Daing

NGA SAN YA
v.
NGA SAN YA.

separately, the Plaintiff-Appellant could proceed against it according to law. He therefore "dismissed the claim against Defendant and the house," and granted the Plaintiff a *decree against Mi Me Daing* with costs. The Judge evidently did not properly understand what the Plaintiff wanted, or what sort of order he ought to make in such a suit. But there can be no doubt that what he intended or would have intended, if he had understood the law, was to pass a money decree against the legal representative of Mi Mè Daing.

And I am of opinion that the actual decree must be treated as one of that character.

The Lower Appellate Court understood the case no better than the Township Court had done. The Judge said that there was "much litigation" between Mi Mè Daing and her husband, that the mortgage contracted to pay her Advocate was of an "essentially fraudulent nature," that she had no right to mortgage the joint property without Defendant-Respondent's consent, and that he was not personally liable; and therefore the Township Court was wrong in giving Plaintiff-Appellant a decree for the money. He proceeded to set aside that decree, although it was only Plaintiff-Appellant who had appealed.

I have no hesitation in holding that the Lower Appellate Court was wrong in setting aside the decree, which, as I have said, was in reality a decree against the legal representative of Mi Mè Daing.

The foregoing disposes of all the points raised in the present 2nd Appeal except the question whether Mi Mè Daing's mortgage of her interest in the *hnapazôn* house and land was valid. Neither of the Lower Courts seems to have understood that that was the real point for determination. The latest decision is the Lower Burma one in *Ma Shwe U* vs. *Mi Kyu*.* In that case all previous decisions in Upper and Lower Burma bearing on the subject were referred to, and the texts contained in sections 251 and 152 of Volume 2 of the Wunwun Mingyi's Digest were considered.

I have referred to the authorities cited, and I find myself unable to come to any other conclusions than those at which the learned Judges of the Chief Court arrived.

I venture to express my concurrence in Sir H. White's opinion that the question of the right of a Burman Buddhist husband or wife to dispose of joint property is a question concerning marriage.

There can be no doubt that the texts declaring that the husband is lord of the wife must be construed in the present day, in a strictly limited sense. Practically in respect of their respective rights to property, the Burman Buddhist husband and wife occupy a position of equality.

We have it then settled that the husband is not at liberty to alienate joint property without his wife's consent, but that he can make a valid transfer of his share and interest in such property. I think it follows of course that the same rules apply to the case of alienations by the wife.

The claim of the husband to alienate the whole was based on the texts declaring him lord of the wife.

* 3. L.B.R., 66.

The wife's rights have been held, in spite of these texts, to stand in the way of such alienation by the husband. *A fortiori* the wife cannot alienate the whole of the joint property without her husband's consent, express or implied.

But on the other hand, the grounds on which it has been held that the husband can make a valid transfer of his share and interest in joint property are equally applicable to a similar transfer by the wife.

The authorities relied on are mainly the judgments of this Court in *Mi Me* vs. *Nga Gyi,** *Guna* vs. *Kyaw Gaung,*** *Mi Thaing* vs. *Tha Gywe*† and *Nga Hmon* vs. *Nga Meik,* ‡ in which the joint property of a Burman Buddhist husband and wife was declared to be held on the principle of a tenancy in common and not on that of a joint tenancy, each partner being entitled to a share (generally a half); and attachments of the interest of a husband or a wife in the joint property were upheld.

If Buddhist law did not apply, it is evident that on the principle of section 44 of the Transfer of Property Act, a transfer by a wife would be as valid as a transfer by a husband.

The learned Advocate for Defendant-Respondent bases his case mainly on the plea that Mi Mè Daing, in effecting the mortgage, not only acted without Defendant-Respondent's consent, but kept the transaction secret from him, and used the money for a private purpose, and that Plaintiff-Appellant, as her brother, was a party to this hostile action. Plaintiff-Appellant does not, it is contended, come into Court in the position of an innocent transferee without notice, who would have an equitable right in his favour.

But in the case of *Mi Shwe U* vs. *Mi Kyu* the matter was dealt with independently of any such considerations. And in the state of things described by Defendant-Respondent himself as above detailed, it was not to be expected that Mi Mè Daing would have gone to her husband for his consent or approval, whereas it was natural that she should take such steps as she could to raise money to pay her Advocate. It is to be noted that she was successful in all three cases in which she was concerned. It must therefore be presumed that she had right on her side, and was justified in the course which she took in those cases. But in the view which I take of the matter, these considerations are immaterial.

I hold therefore that the mortgage in the present case was valid. It being admitted that the property was acquired by purchase during the marriage, the shares would be half and half. But if that had not been so, it would have been merely a matter to be settled in execution, what the shares were.

I set aside the decree of the Lower Appellate Court, and grant Plaintiff-Appellant a mortgage decree for sale of Mi Mè Daing's interest in the house and land in satisfaction of the mortgage debt of Rs. 100 and costs, and that Defendant-Respondent be liable for any deficiency as legal representative, *i.e.*, to the extent of any assets of Mi Mè Daing which came or might have come into his hands.

---

* U.B.R., 92-96, II, 45.
** *Ibid*, 204.
† U.B.R., 02-03, II, Ex. of dec., page .
‡ U.B.R., 04-06, II Buddh. Law, Divorce, page

Buddhist Law—Marriage: Restitution of Conjugal Rights.

Civil 2nd Appeal No. 225 of 1908. March 29th, 1909.

Before G. W. Shaw, Esq., C.S.I.

NGA CHIN DAT *v.* MI KIN PU.

Mr. *J. C. Chatterjee*—for Appellant.

Mr. *A. C. Mukerjee*—for Respondent.

Held,—that there is nothing in the Buddhist Law (explained in *Mi Kin Lat* v. *Ba So*) as to divorce at the will of one party, on surrender of the joint property and payment of the joint debts, in the absence of fault in the other party which is inconsistent with the observance of the conjugal duties in a subsisting marriage, or will bar a suit for restitution of conjugal rights.

References:

Broom's Common Law, 8th Ed., p. 147.
U.B.R., 1902-03, II, B.L., Divorce, p. 6.
————1904-06, II, B.L. Divorce, 3.
————1904-06, II, —— Marriage, 5.
S.J., L.B., 391.

Plaintiff-Appellant sued for restitution of conjugal rights.

* * * * *

Plaintiff-Appellant's allegation was that Defendant-Respondent left his house on the 2nd July 1907 without cause, and refused to return.

* * * * *

It remains to consider the question whether the Lower Appellate Court was right in holding that, as a consequence of the decision in *Mi Kin Lat* v. *Ba So*, * a Burman Buddhist cannot sue for restitution of conjugal rights.

The point was raised by Defendant-Respondent in her memorandum of appeal in the District Court.

The learned Additional Judge is of opinion that since, by the decision cited, divorce at the will of one party without any fault in the other party has been held to be obtainable, by the surrender of all the joint property and payment of all the joint debts, the view formerly taken by the Recorder of Rangoon, that a suit for restitution of conjugal rights will not lie, must be reverted to.

The Recorder's decisions on the point are not available. But they are referred to in *Nga Ngwe* v. *Mi Su Ma*.† They appear, from what is there said, to have proceeded on the ground that any relief granted might be rendered nugatory at the will of the unsuccessful party.

I am unable to see any force in the argument. As was especially insisted on in *Mi Kin Lat's* case, the particular kind of divorce in question is not divorce at will or at mere caprice, but is subject to the condition or penalty of loss of all the joint property and payment of all the joint debts.

The party against whom a decree has been passed in a suit for restitution, if he wishes to escape from the effects of it, must sue for divorce, and having no fault to urge against his partner he must, in

* R., 1904—06, II, Budd. L., Div., p. 3.
† S.J., L.B., 391.

NGA CHIN DAT v. MI KIN PU.

order to succeed, resign all the joint property and pay the joint debts. These are substantial obstacles which may never be removed. While the marriage subsists the parties have rights and duties, and there is nothing in *Mi Kin Lat* v. *Ba So* inconsistent with that position.

On the contrary, the view taken was that, while insisting upon the husband and wife observing their duties to each other, the Buddhist Law-givers had provided for cases where, owing to the weakness of human nature, a married couple could not live amicably together, and that the rules relating to a divorce of the kind in question were no more opposed to the observance of conjugal duties in a subsisting marriage, than those providing for divorce in other circumstances.

The Additional Judge of the District Court thinks that a suit for restitution of conjugal rights was unknown to the Burman Buddhists till it was introduced by the British Courts.

I am not prepared to agree with him. The rules of the Dhammathats imply that the Judge's interference was invoked to compose conjugal differences, and restore cohabitation. This is deducible from the texts quoted in *Mi Kin Lat's* case.

Besides, the point is not material. Unless inconsistent with the Buddhist Law, a suit for restitution of conjugal rights naturally lies, and, as already explained, I am unable to find that there is any such inconsistency. The fact that desertion for three years or one year might mature into a divorce, if no steps were taken to bring about a resumption of cohabitation in the meantime, does not in my opinion establish one.

It has been contended on behalf of Defendant-Respondent that Defendant-Respondent could defeat the present suit by claiming in her defence a divorce with surrender of the joint property, etc. On general principles it would probably depend whether it was convenient to allow a defendant to set up such a counter-claim.‡ But it is not necessary to go into that question, as the Defendant-Respondent did not take that course .

It has further been urged that since, as a defence to a suit for restitution, a defendant may successfully plead the lesser kind of cruelty which would entitle to a divorce with an equal partition of property (*Nga Pye* v. *Mi Me*§ and *Nga Sein* v. *Kin Thet Kyi*‖), the Defendant-Respondent, by pleading that she wished to divorce Plaintiff-Appellant on condition of surrendering all the joint property, etc., should get a decree. But a mere desire for such a divorce would certainly be an insufficient defence, and this also was not actually the defence which Defendant-Respondent set up.

The decree of the Lower Appellate Court is set aside, and that of the Township Court is restored. I make no order as to costs.

‡ *Cf.* Broom's Common Law, 8th Ed., p. 147.
§ U.B.R., 1902-03, II, B.L., Div., p. 6.
‖ U.B.R., 1904-06, II, B.L., Mar. 15.

Civil Procedure.—13.

Civil Appeal No. 318 of 1905. March 11th, 1907.

Before G. W. Shaw Esq.

IBRAHIM BAMBALA *v.* IMAM DIN.

Mr. *S. Mukerjee* for Mr. *H. N. Hirjee*—for Appellant.
Mr. *H. M. Lutter* for Mr. *J. C. Chatterjee*—for Respondent.

Held,—Orders in execution proceedings are governed by principles analogous to those of *res judicata* and are binding, if not appealed against, in subsequent proceedings in the same suit.

References :

I.L.R., 3 All., 173.
U.B.R., 1897-01, II, 252.
I.L.R., 8 Cal., 51=L.R., 8 I.A., 123.
————6 All., 269=——, 11 I.A., 37.
————20 Cal., 551.
————3 All., 141.
L.R., 11 I.A., 181.

Appellant, Ibrahim Bambala, on the 18th March 1903, obtained a decree for Rs. 969 and costs against Respondent, Iman Din, in Civil Regular Suit No. 71 of 1902. On the 17th March 1904 he applied for execution in Execution Case No. 26 of 1904. On this application orders were passed in Miscellaneous Case No. 19 of 1904 on the 3rd June 1904. The last mentioned case was one in which Respondent applied for an order allowing him to pay by instalments. The order was very carelessly and inaccurately recorded. But it must be taken to have been one directing the payment of the decree money by instalments with interest, in accordance with the terms of a bond which Respondent was to execute with a surety or sureties. A document purporting to be a bond of this nature is filed with the proceedings. No appeal was preferred against this order, and my predecessor in Civil Revision No. 13 of 1905, on the 25th April 1905 refused to interfere with it in Revision. It must therefore be held to be an order made under the 2nd clause of section 210, Civil Procedure Code, with the consent of the decree-holder.

It appears that four months' instalments were paid in accordance with this arrangement. The Respondent then made default, and Appellant applied in Execution Case No. 34 of 1905, on the 15th May 1905, for execution against Respondent. This case was "closed," as the result of an order made in Civil Miscellaneous Case No. 15 of 1905 on the 30th May 1905. In the last mentioned case Appellant had applied, apparently on the 28th February 1905, for execution against Respondent's property, and at the same time for an order calling upon his surety "to show cause for his failure to pay the instalments" due. It is not clear what remedy Appellant in this application meant to ask for precisely. But the order on the 30th May was to the effect that under the agreement filed in Civil Miscellaneous Case No. 19 of 1904 the surety was responsible for non-payment, and therefore execution could not be granted against the judgment-debtor's property, and that notice should issue to the surety "against whom execution might be taken out in default." On the

IBRAHIM BAMBALA v. IMAM-UD-DIN.

15th June the application was "withdrawn" (*i.e.*, the Appellant did not at that time wish to proceed further against the surety). Then on the 3rd July 1905 Appellant again applied in Execution Case No. 45 of 1905 for execution of his decree by the arrest and imprisonment of Respondent. The Subdivisional Court on the 19th July 1905 dismissed that application on the ground that "the point is now *res judicata*. By his bond the judgment-debtor is protected against execution on his person and decree-holder must come up on the sureties." This order was appealed and the District Court dismissed the appeal, holding that the question was *res judicata* by reason of the previous application for execution, in Execution Case No. 34 of 1905, having been dismissed and no appeal having been preferred against the order of dismissal. As authority the Additional Judge cited the case of *Ballabh Shankar and others* vs. *Narayan Singh and another** (which had no direct application). He also remarked that there was no reason why the decree-holder should not sue the surety on the agreement of guarantee as held in *Nga Yaw* vs. *Po Chôn and another*.† Against this order Appellant comes up in second appeal on the grounds that the Lower Courts were guilty of an error of procedure within the meaning of section 584, Civil Procedure Code, in deciding on the basis of *res judicata*, and that the order should have been based on the terms of the agreement. The question of the construction of the agreement, it is said, was not raised or decided in the previous proceedings, and the rule of *res judicata* does not apply to proceedings in execution. Before me the learned Advocates on both sides have practically admitted these contentions, and the only point on which they are at variance is as to the effect of the agreement. According to one side the agreement does not bar proceedings in execution against the judgment-debtor (Respondent) in case of default in the payment of the instalments. According to the other, the agreement superseded the decree, and in the absence of any express stipulation reserving the decree-holder's rights of execution against the judgment-debtor, restricts him to proceedings against the surety.

From what has been recorded above, it is evident that the learned Advocates could not have perused all the proceedings.

It is not the fact that the application for execution made in 1905 was dismissed without the question of the construction of the agreement having been raised or decided.

On the contrary, execution against the judgment-debtor's property was expressly refused on the ground that under the agreement Appellant's remedy was against the surety only.

This being so, the Lower Courts were not in error in applying the rule of *res judicata*. Although the use of that expression is not strictly correct, orders in execution proceedings are governed by principles analogous to those of *res judicata* and are binding, if not appealed against, in subsequent proceedings in the same suit. Their binding force depends not upon section 13, Civil Procedure Code, but

* I.L.R., 3 All., 173. † U.B.R., 1897-01, II, 252.

upon general principles of law. There are three decisions of the Privy Council on the subject, which place the matter beyond all doubt :—

Mangal Parshad Diciht vs. *Grija Kant Lahiri**. (1881).

Ram Kirpal Shukul vs. *Mussammat Rup Kuari*† (1883).

Bani Ram and another vs. *Nanhu Mal*‡ (1884).

The first of these was followed by the Calcutta High Court in *Fath Narayan Chaudhri* vs. *Ghandrabati Chaudhrain* § (1892). The second reversed a Full Bench decision of the High Court of Allahabad,—*Rup Kuari* vs. *Ram Kirpal*‖ (1880). The third was a case under the present Code and the facts were not unlike those of the present case.

Here the agreement in question was badly drawn and did not give adequate expression to the intentions of the parties. But it is immaterial whether the Subdivisional Court's interpretation of it was or was not correct. The decision was not appealed. It is therefore final. Whether it was right or wrong, it is binding on the parties and the Lower Courts were right in holding to this effect.

In these circumstances it is unnecessary to consider what the meaning and effect of the agreement were.

The appeal is dismissed with costs.

* I.L.R., 8 Cal., 51=L.R. 8 I.A., 123.
† ——— 6 All., 269=——— 11 I.A., 37.
‡ L.R., 11 I.A., 181.
§ I.L.R., 20 Cal., 551.
‖ I.L.R., 3 All., 141.

Civil Procedure—13.

Civil Appeal No. 177 of 1906. May 24th, 1907.

Before G. W. Shaw, Esq.

NGA THET THA *vs.* MI KYE GYI.

Mr. *J. C. Chatterjee*—for Appellant.

Where an adjudication between the Defendants is necessary to give appropriate relief to the Plaintiffs, there must be such an adjudication, and in such a case the adjudication will be *res judicata* between the Defendants as well as between the Plaintiff and the Defendants. But for this effect to arise there must be a conflict of interest between the Defendants *inter se*.

References:

6 C.D., 42, 43.
8 C.W.N., 30.
I.L.R., 18 All., 65.
————22 All., 386.
————11 Bom., 216.
————25 Bom., 74.
————12 Cal., 580.
————15 Mad., 264.
————20 Mad., 337.

The only question in this case is whether the Plaintiff-Appellant's suit was barred by section 13, Civil Procedure Code.

There was a suit (Civil Regular No. 86 of 1905 of the Township Court) by Nga Bu and others against the present Plaintiff-Appellant and the present Defendant-Respondent and other persons for redemption. The Plaintiffs in that suit alleged a mortgage in 1235 B. E. to Plaintiff-Appellant, Thet Tha, a subsequent sub-mortgage by Thet Tha to Defendant-Respondent, Mi Kye Gyi, and further transfers to the other Defendants. Plaintiff-Appellant, Thet Tha, admitted the alleged mortgage to him in 1235, and supported the Plaintiffs in their allegations as to a sub-mortgage to Defendant-Respondent, Mi Kye Gyi, and later transfers to the other Defendants.

Defendant-Respondent, Mi Kye Gyi, and the other Defendants, denied all the allegations of the Plaintiffs and of their co-Defendant, present Plaintiff-Appellant Thet Tha.

The Township Court framed issues only with respect to the alleged mortgage to Defendant-Respondent, Mi Kye Gyi, and the subsequent transfers, and found in the end that none of the transactions alleged by the Plaintiffs were satisfactorily proved, and dismissed the suit.

That decree was confirmed on appeal.

Then Plaintiff-Appellant sued Defendant-Respondent in the present case (No. 446 of 1905 of the same Court) to recover Rs. 130, being the amount he had had to pay to the Plaintiffs in the previous suit as compensation for the loss of their land (by reason of Defendant-Respondent's defence in that suit), less Rs. 20, the amount of mortgage money received from Defendant-Respondent on his mortgage to her.

In her written statement Defendant-Respondent contended that the suit was barred by section 13, Civil Procedure Code. The Township Court found in favour of Plaintiff-Appellant on this point, holding that section 13 did not apply because the parties were both Defendants

NGA THET THA v. MI KYE GYI.

in the previous suit. On appeal the District Court held to the contrary. I regret to observe that the learned Additional Judge did not deal adequately with the question. It is a very difficult question, but after stating the ground on which the Township Court had held section 13 to be inapplicable, it was obviously not meeting the point to say that the issue in the two suits was identical and therefore "the suit was *res judicata*," and "the question could not be raised again in a subsequent suit."

The leading case in India on the subject is *Ram Chandra Narayan* vs. *Narayan Mahadev* * (1886), which was based on *Cottingham* vs. *Earl of Shrewsbury* † (1843), and has been followed by all the other High Courts.

In the English case as quoted in *Ahmad Ali* vs. *Najabat Khan*‡ (1895) it was said: "If a Plaintiff cannot get at his right without trying and deciding a case between co-defendants, the Court will try and decide that case, and the co-Defendants will be bound. But if the relief given to the Plaintiff does not require or involve a decision of any case between co-Defendants, the co-Defendants will not be bound as between each other by any proceeding which may be necessary only to the decree the Plaintiff obtains."

In *Ram Chandra's* case it was accordingly held that "Where an adjudication between the Defendants is necessary to give the appropriate relief to the Plaintiff, there must be such an adjudication, and in such a case the adjudication will be *res judicata* between the Defendants as well as between the Plaintiff and the Defendants. But for this effect to arise there must be a conflict of interest amongst the Defendants and a judgment defining the real rights and obligations of the Defendants *inter se*. Without necessity the judgment will not be *res judicata* among the Defendants."

The following decisions may be enumerated as having adopted this rule:—

Madhavi vs. *Kelu* § (1892).

Ahmad Ali vs. *Najabat Khan* (1895), already cited.

Chajju vs. *Umrao Singh* ‖ (1900).

Balambhat vs. *Narayan Bhat* ¶ (1900).

Mangni Ram vs. *Sayyid Muhammad Mahdi Husain Khan and others* ** (1903).

There is no need in face of these Rulings to cite cases in which an apparently contrary view was taken.

The question is whether the matter in dispute was actively in issue between the co-Defendants in the previous suit, and in some of the above-noted cases the position of a formal or nominal Defendant is distinguished.

Gour says in his Commentary on section 85 of the Transfer of Property Act: "There can be no *res judicata* as between co-Defendants in a mortgage suit, or for that matter in any suit, unless the matter was in issue between the co-Defendants *inter se* and not merely between the Plaintiff and the Defendants in the suit. Where therefore

* I.L.R., 11 Bom., 216.
† 3 Har's Rep., 627.
‡ ———— 18 All., 65.
§ ————, 15 Mad., 264.
‖ I.L.R., 22 All., 386.
¶ ————, 25 Bom., 74.
** 8 C.W.N., 30.

Civil Procedure—311.

Civil Revision No. 66 of 1906. May 15th, 1907.

Before G. W. Shaw, Esq.

KARATHAN CHETTI *vs.* PALANEAPPA CHETTI.

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

Holding an execution sale at an earlier hour than that specified in the proclamation of sale is a material irregularity to be corrected in accordance with section 311, Civil Procedure Code, and not an illegality rendering the sale void.

References:

I.L.R., 7 All., 289, 676.
——— 21 Cal., 66.
———24 Cal., 291.
———20 Mad., 159
14 W.R., 320.
25 W.R., 328.
L.R., 10 I.A., 25.
———15 I.A., 171.
———27 I.A., 216.
6 C.W.N., 48.

Respondent got a house sold in execution of a decree, and applicant bought it for Rs. 240. Respondent then applied under section 311, Civil Procedure Code, alleging that there was a material irregularity in the conduct of the sale, in that it was held at 7-30 A.M. instead of 10 A.M., the advertised hour, and that he had suffered substantial loss, since the house was worth Rs. 350 and he was himself prepared to offer that sum for it with the permission of the Court.

It was admitted that the sale was advertised for 10 A.M., and held at 7-30 A.M. The parties produced evidence solely with reference to the value of the house. The Subdivisional Court held that no substantial loss had resulted from the irregularity, since according to the evidence Rs. 240 did not appear to be an inadequate price.

On appeal the District Court relying on *Chedama Lal* v. *Amir Beg* (1) (1885), held that the sale did not amount to a sale at all, and therefore passed an order "allowing the appeal," which it presumably meant for an order setting aside the sale. The learned Judge cited *Chedama Lal's* case wrongly, with the result that neither of the Advocates in this Court was able to trace it. It was no doubt a case precisely on all fours with the present one. A sale advertised for 11 A.M. was held at 7 A.M., and a Bench of the Allahabad High Court held that there was more than an irregularity, and that the sale was vitiated and there was practically no sale at all. Another Bench of the same Court similarly held in *Bakhshi Nand* v. *Malak Chand* (2) (1885) that where a sale was held before the expiration of 30 days in contravention of section 290, Civil Procedure Code, there was more than an irregularity and the sale was vitiated. But I cannot find that any of the other High Courts have taken the same view.

In *Khadija Bibi* v. *Munshi Jahad Rahim* (3) (1870), which was another case almost of the same kind as the present case, the sale being proclaimed for 12 o'clock and held before 10, and *Ghumak Chaudhri* v. *Radha Parshad* (4) (1876) a case where the sale was held on the day preceding that to which it had been postponed, the Calcutta High Court treated the defect of procedure as an irregularity.

(1) I.L.R., 7 All., 676.
(2) ———7 All., 289.
(3) 14 W.R., 320.
(4) 25 W.R., 328.

KARATHAN CHETTI v. PALANIAPPA CHETTI.

In *Tasadduk Rasul Khan* v. *Ahmad Husain* (5) (1893) the Privy Council held that non-compliance with the requirement of section 290, Civil Procedure Code, that before sales of immovables in execution 30 days should intervene between proclamation and sale, is a material irregularity within the meaning of section 311, and its effect is not to make the sale a nullity without proof of substantial injury.

Their Lordships had previously in *Olpherts and Macnaghten* v. *Mahabir Parshad* (6) (1882) held that non-statement of the amount of Government Revenue in the sale proclamation is an irregularity that may be objected to under section 311, Civil Procedure Code.

In both these decisions it was held that substantial injury must be proved to have resulted. In the former it was further held that the case must be treated, as the respondents (who alleged in the superior Courts that the sale was void) had themselves treated it, as one of material irregularity, to be redressed pursuant to the provisions of section 311, Civil Procedure Code, since they had applied under section 311. In the latter it is to be observed that the irregularity consisted in non-compliance with section 287, the section which prescribes what a sale proclamation shall contain (including the time and place of sale).

In *Malkarjan* v. *Narahari* (7) (1900) the Privy Council held that an execution sale cannot be treated as a nullity if the Court which sells has jurisdiction to do so. In that case notice was served on the wrong person as representative of a deceased judgment-debtor, and it was argued that the sale was therefore null and void. But their Lordships held that "to treat such an error" (as serving with notice a person who did not legally represent the estate) "as destroying the jurisdiction of the Court, is calculated to introduce great confusion into the administration of the law."

It appears to me that these decisions are sufficient authority for dissenting from the view taken in *Chedama Lal's* case.

I may however mention the following cases :—

In *Surno Moyi Debi* v. *Dakhina Ranjan Sanyal* (8) (1896), a sale was adjourned from the 20th November to the 25th, and again to the 27th November, but no hour was fixed for the sale on either of these days, and in consequence there were no bidders on the 25th and only three on the 27th, when the sale was held. The property fetched a grossly inadequate price. A Bench of the High Court of Calcutta held that there was a material irregularity resulting in substantial injury.

In *Venkata Subbaraya Chetti* v. *Zamindar of Karveti Nagar* (9) (1896), a Bench of the Madras High Court treated as a material irregularity the omission to give notice by beat of drum of a sale which had been postponed, whereby the sale was held practically without any notice at all.

In *Bhikari Misra* v. *Rani Surja Moni* (10) (1900) where a sale was postponed at the instance of the judgment-debtor, and no hour was specified, this omission was held by a Bench of the Calcutta High Court to amount to a material irregularity.

(5) I.L.R., 21 Cal., 66.
(6) L.R., 10 I.A., 25.
(7) ——27 I.A., 216.
(8) I.L.R., 24 Cal., 291.
(9) ————20 Mad., 159.
(10) 6 C.W.N., 48.

I am unable to distinguish a case, where although a date and hour are fixed in the proclamation a sale is held on another date or at another hour, from cases like those cited, where sales were held without any notice having been given of the day or the hour.

The result of the foregoing decisions applied to the present case is as follows :—

The Court had jurisdiction to sell, and the sale therefore was not void, but the holding of the sale at 7-30 instead of 10, the advertised hour, was a material irregularity. Respondent also treated the case as one of material irregularity by applying under section 311. In order to succeed in his application therefore the respondent had to prove that substantial injury resulted from the irregularity.

It is very evident that on this point there is no reason to differ from the finding of the Subdivisional Court. Applicant alleged that from 40 to 50 persons were present, and this was not contradicted. There was at least as much ground for believing the applicant's witnesses as those for the respondent on the question of value. Respondent only called two witnesses, and the Subdivisional Judge was dissatisfied with the demeanour of one of them. They said that the house was worth from Rs. 325 to 350. The applicant called three witnesses, all as far as can be seen, respectable business men, who valued the house at from Rs. 200 to Rs. 250 and gave good reason why it was worth less than it would otherwise have been, namely, that it stood partly on another person's land.

In these circumstances it was not proved that substantial injury resulted from the sale of the house at 7-30 A.M.

In view of this finding it is unnecessary to consider the question of waiver which also arises in cases of this kind. See *Arunachellam Chetti* v. *Arunachellam Chetti* (11) (1888).

The Respondent's application was rightly dismissed by the Subdivisional Court.

In following *Chedama Lal* v. *Amir Beg* without considering the decisions of the Privy Council and other cases above cited, the Lower Appellate Court in my opinion acted illegally or with material irregularity.

The Lower Appellate Court's order is set aside and that of the Subdivisional Court is restored, that is to say, the Respondent's application under section 311, Civil Procedure Code, to set aside the sale, is dismissed.

Respondent will pay applicant's costs.

(11) L.R., 15 I.A., 171.

Civil Procedure—648.

Civil Revision No. 2 of 1907. June 3rd.

Before G. W. Shaw, Esq.

KIN KIN *vs.* NGA KYAW WE AND 2 OTHERS.

Held,—that section 648, Civil Procedure Code, does not extend the operation of section 483, to property outside the jurisdiction of the Court.

References :—

I.L.R., 8 Mad., 20.
I.L.B.R., 310.
P.J.L.B., 56.
7 C.W.N., 216.

The Judge of the Small Cause Court has referred under section 617, Civil Procedure Code, the question whether section 648 extends the operation of section 483 to property situated outside the jurisdiction of the Court.

The Chief Court of Lower Burma in *N. Pannu Thaven* vs. *Sathappa Chetti** (1902) concurring in the decision of the Special Court in *Daud* vs. *Muna Abdul Kasim* † (1894) which followed the Madras High Court in *Krishnasami* vs. *Engel* (1885) ‡ held that section 648 merely prescribes the procedure to be adopted when property outside the jurisdiction is to be attached under some other provision of the Code.

A single Judge of the Calcutta High Court in *Ram Partab* vs. *Madho Rai* § (1902) took the contrary view.

The parties have not appeared, and I have therefore been without the assistance of argument.

Some of the observations of the learned Judge do not help to a decision.

Section 492 deals with temporary injunctions, section 648, with arrests and attachments. An injunction is neither an arrest nor an attachment.

Again, attachments may be made under other sections of the Code, than sections 483 *seqq*, not relating to the execution of decrees, *viz.*, sections 168 and 178 and section 493 where there is no limitation like that found in section 483. In such cases section 648 would of course apply.

After referring to the Rulings cited and others, and on considering the language of sections 483, 484, 485 and 648, I am of opinion that the Lower Burma case and the decisions which it followed are correct.

Under the old Codes it was held that neither section 81 of Act VIII of 1859 nor section 483 of Act X of 1877, as it was originally enacted, covered property outside the jurisdiction of the Court, although neither of them contained the words "within the jurisdiction of the Court" as section 483 of the present Code does.

In face of this limitation it is impossible, in my opinion, to hold that section 648 has any application. If the legislature desires the operation of section 483 to be extended to property outside the jurisdiction of the Court, that section will have to be amended in such a way as to make this intention plain.

My answer to the question referred is therefore in the negative.

I L.B.R., 310. † P.J.L.B., 56. ‡ I.L.R., 8 Mad., 20.
§ 7 C.W.N., 216.

Civil Procedure—558.

Civil 2nd Appeal No. 140 of 1907.
September 27th.

Before G. W. Shaw, Esq.

NGA PO AN *vs.* NGA NYUN BU, NGA SHWE OH AND BEEP SINGH.

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

Where an appeal was dismissed for default and the Appellant applied to have the appeal re-opened on the ground that he was misled by his Advocate who had misunderstood the date fixed for the hearing.

Held,—that a fair opportunity must be given to the Appellant to prove that he had sufficient cause for his non-appearance, and the explanation, if made out, would be a reasonable one and the Appellant would be entitled under section 558, Civil Procedure Code, to have the appeal re-opened.

See Limitation—page 1.

Civil Procedure—503.

Civil Appeal No. 320 of 1907. May 27th, 1908.

Before D. H. R. Twomey, Esq.

NGA KYI MAUNG *vs.* (1) MI SIN, (2) NGA SO, (3) MI ME.

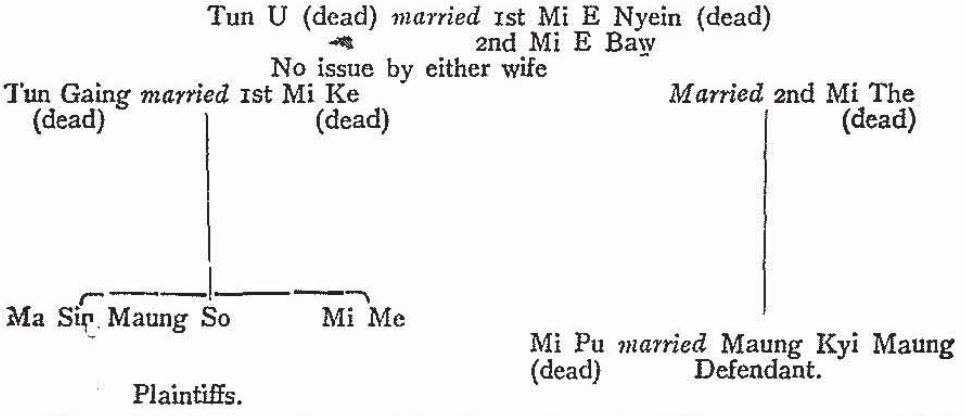
Messrs. *S. Mukerjee* and *C. G. S. Pillay*—for Appellant.
Mr. *K. K. Roy*—for Respondents.

The appointment of a receiver is a step which should not be taken without special reasons, particularly in the case of a *bonâ fide* possessor with legal title. Parties who have acquiesced in property being enjoyed against their own legal rights cannot obtain this form of relief.

References:

I.L.R., 5 All., 556.
——— 17 Cal., 459.
6 C.L.R., 467.
Tagore Law Lectures, 1897, pages 32, 34.

This is an appeal under section 588, clause (24) of the Civil Procedure Code against an order for the appointment of a Receiver *pendente lite* under section 503. The parties are the representatives of two brothers, Tun U and Tun Gaing, and are related to one another as shown below:



The property in suit consists of 10 oil-wells at Yenangyaung which are in the possession of the Defendant-Appellant, Maung Kyi Maung, as relict of Mi Pu. The Plaintiffs claim $\frac{3}{4}$ths of the property and mesne profits, alleging that the oil-wells are the undivided joint property of the two brothers, Tun U and Tun Gaing. The Defendant denies that Tun Gaing had any interest in the property, states that it belonged to Tun U alone, that Tun U adopted his niece Mi Pu, as his daughter, and that he (the Defendant Maung Kyi Maung) is alone entitled to the property, as heir of his wife, Mi Pu.

The plaint contains a statement that there is "an off chance of defendant attempting to alienate" the wells. On this statement and the further statement of the Advocate for the Plaintiffs that "Defendant is taking measures to have the well sites transferred to his name with a view to disposing of them," the District Court directed the appointment of a Receiver under section 503 of the Code.

The appointment of a Receiver is entirely in the discretion of the Court. But it has been held that the power of appointment is not to be exercised as a matter of course, but should be used with the

NGA KYI MAUNG v. MI SIN.

greatest care and caution (*Srimati Prosonomoyi Devi and one* vs. *Beni Madhab*).* The subject was fully considered in the Calcutta case of *Chandidat Jha* vs. *Padmanand Singh*.† The learned Judges referred to the English law as described in Kerr on Injunctions and Kerr on Receivers and held that a good *primâ facie* title has to be made out before an order for the appointment of a Receiver can be granted.

I have also consulted the Tagore Law Lectures, 1897, which deal with the law relating to Receivers in British India. On page 32 is quoted the Calcutta case, *Gossain Dalmir Puri* vs. *Tekait Hetnarain* ‡ where it was laid down that the step should not be taken without special reasons, particularly in the case of a *bonâ fide* possessor with legal title. On page 34 the learned lecturer refers to an English case where it was ruled that parties who have acquiesced in property being enjoyed against their own alleged rights cannot come to Court for this form of relief.

In the present case Maung Tun U who dug the oil-wells died in 1257 B.E., *i.e.*, 13 years ago, leaving a widow, Mi E Nyein. It is admitted that Mi E Nyein and Mi Pu then managed the property and that on Mi E Nyein's death, in 1261, Mi Pu continued to manage the property alone. It is also admitted that the wells have stood in Mi Pu's name since before Mi E Nyein's death. The Plaintiffs apparently made no attempt to assert their rights till last year, when they brought this suit.

I think this recital of circumstances is sufficient to show that the Lower Court did not exercise its discretion reasonably in appointing a Receiver on the bare assertion of the Plaintiffs that Maung Kyi Maung is about to attempt to alienate.

The learned Judge should certainly have required affidavits or other proofs from the Plaintiffs, and should have heard what the Defendant had to say. If he had then considered the whole circumstances of the case, I think he would have seen that the case is not one in which a Receiver should be appointed. Maung Kyi Maung is in possession and ostensibly has a good title. On the other side there is the unestablished claim of the Plaintiffs that their father Tun Gaing had a joint interest in the wells, a claim which they seem to have slept on for a good many years.

The Lower Court's order for the appointment of a Receiver is set aside with costs against the Plaintiff-Respondents. Advocate's fee in this Court is fixed at two gold mohurs.

It will be open to the Plaintiff-Respondents, if they think fit, to apply to the District Court for an injunction under section 492.

* I.L.R., 5 All., p. 556. † I.L.R., 22 Cal., p. 459.
‡ 6 C.L.R., 467.

Civil Procedure—520, 521.

Before D. H. R. Twomey, Esq.

MI HLA WAING *vs.* NGA KAN.

Mr. *J. C. Chatterjee*—for Applicant.

Civil Revision No. 73 of 1907. March 13th, 1908.

In deciding whether an award of compensation in a seduction case should be enforced or not, the Courts have only to look to the provisions of sections 520 and 521, Code of Civil Procedure, and determine whether any of the grounds mentioned or referred to in those sections is shown against the award. The fact that the subject-matter of an award is not such that it could be a cause of action in a Civil Suit is not necessarily an objection to the legality of the award.

References:

U.B.R., 1897-01, II, 499.

Cunningham and Sheppard's Contract Act, page 101.

The Applicant was seduced by the Respondent and they agreed to refer the question of damages to arbitration. The arbitrators awarded Rs. 37-8-0 as damages, and as the Respondent refused to pay, the Applicant sued in the Township Court for the enforcement of the award. The Township Court dismissed the suit. The Judge thought that as an action for damages for seduction will not lie in the regular Courts the arbitrators had no authority to entertain such a claim. In this view the District Court concurred and dismissed the Applicant's appeal.

It is true that a woman cannot bring an action for damages for seduction (*Ma Yon* vs. *Maung Po Lu* *). But so far as I know there is no authority for the view that arbitrators can take cognizance only of claims in respect of which the regular Courts will give relief. In deciding whether an award should be enforced or not, the Courts have only to look to the provisions of sections 520 and 521, Civil Procedure Code, and determine whether any of the grounds mentioned or referred to in those sections is shown against the award. The fact that the Applicant could not have sued the Respondent for damages cannot in my opinion be regarded as " an objection to the legality of the award " [section 520 (*c*)]. The Buddhist Dhammathats provide for the payment of compensation for seduction, and though such cases are not now decided according to Buddhist law, compensation for seduction is still frequently paid by private arrangement between the parties or their families, and there is nothing immoral in such an arrangement. It may be remarked also that according to English law, the consideration of past co-habitation and previous seduction does not make a bond void. Such consideration is not held good so as to support a promise not under seal, but it is not illegal.†

The Lower Courts having failed to exercise a jurisdiction vested in them by law, this application must be allowed. The original suit was decided solely on the question above dealt with. It is necessary to remand the case.

The decree of the District Court is set aside and it is ordered that the Township Court shall re-admit the suit under its original number in the register and proceed to determine the suit on its merits.

The costs incurred in this Court and in the District Court will be borne by the Respondent.

---

* U.B.R., II, 1897-01, page 499.

† Cunningham and Sheppard's Contract Act, 9th Edition, page 101

Civil Procedure—O. II—1—2.

Civil Miscellaneous No. 8 of 1909.
May 24th.

Before G. W. Shaw, Esq., C.S.I.

NGA PO CHEIN *vs.* MI PWA THEIN.

Mr. *J. C. Chatterjee*—for Appellant.
Mr. *J. N. Basu*—for Respondent.

Where plaintiff sued for a share of produce of land alleging that he was a co-heir and the land undivided family property, and defendant denied these allegations.

Held—that the suit was one for partial partition and, as such, was not maintainable on the principle laid down in *Mi Mya* v. *Mi Myè* (U.B.R., 1897—01, II, p. 229).

The authorities for *Mi Mya* vs. *Mi Myè* examined and the decision affirmed.

References:

U.B.R., 1902-03, II, Civ. Pro., p. 3.
————1897-01, II, p. 229.
————1904-06, II, Civ. Pro., p. 1.
I.L.R., 15 Mad., 98.
————17 Cal., 707.
———— 7 Bom., 272.
————12 Cal., 566.
————22 Mad., 538.
————24 Bom., 128.
————14 Mad., 324.
————14 Cal., 122.
Mayne's Hindu Law, 8th Ed., p. 647.

THIS is an application for review of the judgment of the Officiating Judicial Commissioner, Mr. Twomey, in Civil 2nd Appeal No. 97 of 1908. It was admitted by Mr. Twomey himself.

Nearly all the grounds taken in the application, though now set out with greater elaboration, are to be found in the grounds of appeal, and there can be no doubt that for this reason most of them are inadmissible, as explained in *Mi Myit* v. *Kin Kin Gyi.**

On one point, however, an error of law is alleged, which appears to be a good ground for review, and probably it was on this point mainly that the application was admitted.

On the view which I take of it, it will be unnecessary to make further reference to any of the other grounds.

The question is whether the present suit by Plaintiff-Respondent was barred by reason of the fact that it failed to include a claim to partition, and a share of the land in which she alleged she had a joint interest.

The view taken by Mr. Twomey was that while this omission might bar a subsequent suit for the partition of the land under section 43, Civil Procedure Code, 1882 (O. II, r. 2), it could not affect the decision of the present case, which is no doubt the correct interpretation of the effect of sections 42 and 43 (O. II, rr. 1 & 2) as applied to ordinary cases. This sufficiently appears from Amir Ali and Woodroffe's notes to O. II, rr. 1 & 2, of the New Code.

But it is objected (1) that when Defendant-Appellant in his written statement denied Plaintiff-Respondent's title to the land, the claim of

* U.B.R., 1902-03, II, Civ. Pro., p. 3.

NGA PO CHEIN v. MI PWA THEIN.

the latter for " mesne profits " could not lie without a claim for the land; (2) that the principle affirmed in *Mi Mya* v. *Mi Myè** barred the suit.

On the first point reference has been made to *Chit Le* v. *Pan Nyo*,† but that merely decided that claims for possession and for mesne profits are based on one and the same cause of action, and therefore a second suit is barred by section 43 (O. II, r. 2). It does not support the contention put forward on behalf of the Defendant-Appellant that the first suit is bad.

There is much force in the learned Advocate's contention that an anomalous position would arise if this suit were admitted, for the Plaintiff-Respondent would be able to sue year after year for a share of produce though she would be unable, by reason of O. II, r. 2, to sue for the partition of the land itself, and no doubt a suit of this kind is an evasion of the Stamp Law, as the Plaintiff practically gets an adjudication in respect of the land by merely paying court-fees on a trifling share of produce for one year.

But numerous instances occur of suits in which the title to immoveable property is disputed incidentally only: *e.g.*, *Muttu Karuppan* v. *Sellan*,‡ a suit for the value of fish taken from a tank, where the Defendant disputed the Plaintiff's title to the tank; and *Krishna Prasad* v. *Maizuddin Biswas*,§ a suit for damages for cutting and carrying away grass from land, the Plaintiff's title to which was disputed by Defendants. Such suits have not been held to be bad on the ground now alleged.

With regard to the second objection, I have referred to the decisions followed in *Mi Mya's* case to some more recent cases mentioned by Amir Ali and Woodroffe in their notes to section 17 of the New Code of Civil Procedure, and also to Mayne's Hindu Law, 8th Edition, page 647, where the law on the subject as laid down in judicial decisions is stated.

In *Hari Narayan Brahme* v. *Ganpatrav Daji* ‖ (1883) the reason given is that when a Plaintiff seeks to recover a share of property in the hands of the Defendant, it is necessary for the Court to decide whether, under the circumstances of the case, he is entitled to that partition, and the learned judge said: "I apprehend that no Court would decide that a Plaintiff who withheld property, which he might and therefore ought to bring into hotchpot, had a right to the partition of the property in the possession of the Defendant." The general rule was also stated to be that "every partition suit shall embrace all the joint family property."

The qualifications to which that rule was said to be subject "as for instance where sufficient portions lie in different jurisdictions, or where a portion is not available for actual partition as being in the possession of a mortgagee" do not apply in the present case.

---

* U.B.R., 1897—01, II, 229.
† ——— 1904-06, II, Civ. Pro., p. 1.
‡ I.L.R., 15 Mad., 98.
§ ———17 Cal., 707.
‖ I.L.R., 7 Bom., 272.

Hari Das Sanyal v. *Pran Nath Sanyal* * (1886) was a case where the Plaintiffs sued for partition of a part of the lands of which they were in joint possession with the Defendants.

The suit was held to be bad, the previous Bombay case and others being followed.

Jogendra Nath Mukerji v. *Jujubundha Mukarji* † (1887) was decided on the same ground.

In *Chandu* v. *Kunhamed* ‡ (1891) it was explained that the object of the rule is to avoid multiplicity of actions.

In *Venkata Nara Simha Naidu* v. *Bhashya Karlu Naidu* § (1899) and *Shivmur Teppa* v. *Virappa* ‖ (1899) the rule was affirmed. In the last mentioned case Mr. Justice Rana De cited a number of authorities and asserted the rule in emphatic terms.

It is, I think, clear from Mayne's account that the rule is equally applicable to cases under the Dayabhaga as to cases under the Mitakshara Law. There is therefore no reason to doubt its applicability to cases under the Burmese Buddhist Law

Now it appears to me that the Plaintiff-Respondent's claim in the present case, to a share of the produce of land which she alleged to be undivided family property, was in the nature of a suit for partition of a portion of the alleged joint property. Whether in such cases there is but one cause of action or whether the causes of actions are entirely distinct is a difficult question, and decisions of the various High Courts can be brought forward in support of either view.

Admittedly the present case would be different if the Defendant admitted the Plaintiff's title to the land and the dispute was confined to the share of produce claimed.

But when it appears, from the defence set up, that the Plaintiff's title to the land is disputed, then in my opinion the Plaintiff is shown to be suing for a partial partition.

She asks in effect for partition and a share of the produce of certain land for one year. The ground on which she claims to be entitled to these things are that the land is undivided family property, and that she is a coheir with a subsisting interest in the same.

The defendant denies that she has any subsisting interest in the land. It is that denial that gives her the immediate right to sue for partition, and the right extends to the whole estate. I therefore think that the Township Court was right in dismissing the suit on this ground.

The learned Officiating Judicial Commissioner did not consider this question: apparently it escaped his attention.

For the reasons above given, I set aside the decree under review and the decree of the Lower Appellate Court, and restore that of the Township Court. Plaintiff-Respondent will pay all costs.

* I.L.R., 12 Cal., 566.
† ——— 14 Cal., 122.
‡ I.L.R., 14 Mad., 324.
§ ——— 22 Mad., 538.
‖ I.L.R., 24 Bom., 128.

Civil Procedure—O. VII—10.

Civil Revision No. 51 of 1909. June 23rd.

Before G. W. Shaw, Esq., C.S.I.

MI LON MA GYI AND MI ME SHIN *vs.* NGA BA, MI PAW AND MI PWA SHIN.

Mr. *K. K. Roy*—for Applicants.

Held—that a High Court by directing under section 22, Civil Procedure Code, that a suit shall proceed in a Court in another jurisdiction, and not in the Court in its own jurisdiction in which it has been instituted, in effect stays further proceedings in the latter Court, and makes that Court incompetent to proceed with the case, and hence the only course open to it is to return the plaint to the Plaintiff for presentation in the proper Court.

References:

I.L.R., 2 All., 241.
————5 All., 60.

IN Civil Miscellaneous Case No. 4 of 1909 of this Court an order was made under section 22 of the Civil Procedure Code, 1908, directing that the suit instituted by the present Applicants against Respondents, Mi Pwa Shin and others (Civil Regular No. 311 of 1908 of the District Court, Mandalay) should proceed at Ma-ubin in Lower Burma.

The District Court then refused to return the plaint and attached papers to the Plaintiffs to be presented in the proper Court at Ma-ubin, but forwarded the proceedings to the Court at Ma-ubin, holding that the order of this Court must be taken to be an order of transfer.

This view is, I think, clearly wrong, as a reference to *Skinner* v. *Orde* * and *Tula Ram* v. *Harjiwan Das* † is sufficient to show.

The phraseology of the new Code is clearer than that of the old, but still refrains in a marked manner from empowering a High Court to "transfer" to a Court in another jurisdiction, or, in the words of Mr. Justice Straight, to "intrude" its orders "into the jurisdiction of the other High Courts."

A High Court by directing under section 22 that a suit shall proceed in a Court in another jurisdiction, and not in the Court in its own jurisdiction in which it has been instituted, in effect stays further proceedings in the latter Court, and makes that Court incompetent to proceed with the case. The only course open to it is then to return the plaint to the Plaintiff for presentation in the proper Court, *i.e.*, the Court in the other jurisdiction in which the High Court has determined that it shall proceed. (O. VII, r. 10.)

I set aside the District Court's order accordingly, and direct that it recall the proceedings and deal with them in the manner now explained.

The costs of this application to follow the result of the case.

* I.L.R., 2 All., 241. † I.L.R., 5 All., 60.

Civil Procedure—O. IX—9, 13; O. XLI—19.

Civil 2nd Appeal No. 217 of 1908.
April 2nd, 1909.

Before G. W. Shaw, Esq., C.S.I.

NGA CHOK *v.* NGA ON GAING.

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

Principles by which Courts should be guided in dealing with applications under these rules.

References:

I.L.R., 6 All., 383.
——— 26 Mad., 599.
15 W.R., 235.

THIS is an appeal of a two-fold character—(1) under section 584 of the Code of 1882 against an order under section 556 dismissing an appeal for default; (2) under section 588 (27) against an order under section 558 refusing to reopen the appeal.

Under the present Code it is quite clear that there is no appeal against an order dismissing an appeal for default. Under the Code of 1882 this was apparently doubtful, and it was held that such an order was a decree and that an appeal lay under section 584. Though I think that view open to question, it is unnecessary to decide the point. Assuming that such an appeal lay, the ground taken here is in my opinion unsustainable. It is that section 556 no longer applied to a case which had been remanded and resubmitted to the Appellate Court with the additional evidence and findings on the same. The contention is that if the Appellant failed to appear, that was merely equivalent to his filing no objections and that "in any case the Court was bound to consider the findings of the Lower Court on the merits." The learned Advocate relies on Amir Ali and Woodroffe's notes to O. XLI, r. 26, where a statement is made to this effect on the authority of *Woomesh Chunder Roy* v. *Jonardun Hajrah* * (1871) and *Umed Ali* v. *Salima Bibi* † (1884). But those cases do not support his contention. An appeal is still being heard at the stage when the proceedings have been resubmitted after a remand, and a day has been fixed for the parties to file objections to the findings of the Lower Court. There is nothing to take the case out of the general rule contained in section 556 of the Code of 1882. The decisions cited did not deal with the situation in question. The only thing they determined was that although a party did not file objections, the Court was still bound to consider the findings on the merits. There was no failure to appear in those cases. The Code of 1908 makes no change on the point just discussed.

On the merits of the order dismissing for default, the subject of the appeal under section 588 (27), the District Court's proceedings are very scanty, not to say defective. The application under section 558 is filed in the Process-Record, and the only record of the way it was dealt with consists of an endorsement on it by the Judge, refusing to

* 15 W.R., 235. † I.L.R., 6 All., 383.

NGA CHOK
v.
NGA ÔN GAING.

reopen on the grounds that the case was called twice (?or thrice), that there was no reason why the Advocate should not have appeared, and that the Advocates in his Court were "exceedingly slack" and had been frequently warned.

There is nothing to show that the Appellant or his Advocate had been heard in support of the application, or had an opportunity of proving that there was sufficient cause.

Before me it is asserted that the Appellant was taken very ill with cholera or something of the kind at 10 o'clock at the Advocate's house, and that the Advocate considered himself bound by humanity to stay and attend to him, and was only too late by 15 minutes after all.

The application stated that Appellant was taken very ill (with what is called fever) *at the Advocate's house*. So far it bears out these assertions.

I am not satisfied that the learned Judge bore in mind the principles underlying this and similar rules. As observed in the cases summarized in Amir Ali and Woodroffe's notes to O. IX, r. 13, of the present Code, "The first object and purpose for which Courts sit is..... that the parties shall be heard, and therefore the object of this rule is to ensure, within reasonable limits as to public convenience, that every defendant shall have a hearing. Similar provisions exist in the procedure of the English and United States Courts, the general rule being that, apart from cases where the defendant has not been properly notified of the hearing, every decree may be set aside *for unavoidable casualty* or *misfortune* preventing the party from defending or prosecuting, or for fraud practised by the successful party in obtaining the judgment or *for mistake, inadvertence, surprise or excusable neglect*. Applications of this character should therefore always be disposed of as substantial justice may require, and even where there is a doubt the benefit should be given to the appellant and the decree set aside."

These remarks apply equally well to cases under O. IX, r. 9, and O. XLI, r. 19 (corresponding to sections 103 and 558 respectively of the old Code).

Here again Amir Ali and Woodroffe in their notes to O. XLI, r. 19, may be quoted:—"This and the kindred provisions in O. IX, r. 13, mean that the application may be based upon any ground which would be a just and proper one for granting the application, and not that the application can be based upon one ground only, *viz.*, that the applicant was prevented by sufficient cause from appearing. The affirmative provisions of the Code, that a plaintiff or appellant may prove that he was prevented by sufficient cause.....do not imply the negative, *viz.*, that an application for restoration cannot be granted unless sufficient cause (in this sense) is shown." The authority for these remarks is the Madras case of *Somayya* v. *Subamma** (1903) decided under the Code of 1882.

The few modifications made in the phraseology of the new Code imply that this interpretation was accepted by the Legislature as correct.

* I.L.R., 26 Mad., 599.

On the principles just explained, I am of opinion that if the Appellant was taken ill at 10 o'clock at his Advocate's house and if the Advocate on this account arrived late at Court, Appellant had a good reason for getting the appeal reopened.

But as there is no evidence before me, I cannot properly decide whether the appeal should or should not be reopened.

I therefore set aside the order of the District Court, and direct that it admit the application, send notice to the other side, take such evidence as may be offered, and then decide whether the appeal is to be reopened or not.

Costs will abide the final result.

Civil Procedure—1882—13; 1908—11.

Civil 2nd Appeal No. 230 of 1908. June 21st, 1909.

Before G. W. Shaw, Esq., C.S.I.

MANURATH SINGH *v.* RAJ KUMARI AND RAM SINGH.

Mr. *J. C. Chatterjee*—for Appellant.
Mr. *S. Mukerjee*—for Respondent.

A Judgment-Debtor applied under section 258, Civil Procedure Code, 1882, to have an adjustment out of Court recorded. The Court, after hearing the parties and enquiring into the facts, decided that the alleged adjustment was not proved.

This order was confirmed in appeal. The Judgment-Debtor afterwards brought a regular suit to recover the money he alleged he had paid by way of adjustment out of Court.

Held,—that the suit was barred by section 13, Civil Procedure Code, 1882.

References:

I.L.R., 21 Cal., 437.
——— 5 Mad., 397.
——— 18 Mad., 26.
13 W.R., F.B., 69.
L.R., 11 I.A., 37.

RESPONDENT got a decree against Appellant and during execution Appellant applied to the Court under section 258 of the Code of Civil Procedure, 1882, for an alleged adjustment out of Court by a payment of Rs.555 to be certified. The Court dismissed that application on its merits, and that order was upheld in appeal. The execution of the decree accordingly proceeded as though no adjustment had taken place. Then Appellant brought the present suit for recovery of Rs. 555, and pending decision applied for stay of execution under section 243, Civil Procedure Code, or for an injunction under section 492, restraining the Executive Engineer from paying into Court some moneys attached by Respondent in the execution case. Actually an order was issued in Form $\frac{\text{Judicial}}{\text{Civil—78}}$. That is to say, an attachment before judgment was granted. The Court dealt with the application in a perfunctory and careless manner.

Both the Courts below decided against Appellant.

A preliminary objection has been taken on behalf of Respondent that the suit was barred by the provisions of sections 258 and 244.

There are a great many decisions on the subject. *See* Amir Ali and Woodroffe's notes to O. XXI, r. 2 (corresponding to section 258).

A series of cases is to be found beginning with *Gunamani Dasi* v. *Prankishori Dasi** (1870), to the effect that a suit will lie upon an uncertified adjustment. *Gunamani's* case was one where no application had been made by either party for the adjustment to be recorded as certified.

Viraraghava Reddi v. *Subbakka* † (1882), was a case where the judgment-debtor had applied to the Court under section 258, but beyond the time allowed by the Limitation Act (then only 15 days).

In the last mentioned case it was held that a suit would lie on a promise to certify, and in the absence of such a promise a suit would

* 13 W.R., F.B., 69. † I.L.R., 5 Mad., 397.

MANURATH SINGH. v. RAJ KUMARI.

lie on the ground of fraud or negligence, where, by reason of the decree-holder's failure through fraud or negligence to certify adjustment, the judgment-debtor has had to pay a second time.

In other cases it has been held that a suit will not lie, but in most of these the suit was for a declaration that the decree-holder had no right to execute the decree, or for an injunction restraining him from executing it, or for an order setting aside a sale held in execution or for some similar relief, that is to say, they were cases which sought to interfere with the execution of the decree in plain contravention of section 244.

The subject, as has been said, is lucidly discussed by Mr. Justice Pigott in *Azizan* v. *Matuk Lal Sahu*.* I cannot find that the decisions in the first two cases above cited have ever been shown to be wrong.

They are representative of those in which it has been held that a suit will lie, and on which the Appellant relies. The weight of authority is on their side.

But the present case differs from those, in the fact that the Appellant (the Judgment-Debtor) applied under section 258 (within limitation), and the application was dismissed on its merits.

In other words, there was here an order falling within section 244. It was confirmed on appeal, and the Appellant did not attempt to get the appellate decree set aside by this Court. It was therefore final.

If the Appellant was wronged he had his remedy. His grievance was investigated and adjudicated upon. This cuts away the ground on which it was held in *Viraraghava's* case that the judgment-debtor was deprived of a remedy by the short period of limitation allowed.

Apart from this, it appears to me that the order in execution deciding on the merits against the alleged adjustment and dismissing Appellant's application is *res judicata*.

This is the view taken in *Guruvayya* v. *Vudayappa* † (1894). *Cf.* the report of *Ram Kirpal Shukul* v. *Musammat Rup Kuari* ‡ (1882).

Proceedings in execution are proceedings in a suit—proceedings in the suit in which the decree was passed that is being executed. When therefore a matter directly and substantially in issue has been adjudicated upon in such proceedings, it has been heard and finally decided in a suit, and it is not open to the unsuccessful party to get it retired in a fresh suit. The provisions of section 11 of the Code of 1908 (corresponding to section 13 of the old Code) stand directly in the way.

In the circumstances it is unnecessary to go into the merits.

The appeal is dismissed with costs.

* I.L.R., 21 Cal., 437. † I.L.R., 18 Mad., 26. ‡ L.R., 11 I.A., 37.

Contract Act—25.

Civil and Appeal No. 53 of 1906. February 27th, 1907.

Before G. W. Shaw, Esq., C.S.I.

ABDUL GAFUR AND FATIMA BIBI *v.* DEYAN SINGH, legal representative of NAN SINGH.

Mr. *A. C. Mukerjee*—for Appellants.
Messrs. *J. C. Chatterjee* and *S. Mukerjee*—for Respondent.

Where a gift is not a question of inheritance, succession, religious institution or usage, it is governed by the Contract Act.

See Buddhist Law—Gift, page 1.

Contract—20, 65.

Civil 2nd Appeal No. 267 of 1905. February 27th, 1907.

Before G. W. Shaw, Esq., C.S.I.

SADHU *v.* NGA SI GYI AND MI MI.

Mr. *C. G. S. Pillay*—for Appellant.

Held,—that where Defendant sold and Plaintiff bought land as a house-site in the belief that it was *bobabaing*, and it afterwards turned out that the land was State, the parties were under a mistake of fact, within section 20, Contract Act, and the Plaintiff was entitled to recover the purchase money under section 65.

See Evidence, page 1.

Contract—2, 10, 11.

Civil Appeal No. 76 of 1906. June 24th, 1907.

Before G. W. Shaw, Esq., C.S.I.

KAN GAUNG *vs.* MI HLA CHOK, A MINOR BY HER GUARDIAN, MI THUZA.

Mr. *Tha Gywe*—for Appellant.
Mr. *A. C. Mukerjee*—for Respondent.

Held,—On the authority of *Mohori Bibi* v. *Dharmodas Ghosh* * that a female minor cannot sue for compensation under the Contract Act for the breach of a promise of marriage made to her.

But where the circumstances entitle her to compensation under the Buddhist Law, she can succeed independently of Contract.

References:

* L.R., 30 I.A., 114.
I.L.R., 5 Cal., 669.
S.J.L.B., I., 114.
S.J.L.B., I., 235.
S.J.L.B., I., 533.
U.B.R., 1892-96, II, 200.
————1897-1901, II, 499.

Trevelyan's—The law relating to Minors, 3rd Edition, page 18.
Amir Ali and Woodroffe's Commentary on the Evidence Act, 4th Edition, pages 637, 644.
Smith's Leading Cases, 10th Edition, pages 808, *seqq.*
Chan Toon's Principles, pages 28—33.
Kin Wun Mingyi's Digest, II, 50, 53, 54, 64, 73, 75, 78, 83, 88, 142, 143 and 149.

Plaintiff-Respondent sued for Rs. 60 damages for breach of promise of marriage and Rs. 30 damages for seduction. She alleged that Defendant-Appellant promised to give 2½ tickals of gold and Rs. 60 and to ask her in marriage, that she allowed him sexual intercourse and also eloped with him on the strength of this promise, and that he subsequently failed to perform it.

Defendant-Appellant admitted that he was in love, and that he eloped with Plaintiff-Respondent, but he said that his parents would not agree to his marrying her, and denied the alleged promise. He further said that he was willing to marry Plaintiff-Respondent, but not to give her 2½ tickals of gold and Rs. 60. As to the facts, the Lower Courts are agreed that Defendant-Appellant did promise to give 2½ tickals of gold and Rs. 60, and to ask for Plaintiff-Respondent in marriage, and I see no reason to doubt the correctness of this finding. Besides Plaintiff-Respondent herself there is the evidence of her elder sister, Mi Bwin Gyi, of her cousin once removed, Mi Chit and of her "cousin-in-law twice removed" Tet Kaung. They all speak to one particular occasion, in Tawthalin 1267 B.E., about lamp lighting time, when Plaintiff-Respondent and Mi Chit were spinning, and Defendant-Appellant in the presence of the other witnesses went to Plaintiff-Respondent, and in reply to her question as to what he would do since his parents did not agree, made the promise alleged.

Plaintiff-Respondent alleged that Defendant-Appellant repeated this promise on several occasions. But she failed to prove this.

There was no direct evidence to support her statements that Defendant-Appellant, when he eloped with her, promised to marry her on their return, and that after the elopement he promised to marry her afterwards,—made this promise to her mother on the way back.

KAN GAUNG
v.
MI HLA CHOK.

Her sister, Mi Bwin Gyi, states that nothing was said about the marriage when she and her mother went to bring Plaintiff-Respondent back, and that after the return, when the mother told Defendant-Appellant to ask for Plaintiff-Respondent in marriage, he said that he could not do so. The mother was not asked about any promise made to her. There is however no reason for disbelieving the witnesses, although they are relations, in respect of the promise in Tawthalin.

All the circumstances of the case including the elopement, and the Defendant-Appellant's expressed willingness to marry Plaintiff-Respondent, support the Plaintiff-Respondent's allegation that he promised marriage.

The Township Court thought that Defendant-Appellant's object was to secure regular sexual intercourse and therefore the promise could not be enforced. That was a strange perversion of the Law. A man cannot escape from a promise of marriage because he has made it without any intention of carrying it out and with the sole object of getting sexual intercourse on the strength of it. The validity of the promise depends on other considerations. The Lower Appellate Court pointed out the error into which the Township Court fell.

The Defendant-Appellant in this Court has raised a new point, *viz.*, that Plaintiff-Respondent being a minor, a promise to marry made to her cannot be enforced. This contention is based on the decision of the Privy Council in *Mohori Bibi* vs. *Dharmodas Ghosh*,* where it was held that under the Contract Act a minor cannot make a contract. It is not disputed that Plaintiff-Respondent was a minor "according to the law to which she is subject," *viz.*, the Buddhist Law [section 11, Contract Act, and section 2, Indian Majority Act (IX of 1875)]. But it is contended on her behalf (1) that the Plaintiff-Respondent's mother was a party, (2) that the Privy Council Ruling did not decide that a minor could not enforce a contract, (3) that Defendant-Appellant is estopped by section 115, Evidence Act, from pleading the Plaintiff-Respondent's minority, (4) that a claim for damages for breach of promise of marriage is not a matter of contract but of marriage or of tort.

On the first point I have examined the evidence, and regarding the matter purely as one of contract, my conclusion is that the Plaintiff-Respondent's mother was not a party. If the promise had been made to her, there would have been an end of the case. The other questions would not arise. But as I have already said, Plaintiff-Respondent's assertion that Defendant-Appellant made the promise to her mother on the way back after the elopement and after the return, is not borne out by a single witness, and Tet Kaung's statement, that the mother was present on the occasion of the promise in Tawthalin, is not borne out by the evidence of the other persons who were present. In short the promise was made to the Plaintiff-Respondent who was a girl of 16 at the time of the hearing in the Township Court.

With reference to the second point, it is true that in *Mohori Bibi* vs. *Dharmodas Ghosh* it was the minor who sought to avoid the alleged contract. But the ground on which their Lordships proceeded

* L.R., 30, I.A., 114.

was that an agreement with a minor is not a contract at all, since by sections 2, 10 and 11 of the Contract Act an agreement is a contract when the parties are competent to contract, and a minor is not competent to contract. It clearly follows from this that as Trevelyan says "an agreement made by a minor is not voidable but absolutely void," "no effect can be given to such an agreement at the instance of either party" and a "minor cannot take advantage" of it "even though it be for his benefit" (Trevelyan's—The Law relating to Minors, 3rd Edition, page 18).

I pass to the question of estoppel. Here it is quite clear that there was no estoppel within the meaning of section 115, Evidence Act. It is only necessary to read that section to see that it can have no application to the facts of the present case. In *Mohori Bibi's* case the Privy Council held that section 115 did not apply because there was no misrepresentation, the party contracting with the minor being fully aware of the fact that he was a minor in spite of his declaration to the contrary. Here the Defendant-Appellant made no representation whatever with respect to the Plaintiff-Respondent's age.

Assuming that there are estoppels which do not come within the four corners of sections 115—117 of the Evidence Act, as explained by Garth, C. J. in the *Ganges Manufacturing Co.* vs. *Surajmal** quoted by Amir Ali and Woodroffe on page 637 of the 4th Edition of their commentary on the Evidence Act, I am unable to find from a perusal of the note to *Doe* vs. *Oliver* on "estoppel by matter *in pais*" in Smith's Leading Cases (10th Edition, pages 808 *seqq.*) any authority for applying the doctrine of estoppel to the present case. The reports of the cases themselves are not available, but as far as the note goes, the elements of estoppel appear to be always the same :—there must be a representation which induces another to alter his previous position.

It has also been pointed out that "it is an absolutely fundamental limitation on the application of the doctrine of estoppel that it cannot be applied with the object or result of altering the Law of the land. The Law for instance imposes fetters upon the capacity of certain persons to incur legal obligations, and particularly upon their contractual capacity.....This general law is in no way altered by the law of estoppel. It is not allowed to enlarge the status or capacity of parties."(Amir Ali and Woodroffe, 4th Edition, page 644, from Cababe's Estoppel, 123, 124.

It remains to consider whether damages for breach of promise of marriage can be claimed independently of contract.

The decisions in Burma on the point are—

(1) *Mi Kin* vs. *Nga Myin Gyi* † a suit for damages for seduction or rather pregnancy. No promise of marriage was proved, and Mr. J. Jardine held that no question regarding marriage was raised, and that pregnancy was not a cause of action on the principles of justice, equity and good conscience.

* I.L.R., 5 Cal., 669.

† S.J.L.B., Vol. I, 114.

KAN GAUNG
v.
MI HLA CHOK.

(2) *Nga Po Thaik* vs. *Mi Hnin Zan.** This dealt with the same subject more fully. The decision was to the effect that as there was no promise to marry there was no right to sue. Mr. Jardine also observed that if in a case of the kind there has been a promise to marry, the Court would look at all the circumstances before awarding damages, and the amount would depend on circumstances "as the Dhammathats very plainly show."

(3) *Nga Hmaing* vs. *Mi Pwa Me.* † Here a promise to marry was alleged as well as seduction. The Special Court held that the case was one of a breach of contract, and unless forbidden by the Burmese Law it would lie, and that the injury resulting from seduction might be considered in estimating the amount of damages.

These conclusions were adopted and applied to Upper Burma in *Mi Yon* vs. *Po Lu.*‡

They assume what is obviously the fact, that a promise of marriage, and breach of such a promise are questions of marriage, to be determined in the case of Buddhists according to the Buddhist Law, "except in so far as such Law has by enactment been altered or abolished or is opposed to any custom having the force of Law" (Burma Laws Act, section 13). Marriage under the Buddhist Law is not wholly a matter of contract as was pointed out in *Myat Tha* vs. *Mi Thon.*§ I am therefore of opinion that where, as in the present case, the Contract Act cannot be relied upon, a suit for damages for breach of promise will still be maintainable if the Buddhist Law authorizes compensation in such a case.

The Buddhist Law, as to the parties whose consent is necessary to a marriage, is stated at pages 28 to 33 of Chan Toon's Principles. Briefly it is as follows:—Up to the age of 20 a Buddhist woman who has not been married before can only be married with the consent of her parent or guardian, who in the absence of the father is ordinarily the mother, but the woman's consent is also necessary.

In the present case the Defendant-Appellant got the consent of Plaintiff-Respondent, but he did not ask for the consent of the mother, and after the elopement, when for the first time the mother is shown to have given her consent, the Defendant-Appellant was not willing to marry the Plaintiff-Respondent.

But according to section 50 of Volume 2 of the Kinwun Mingyi's Digest, a girl's parents should grant permission when the parties are in love and, if they connive at sexual intercourse, this is to be taken as consent binding upon them (section 99).

As a rule the Dhammathats seem to consider that when the suitor fails to carry out his promise it is sufficient that the girl should be at liberty to marry another: and compensation is awarded only to the suitor when the girl or her parents fail to go through with the matter (*cf.* sections 53, 54, 64 and 78). But in certain circumstances the suitor is declared to be liable to compensate the girl or her parents.

* S.J., L.B., 235. † Ib. 533. ‡ U.B.R., 1897-1901, II, 499.
§ U.B.R., 1892-06, II, 200.

Thus a suitor who marries another woman shall not demand the restoration of the bridal presents (section 73).

In the case of rival suitors, where one has given presents to the parents and the other has obtained sexual intercourse from the girl, the latter is to marry the girl and, if he repudiates her, he is to compensate the parents for what they have had to pay to the other suitor (section 75).

Where the bridegroom repudiates the girl at the time of marriage, if the marriage has not been consummated, he is to forfeit the bridal presents and to pay compensation. If the marriage has been consummated, he is also to pay *Kobo* (sections 83 and 88).

Then the seducer is liable to pay compensation to the parents (section 142).

And if a man elopes with a woman because her parents disagree and subsequently repudiates her, he is to pay her his *Kobo* (sections 143 and 149).

The case of seduction has been ruled out, as not being a question of marriage, but the other cases dealt with in these passages all involve questions of marriage, and I think they furnish sufficient authority for holding that in a case like the present the defaulting suitor is liable to compensate the girl or her parents.

It will be observed that in the case of elopement the consent of the girl's parents is not necessary to render the man liable.

The present case was stronger, for after the elopement the Plaintiff-Respondent's mother called upon Defendant-Appellant to carry out his promise, in other words she gave her consent, which had before been wanting.

In these circumstances it appears to me that, apart altogether from contract, the Plaintiff-Respondent is entitled to compensation under the Buddhist Law, and the Plaintiff-Respondent's minority is immaterial.

The compensation awarded by the Lower Appellate Court was not excessive.

The appeal is dismissed with costs.

Civil Revision No. 4 of 1908. January 20th.

Contract—151, 152.

Before G. W. Shaw, Esq.

MAHOMED ALI *vs.* NGA PE.

Mr. *S. Mukerjee*—for Applicant.
Mr. *J. C. Chatterjee*—for Respondent.

Where the driving beam of a sewing machine was bailed to a copper-smith to repair it by soldering with copper, and excessive heat was applied whereby the tip of the driving beam was melted and the beam rendered useless.

Held,—in a suit for damages against the coppersmith, that section 151, Contract Act, applied, that the degree of care required of the Applicant was that of a skilled copper-smith, and that the burden of proof lay upon the Defendant to prove the exercise of such care.

References:

Smith's Leading Cases, I, 167.
U.B.R., 1897-01, II, 337.
3 Hurlstone and Coltman's Reports, 596.

Plaintiff-Applicant in this case sued to recover only Rs. 40, the value of a sewing machine, and as we shall see, that was ten times as much as he ought to have claimed. But the point for determination was not free from difficulty. Plaintiff-Applicant entrusted the driving beam of his sewing machine to Defendant-Respondent who is a coppersmith, for repair. He wanted a broken tip soldered with copper. Defendant-Respondent undertook to do the repair. The contract was one of bailment, and the law is contained in sections 151 and 152 of the Contract Act. As the evidence showed Defendant-Respondent employed another copper-smith to do the work under his instructions. But he spoke of it as his own work, and it was not alleged that he was bound to carry out the repair with his own hands. Section 154 does not therefore apply. In the course of the soldering "excessive heat" was applied, and the other tip of the driving beam was melted, so rendering the driving beam useless. The question was whether Defendant-Respondent was liable to compensate Plaintiff-Applicant for the damage.

The difficulty of the case lies in the fact noted by Cunningham and Sheppard in their notes to section 151, that "the section says nothing about the degree of skill required of the bailee where the bailment is made for a purpose demanding some special skill. The test of the prudent man does not suffice for cases where skill is required, but is wanting."

It is remarkable that the same omission is to be found in all the authorities on bailment I have been able to consult from *Coggs* vs. *Bernard* (1703)* the leading case on bailment, downwards.

The explanation seems to be that cases of the kind lie on the border line between Tort and Contract, and that damage by a bailee from want of skill was formerly treated as a Tort. See *Pollock on Tort*, 7th Edition, page 427, where he quotes from an old case "If a smith prick my horse with a nail, etc.: I shall have my action upon the case (*i.e.* an action for Tort) against him, without any warranty

* Sm. L.C., I. 167.

MAHOMED ALI v. NGA PE.

by the smith to do well.....For it is the duty of every artificer to exercise his art rightly and truly as he ought."

But Pollock goes on to explain that nowadays, "it seems better to say that wherever there is a contract to do something, the obligation of the contract is the only obligation between the parties with regard to the performance, whether there was a duty antecedent to the contract or not." (*Ib.* 524); and again that "Negligence in performing a contract and negligence independent of contract create liability in different ways: but the authorities that determine for us what is meant by negligence are in the main applicable to both." "Negligence is the omission to do something which a reasonable man, ...would do, or doing something which a prudent and reasonable man would not do." (*Ib.* 428).

And he further observes "The general duty of diligence includes the particular duty of competence in cases where the matter taken in hand is of a sort requiring more than the knowledge or ability which any prudent man may be expected to have. The test is whether the defendant has done all that any skilful person could reasonably be required to do in such a case. This is not an exception or extension but a necessary application of the general rule. For a reasonable man will know the bounds of his competence and will not intermeddle (save in extraordinary emergency) where he is not competent" (*Ib.* page 432).

"If the party has taken in hand the conduct of anything requiring special skill and knowledge, we require of him a competent measure of the skill and knowledge usually found in persons who undertake such matters. If a man will drive a carriage he is bound to have the ordinary competence of a coachman, if he will handle a ship of a seaman, if he will treat a wound of a surgeon, if he will lay bricks of a bricklayer, and so in every case that can be put. Whoever takes on himself to exercise a craft holds himself out as possessing at least the common skill of that craft and is answerable accordingly. If he fails, it is no excuse that he did the best he, being unskilled, actually could. He must be reasonably skilled at his peril." (*Ib.* page 27).

The practical result is that the diligence required in the case in hand will be according to circumstances, an ordinary man's or some particular kind of expert's." (*Ib.* page 432).

I think this is sufficient to show that section 151 of the Contract Act governs the present case, and that by that section the degree of care required of the Defendant-Respondent was that of a skilled copper-smith.

The next point to be noticed is the burden of proof. This was dealt with in *Ebrahim* vs. *Chan Che Shok.** The rule quoted there from *Scott* vs. *London Dock Company,*† appears to be applicable: and according to Pollock another special rule lays the burden of proof on Defendent-Respondent. "If a man has undertaken, whether for reward or not, to do something requiring special skill, he may fairly be called on, if things go wrong, to prove his competence" (*Law of Torts,* 7th Edition, page 437).

* U.B.R., 1897-01, II, 337.

† 3 H and C, 596.

It appears to me to be evident that such an accident as that which happened in the present case is not the sort of accident that is likely to occur in the process of soldering, if proper care and skill are used.

The Defendant-Respondent made no attempt to prove that it was, or that proper care, which here means as above explained the care that would be taken by a skilled copper-smith, was used.

All that he and his employé, Nga Kywe, could say was that due care and attention were exercised, a statement which on the face of it was negatived by their admission that excessive heat was applied, and by the undeniable fact that the tip of the beam was melted.

The Lower Court held on the evidence of Nga Kywe that due care and attention were exercised, but in doing so it clearly overlooked the facts which I have just mentioned. In overlooking these facts, I am of opinion that the Lower Court was guilty of illegality or material irregularity within the meaning of section 622, Civil Procedure Code.

I agree, however, with the Lower Court that Plaintiff was not justified in claiming the value of the entire machine. One of his own witnesses spoke to having made a new driving beam for the Plaintiff-Applicant for Rs. 4, or Rs. 5. Another of his witnesses said that driving beams are generally worth between Rs. 3-8 and Rs. 4, Plaintiff-Applicant himself valued the driving beam that was spoiled at from Rs. 10 to Rs. 15 but there was no evidence to support him. He therefore not only claimed the value of the whole machine, when he could have got a new driving beam cast, but he put an excessive value on the beam.

I set aside the decree of the Lower Court and grant Plaintiff-Applicant a decree for Rs. 4. In the circumstances I am of opinion that each party should bear his own costs.

Contract—73.

Civil 2nd Appeal No. 241 of 1907. May 25th, 1908.

DAMAGES.

Before D. H. R. Twomey, Esq.

NGA MAUNG GYI *vs.* RAMZAN ALI.

Mr. *S. Mukerjee*—for Appellant.
Mr. *A. C. Mukerjee*—for Respondent.

Where the contract of hiring provides for the payment of certain wages, although it may be optional on the part of the master to find work and he may, if he pleases, discontinue his business, yet he must nevertheless pay the wages agreed upon, whether he find work for the servant or not, or he will render himself liable to an action for damages.

See Master and Servant page 1.

Contract—74.

Civil Revision No. 97 of 1908. June 14th, 1909.

Before G. W. Shaw, Esq., C.S.I.

DERAMALL *v.* NGA SAUNG.

Mr. *J. N. Basu*—for Applicant.

Held—a stipulation in a bond for payment of interest at an enhanced rate (120 per cent. per annum) from date of execution, in case of failure to pay principal and interest at 60 per cent. per annum within a time specified, is by way of penalty within section 74, and interest at the same instead of at the enhanced rate is reasonable compensation.

References :

I.L.R., 5 All., 238.
————12 Bom., 242.
————29 Cal., 43.
U.B.R., 1897-01, II, 333.
Pollock on Contract, section 74.
Cunningham and Shephard, Notes on Contract.

THE facts are admitted. Plaintiff-Applicant lent Rs. 50 to Defendant-Respondent on a bond dated 13th Tabaung *lazan* 1264 (10th March 1903). The Defendant-Respondent by the bond undertook to repay the Rs. 50 principal together with interest at 8 annas per Rs. 10 per mensem (or 60 per cent. per annum) in three months, and in case he failed to do so, to pay interest from date of execution at Re. 1 per Rs. 10 per mensem (or 120 per cent. per annum) to date of payment in full.

Only one payment of Rs. 50 towards interest was made, *viz.*, on the 6th Tabodwè *lazan* 1266 (9th February 1905). Plaintiff-Applicant therefore sued for the Rs. 50, principal, and Rs. 200, balance of interest at 120 per cent.

The Township Court granted Plaintiff-Applicant a decree for the full amount claimed, being unaware of any law by which it could reduce the interest.

On appeal, the District Court held that the stipulation for enhanced interest was "by way of penalty," and that the Plaintiff-Applicant was entitled, under section 74, Contract Act, only to reasonable compensation for the breach, and proceeded to give Plaintiff-Applicant a decree for interest at 60 per cent. per annum only, to date of institution, that is to say, it granted him as reasonable compensation interest at the same instead of at the enhanced rate. It also made no order as to costs, holding that Plaintiff-Applicant had disentitled himself to costs by not accepting a sum of Rs. 60 offered by Defendant-Respondent.

This point may be settled at once. Defendant-Respondent offered the Rs. 60 in full satisfaction. A great deal more than Rs. 60 was due under the bond at the time the offer was made. Plaintiff-Applicant therefore refused it, and Defendant-Respondent took the money away again.

I cannot agree with the Lower Appellate Court that Plaintiff-Applicant, by not accepting the Rs. 60, in any way disentitled himself to costs. He was quite ready to accept the Rs. 60 as a part payment, but in that case he wished Defendant-Respondent to sign for the

DERAMALL v. NGA SAUNG.

balance, which Defendant-Respondent would not do. Defendant-Respondent, on the other hand, did not want to pay the Rs. 60 on account: he wanted Plaintiff-Applicant to accept it in full satisfaction, which Plaintiff-Applicant was not bound to do, and would not do.

There is no reason why the ordinary rule should be departed from, that costs follow the event. The reasons which the District Court gave for departing from that rule were not good.

The applicability of section 74 of the Contract Act, to stipulations for an enhanced rate of interest in case of default, is fully dealt with in Pollock's notes to section 74 in his Edition of the Contract Act, and also in Cunningham and Shephard's notes in their Edition. (The former is the more lucid exposition of the subject.)

The result is that at the present time it is admitted on all hands that a stipulation like that in the present case, for payment of an enhanced rate of interest *from the date of the bond,* is a stipulation by way of penalty within the meaning of section 74.

I do not understand the Lower Appellate Court's remark that "the present case clearly falls within the latter category" (*i.e.*, "contracts by which the enhanced rate was to run from date of default"). The bond here is explicit and cannot be misconstrued, ချုပ်ထဲ့တဲ့နေ့မှ "from the date of execution." It is therefore unnecessary to discuss the question whether the stipulation was intended to form part of the contract or was merely in the nature of a threat; since that question only arises in cases where the stipulation is for an enhanced rate of interest from date of default.

It remains to consider what is reasonable compensation, and on this point, whether, as the learned Advocate for Plaintiff-Applicant contends, the case ought to have been remanded by the District Court and ought to be remanded now.

The general principle on which reasonable compensation should be fixed, in cases under section 74, Contract Act, was stated in *Kala Singh* v. *Po Thaung,** and where the contract is to deliver a certain quantity of indigo (*Nait Ram* v. *Shib Dat*) † or to borrow money at interest for a certain period (*Datubhai* v. *Abu Bakr*),‡ and in such like cases no doubt questions of fact are involved, on which evidence may have to be taken.

But in a case like the present, there are no questions of fact which it is necessary to determine.

In *Rameswar Prasad Singh* v. *Rai Sham Kishn,* § where the stipulation in question was similar to that of the bond in the present case, the Subordinate Judge allowed as reasonable compensation interest at the same instead of the enhanced rate, and that decision, as far as it went, was upheld by the High Court.

I have not been able to find any cases like this, where a remand was ordered with a view simply to determine what would be reasonable compensation.

Here the original rate of interest was very high, 60 per cent. per annum, and it is interest at that rate which the District Court has

* U.B.R., 1897-01, II, 333.
† I.L.R., 5 All., 238.
‡ I.L.R., 12 Bom., 242.
§ ——— 29 Cal., 43.

allowed as reasonable compensation for the breach of the contract to repay the principal within three months (with interest at that rate).

It appears to me to be very fair compensation indeed, and I am unable to see any just ground for complaint with the way the District Court exercised its discretion in this particular.

My conclusion, therefore, is that the only modification which it is necessary to make in the Lower Appellate Court's decree is in respect to costs.

The decree of the Lower Appellate Court is modified. The Defendant-Respondent will pay the Plaintiff-Applicant's costs in the Lower Courts in proportion to the amount decreed.

The Defendant-Respondent will also pay Plaintiff-Applicant's costs in this Court in proportion to his success.

Court-fees—7 (X) (d).

Civil Appeal No. 280 of 1907. May 19th, 1909.

Before G. W. Shaw, Esq., C.S.I.

U THI HA *v.* U THUDATTHANA (1), U KEIKTIMA, U ZAGAYA, U EINDAMA, U THUDATTHANA (2), U EINDA, U SANDAWAYA, U NAGIYA, U WISEIKTA, U KEIKTI, U NANDA (1), U ZAWTA, U ZANEINDA, U THUZATA, U NANDA (2), U SANDIMA.

Mr. *S. Mukerjee*—for Appellant.
Mr. *J. C. Chatterjee*—for Respondents.

Nature of a suit to enforce a decision of the Thathanabaing. Court-fee payable on the same

See Buddhist Law—Ecclesiastical, page 5.

Damages.

Civil Revision No. 73 of 1907. March 13th, 1908.

Before D. H. R. Twomey, Esq.

MI HLA WAING *vs.* NGA KAN.

Mr. *J. C. Chatterjee*—for Applicant.

In deciding whether an award of compensation in a seduction case should be enforced or not, the Courts have only to look to the provisions of sections 520 *and* 521, *Code of Civil Procedure, and determine whether any of the grounds mentioned or referred to in those sections is shown against the award. The fact that the subject-matter of an award is not such that it could be a cause of action in a Civil Suit is not necessarily an objection to the legality of the award.*

See Civil Procedure, page 19.

Evidence—58, 91.

Civil 2nd Appeal No. 267 of 1905. February 27th, 1907.

Before G. W. Shaw, Esq.

SADHU *v.* NGA SI GYI, MI MI.

Mr. *C. G. S. Pillay*—for Appellant.

Evidentiary admissions and admissions by the pleadings distinguished.

Held,—that an admission by Defendant (in his preliminary examination) of an agreement alleged in the plaint was not excluded by section 91, Evidence Act, and rendered proof of the agreement unnecessary.

Transfer of property——55 (2)—The principle applied as a matter of justice, equity and good conscience.

Held,—that where Defendant sold and Plaintiff bought land as a house-site in the belief that it was *bobabaing*, Defendant impliedly guaranteed that he had a good title and Plaintiff was entitled to recover the purchase money when it turned out that the land was State and he was prevented from building on it.

Contract 20, 65—*Held,*—that where Defendant sold and Plaintiff bought land as a house-site in the belief that it was *bobabaing*, and it afterwards turned out that the land was State, the parties were under a mistake of fact, within section 20, Contract Act, and the Plaintiff was entitled to recover the purchase money under section 65.

References:

Amir Ali and Woodroffe's Evidence Act, section 58.
U.B.R., 1897-01, II, 379 (followed).
Gour's Law of Transfer in British India, vols. I, 481, 497, III, 1272.

Plaintiff-Appellant sued to recover Rs. 180 alleging that he bought for that sum a piece of land as a house-site from Defendants-Respondents, they agreeing to make good any loss he might incur in respect of the transaction, and that the Deputy Commissioner thereafter declared the land to be State and refused permission to him to build on it.

Defendants-Respondents admitted these allegations. In the written statement indeed Defendant-Respondent, Si Gyi, denied having agreed to make good any loss, but in his preliminary examination, before issues were framed, he admitted that he and his wife, the other Defendant, had done so.

The sale-deed was unregistered and was on that account inadmissible in evidence and was rejected. And oral evidence of the transaction was excluded by section 91, Evidence Act.

The Township Court dismissed the suit on the ground that the agreement did not cover the action of the Collector for which Defendants-Respondents were not responsible. The Additional Judge thought that it was Plaintiff-Appellant's duty to find out whether the land was State or *bobabaing* before he bought it. On appeal the District Court confirmed this decision. The learned Judge apparently held that the admissions of the Defendants-Respondents could not be proved. He also thought, applying the maximum of "*caveat emptor*," that Plaintiff-Appellant did not exercise proper caution and that the agreement to make good loss which Defendant-Respondent admitted in his preliminary examination would not extend to action by the Collector "of which he had no knowledge or warning at the time of sale, and which completely altered the status of the land."

First with regard to the admission, I think the District Court perhaps overlooked the distinction between evidentiary admissions

SAUHU v. NGA SI GYI.

and admissions by the pleadings.* If Defendants-Respondents had adhered to the position they took up in the written statement, no doubt Plaintiff-Appellant would have been unable to prove admissions which they might have made elsewhere, or might make in evidence (as Defendant-Respondent, Si Gyi, did when he was examined as a witness). But admissions by the pleadings stand on a different footing. Section 58 of the Evidence Act is the provision of law which governs such admissions.

The circumstances of the case are precisely those of *Nga Kat* v. *Nga So* † which apparently escaped the notice of the Lower Courts.

On the authority of that ruling, I am of opinion that it was not necessary for Plaintiff-Appellant to prove the agreement in question, and there was nothing to exclude the Defendant-Respondent's admission made in his preliminary examination.

The question is whether the agreement covered the action of the Collector. On this point I am unable to see how that interference can be excluded from the operation of the agreement. The Plaintiff-Appellant wanted a house-site, and the agreement was intended to protect him against interference which would prevent him from the peaceable enjoyment of the land as such. As soon as he had got the land he was prevented by the Collector from building. It was declared that the land was State and that Defendants-Respondents should not have sold it. It is quite clear that they sold it as *bobabaing* land. As the District Judge has observed, they had no knowledge or warning that the Collector would declare it State. Presumably Plaintiff-Appellant was equally without any information of the kind.

In these circumstances it appears to me that Defendants-Respondents are liable on their agreement to restore the purchase money to Plaintiff-Appellant, which is all he asks for.

In the face of the agreement I do not see how the rule of *caveat emptor* could in any way be applied. Apart from this it is very doubtful whether that maxim retains validity in respect of the vendor's title. In his Law of Transfer in British India, volume 3, page 1272, Gour says, "The doctrine of *caveat emptor* is now no longer current in India. Even in England the rule is said to be circumscribed by so many exceptions as 'well-nigh to eat up the rule' . . . . Both under section 55 of the (Transfer of Property) Act and section 109 of the Indian Contract Act, there is a clear warranty of title implied in every contract.

By section 55 (2) of the Transfer of Property Act, "The seller shall be deemed to contract with the buyer that the interest which the seller professes to transfer to the buyer subsists, and that he has power to transfer the same." On this Gour says in his work already cited, volume 1, page 481, quoting from a Bombay decision, "A defect in title will render the vendor liable to damages independently of any fraud on his part. In this respect the law is the same as in England, where it is not necessary to aver fraud to obtain damages for the conveyance of defective title." And again at page 497, "The vendor

* *See* Amir Ali and Woodroffe's Commentary on section 58, Evidence Act.
† U.B.R., 1897-01, II, page 379.

under this clause is deemed to contract that he has title to convey the property sold by him. The old rule of *caveat emptor* is thus now obsolete and the covenant here enacted must be taken as incorporated into every contract . . . Under this clause the vendor is presumed to guarantee his title absolutely to the property. And if, after purchase the vendee discovers a material defect in the property, he is entitled to rescind the contract."

The Transfer of Property Act of course is not in force, but the principle deserves to be followed as a matter of justice, equity and good conscience.

There is yet another consideration. Both the parties believed at the time of the sale that the land was *bobabaing*. It appears to me that this was such a mistake as is referred to in section 20 of the Contract Act. The Collector's order did not in reality alter the status of the land. It declared it to be in fact State, that is, to have been always State.

This being so, section 65 of the Contract Act requires that Defendants-Respondents should restore or make compensation for the advantage they received: and this apart from any agreement such as that here admitted to have been made.

For these reasons I set aside the decree of the Lower Appellate Court and grant Plaintiff-Appellant a decree for Rs. 180 and costs as prayed.

Evidence—91.

Civil 2nd Appeal No. 245 of 1906. July 15th, 1907.

Before G. W. Shaw, Esq.

NGA WAIK AND MI NU *vs.* NGA CHET AND NGA PO TUN.

Mr. *C. G. S. Pillay*—Advocate for Appellants.
Mr. *J. C. Chatterjee*—Advocate for Respondents.

Held—that where money is lent on terms contained in a promissory note given at the time of the loan, the plaintiff is debarred by Section 91 of the Evidence Act from resorting to the original consideration.

References :

1 East, 55.
U.B.R., 1897-1901, II, 390.
——————391, superseded.
I.L.R., 3 All., 717.
——— 4 All., 135.
——— 9 All., 351.
——— 26 All., 178, followed.
——— 12 Bom., 443.
——— 24 Bom., 360, dissented from
——— 3 Cal., 314.
——— 7 Cal., 256.
——— 8 Cal., 721.
——— 23 Cal., 851, dissented from
——— 5 Mad., 166.
——— 7 Mad., 112.*
——— 10 Mad., 94.
——— 23 Mad., 527.
21 W.R., 1.
24———88.

Plaintiffs-Respondents sued for Rs. 610 being Rs. 400 principal and Rs. 210 interest due on a document. Defendants-Appellants denied having borrowed the money or executed the document.

The Subdivisional Court found that the execution was not proved and dismissed the suit. On appeal the District Court held on the authority of *Nga Hlaw* vs. *Nagassat* * and *Ewing* vs. *White* † that Plaintiffs-Respondents could succeed on the original consideration and remanded the case for a fresh decision—"on the merits." The case had been decided on the merits in the first instance and not on a preliminary point, and Section 564, Civil Procedure Code, expressly barred a remand for a fresh decision. If the case was to be remanded it could only be remanded under section 566.

The Subdivisional Court however came to a fresh decision—in favour of Plaintiffs-Respondents, and this was confirmed on a new appeal by the District Court.

The main point now for determination is whether the Lower Appellate Court was right in holding that Plaintiffs-Respondents were entitled to succeed on the original consideration, that is on oral evidence of the loan apart from the document.

The Rulings of this Court on the subject are those on which the Lower Appellate Court relied *Nga Hlaw* vs. *Nagcssat* and *Ewing* vs. *White,* both dating from 1898. Undoubtedly they leave the matter in some obscurity. There were in existence some cases which they

* U.B.R., 1897-01, II, 390. † U.B.R., 1897-01, II, 391.

NGA WAIK v. NGA CHET.

did not refer to, and there have been some more recent decisions by the Indian High Courts. In these circumstances I have taken the opportunity of re-examining the authorities.

Ankar Chandar Rai vs. *Madhab Chandar Ghosh* (1873) * was a suit on an unstamped promissory note: the gist of which was, "R. N.B. deposited with me Rs. 900 ... I will pay the same on demand," etc. It was held that the Plaintiff could not "make use of that part of it which states the deposit of money, and say that from the deposit there arose a contract on the part of the Defendant to repay it, because here the parties have made an express contract which has been put in writing. The Plaintiff cannot resort to any implied contract; if he recovers at all, it must be on the contract actually made, and he must prove that, if it is denied. And he must do it by the production of the writing, which not being stamped, cannot be used in evidence, and the suit must fail." It is not necessary to refer to that part of the judgment which dealt with the question whether the Plaintiff could succeed on the Defendant's admission.

Similarly in *Prosanno Nath Lahiri* vs. *Tripura Sundari Debi* † (1875), oral evidence was held inadmissible where a deposit of money was made on a promissory note, which was excluded for want of a stamp, the ground taken being that the contract was reduced to writing and the only cause of action which the Plaintiff had against the Defendant arose out of the contract embodied in this unstamped promissory note.

The next case was *Golap Chand Marwari* vs. *Thakurâni M. Kuari* ‡ (1878). That was also a suit on an unstamped promissory note. It was held on the authority of an English case *Farr* vs. *Price* § that the existence of an unstamped promissory note does not prevent the lendor of money from recovering on the original consideration, and it was considered improbable that the Judges who decided Ankar Chandar Rai's case intended to overrule *Farr* vs. *Price*. No reference was made to section 91, Evidence Act, (which was evidently in the minds of those Judges). The principle of *Farr* vs. *Price* was not explained, and the report does not show, whether the loan in question was made before and independently of the execution of the promissory note.

In *Banarsi Das* vs. *Bhikhari Das* ‖ (1881), which was a suit on an unstamped promissory note executed for Rs. 800, found due on an adjustment of accounts between the parties and agreed to be paid by instalments, it was held that the agreement come to at the adjustment for payment by instalments was expressed in writing in the promissory note, and the terms of the agreement could only be proved by the promissory note, section 91, Evidence Act, clearly applying. The suit was for an instalment due under the agreement, and Mr. J. Spankie said that after the adjustment if the Plaintiff had sued for the whole Rs. 800, independently of the promissory note, he could not doubt that the suit would have been maintainable. Evidently the view which the learned Judge took was that the obligation to pay

* 21 W.R.I. † 24 W.R., 88. ‡ I.L.R., 3 Cal., 214.
§ 1 East, 55. ‖ I.L.R., 3 All. 717.

Rs. 800 existed before the promissory note was executed, and independently of it.

Then comes the important case of *Shaikh Akbar* vs. *Shaikh Khan** (1881). It was also a suit on a promissory note which was insufficiently stamped, and was lost. Ankar Chandar Rai's, Prosanno Nath Lahiri's and Golap Chand Marwari's cases were referred to

It was held that there was no loan independently of the note. Sir R. Garth, C. J., explained, as it seems to me in a very lucid manner, in what circumstances evidence may be given of the original consideration where a promissory note is inadmissible.

He said "whether evidence of the consideration for the note was admissible depends upon the circumstances under which the note was given." He then went on in the words quoted in *Ewing* vs. *White* to explain that there are two classes of cases: one where the cause of action is complete in itself, before a bill or note is given, and the other where there is no cause of action independently of the bill or note, "as for instance, when in consideration if A depositing money with B, B contracts by a promissory note to repay it,...here there is no cause of action for money lent or otherwise than upon the note itself .....In such a case the note is the only contract between the parties." He explains further that Ankar Chandar Rai's and Prosanno Nath Lahiri's were cases of this second class, while Golap Chand Marwari's case *apparently* belonged to the first class. He implies that *Farr* vs. *Price* belonged to the first class; and states distinctly that *James* vs. *Williams* and other cases mentioned in Addison on Contracts, 3rd Edition, page 1204 (? 10th Edition, page 140) † did so.

In *Hira Lal* vs. *Datadin* (1881) ‡, there was a loan already existing, and part of it had been repaid, when a promissory note was executed in favour of the creditor for the balance. This was clearly a case falling into Sir R. Garth's first class, and the very brief judgment of Judges Straight and Oldfield to the effect that the "existence of the promissory note does not debar the Plaintiff from resorting to the original consideration," does not indicate that they proceeded on a different principle.

Valiappa Ravuthan vs. *Mahummed Kasim Marakayar* § (1881) similarly was not inconsistent. It was a suit upon a hundi. There was nothing to show that the consideration was paid independently of the hundi. The decision that the suit was "brought on the hundi and the Respondent can only recover on the hundi" was only as far as appears such a decision as Sir R. Garth would have passed in a case falling in his second class.

In *Radhakant Shaha* vs. *Abhaicharn*‖ (1882), we have an instance in which Sir R. Garth applied and incidentally explained his own decision in *Shaikh Akbar* vs. *Shaikh Khan*. It was a suit on a *hundi*. The Plaintiffs had advanced, (*i.e.*, lent) Rs. 500 to the Defendants on the security of the hundi. Sir R. Garth said, "if the consideration for the bill had been an independent cause of action complete in itself

*They are cited by Addison as instances where a bill or note is given by way of payment of a previously existing debt.

† I.L.R., 7 Cal., 256.
‡ I.L.R., 4 All., 135.
§ I.L.R., 5 Mad., 166.
‖ I.L.R., 8 Cal., 721.

NGA WAIK v. NGA CHET.

before the bill was given, the Appellant's argument would have been well founded. But here it is stated in the plaint, and it is evidently the fact, that the Rs. 500, which was the consideration for the bill, was advanced . . . upon this particular bill, and as the bill itself is the best evidence of the terms upon which the advance was made, the Plaintiffs could not establish their case without proving the bill." He referred to Shaik Akbar's case as fully explaining the law upon the subject.

Krishnasami vs. *Rangasami* * (1883), a suit on a promissory note was placed by the Judges who decided it in the first of Sir Richard Garth's classes, the cause of action being complete in itself before the giving of the note. The facts are not reported with sufficient fullness to enable me to state them independently. It must be taken that the loan had been effected verbally in the first instance, and that the promissory note was given afterwards on "account of the debt" or as collateral security. If this was not so, then I think that the classification would be wrong.

In *Pothi Reddi* vs. *Velayudasivan* † (1886), the terms of a contract to repay a loan of money with interest having been settled and the money paid, a promissory note specifying these terms was executed later on the same day by Defendant and given to Plaintiff. The promissory note was not stamped. It was held that to rule that where the original cause of action is the note or bill itself (Sir R. Garth's 2nd class), it is open to the Plaintiff, if the note is lost or not receivable in evidence,—to frame his suit as one for money lent independently of the note, would entirely nullify section 91, of the Evidence Act, that "when a loan is made by Plaintiff to Defendant, and in consideration of that loan the Defendant contracts by a promissory note to pay it with interest at a certain date, there is no cause of action for money lent or otherwise than upon the note, and if for want of a stamp the note is not receivable in evidence, the Plaintiffs' claim must fail." It was held that that was a case of the kind.

In *Balbhadar Prasad* vs. *The Maharaja of Betia* ‡ (1887), a decree-holder agreed with the Maharaja to discharge an employé of his from arrest in execution of decree, upon the condition that he (the Maharaja) would pay the amount of the debt. Accordingly the Maharaja executed a promissory note reciting the circumstances. It was not stamped. It was held that evidence of the original consideration was admissible. Two of the three Judges gave different reasons for their opinion; Edge, C.J., that the promissory note did not express what the real contract was, Oldfield, J., that there was nothing to show that the document was intended to embody the contract between the parties, Straight, J., gave no reasons. With great respect I venture to doubt the correctness of this decision and the reasons given for it.

The document stated all the essential facts of the transaction, and there is nothing to indicate that it was not intended to embody the

* I.L.R., 7 Mad., 112. † I.L.R., 10 Mad., 94.
‡ I.L.R., 9 All., 351.

terms of the contract. I think that section 91, Evidence Act, clearly barred oral evidence.

We come next to *Damodar Jagannath* vs. *Atmaram Babaji* * (1888). The facts were similar to those of *Ankar Chandar Rai* vs. *Madhab Chandar Ghosh*. The Defendant borrowed Rs. 38 on a promissory note. He admitted this, but pleaded payment and relied also on the note being unstamped. Jardine, J., held that the cause of action was the promissory note, and that oral evidence was inadmissible (or at least that the Defendant's admission did not avail the Plaintiff's).

Birdwood, J.'s remarks are not very clear to my mind. But he held that section 91, Evidence Act, excluded any evidence of the transaction but the note itself. The decision was therefore clearly in accordance with *Shaikh Akbar* vs. *Shaikh Khan* as interpreted above.

In *Pramatha Nath Sandal* vs. *Dwarka Nath De* † we have the first authoritative pronouncement that in Sir R. Garth's class 2, as well as in his class 1, oral evidence of the "original consideration" may be given independently of the promissory note.

The most important part of the judgment is quoted in *Ewing* vs. *White*. I shall refer further on to its interpretation of *Shaikh Akbar* vs. *Shaikh Khan*. I will only remark here that the learned Judge did not touch upon section 91 of the Evidence Act, and that his decision proceeded mainly on the Defendant's admission of the loan and of the execution of the note in question.

In *Ramachandra* vs. *Venkataramana* ‡ (1899) a Plaintiff who was unable to rely upon his promissory note was allowed to resort to the original consideration. But the report of the case does not enable me to say whether the facts fell into class 1 or class 2 of *Shaikh Akbar* vs. *Shaikh Khan*. It cites no authority, and gives no explanation of the conclusion come to. In its reference to *Pothi Reddi* vs. *Velayudasivan* I confess that I do not understand the judgment.

Krishnaji vs. *Rajmal* § (1899) followed *Pramatha Nath Sandal* vs. *Dwarka Nath De*. It was a case whether Plaintiff lent the Defendant Rs. 675 and at the same time took a hundi "to secure its repayment." In other words, it was a case falling into Sir R. Garth's second class. Jenkins, C. J., said that "Golap Chand Marwari's case lays down no new law but merely professes to follow *Farr* vs. *Price*, which is but one of many cases where the law has been similarly expounded," and referred with approval to Sir C. Petheram's decision in Pramatha Nath's case and his experience and knowledge of commercial law.

He went on to give his reasons for thinking that section 91, Evidence Act, does not bar oral evidence in these cases. He said "it is true that the terms of the contract contained in the Hundi can only be proved by the hundi, but this does not prevent proof of the loan independently of the note."

* I.L.R., 12 Bom., 443.
† I.L.R., 22 Cal., 851.
‡ I.L.R., 23 Mad., 527.
§ I.L.R., 24 Bom., 360.

NGA WAIK v. NGA CHET.

Oldfield, J., in Balbhadar Prasad's case, had apparently taken a similar view which he supported by a quotation from Best on evidence.

I venture with the utmost respect to express the opinion that this is not a justifiable interpretation of section 91, Evidence Act, and that if it were correct, it would nullify the provisions of that section altogether.

The object of section 91, Evidence Act, is to exclude not oral evidence of the contents of the document, but oral evidence of the transaction. As Amir Ali and Woodroffe say quoting from Tayler (9th Edition, paragraph 401) "Oral proof cannot be substituted for the written evidence of any contract...which the parties have put in writing ... The written contract is not collateral, but is of the very essence of the transaction" (Amir Ali and Woodroffe, Evidence Act, 4th Edition, page 454).

Mr. J. Candy in the same case referred to *Hira Lal* vs. *Datadin* as authority for holding that section 91 did not bar oral evidence. But as we have seen, Hirà Lal's case was one where the cause of action was complete before the promissory note was executed.

The last and most recent is *Parsotam Narain* vs. *Talley Singh** (1903), which was decided by Mr. J. Aikman. The Plaintiff sued on a promissory note which was insufficiently stamped. The facts were that the Defendant borrowed Rs. 200 on terms contained in the note which was given at the time of the loan.

It was held that the Plaintiff was not entitled to set up a case independent of the note. The learned Judge referred to *Shaikh Akbar* vs. *Shaikh Khan, Radhakant Shaha* vs. *Abkai Charn, Hira Lal* vs. *Datadin and Pramatha Nath Sandal* vs. *Dwarka Nath De* and dissented from the latter's interpretation of *Shaik Akbar* vs. *Shaikh Khan*. He held that when a Plaintiff lends money on terms contained in a promissory note given at the time of the loan, he must prove those terms by the promissory note, and that the decisions which have held otherwise ignore the provisions of sections 91, 65 and 22 of the Evidence Act.

I am under the disadvantage of being unable to refer to any of the English cases cited. None of the decisions which profess to rely on them give sufficient information of the facts to enable me to form an opinion of their precise effect.

It is, however, noteworthy that the learned Judges who apparently regarded them as an authority for admitting oral evidence, in cases falling in Sir R. Garth's second class, either omitted altogether to consider the bearing of section 91, Evidence Act, or else put forward explanations of that section which will not bear scrutiny.

Sir R. Garth's exposition of the law in *Shaikh Akbar* vs. *Shaikh Khan* has been accepted on all hands as correct. And I have no hesitation in giving my adherence to Mr. J. Aikman's interpretation of it in the last cited decision, rather than to that adopted in *Pramatha Nath Sandal* vs. *Dwarka Nath De* and in *Krishnaji* vs. *Rajmal*.

* I.L.R., 26 All., 178.

There can be no manner of doubt that Sir R. Garth distinguished between cases in which a cause of action is complete in itself before the promissory note is given, cases, that is, where *e.g.*, the loan and the giving of the promissory note are different transactions, and the note is not a reduction to writing of the loan transaction, and cases where the bill or note is given as part of the original transaction, as the written record of that transaction : and that he did not intend to say that in the second of these two classes of cases, the creditor may disregard, the bill or note, and sue on the original consideration.

For the reasons explained by Mr. J. Aikman, I am of opinion that this is clear from the judgment in Shaikh Akbar's case itself, and in face of *Radhakant Shaha* vs. *Abhaicharn*, it is impossible to adopt any other interpretation. There is nothing about a loan to take it out of the operation of section 91, Evidence Act.

In short, I hold that where the promissory note is the record of the loan transaction, section 91, Evidence Act, debars the Plaintiff from resorting to the original consideration. In the present case the document was to the following effect :—

"On the 8th *Wazo lazan*, 1265, Ko Waik and his wife Mi Ni..... said to.....U Chit and son Ko Po Tun,.....We are in need of money, please lend us Rs. 400, on interest at 4 annas per Rs. 10 per month ; accordingly.....U Chit and son.....lent the money on interest at 4 annas per Rs. 10 per month. The principal and interest must be paid in full on the forthcoming month of *Tagu*, Ko Waik and wife.....agreeing that in case of failure to pay the money, the land described below should be taken up and enjoyed :—This is the first time the land has been mortgaged. It must not be mortgaged to any one else."

The latter part was ineffective for want of registration, but the former part, which contains a distinct promise to pay, comes within the definition of a promissory note given in section 4 of the Negotiable Instruments Act (1881).

It is also obviously on the face of it, the record of the loan transaction.

It follows from what has gone before, that section 91, Evidence Act, barred the admission of oral evidence of the loan.

With reference to the evidence adduced in proof of the execution of the promissory note, the Lower Appellate Court omitted to come to any finding on it. Presumably, the learned Judge did not think the evidence sufficient, or he would not have remanded the case for proof of the original consideration. But this is uncertain, I therefore record my opinion that the Subdivisional Court came to the right conclusion. The witnesses were in disagreement. Two of them were casual witnesses and the third a daughter of the Plaintiff, Nga Chet's. All were contradicted by the document itself when they stated that it was signed for Defendant, Nga Waik, in ink. As Nga Waik was literate, there was also no reason why he should not have signed his own name. It was not of course necessary for him to do so. But a person who lends money and does not take the precaution

NGA WAIK
v.
NGA CHET.

of getting the debtor's own signature, adds very greatly to the difficulty of proving his case if he ultimately has to go into Court.

The Defendant-Appellants entirely denied the loan. Their defence was that the claim was a false one, and that they were elsewhere at the time when they were stated to have signed the document. They adduced evidence to prove the *alibi*. It is not necessary to discuss that evidence. The Plaintiff-Respondent failed to prove the execution of the document.

The Lower Appellate Court's decree is set aside and the Plaintiff-Respondents' suit is dismissed with costs.

Evidence—8, 18 (2), 21, 65, 66, 91, 157, 167.

Civil Appeal No. 318 of 1906. October 11th, 1907.

Before G. W. Shaw, Esq.

MI LE BYU *vs.* MI SHWE MYA AND NGA BA O.

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

"Hearsay"

Distinction between secondary evidence of the contents of a document and oral evidence of the transaction.

References:

U.B.R., 1892-96, II, 586.
————1897-01, II, 382, 556.

The Subdivisional Court in trying this case seems to have proceeded as though the rulings of this Court for the last 16 years had not existed.

In the first place the rules contained in section 85 of the Transfer of Property Act required that all interested persons should be joined as parties—if they did not wish to be Plaintiffs, then as Defendants. This has been the law in Upper Burma since 1892. See *Nga Ko* vs. *Nga Kye*,* and Upper Burma Courts Manual, paragraphs 659—661.

The Defendant also in her written statement expressly took an objection on this ground.

However, the non-joinder cannot now be considered.

In the next place it appeared from the Plaintiff Mi Shwe Myi's preliminary examination that there was a document of mortgage, and sections 65 and 66 of the Evidence Act required that the Court should take notice of that fact. Innumerable decisions of this Court have insisted on the due observance of the Law of Evidence in this particular *cf.* for example *Abdur Razzak* vs. *Mi U* ** and *Mi Ein Min* vs. *Tun Tha*.‡

The Plaintiffs-Respondents did not ask that notice might be given to Defendant-Appellant to produce the mortgage deed and no such notice was given to her. The Court nevertheless proceeded at once to accept oral evidence which has been described as secondary evidence. The ruling last cited is opposed to the application of the second proviso to section 66 to a case like this, and my own investigation of the meaning and effect of that proviso has failed to discover any authority for its application to the case of a suit against a mortgagee. The question was whether the land in suit was included in a mortgage which Plaintiff-Respondent recently redeemed. The evidence consisted of the depositions of the mortgagor, Mi On Twin, Plaintiff-Respondent's aunt, (who ought to have been a party) that she made the mortgage and that it was of such and such a character, and certain statements made by Sein Get, Shwe Yin and Nga Aung, which the Subdivisional Judge dismissed as "hearsay." There is no mention of hearsay in the Evidence Act. On the assumption that oral evidence of the transaction was admissible, the evidence of Sein

* U.B.R., 1892-96, II, 586.
** U.B.R., 1897-01, II, 382.
‡ *Ibid.* 556.

MI LE BYU
v.
MI SHWE MYA.

Get and Shwe Yin that Mi On Bwin told them that she had mortgaged the land in suit might have been admissible under section 157, Evidence Act, if the Judge had ascertained clearly that she made the statement in question at or near the time of the transaction; and similarly the evidence of Nga Aung, that Mi On Bwin told him the same thing, might have been admissible under the same section in the same circumstances, and also as evidence of conduct on the part of Nga Pu under section 8, if the Judge had ascertained clearly that Nga Pu was present, heard what Mi On Bwin said and preserved silence; while Sein Get's and Nga Aung's evidence, that Nga Pa said that the land in suit had been mortgaged to him, would have been admissible as evidence of an admission under sections 18 (2) and 21.

But the provisions of section 91 stand in the way. The terms of the mortgage could only be proved by the production of the mortgage deed or of secondary evidence of its contents, in case it was shown to be lost or destroyed, or the Defendant-Appellant, after notice, failed to produce it. It was not shown to be lost or destroyed, and the Defendant-Appellant got no notice to produce it. If the oral evidence adduced had been in the nature of secondary evidence, I should have been disposed to remand the case for it to be either put on a proper footing or shown to be inadmissible. The ignorance in the Lower Courts of parties and Advocates and, I regret to say, sometimes of Judges, is so great that I am loath to decide a case on a ground of the kind when proper enquiry has not been made.

But the evidence neither of Mi On Bwin nor of Sein Get nor of Shwe Yin nor of Nga Aung was secondary evidence. It was oral evidence, either direct or as to admissions of the terms of the mortgage transaction which section 91 does not admit.

There was therefore no admissible evidence whatever of the mortgage.

And there was no evidence to support Plaintiffs-Respondents' allegation that at the redemption Defendant-Appellant allowed redemption of the land in suit. In fact it is evident from their own statements that she did not.

The evidence that the land in suit belonged at one time to Plaintiffs-Respondents' predecessors, was not evidence of the mortgage at all. I hold therefore that Plaintiffs-Respondents failed to establish their right to redeem the *Tagundaing* land. And the lower Courts, by deciding in Plaintiffs-Respondents' favour on inadmissible evidence, acted in contravention of the Law of Evidence (see section 167, Evidence Act).

The decree of the Lower Appellate Court is set aside and the Plaintiffs-Respondents' suit is dismissed, with all costs.

Evidence—92.

Civil Appeal No. 14 of 1907. September 21st, 1908.

Before D. H. R. Twomey, Esq.

MI GYWE *v.* KESHAN RAM, JIBAN RAM AND V. A. R. ALLAGAPPA CHETTY.

Mr. *A. C. Mukerjee*—for Appellant.
Mr. *H. M. Lütter*—for Respondents.

Held,—that a person who has executed a deed of sale cannot be allowed to produce oral evidence showing that the transaction was intended to take effect only as a mortgage, unless the evidence tendered is shown to be admissible under one of the provisoes to section 92. *Also*—that the embargo contained in section 92, applies not only to direct evidence of a contemporaneous oral agreement but also to indirect evidence showing by the acts and conduct of the parties that there was such an agreement.

References:

I.L.R., 22 All., 149.
——— 25 Mad., 7.
3 L.B.R., 100.
I.L.R., 4 Bom., 594.
——— 30 Bom., 119.
——— 30 Bom., 426.
——— 5 Cal., 300.
Shephard and Brown's Transfer of Property Act, 6th Ed., p. 243.
U.B.R., 1902-03, II, Evid., 1.

In September 1901 the Plaintiff-Appellant, Mi Gywe, and her husband (since deceased) conveyed their house and land by a deed of sale to Keshan Ram and Company, a firm of Mandalay traders. Mi Gywe and her husband had already received Rs. 500 from them and a further sum of Rs. 500 was received at the time of the conveyance. The vendors were allowed to remain in possession, but the property was transferred to Keshan Ram's name in the Town Lots register, and although the vendors continued to pay the rates and taxes, the receipts were made out in Keshan Ram's name. In 1903 Keshan Ram and his partner mortgaged the property to the 2nd Defendant for Rs. 1,000.

The Plaintiff-Appellant sued to redeem the property for Rs. 600 (the amount received from Keshan Ram & Co. *less* Rs. 400 repaid by the Plaintiff-Appellant) alleging a contemporaneous oral agreement that the transaction of 1901 should be treated as a mortgage and not as a sale.

The Plaintiff-Appellant produced two witnesses, whose evidence the Lower Court believed, that the intention was to mortgage the property as security for money advanced. Stress was also laid on Keshan Ram's acts and conduct as showing the intention of the parties. He collected no rent from the Plaintiff-Appellant and her husband, and never took possession. Moreover, he signed receipts for Rs. 300 and Rs. 100 in the Plaintiff-Appellant's account book, and the payment of Rs. 300 is shown in the Burmese entry in this book as အိမ်တိုးဆပ်။ *i.e.*, "instalment towards price of house." But it must be noted that Keshan Ram at the same time made an entry in his own vernacular to the effect that he had received the

MI GYWE v. KESHAN RAM,

Rs. 300 "on a former account." He said that the payments of Rs. 300 and Rs. 100 were partly towards a running account and partly on account of rent of the house which after the sale he let to the Plaintiff-Appellant. Keshan Ram did not prove, however, that the payments were partly on account of rent, and his accounts which were produced did not show that he had received any payment from the Plaintiff-Appellant as rent. The Lower Court thought that the direct evidence of what was said at the time and the indirect evidence as to the acts and conduct of the parties were sufficient to prove the Plaintiff-Appellant's contention as to a contemporaneous oral agreement, whereby the transaction of 1901 was to operate as a mortgage and not as an outright sale. The learned Judge next considered rulings of the Privy Council and the High Courts as to the bearing of the Evidence Act, Section 92, on such cases as this. He recorded no definite finding on this point, but was "inclined to think Plaintiff's evidence is altogether inadmissible under section 92, Evidence Act, and that no fact has been proved under proviso(1) which would invalidate the deed and entitle Plaintiff to any relief, unless it can be said that the sale was a mere paper sale without any transfer of possession." Later on he remarks "The whole case then turns on the question of delivery of possession," and then points out that "under section 54 of the Transfer of Property Act delivery of possession is not essential to create a valid sale." As delivery of possession is not essential, the learned Judge's previous remark that the whole case turns on delivery of possession is rather inconsequent. Finally, he decided, but "with great hesitation," that the Plaintiff's suit must be dismissed.

The highest authority on the application of section 92, Evidence Act, to cases of this kind is that of the Privy Council ruling *Balkishen Dass* v. *Legge* (1). The question before Their Lordships was whether certain deeds constituted a mortgage or an out-and-out sale, and they held oral evidence of intention to be inadmissible for the purpose of construing the deeds or ascertaining the intention of the parties. Section 92 of the Evidence Act was to be strictly observed, and it was further ruled that certain cases in the English Court of Chancery which were referred to in the judgment of the High Court have no application to the Law of India as laid down in the Evidence Act. This decision, however, has not been uniformly interpreted and applied by the various High Courts in India. The conflict of opinion among the High Courts is fully described in the Lower Burma (Full Bench) case, *Maung Bin* v. *Mi Hlaing and others* (2), in which the facts were very similar to those of the present case. The learned Judges (Fox, Adamson and Irwin), dissenting from the Calcutta High Court's interpretation of the Privy Council decision, adopted the views expressed by the Madras High Court in *Achutaramaraju* v. *Subbaraju* (3), that evidence of the acts and conduct of the parties is not admissible to show that an absolute conveyance was intended to operate as a mortgage or conditional sale only. Such evidence could be relevant only on the ground that the conduct leads to the inference that there was a contempora-

(1) I.L.R., (1899) 22 All., 149. (2) L.B.R., (1905) III, 100. (3) I.L.R., (1901) 25 Mad., 7.

neous agreement or statement between the parties that the absolute sale deed was to operate only as a mortgage; but section 92 enacts that no evidence of any oral agreement shall be admitted to vary the terms of a written contract or grant, and no exception is made in the provisoes in favour of evidence relating to the acts and conduct of the parties from which an inference might be drawn that there was such an oral agreement. The Bombay High Court in the recent cases *Dattoo* v. *Ramachandra* (4) and *Abaji Annaji* v. *Laxman* (5) came to substantially the same conclusions as the Lower Burma Chief Court on consideration of the Privy Council ruling. In the former case evidence had been tendered to show that the ostensible vendor remained in possession, that there was no transfer of the land in suit, and that the consideration was inadequate. The Plaintiff had contended that these circumstances should be considered in deciding whether the transaction was really a mortgage or a sale. The High Court held that the contention was opposed to the Privy Council ruling. In the latter case it was held that evidence of intention cannot be given for the purpose of construing a document which on the face of it is a sale out-and-out.

It is also worth remarking that the later rulings of the Calcutta High Court which were dissented from by the Madras High Court and in the Lower Burma case, *Maung Bin* v. *Mi Hlaing*, are at variance with earlier decisions of the Calcutta High Court to the effect that the rule expressed in section 92 is no less infringed when an agreement inconsistent with the terms of a sale deed is proved by evidence of acts and conduct than it is when such an agreement is proved by direct evidence [see *Daimodee* v. *Kaim Taridar* (6)].

In Upper Burma it was held by the Judicial Commissioner, Mr. (now Sir) Harvey Adamson, in 1902, [*Lu Gyi and one* v. *Hla Byu and one* (7)], that oral evidence is admissible "to show from the collateral circumstances of the case" whether an actual sale was intended by the parties to be a mortgage. It was said that "the Court will look to the surrounding circumstances and the acts and conduct of the parties in order to ascertain" their intention. The view taken by the learned Judicial Commissioner in that case appears to have been based mainly on a Bombay decision of 1880, *Baksu Lakshman* v. *Govinda Kanji* (8)]. But the Privy Council ruling (1) of 1899 was not referred to, and it therefore escaped the Judicial Commissioner's notice that the ground on which Mr. Justice Melvill based his decision in *Baksu Lakshman* v. *Govinda Kanji* (8) had been (as Mr. Justice Fox afterwards expressed it in *Maung Bin's* case) cut away entirely.

Moreover, Sir H. Adamson was himself a member of the Full Bench which decided *Maung Bin* v. *Ma Hlaing* (2), and his judgment in that case shows that he receded from the position taken in the Upper Burma ruling of 1902.

(4) I.L.R., (1905) 30 Bom., 119.
(5) ... ... 426.
(6) I.L.R., (1879) 5 Cal., 300, and Shephard & Brown's Transfer of Property Act, 6th Ed., p. 243.
(7) U.B.R., 1902-03, II, p. Evid., 1.
(8) I.L.R., 4 Bom., 594.

MI GYWE
v.
KESHAN RAM.

According to the authorities which have now been cited, it is clear that a person who has executed a deed of sale cannot be allowed to produce oral evidence showing that the transaction was intended to take effect only as a mortgage, unless the evidence tendered is shown to be admissible under one of the provisoes to section 92. It is also clear that the embargo contained in section 92 applies not only to direct evidence of a contemporaneous oral agreement but also to indirect evidence, showing by the acts and conduct of the parties that there was such an agreement.

I entertain no doubt that the Lower Burma interpretation of the Privy Council ruling is correct, and that the learned Judges of the Chief Court have correctly expounded the principles of section 92 of the Evidence Act.

These principles may now be applied to the present case. I find that proviso (1) to section 92 is relied upon by the Plaintiff-Appellant as covering the evidence which she produced to defeat the sale. It is urged that there was fraud in the execution of the document. As to this argument, it is sufficient to refer to the statement in the plaint that the Plaintiffs consented to execute a sale deed on the understanding that the transaction would be treated as a mortgage. It is clear therefore that she knew what she was doing, and her subsequent statement on oath that she did not know what sort of document she was signing is unworthy of belief. But it is contended, finally, that there is fraud in the very fact that the Defendant Keshan Ram denies the mortgage and falsely claims the transaction to have been a sale. This contention is very clearly shown to be untenable by Sir H. Adamson's remarks in *Maung Bin* v. *Ma Hlaing* (2). As he points out, if such a contention were valid there would be no conceivable case in which the terms of proviso (1) would not exempt from the operation of section 92, evidence of a contemporaneous oral agreement which is denied by the opposite party. "This is a *reductio ad absurdam*. The provisions of the section would in all cases be rendered nugatory by the provisions of the proviso."

On the grounds which have been stated above, it must be held that the evidence produced by the Appellant was inadmissible. I concur in the dismissal of the suit and dismiss this appeal with costs.

Evidence—35.

Civil 2nd Appeal No. 86 of 1908. November 15th, 1909.

Before G. W. Shaw, Esq., C.S.I.

MI SE BAW, NGA TAING AND MI E NYEIN (Appellants) *v.* MI MIN YA, NGA HMYA, NGA PAW U, legal representative of NGA TUN AUNG (deceased), MI THET PU, legal representative of NGA U THA (deceased), NGA PO TIN, MI WA BAUK, MI PA DAUK, NGA PAN BU, legal representative of MI MIN THA (deceased), NGA SHWE KYI AND NGA NET (Respondents).

Mr. *Pillay*—Advocate for Appellants.
Mr. *Tha Gywe*—Advocate for Respondents.

Supplementary Survey Records.

Held—insufficient in the absence of other reliable evidence to prove a mortgage.

References:

Directions to Revenue Officers concerning Supplementary Survey in Upper Burma (Edition 1905).
2 L.B.R., 56.
U.B.R., 1904-06, II, Evid., p. 3.

PLAINTIFFS-RESPONDENTS sued to redeem 14·60 acres of land alleging a verbal mortgage in 1263 B.E. (1901-02) by their predecessor, Shwe Hlauk, to Defendant-Appellant Mi Se Baw's husband, Nga Kun, since deceased. The other Defendants-Appellants are mortgagees (or sub-mortgagees) of Mi Se Baw and Nga Kun. Defendants-Appellants denied the mortgage. It was therefore incumbent on Plaintiffs-Respondents to prove the mortgage they alleged, and if they did not do so satisfactorily their suit failed. It was not necessary for the Defendants-Appellants to adduce any evidence. The defence was that the land was the *bobabaing* of Nga Kun. But if they failed to prove this the fact was immaterial. These things have ben repeated so often in the published Rulings of this Court that it is astonishing to find them still overlooked.

The Township Court held that Plaintiffs-Respondents had failed to discharge the burden of proof. The Judge did not discuss the evidence with as much intelligence as I should have expected from him; he is ordinarily sound and sensible. But his conclusion was certainly right.

The Lower Appellate Court's judgment which reversed the decision of the Township Court and granted Plaintiffs-Respondents a decree for redemption surprises me greatly. The learned Additional Judge usually displays an adequate acquaintance with the law and sound common sense in applying it. Here it is only too apparent that he fell short in both respects.

The Plaintiffs-Respondents' first witness was the Record-keeper of the Land Records Office. He was unable to give any relevant or admissible evidence. What Plaintiffs-Respondents apparently wanted to prove was the entry of the alleged mortgage in the Settlement Records. The proper way and the only way to do that was to obtain and put in evidence a certified copy. [Section 65 (*e*) and note to the same, Evidence Act.]

MI SE BAW
v.
MI MIN YA.

The second witness, Aung Dun (the village headman), stated that the land when he first knew it 20 years back belonged to Shwe Hlauk, and that eight years before suit it got into the possession of Nga Kun. That was the only relevant or admissible evidence in his deposition.

The third witness, Tha E, a cousin of Shwe Hlauk, said that he and Shwe Hlauk jointly owned the land in dispute and land to the west of it, and that eight years back they partitioned, and the land in suit fell to Shwe Hlauk; also that "about six years ago" Nga Kun told him the land in dispute had got into his possession under mortgage. That was the only relevant or admissible evidence in his deposition.

The fourth witness, Shan Gyi, uncle of the Plaintiff-Respondent Mi Min Ya, said that he had known the land for 52 years and that it used to belong to Shwe Hlauk, also that about five years ago Nga Kun told him he had bought the land. That was the only relevant or admissible evidence in his deposition.

That was the whole of the Plaintiffs-Respondents' evidence except—

(1) a certified copy of the Supplementary Survey Map and Register for 1899-1900,

(2) a certified copy of the Supplementary Survey Map and Register for 1906-07,

both of which showed Shwe Hlauk and his son-in-law, Nga Hmya, as owners, the first Nga Kun and Mi Se Baw as mortgagees, the second Nga Taing and Mi E Nyein as mortgagees.

The witnesses' depositions before referred to contain several inadmissible statements as to what the witnesses heard, as to what Shwe Hlauk said, and as to what was recorded in a Revenue Register.

The fact that the land belonged to Shwe Hlauk at a former time did not help the Plaintiffs-Respondents. This has been explained in several of the published Rulings of this Court.

Tha E as a cousin of Shwe Hlauk's was not a witness whose unsupported statement as to an admission by Nga Kun—a statement of the vaguest possible character besides—was entitled to implicit credit if it had stood alone. But what are we to say of it when we find that Shan Gyi, Plaintiff-Respondent Mi Min Ya's uncle, deposed to a perfectly inconsistent admission? On the face of it, it cannot be assumed that "bought" meant "received in mortgage." But if this witness had also deposed to an admission of the mortgage his evidence would be no better that Tha E's, and one would not corroborate the other since they did not profess to refer to the same occasion.

In *Mi Sa U* v. *Nga Pyan*,* I explained how entries in Settlement Records are made and what their position as evidence is, and I refused to uphold a decree for redemption based on Settlement Records of a mortgage supported by no other reliable evidence. The learned Additional Judge of the District Court does not seem to have read that decision.

The character of Supplementary Survey Records is similar; but the value is rather less. The Directions to Revenue Officers concern-

* U.B.R., 1904-06, II, Evid., page 3.

ing Supplementary Survey in Upper Burma* explain their purpose, and the method in which they are made.

The object is to keep the Settlement Records up to date, and this is effected by having a revised map and revised registers prepared annually in which all changes since the records of the previous year were prepared are recorded. For the correct record of these changes the Revenue Surveyor is responsible (Direction 21). His work is checked, as follows:—

1. The Inspector is required to verify the Revenue Surveyor's work in a proportion of cases. As regards the particular class of entries here in question, the proportion is 12 per cent., or one holding out of eight.

2. The Superintendent of Land Records is required to test personally the work of the Revenue Surveyor and Inspector in not less than five per cent. of *kwins* in each Revenue Surveyor's circle. (The *kwin* is the survey unit, and is a division of a Revenue Surveyor's circle.)

3. The District Officers are required to inspect so many *kwins* with a view further to test the work of the Revenue Surveyor and his immediate superiors.

The Subdivisional Officer and the Township Officer have each to inspect one *kwin* in each Revenue Surveyor's circle. The Deputy Commissioner has to inspect as many *kwins* as he can in the course of his tours.

It is evident that all this inspection does not afford a check as good as that where the Settlement Officer after fixing a day, and with all the people of the village before him, "determines and records the tenure upon which each person holds." There every holding is checked. In the nature of things, a great part of the Revenue Surveyor's work must escape verification.

And it has to be remembered that the entry of transfers (mortgages, etc.) is a very small and comparatively unimportant part of the Revenue Surveyor's work, and therefore unlikely to attract particular care and attention.

There was nothing whatever to show under what circumstances the entries in question in the present case were made.

In these circumstances, I am of opinion that the Supplementary Survey Maps and Registers, supported by no other evidence than what I have analysed and commented on above, were altogether insufficient to support a decree for redemption in Plaintiffs-Respondents' favour.

A fact to be noted is that the map and register of 1899-1900 date two years before the year of the mortgage, as alleged in the plaint 1263 (=1901-02). The Plaintiffs-Respondents, of course, might have made a mistake in their plaint, but it is impossible they can succeed in ousting persons in possession by a hazy allegation of a mortgage with nothing substantial of any sort to support it, but a couple of years' Supplementary Survey Records.

* Revised Edition, 1903.

MI SE BAW
v.
MI MIN YA.

The Lower Appellate Court, in my opinion, went seriously astray in holding, as it practically did, that the entries in question were sufficient proof of the alleged mortgage unless the Defendants-Appellants could show that they were incorrect. I regard this as an unwarrantable extension of the rule stated in *Ya Gyaw* v. *Mi Ngwe.**

The decree of the Lower Appellate Court is set aside and the Plaintiffs-Respondents' suit is dismissed with all costs.

* 2 L.B.R., 56.

Execution—Signing.

Civil Revision No. 50 of 1906. March 22nd, 1907.

Before G. W. Shaw, Esq.

NGA MYAT THIN AND MI MYA GON *v.* NGA MYE AND NGA PO KYIN.

Mr. *J. C. Chatterjee*—for Applicants.
Mr. *S. Mukerjee*—for Respondents.

A man may sign a promissory note by getting some one to write his name for him.

References:

U.B.R., 1897-01, II, 391.
——— 1892-96, I, 303.
——— II, 462.

Plaintiffs-Applicants sued for Rs. 100 principal and Rs. 87-10-8, interest due on a promissory note, dated 2nd *lazan*, 1st *wazo* 1266 B.E.

There were four defendants. Nga Pyu did not appear, and the case was heard *ex-parte* as against him. The Judge omitted to examine the process-server or to record a finding that he had been duly served. But Nga Pyu did not appeal or apply to have the case re-opened. The claim against Po Yôn was dismissed, and Plaintiffs-Applicants did not appeal.

Defendants-Respondents Nga Myè and Po Kin, admitted having signed a previous promissory note, but denied the note filed with the plaint.

The first Court found against them. They appealed.

The Lower Appellate Court "dismissed the suit." Neither judgment nor decree states whether the whole suit (against Nga Pyu as well as Defendants-Respondents) was dismissed, or whether the suit as against Defendants-Respondents only was dismissed. As the grounds on which the learned Judge proceeded were common to Nga Pyu and the Defendants-Respondents, it is to be presumed that the suit against Nga Pyu was also dismissed.

The view which the Lower Appellate Court took of the case was extraordinary. The gist of the judgment is "on the evidence the conclusion would appear to be that the money was borrowed, but the case is bad in law. The Plaintiff ought to have sued for money lent. He should not have sued upon the strength of the promissory note which is evidently written by one man and bears as a mark of genuineness only one cross-mark. Before a suit can be brought upon a promissory note, the Plaintiff must know and take precautions that the note is duly executed. In this case the note has not been duly executed. Therefore the case fails on technical grounds."

The learned Judge overlooked the fact that if for any reason the promissory note was excluded, Plaintiffs-Applicants were entitled to succeed on proof of the original consideration, unless it appeared that the case was of the exceptional kind where the promissory note was itself the original cause of action. *Ewing* vs. *White** is conclusive on this point.

But the finding that the promissory note was not duly executed is not sustainable. What the learned Judge apparently meant was that

* U.B.R. 1897-01, II, 391.

NGA MYAT THIN v. NGA MYE.

if Plaintiffs-Applicants' witnesses' account of the way the note was executed was correct, the promissory note was not duly executed.

What they said was that Ba Thaw wrote the note, and also wrote, at the request of Defendants, their signatures, they holding or touching the pen and Defendant-Respondent Nga Myè himself making a cross-mark.

The District Judge apparently thought that the omission of the other Defendants to make cross-marks invalidated the whole transaction. He cited no authority for the view he took. None has been cited before me and I know of none.

"Execution" as applied to a document means its completion according to law.

In England in relation to "deeds" it consists or consisted of signing, sealing and delivery, of which the signing is or was perhaps not necessary. In Upper Burma in Burmese times documents were invariably executed without being signed. This was fully explained in *Queen-Empress* vs. *Mi Nan Tha.*† Since the date of that judgment the Stamp Act of 1899 has taken the place of the Act then in force (Act I of 1879), and in the later enactment "execution" is defined to mean "signing." The effect of that definition is not altogether clear. But it only applies to the Stamp Act and need not now be considered.

Here the document in question being a promissory note, signature was necessary by section 4 of the Negotiable Instruments Act, 1881.

But we have to see what signature means. This was considered in *Aung Gyi and another* vs. *Shwe Kyu*‡ in connection with section 19 of the Limitation Act.

The Rulings collected in Rivaz's notes to section 19 of the Limitation Act, to which reference is made in that decision, show that a mark has been held to be a sufficient signature, and that the name may be written by an agent duly authorized as well as by the person himself. The explanation to section 19, Limitation Act, expressly states that signing means signed either personally or by an agent duly authorized, and this appears to be the English law on the subject (see Encyclopædia of the Laws of England S. V. Signed).

The General Clauses Act now in force in section 3, clause (52), declares that "sign" is to be understood to include "mark" in the case of an illiterate person. This does not seem to alter the law with respect to signing by an agent. But it is unnecessary to consider that point. When the Negotiable Instruments Act was enacted, the General Clauses Act in force (Act I of 1868) contained no definition of signing. The definition was first introduced in Act I of 1887, and section 27 of the Negotiable Instruments Act means, according to Chalmers, that it is "immaterial what hand actually signs the principal's name to a bill if in fact there is authority to put it there." He states indeed in so many words that an agent signing for his principal may sign the principal's name simply. By section 182 of the Contract Act an agent is a person employed to do any act for another who is called the principal.

† U.B.R., 1892-96, II, 303.

‡ U.B.R., 1892-96, II, 462.

It follows that a man may sign a promissory note by getting some one else to write his name for him, and a mark is not necessary at all. I am therefore of opinion that if the promissory note in question was signed in the way described by the witnesses for Plaintiffs-Applicants it was duly signed, and duly executed.

In overlooking these considerations the Lower Appellate Court was guilty of an illegality or material irregularity within the meaning of section 622, Civil Procedure Code.

As the Lower Appellate Court did not discuss the evidence or deal with the real points for determination, I cannot properly dispose of the case in these proceedings.

The decree of the Lower Appellate Court is set aside and it is ordered that the Lower Appellate Court rehear the appeal according to law.

Costs will abide the final result.

Execution—Signing.

Civil Appeal No. 5 of 1907. October 16th.

Before G. W. Shaw, Esq.

MI TA *vs.* NGA SEIN.

Mr. *J. C. Chatterjee*—for Appellant.
Mr. *A. C. Mukerjee*—for Respondent.

Held,—that a parabaik mortgage deed dated 1256 B.E. (1894-1895), though not signed, was executed within the meaning of the Stamp Act then in force (I of 1879), and therefore liable to Stamp duty.

Held also,—that where the Defendant was alleged to be withholding an unstamped parabaik document, that did not render secondary evidence admissible.

Mi Ein U vs. *Aung Hmwe's* interpretation of *Raja of Bobbili* vs. *Inuganti China* affirmed.

References:

U.B.R., 1892-96, I, 303.
——— 1897-01, II, 365, 421.
——— 1907, II, Ex. Signing, p. 1.
I.L.R., 19 Bom., 635.
L.R., 26 I.A., 262.

Plaintiff-Appellant sued to redeem a mortgage of 13·77 acres of land called Tandawya on payment of Rs. 60. She alleged a partition in 1255 (or 1256) B.E., at which this land fell to her as her share of ancestral property, and a mortgage to Defendant-Respondent in 1256. She admitted that Defendant-Respondent had been previously in possession and that she never got actual possession. Defendant-Respondent admitted that Plaintiff-Appellant was a co-heir, but denied that there was any partition at which she received the land in suit, and denied the mortgage. He said that this land belonged exclusively to him.

Plaintiff-Appellant in her plaint said that the mortgage was recorded on a parabaik in possession of Defendant-Respondent. Defendant-Respondent denied having any such document.

It further appeared in the course of the hearing that the partition was also recorded on a parabaik, and the Subdivisional Court called upon the witness who had that document to produce it, and inspected it when it was produced and used it as evidence, but it has not been submitted with the proceedings to this Court, and the record contains no copy of it, and no other reference to it except what is to be found in the evidence and the judgment. The Court also took oral evidence of the mortgage without giving any heed to the question of a mortgage deed, and granted Plaintiff-Appellant a decree for redemption on the strength of that evidence.

On appeal the District Court reversed the Subdivisional Court's decree, and dismissed the suit on the ground that the parabik mortgage deed being unstamped, secondary evidence could not be received.

It is now contended on behalf of Plaintiff-Appellant (1) that the parabaik document not being signed was not "executed" within the meaning of the Stamp Act, and therefore was not liable to stamp duty, (2) that if it was so liable, secondary evidence ought not to have been

MI TA
v.
NGA SEIN.

excluded, since Defendant-Respondent was withholding the oirignal, (3) that apart from the mortgage, Plaintiff-Appellant was entitled to succeed on the strength of the partition.

The learned Advocate has said nothing in argument on the third point, and it is evident that it would not be sufficient for Plaintiff-Appellant to prove that she got the land in suit at a partition in 1256 B.E. The case of *Mindin* vs. *On Gaing* * is conclusive.

It being pointed out to the learned Advocate that Act I of 1879, which was the Stamp Act in force in 1256 B.E. (1894-1895), did not define execution at all, he contends that it nevertheless must be taken to have contemplated that execution meant signing, that the present Act did not introduce any new law in defining execution as it did. He claims that this argument is supported by the uniform practice ever since the Stamp Law was introduced into Upper Burma. I do not know what the object of introducing the definition of execution into the Stamp Act of 1899 was. But I concur in the view which was taken in *Bhawanji Harbhum* vs. *Dovji Punja* † (1894). The reason why the Act of 1879 did not define "executed" and "execution" probably was that "the practice of authenticating a document by signature is not so common in India as in England, and instruments are often completed without a formal signature at the end." The learned Judges said "the somewhat elastic term "execution" without definition is therefore employed. Now execution means completed, (Wharton's Law Lexicon, Title "Executed"). Execution is when applied to a document, the last act or series of acts, which completes it. It might be defined as formal completion. Thus execution of deeds is the signing, sealing and delivery of them in the presence of witnesses. Execution of a will includes attestation. In each class of instruments we have to consider when the instrument is formally complete."

This agrees with my recent remarks in *Myat Thin* vs. *Nga Mye*.‡ The subject was fully considered in *Queen-Empress* vs. *Mi Nan Tha*§ cited in that case.

There is nothing to show that in the Stamp Act of 1879 it was intended to exempt from stamp duty instruments executed otherwise than by signing; and I have no hesitation in holding that the mortgage deed in question was executed within the meaning of that Act, and liable to Stamp duty.

I am not called upon in this case to decide whether a similar instrument executed since the Stamp Act of 1899 came into force is or is not liable to Stamp duty.

On the second point it is contended that in the Privy Council case of *Raja of Bobbili* vs. *Inuganti China* ‖ (1899) it was not necessary to decide, and it was not decided whether an adversary should be permitted to defeat the ends of justice by withholding a document, and therefore *Mi Ein U* vs. *Aung Hmwe*, ¶ went too far in saying that the Ruling in the *Raja of Bobbili's* case "includes all cases in which the original writ has not been produced." I have referred to the Privy

* U.B.R., 1897-01, II, 421.
‡ U.B.R., 1907, II, Ex. Signing, p. 1.
§ U.B.R., 1892-96, I, 303. ‖ L.R., 26 I.A., 262.
¶ U.B.R., 1897-01, II, 365.

Council decision, and I see no good reason for dissenting from my learned predecessor's interpretation of it. It is true that the particular case was not one in which the adversary had withheld the document. But the grounds on which the judgment proceeded were that the clauses of the Stamp Act (1879) dealt throughout with and exclusively referred to the admission in evidence of original documents, which at the time of execution were not stamped at all, or were insufficiently stamped. What the Appellant there contended was that a copy should be admitted on payment of the duty and penalty. Their Lordships observed, "In the opinion of their Lordships the effect of granting the remedy which the Appellant maintains he is entitled to would be to add to the Act of 1879, a provision which it does not contain, and which the Legislature of India, if the matter had been brought under their notice, might possibly have declined to enact."

Similar remarks may obviously be made of the Plaintiff-Appellant's contention in the present case, which is that she should be allowed to give (oral) secondary evidence—apparently without even paying duty and penalty—on the mere ground that Defendant-Respondent is withholding the original document.

And it is to be observed that the Stamp Act of 1899, which governs the present case *in this matter*, does not differ from its predecessor in this respect. The Legislature evidently did not see fit to enact any such provision as the Privy Council referred to, although the matter had been brought under their notice by the decision in question.

I am therefore of opinion that the Lower Appellate Court was right in holding that secondary evidence was inadmissible.

It follows that Plaintiff-Appellant's suit was rightly dismissed, even as the Raja of Bobbili's claim to an estate worth Rs. 40,000 was dismissed.

The appeal is dismissed with costs.

Guardian and Wards—17.

Civil Appeal No. 222 of 1907. May 25th, 1908.

Before D. H. R. Twomey, Esq.

MA ZAKERIA *vs.* HARUN.

Mr. *S. Mukerjee*—for Appellant.
Mr. *J. C. Chatterjee*—for Respondent.

Held,—that where the only candidates for the guardianship of the property of a minor are the mother and a paternal uncle, there appears to be no authority, under the Mahomedan law, for preferring the uncle.

References :

Wilson's Digest of Anglo-Mahomedan Law, paragraph 112, Tagore Law Lectures, 1873, page 476 and note.
I.L.R., 29 All., 10.
U.B.R., 1892—96, II, page 540.

The Appellant, Ma Zakeria, is the widow, and the Respondent, Harun, is the brother of one Maung Puca, Mahomedan, deceased. Both of them applied to the District Court, Mandalay, for appointment as guardian of the persons and property of the minor children of Maung Pu and Ma Zakeria.

The District Court appointed Harun guardian of the property of all the children, and of the persons of two of the sons who are over seven years of age, and appointed Ma Zakeria guardian of the two minor daughters and of one son who is under seven.

Ma Zakeria appeals under section 47 of the Guardian and Wards Act, 1890. Section 17 of the Act lays down that in appointing a guardian the Court shall be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor.

It is clear that the personal law to which the minors in this case are subject is the Mahomedan law. The provisions of that law as to who are the guardians of the *persons* of a minor are different from the provisions as to who are the guardians of the *property* of a minor. As regards *Hizanat,* or custody of the person, it is a well established rule that the mother's claim stands first in the case of boys under seven and girls under the age of puberty, and that after these ages the *Hizanat* belongs to the father, his executor, the paternal grandfather and the paternal male relatives in the same order as for inheritance.

The text books cited in the Lower Court's judgment, and the ruling of this Court in the case, *Ma Thi and another* vs. *Aga Mahomed Jawad,** are conclusive on this point. There is no doubt therefore that the orders of the Lower Court as to the custody of the five children are in accordance with the Mahomedan law.

Turning now to the question of the minor's property, I find much reason to doubt the correctness of the order assigning the guardianship to the Respondent, Harun, paternal uncle of the minors.

The learned Judge remarks: "It is quite clear that Ma Zakeria has no right under Mahomedan law to be guardian of the property. I

* U.B.R., 1892—96, II, p. 540.

MA ZAKERIA v. HARUN.

think this beyond dispute." He cites in support of this proposition the following authorities :—

(1) The ruling in *Ma Thi's* case already mentioned.
(2) Page III, Wilson's Digest.
(3) Page 476, Amir Ali's Mahomedan Law, Volume II.

But these authorities do not support the learned Judge's view. The ruling in *Ma Thi's* case does not deal with the question of guardianship of property at all. The only question that arose in that case was as to the custody of a minor's person. Mr. Burgess incidentally remarked that under Mahomedan law the mother would not be the natural guardian of the minor's property. That remark is in accordance with all the texts. But it is equally clear that the paternal uncle is not the natural guardian. The guardians of a minor's property are—

(1) the father,
(2) the father's executor,
(3) the executor's executor,
(4) the father's father,
(5) the executor of the last named, and
(6) his executor.

Failing all these, it was for the *Kazi,* and therefore now is for the Court, to appoint a guardian or guardians.* No provision is made for guardianship by the male paternal relatives as in the case of guardianship of the person, and the Courts in India have affirmed that blood relations as such, other than the father or paternal grandfather, have nothing to do with the property of a Mahomedan minor.† Where the only candidates for the guardianship of the property are the mother and a paternal uncle of the minor, there appears to be no authority for preferring the uncle. It has been authoritatively held on the contrary in a recent Allahabad case ‡ that the uncle has no legal right under Mahomedan law superior to that of the mother. It is for the Court to decide what appears to be for the welfare of the minor. Section 17 (2) of the Guardian and Wards Act lays down that the Court should consider the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent and any existing or previous relations of the proposed guardian with the minor or his property.

The Lower Court saw no equitable considerations in Ma Zakeria's favour. But I think the nearness of kin to the minors is certainly a point in her favour, and I think the dishonest conduct of the uncle and nephew, whose letters of administration were revoked in Civil Miscellaneous Case No. 63 of 1905, Mandalay District Court, may also be taken into consideration as indicating that in this case the paternal collateral relatives generally are not predisposed to deal with the property of the minors for the benefit of the latter. It does not appear that the father expressed any wish in the matter of the

* Sir R. K. Wilson's Digest of Anglo-Mahomedan Law, paragraph 112; Tagore Law Lectures 1873, page 476.
† *Note* to paragraph 112, Sir R. K. Wilson's Digest.
‡ I.L.R., 29 All., page 10.

guardianship. On the whole I think that so far as the welfare of the minors is concerned there is a decided balance of advantage on the side of the mother's appointment.

On the grounds which have now been stated, I set aside the order of the District Court appointing the Respondent, Harun, as guardian of the minors' property, and direct that the Appellant, Ma Zakeria, shall be appointed guardian of the property of all her minor children, on furnishing security to the satisfaction of the District Court under section 34 of the Guardian and Wards Act, 1890.

The orders of the District Court as regards the guardianship of the persons of the minors are confirmed.

The costs of the Appellant in both Courts will be borne by the Respondent. The Advocate's fee in this Court is fixed at two gold mohurs.

Limitation—5.

Civil 2nd Appeal No. 140 of 1907. September 27th.

Before G. W. Shaw, Esq.

NGA PO AN *vs.* NGA NYUN BU, NGA SHWE OH AND BEER SINGH.

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

The true rule under section 5 of the Limitation Act, is whether under the special circumstances of each case the Appellant acted under an honest though mistaken belief formed with due care and attention.

In the exercise of discretion under the section the words " sufficient cause " should receive a liberal construction so as to advance substantial justice when no negligence, nor inaction, nor want of *bonâ fides* is imputable to the Appellant.

Where an appeal was dismissed for default and the Appellant applied to have the appeal re-opened on the ground that he was misled by his advocate who had misunderstood the date fixed for the hearing.

Held,—that a fair opportunity must be given to the Appellant to prove that he had sufficient cause for his non-appearance, and the explanation, if made out, would be a reasonable one and the Appellant would be entitled under section 558, Civil Procedure Code, to have the appeal re-opened.

References :

Notes to section 5, Mitra's Commentaries on the Limitation Act (1907).
XI. L.B.R., 23.
I.L.R., 13 Mad., 269.
————25 Mad., 166.
————21 Bom., 552.

This is an appeal under section 588 (27), Civil Procedure Code. The first point for determination is whether it can and ought to be admitted under section 5, Limitation Act, the proper time allowed for presenting it having expired before it was presented.

The learned advocate for Respondent has referred to the notes to section 5 in Mitra's Commentaries on the Limitation Act (1907).

The result of the decision according to these notes is apparently that a *bonâ fide* mistake in law may be sufficient cause *Krishna* v. *Chathappan* * (1889) *and Dadabhai v. Maneksha* † (1896).

In the first of these cases it was said, "the true rule is whether under the special circumstances of each case the Appellant acted under an honest though mistaken belief formed with due care and attention," and that in the exercise of discretion under section 5, the words "sufficient cause" should "receive a liberal construction so as to advance substantial justice when no negligence nor inaction nor want of *bonâ fides* is imputable to the Appellant."

According to Sir Arnold White (C.J.) in *Kichilappa Naikar* v. *Ramanujam Pillai* ‡ (1901) the material question is whether the Appellant has been deligent during the period of delay.

Now in the present case there was no want of diligence or *bonâ fides*, and there was certainly some reason for the Appellant to suppose that a second appeal lay under section 384, since the District Court had gone into the merits although the Appellant did not appear when the case wae called.

* I.L.R., 13 Mad., 269. † I.L.R., 21 Bom., 552.
‡ I.L.R., 25 Mad., 166.

NGA PO AN
v.
NGA NYUN BU.

The circumstances appear to me to be distinguishable from those of *Nga Han* v. *Su Ya* * and other cases that have been cited.

I hold, therefore, that sufficient cause has been shown within the meaning of section 5, Limitation Act.

On the merits of the order in question, the gravamen of Appellant's complaint is that the Lower Appellate Court did not give him an opportunity of proving that he was prevented by sufficient cause from appearing on the 15th December.

This appears to be well founded. The only record of the matter consists of a very brief order endorsed by the Judge on the back of the Appellant's petition praying that the appeal might be readmitted.

The ground alleged by Appellant was that his Advocate wrote to him telling him that the 15th January had been fixed, and that is why he was not present on the 15th December.

The case had been fixed first for the 10th December. On that day Appellant attended, but Respondents had not been served and the Judge was absent. The case was postponed till the 12th when the Judge ordered fresh notice to issue for the 15th. As one of the Respondents was in jail in Rangoon and the summons sent to the Chief Court, Lower Burma, for service on him had not been returned by the 12th, was in fact only returned on the 13th, and apparently did not reach Magwe till the 16th, and obviously three days was an insufficient time to allow of a notice being sent from Magwe to Rangoon for service and return, the Advocate might very reasonably have been expected to suppose that the 15th January was meant. The Appellant apparently put in evidence the two letters he received from his Advocate on the subject.

The Judge gave no heed to any of these things, and did not examine the Appellant or the Advocate or consider the circumstances under which the alleged misunderstanding took place.

In the circumstances noted I am of opinion that the Appellant would have been entitled under section 558 to have the appeal reopened.

The explanation if sufficiently made out would have been a very reasonable one.

The Code provides for cases being reopened where there has been sufficient cause for the non-appearance. I think that this must be construed in a fair and liberal manner.

I do not think that the Judge treated the Appellant fairly in fixing dates for the hearing of the appeal. He failed to sit on the day for which the case was first fixed. The Appellant very naturally went home to his village, leaving it to his Advocate to appear on the next day (two days later). People cannot be expected either to run back and forward between Magwe and their village every two days, or to stay indefinitely in Magwe.

This explains how Appellant was not present in person on the 12th.

Then in fixing a day, three days off, for service of a notice in Rangoon, the Judge acted in a manner that was calculated to mislead the Advocate.

* XI B.L.R., 23.

I set aside the District Judge's order of the 22nd December refusing to reopen the appeal, and direct that he give the Appellant an opportunity of proving the truth of his explanation, and if it is proved, that he re-admit the appeal and dispose of it on the merits.

Respondents will pay the cost of this appeal.

Limitation—II, 178.

Civil Revision No. 99 of 1907. January 31st, 1908.

Before G. W. Shaw, Esq.

NGA LU DOK AND MI THA LI *vs.* MI SAN BAING.

Mr. *C. G. S. Pillay*—for Applicants.
Mr. *A. C. Mukerjee*—for Respondent.

Held,—that after an appeal has been rejected under section 549, Civil Procedure Code, the Applicants may apply to have it restored on furnishing the required security. No special period of Limitation being provided for such an application, the Article of Schedule II to the Limitation Act which applies, is Article 178.

References:

I.L.R., 8 All., 315.
——— 18 All., 101.
U.B.R., 1892-96, II, 279.

On the merits of the order directing Applicants to furnish security under section 549, Civil Procedure Code, it is unnecessary to say anything now, though it seems doubtful if the Lower Appellate Court had in view the Ruling in *Mi Yi* vs. *Myat Kyaw*, * and the Indian decisions on which it was based. Nor can any fault be found with the order of the Lower Appellate Court passed on the 7th June last rejecting the appeal on the failure of Defendant-Applicant, Lu Dok, to appear and the failure of Defendant-Applicant, Mi Tha Li, to furnish security. Lu Dok was proved in the ordinary way to have been duly served with the notice issued to him to show cause against the application under section 549, and Mi Tha Li, who did appear at the hearing of that application on the 24th May and was heard and given time till the 7th June to furnish security, stated on the 7th June that she could not furnish security.

We have to do now with an application presented to the Lower Appellate Court on the 9th August following by both the Defendants-Applicants, praying that they might be allowed to furnish security, and that their appeal might then be restored. They expressly cited the Privy Council case of *Bulwant Singh* vs. *Daulat Singh* † as authority for their prayer. The Lower Appellate Court however, in a very summary order, without any reference to that decision, rejected the application saying simply "I see no reason to reopen the case."

I have given my best consideration to the judgment of their Lordships, and it appears to me to be clear authority for holding that after an appeal has been rejected under section 549, the Applicants may apply to have it restored on furnishing the required security. No special period of Limitation being provided for such an application, the Article of Schedule II to the Limitation Act which applies, is Article 178. Thus the application was in ample time.

The head note to the report of *Bulwant Singh's* case, to the effect that an appeal may be restored "on sufficient grounds at the Court's discretion," is not borne out as far as I can see by the judgment itself, which rather implies that if the Applicants can furnish the

* U.B.R., 1892-96, II, 179. † I.L.R., 8 All., 315.

NGA LU DOK
v.
MI SAN BAING.

security with a reasonable time, to be allowed to them for the purpose after their application has been made, the appeal ought to be restored.

Apparently the learned District Judge here like the High Court in *Bulwant Singh's* case, held that the Applicants' petition to restore after security had been furnished, "was not entertainable and could not be listened to."

In both cases the error consisted in supposing that an order under section 549, Civil Procedure, is a final order.

I am of opinion that in rejecting the application of the 9th August as it did, the Lower Appellate Court was guilty of an illegality or material irregularity within the meaning of section 622.

Following the course taken in the case above cited I direct that Applicants may give security for the costs of the appeal and the original suit, (see *Lekka* vs. *Bhawna*),* of such a nature as shall be satisfactory to the District Court, and within such reasonable time as shall be fixed by that Court, and that upon their giving such security, their appeal shall be restored to the files of that Court.

There will be no costs of this appeal.

* I.L.R., 18 All., 101.

Civil Appeal No. 278 of 1908. February 1st, 1909.

Limitation—Schedule—II, 10.

Before G. W. Shaw, Esq., C.S.I.

NGA SHWE DOK, MI KIN AND NGA KYE *v.* NGA NU, MI MI, NGA MYA AND NGA PU.

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

Held,—that the right to redeem land in possession of a usufructuary mortgagee does not admit of physical possession, and therefore limitation for a suit for pre-emption based on the sale of such a right runs from the date of registration of the sale deed.

References :—

I.L.R., 9 All., 234.
P.R., No. 168 of 1884.
——— 160 of 1889.
——— 45 of 1895.
——— 16 of 1902.
Mitra, Starling and Rivaz on Limitation.

Defendant-Respondent, Nga Pu, sold the land in suit to the Defendants-Appellants by a document dated 29th May 1906, which was registered on the 18th June 1906. On the 16th December 1907 the other Respondents sued to enforce an alleged right of pre-emption.

Defendants from the first pleaded that such a suit was barred by limitation, but in the First Court the real point of difficulty does not seem to have been raised.

In the Lower Appellate Court and in this Court, however, it was explicity alleged on behalf of the Defendants-Appellants that the suit was barred under Article 10 of Schedule II to the Limitation Act, by being instituted more than one year after the date on which the sale deed was registered. Plaintiffs-Respondents, on the other hand, count from the date of Appellants' taking physical possession after redeeming the mortgage.

The Additional Judge of the District Court said that he could find no authority for the contention of the learned Advocate for Defendants-Appellants that the subject of the sale did not admit of physical possession, because the land was at the time of sale in possession of a usufructuary mortgagee. He took it that the subject of the sale was the land, and that as land admits of physical possession by its nature, it was immaterial whether it was in possession of a usufructuary mortgagee or not.

At first sight this seems to be a correct construction and application of Article 10, but closer consideration shows that it is not.

The subject of the sale was the vendor's interest in the property, and that was what the Transfer of Property Act calls the right to redeem,—an incorporeal right, which from its nature did not admit of physical possession.

The commentaries mention several decisions to this effect. I do not know what book or books of reference the Additional Judge of the District Court had at his disposal on the Limitation Law. There are well known works by Mitra, Starling and Rivaz, not to attempt an

NGA SHWE DOK v. NGA NU.

exhaustive catalogue. All these mention the case of land in possession of a mortgagee, and cite the decisions just referred to, and they do not, as far as I can see, so much as mention the view taken by the Lower Appellate Court.

The following cases may be mentioned :—

Shiam Sundar v. *Amanant.**
Bhawani v. *Attar.*†
Gafar Khan v. *Sattar.*‡
Tikaya Ram v. *Dharam Chand.*§

Mitra says, "Under Act XIV of 1859 the starting point was the date of taking possession, under Act IX of 1871, it was the date of taking actual possession, but under this Act (XV of 1877) it is the date of taking physical possession. There can be no physical possession of an intangible thing such as a right to a reversion, or a right of redemption of property in the usufructuary possession of a mortgagee. . . . . The word "physical" is highly *restrictive,* and the term "physical possession" means "personal and immediate possession." And again, "The words 'does not admit of physical possession' in this article mean 'does not, *for the time being,* admit of physical possession'." The last sentence is a quotation from a recent (1902) Punjab case, *Panna* v. *Bhagwan,*‖ where it was held that a house in the occupation of a tenant, when sold, did not admit of immediate physical possession.

Starlings says that under Act IX of 1871 there were differences of opinion as to whether the purchaser of an equity of redemption (*sc.* right to redeem) got "actual possession" when the equity of redemption was completely transferred to and vested in him, *e.g.,* by mutation of names, or whether actual possession was obtained when the deed of sale was executed, or when the sale was otherwise completed as by payment of the purchase money; and he adds, "These questions have been set at rest by the alteration in the present article, which provides that when physical possession can be obtained, then that is the date whence the period of limitation runs, otherwise it runs from the date of the registration of the document of sale."

This explanation of the alteration in the law seems to me to support the construction which I have adopted, and to show that as, in the present case, the purchaser of the right to redeem could not get physical possession till he redeemed, the intention of the Legislature was that limitation should run from the date of registration.

In view of my decision on the point of limitation, it is unnecessary to go into the merits of the case.

The decrees of the Lower Courts are set aside and the Plaintiffs-Respondents' suit is dismissed with all costs.

* I.L.R., 9 All., 234.
† P.R., No. 68 of 1884.
‡ P.R., No. 160 of 1889.
§ P.R., No. 45 of 1895.
‖ P.R., No. 16 of 1902.

Limitation—Schedule—II—113, 115, 120, 176.

Civil Revision No. 181 of 1908. June 28th, 1909.

Before G. W. Shaw, Esq., C.S.I.

MI LE BYU v. NGA CHIT PU.

Mr. *R. G. Aiyangar*—for Applicant.

In a suit for money due under an award or for specific performance of an award, the period of limitation, if not three years under Article 115 or Article 113, would be six years under Article 120 of Schedule II of the Limitation Act.

References:

I.L.R., 5 All., 263.
" 16 All., 3.
" 23 All., 285.
" 23 Mad., 593.
U.B.R., 1902-06, II, 481.

THE only point for determination is whether the suit was barred by Limitation. It was a suit to recover Rs. 22 under an award of arbitrators. The learned Advocate for Defendant-Applicant contends that Article 176 of the Second Schedule to the Limitation Act, 1877, applied. The authorities he has cited as supporting this contention are the following:—

(1) *Sukho Bibi* v. *Ram Sukh Das* (1883).*
(2) *Raghubar Dial* v. *Madan Mohan Lal* (1893).†
(3) *Sornavalli Ammal* v. *Muthayya Sastrigal* (1900).‡
(4) *Sheo Narain* v. *Beni Madho* (1901).§

The first two were suits like the present for money due under an award. The decision was that Article 113 applied.

The third and fourth were suits to recover immoveable property, to which the Plaintiff's right had been declared by an award. It was held that they were not suits to enforce an award and that the period of Limitation was 12 years. In the Madras case the learned Judges doubted the correctness of the earlier Allahabad decisions. In *Sheo Narain's* case, those earlier decisions were held to be distinguishable: something had to be done under the award in those cases where there nothing had to be done.

I am unable to see how any of these Rulings lends support to the contention here put forward. There have apparently been no decisions on the subject in either Upper or Lower Burma. The only case I can find where the points that arise were referred to is *San Dun* v. *Di Bo*, ‖ but it was not necessary there to decide them.

It appears to me that the contention put forward on behalf of Defendant-Applicant is altogether unsustainable. Article 176 of Schedule II of the Limitation Act, 1877, prescribed the period of Limitation for an application under section 516 or section 525, Civil Procedure Code, 1882. It could not apply to a regular suit. This was undoubtedly a regular suit, whether it be regarded as a mere suit for money due under the award, or as a suit for specific performance of an award; and the period of Limitation, if not three years under

* I.L.R., 5 All., 263.
† ——— 16 All., 3.
‡ I.L.R., 23 Mad., 593.
§ ——— 23 All., 285.
‖ U.B.R., 1902-06, II, 481.

MI LE BYU
v.
NGA CHIT PU.

Article 115 or Article 113 would be six years under Article 120. It is therefore unnecessary to decide whether this was a suit to enforce a contract within the meaning of Article 113, though I confess that I see no difficulty, having regard to the terms of section 30 of the Specific Relief Act, in applying Article 113 to a suit to enforce an award, at least where there was something to be done under the award, and it is sought to get that thing done.

The application is dismissed with costs.

Land and Revenue Regulation—39, 53 (2), (ii).

Civil Revision No. 108 of 1908. July 27th.

Before D. H. R. Twomey, Esq.

NGA CHIT TUN *v.* NGA SE GYI.

Mr. *H. N. Hirjee*—for Appellant.

Held,—that a Civil Court may attach the produce of State land in execution of a decree, but that before paying out the sale-proceeds the Court should ascertain from the Revenue authorities whether all revenue and arrears due on the land from which the produce was obtained, have been satisfied, and, if these dues have not yet been satisfied, should make them good as a first charge from the sale-proceeds.

References :—

U.B.R., 1897-01, II, 258.

The Applicant attached certain paddy "reaped, threshed, and stored on the threshing floor and being conveyed to the granary." The Subdivisional Court without any application from the judgment-debtor, removed the attachment in obedience to a general order from the District Court which runs as follows :—

"*Dated* *March* 1908.

"The attention of Judges in this District is drawn to Rule 53 (2, (ii), Upper Burma Land and Revenue Regulation, which provides that a Civil Court shall not exercise jurisdiction over any claim to the ownership or possession of 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 rent, profits, or produce thereof. This appears to me to debar Civil Courts from attaching paddy grown on State land, and until my opinion is overruled by higher authority, this direction must be followed by all Courts subordinate to me."

It is urged that the order of the District Court is illegal, and that crops once severed from State land are liable to attachment in execution of Civil decrees, notwithstanding the provisions of the Land and Revenue Regulation cited in the order of the District Court.

Mr. Hirjee, Advocate for the Applicant, points out that if the view of the District Court is held to be right, any paddy which has been grown on State land would still be subject to the jurisdiction of the Revenue authorities alone, even after it has reached the Rangoon mills or any private purchaser, and that such a view would result in great public inconvenience, and cannot be in accordance with the intention of the Legislature.

Looking merely to the languge of section 53, sub-section (2), clause (ii), of the Land and Revenue Regulation, I think it is very doubtful whether it will bear the interpretation which has been put upon it by the District Judge. An application in execution to sell certain produce as the property of the judgment-debtor does not appear to be "a claim to establish an interest in" such produce. But there is an authoritative ruling (apparently overlooked by the District Judge) which throws much light on the matter. In *Maung Po Min* v. *Maung Po* * it was held that there is nothing in section 53, sub-section (2), clause (ii), to prevent the sale of an interest in State land in execution of a decree. The question in that case was whether the interest of a judgment-debtor in State land could be attached and sold in execution. It was decided that it could not. But the reason given

* U.B.R., 1897-01, II, p. 258.

NGA CHIT TUN v. NGA SE GYI.

was not that section 53 (2), (ii), constitutes a bar to the jurisdiction of the Civil Courts in such a case, but that an occupier's right in State land is not saleable property within the meaning of section 266 of the Code of Civil Procedure, because under section 25 of the Land and Revenue Regulation the occupier has no heritable or transferable right of use or occupancy in the land.

But it is clear that the produce of State land is saleable property belonging to the occupier. There is nothing in the Land and Revenue Regulation to show that the produce belongs to anyone but the occupier, and therefore it is liable to attachment for his debts under section 266 of the Code. Furthermore, it will be seen that section 39 of the Regulation clearly contemplates the attachment of such produce in execution of decrees. That section stipulates only that the produce "shall not be liable to be taken in execution of a decree or order of any Court until the revenue chargeable thereon, and any arrear of revenue due in respect of the land, have been paid." I understand the words "taken in execution" to mean that the sale-proceeds are not to be paid out to the decree-holder until all revenue and arrears, which under section 39 constitute a first charge on the produce of the land, have been satisfied. It follows therefore that a Civil Court may attach the produce of State land in execution of a decree, but that before paying out the sale-proceeds the Court should ascertain from the Revenue authorities whether all revenue and arrears due on the land from which the produce was obtained, have been satisfied, and, if these dues have not yet been satisfied, should make them good as a first charge from the sale-proceeds.

In exercise of the powers conferred by section 622 of the Code of Civil Procedure, I set aside the order of the Subdivisional Court removing the attachment in the present case. The Subdivisional Court will proceed in accordance with the law as explained above.

The District Court will cancel and withdraw the general order referred to.

Mortgage.

Civil 2nd Appeal No. 306 of 1906. September 23rd, 1907.

Before G. W. Shaw, Esq.

NGA KYAW, MA KYWE, NGA PO SIN AND MI THON *vs.* NGA YU NUT AND MI PAW.

Mr. *H. N. Hirjee*—for Appellants.
Mr. *K. K. Roy*—for Respondents.

Held,—That in Upper Burma the Courts being bound not by the ancient law of India in relation to mortgages but by equity, justice and good conscience, the equitable rule contained in section 60 of the Transfer of Property Act would apply in favour of redemption.

But that if the case were one depending on the terms of the contract where the terms of a mortgage deed were that the mortgagors would redeem at a certain time, and if they failed to do so, would make over the land outright to the mortgagees, and the mortagors sued for redemption after the expiry of the stipulated time, the mortgagors' right to redeem was not forfeited by reason of their having failed to redeem at the stipulated time;

that the contract was not intended to execute itself, and that a further transaction was necessary before the land could become the property of the mortgagees.

References:

S.J.L.B., 549.
——— 645.
1 L.B.R., 192.
13 M.I.A., 560.
I.L.R., 26 Cal., 1.
——— 1 Mad., 1.
U.B.R., 1897-01, II, 502.
——— II, 509.

Plaintiffs-Appellants sued for redemption on payment of Rs. 430, the original mortgage money. The Defendants-Respondents admitted the mortgage, and produced the mortgage deed, a registered document, executed in *Tazaungmon* 1261-B.E. The defence was that by the terms of the deed Plaintiffs-Appellants had forfeited their right to redeem.

The document was of an unusual character. It ran as follows:—

On the 11th *Tazaungmon Lazok* 1261 U.E. and his daughter, Mi Kywe.....said to Ko Yunut and his wife, Ma Paw, "We wish to mortgage our land, called *Maubin* yielding 600 baskets of paddy, situated on the north of Ywagauk and bounded as shown below, for Rs. 430. We will redeem it in *Tabaung* 1262, by payment of an extra sum of Rs. 70, *i.e.*, Rs. 500 in all. If while the land is in Ko Yunut's possession there be any interference on the part of Government or others, we will bear the responsibility thereof with costs. If on the arrival of the date (specified) * we fail to redeem, we will make over outright † to Ko Yunut and wife, Ma Paw, the land within the (aforesaid) boundaries for Rs. 430, the money advanced." Whereupon Ko Yunut and wife, Ma Paw, paid over Rs. 430 and accepted the *Maubin* land in mortgage, etc.

The Township Court was of opinion that having regard to the language of the document it could not be held that the Defendants-

* ဝရုတ်ဝေ့ရောက်။ † အစိုင်ရှိဆွေးမြှစ်ဖြတ်ပေးထွင်းပါမည်။

NGA KYAW
v.
NGA YU NUT

Respondents had the right to take the land outright of their own accord, that what was contemplated was that the mortgagors would convey the land to them if they failed to redeem, that as the mortgage had been reduced to writing, it was reasonable to suppose that the conveyance would also be in writing, and that there was nothing to show that the land had been in fact given over outright in accordance with the terms of the document.

The Lower Appellate Court gave no heed to the terms of the stipulation in question. It proceeded on the assumption that it was identical with the agreement dealt with in *Shwe Maung* v. *Shwe Yit* * and holding that Rs. 430 was a fair equivalent for the land at the time of the mortgage, and that the stipulation was not in the nature of an extortionate penalty as in *Tun Wa* v. *Nga Nyun,* † effect must be given to it.

The sole ground taken by Plaintiffs-Appellants in 2nd Appeal is that by the terms of the agreement the Plaintiffs-Appellants are not prevented from redeeming, the Defendants-Respondents having taken no steps to enforce the stipulation. Defendants-Respondents rely on the Lower Burma cases cited and the later case of *Nga Maung* v. *Mi Bok Son.*‡

The last mentioned follows the first two, and the Privy Council decisions on which they purport to be based. The agreement in question appears to have been identical with that in *Shwe Maung's* case : namely, that if the mortgagor did not redeem at the time stated the creditor would be entitled to outright ownership of the land.

The Lower Burma judgments do not clearly show what the description of mortgage was in each case.

In *Pattabhiramier* v. *Vencatarow* § (1870) the mortgage was apparently a combination of a mortgage by conditional sale with a usufructuary mortgage.

And what was decided was that "the contract of mortgage by conditional sale was enforceable according to its letter by the ancient law of India, which must be taken to prevail in every part of India in which it had not been modified by actual legislation or established practice."

The mortgage in *Thumbusami Mudali* v. *Husain Rauthan* ‖ (1875) was held not to be one of that description. Their Lordships of the Privy Council, however, while affirming the decision in *Pattabhiramier's* case expressed an opinion in favour of an Act affirming the right of the mortgagor to redeem until foreclosure by a judicial proceeding, and against the decision of cases on the intention of the parties.

The Transfer of Property Act in section 60 gave effect to this opinion.

Here in Burma we have nothing to do with the ancient law of India in relation to mortgages. We are bound by equity, justice and good conscience, and the rules contained in the Transfer of Property Act have been commended to the Courts as rules of equity, justice and

* S.J.L.B., 549. † S.J.L.B., 645.
‡ 1 L.B.R., 192. § 13 M.I.A., 560. ‖ I.L.R., 1 Mad., 1.

good conscience; in more than one decision (*cf.* also paragraphs 659—661, Upper Burma Courts Manual).

In *Kadir Moideen* v. *Nepean** 1898) the Privy Council expressed itself not unfavourably to this course.

In these circumstances I doubt whether agreements such as those dealt with in the Lower Burma decisions above cited ought to be given effect to in this Province.

These considerations perhaps escaped notice in *Nga An* v. *Nga Hnaw* † and *Mi Po* v. *Kyaw Dun* ‡ as well as in the Lower Burma cases which they followed. The Transfer of Property Act not being in force, we are of course not bound by the letter of it, and need not observe the distinction between anomalous and other mortgages. But the decision of the present case would not be affected if we were. If the mortgage in question here were one of the ordinary kinds the principal of section 60 of the Transfer of Property Act would apply. But the mortgage appears to be of a different character.

It is not a mortgage by conditional sale as defined in section 58 of the Transfer of Property Act, since it is not ostensibly a sale, and having regard to the stipulation for the payment of Rs. 70 extra, it cannot be classed as a usufructuary mortgage proper. Assuming it to fall in the category of anomalous mortgages referred to in section 98 of that Act, then under that Act the rights and liabilities of the parties would be determined by the terms of the deed. The Plaintiffs-Appellants, as already stated, rely on the terms of the deed. On this point I am of opinion that the learned Judge of the Township Court was right, that the contract was not intended to execute itself, that a further transaction was necessary before the land could become the property of the mortgagees. This appears to me to be clear from the peculiar phraseology employed. "We will make over," is not the kind of language that would naturally have been used if it had been intended that the document should execute itself.

The equitable principle contained in section 60 of the Transfer of Property Act as already explained, is in favour of the conservation of the right to redeem, and as observed in *Mi Po* v. *Kyaw Dun* above cited it is "in consonance with the normal attitude of Burmese in respect of mortgages of land" and "the intention to extinguish that right should be clearly expressed, or should be deducible unmistakeably from the words of the deed or the conduct of the parties" in cases which depend upon the terms of the contract.

In these circumstances I have no hesitation in deciding in favour of the Plaintiffs-Appellants. When the Plaintiffs-Appellants failed to redeem in *Tabaung* 1262, I think that it was for Defendants-Respondents, if they wished to extinguish the right to redeem, to take steps to that end, if necessary by instituting a suit for foreclosure. They did not do so, and as long as they allowed matters to remain as they were the Plaintiffs-Appellants were entitled to redeem.

I set aside the decree of the Lower Appellate Court and restore that of the Court of 1st Instance. Defendants-Respondents will pay the Plaintiffs-Appellants' costs.

* I.L.R., 26 Cal., 1. † U.B.R., 1897-1901, II, 502.
‡ U.B.R., 1897-10, II, 509.

Mortgage.

Civil Appeal No. 174 of 1908. January 15th, 1909.

Before G. W. Shaw, Esq., C.S.I.

MI NAN MYA *v.* NGA HMI.

Mr. *H. M. Lutter*—for Appellant.
Mr. *A. C. Mukerjee*—for Respondent.

Mortgage—Condition for sale without the intervention of the Court.

Held,—in a case of a simple mortgage, with condition for sale by the mortgagee without the intervention of the Court, where the sale had been held and the mortgagor had had seven months' notice, that on principles of equity, justice, and good conscience, the mortgagor was not entitled to recover possession from the vendee, a *bonâ fide* purchaser for value.

References :

U.B.R., 1907, II, Mortgage, page 1.
3 W.R., 157.
I.L.R., 30 Mad., 61.
Gour's Law of Transfer in British India, Volume II, paras. 1077, 1097.
Ghosh's Law of Mortgage, pages 19, 264, 282, 328, 273 *seqq.*, 851, 855.

Plaintiff-Respondent sued "to eject" Defendant-Appellant from a house and land which he had bought at an auction held at the instance of Defendant-Appellant's mortgagees. I have required *ad valorem* Court Fees to be paid, the suit being properly one for possession liable to stamp duty under section 7 (v) (*c*) or (*e*), Court Fees Act,

The defence set up in the written statement was that the sale was held without Defendant-Appellant's knowledge, which was admittedly contrary to the fact.

The real points in dispute were whether a clause in the mortgage deed giving the mortgagees the right to sell the property without the intervention of the Court was valid, and, if not, whether Plaintiff-Respondent was still entitled to recover possession from Defendant-Appellant.

These are the only points for determination in the present appeal.

The District Court granted Plaintiff-Respondent a decree for Defendant-Appellant's ejectment. The learned Judge seems to have been a good deal puzzled as to the law applicable, whether the rules contained in the Transfer of Property Act should be followed and, if so, what they meant. His difficulties were apparently due in part to his having failed to apprehend correctly the meaning and effect of the decision in *Nga Kyaw* v. *Yu Nut*, * a case where the question was whether the Plaintiffs had the right to redeem in face of a condition in the mortgage deed by which they had agreed to make over the property to the mortgagee if they failed to redeem by a certain date. Briefly the view which was there taken was this :—

On general principles of equity, justice, and good conscience the Plaintiffs are entitled to redeem. The rules contained in the Transfer of Property Act may be regarded as principles of equity, justice, and good conscience. As the Act is not in force in Upper Burma the Courts are not bound by the letter of it, and need not observe the distinction between anomalous and other mortgages. But if the letter

* U.B.R., 1907, II, Mortgage, page 1.

MI NAN MYA
v.
NGA HMI.

of the Act were applied, this would not affect the decision, since assuming that the mortgage was one of the regular kinds governed by section 60, the Plaintiffs must succeed on the principle embodied in that section, and assuming that it was an anomalous mortgage, the Plaintiffs would still succeed on the terms of the contract, under section 98. In face of this position, it is not intelligible how the question, whether section 98 of the Transfer of Property Act is one of the sections to be followed by Courts in Upper Burma, could present itself as one for serious discussion.

For the same reason it appears to me to be immaterial whether section 98 overrides section 69. But as a matter of construction, it is clear that the provisions of section 98 dealing with anomalous mortgages are in the nature of an exception. The mortgages specified in section 58 and the combinations of them specified in section 98 are governed as to the rights and liabilities of the parties by the general rules contained in the Chapter, including section 69, but anomalous mortgages are declared to be governed by the terms of the Contract; that is to say, they are not governed by those general rules.

In the present case, however, the mortgage in question was clearly a simple mortgage, and the bye-agreement as to sale did not alter its character. To take the contrary view would be to render section 69 of no effect.

Hence if the Act applied the case would be governed by section 69.

As to whether the third paragraph of that section applies only to the classes of mortgages specified under heads (*a*), (*b*) and (*c*) in the first paragraph, the language of the section is not as lucid as it might be. But there are no limitations to the application of the third paragraph, and construing the whole section together, I think that "in the professed exercise of such a power" must be referred to the first part of the first paragraph, and that "otherwise improperly exercised" covers the case where the power is invalid because not falling within clause (*a*), (*b*) *or* (*c*). This appears to be the interpretation put upon it by Ghosh (*see* his notes to section 69 on page 855 of his work). Gour cites *Doucett* v. *Wise* * apparently as authority for the contrary view (Gour's Law of Transfer in British India, Volume II, paragraph 1097). But that case was decided long before the Transfer of Property Act was enacted.

It follows that if the Transfer of Property Act had been in force, the power under which the sale by the Defendant-Appellant's mortgagees to Plaintiff-Respondent was effected would have been invalid. But on the other hand, the Defendant-Appellant would not have been at liberty to impeach the sale. Her remedy would have been in a suit for compensation, and she would have had to prove in such a suit that she was damnified.

It remains to consider what should be done on the principles of equity, justice, and good conscience.

An agreement giving a power of sale is in one sense, no doubt, an interference with the right of redemption (*cf. Ghosh's* first note to

* 3 W.R., 157.

section 69, Transfer of Property Act, at page 851 of his Law of Mortgage). But the general rule as stated by Ghosh in his work is that the mortgagor has "the right to redeem the mortgage before it is foreclosed or the estate is sold by the mortgagee" (3rd Ed., page 264), and where a default has taken place, the mortgagee has "generally speaking the right to foreclose or to sell the mortgaged property" (*Ib.*, page 328)—in the case of a simple mortgage to sell. This being so, an agreement for sale (even without the intervention of the Court) seems to be at least distinguishable from ordinary clogs to redemption. Although the right to sell is strictly confined in many systems of law to sale through the intervention of the Court, this is not the case with mortgages under the English law; or with English mortgages and some other mortgages as well, under the Transfer of Property Act. From Ghosh's observations on pages 273 *seqq.*, it would appear that the doctrine against clogging redemption is no longer regarded in England with the same favour as it was. He sums up his account by saying that "in the more modern cases the Court has generally proceeded upon some independent ground of equity arising out of the relations between the parties."

In India it is admitted that the doctrine in question is not open to the same objection, and it continues to be affirmed by the Courts (*see* Ghosh's Law of Mortgage, pages 19 and 282). But from the accounts given by Ghosh and Gour of the judicial decisions before the Transfer of Property Act, it is evident that there was considerable conflict of opinion as to whether an agreement for private sale should be enforced as a matter of equity. It is unnecessary to refer in detail to those cases.

Gour conceives that the Courts, in dealing with transactions entered into before the Transfer of Property Act, will be guided by the Calcutta and Bombay decisions which incline in favour of a private sale when not exercised in a fraudulent or improper manner, opinion having crystallized in this direction before the Act restored the earlier law. But he states that the decisions are so conflicting that it is impossible to reconcile them (Volume II, paragraph 1077 and notes to same).

A recent Madras case, *Nilakandhan* v. *Ananthakrishna Ayyar*, * has been referred to on behalf of Defendant-Appellant as supporting the contention that the sale now in question ought to be set aside. But that was a case where there was a stipulation for perpetual renewal of the mortgage, and the mortgagor's claim to redeem in spite of that stipulation, was upheld. There was no question of sale. The position was not unlike that in *Nga Kyaw* v. *Yu Nut* above cited.

A case like the present is different. But in Upper Burma I think that in dealing with such a case we should still apply the general rules contained in the Transfer of Property Act, as representing principles of justice equity, and good conscience while not adhering strictly to the letter, and having regard to the circumstances of the particular case.

* I.L.R., 30 Mad., 61.

MI NAN MYA
v.
NGA HMI.

Now what are the principles applicable to the present case to be extracted from the Act?—that generally speaking in a simple mortgage a power of private sale is invalid, but that if a sale is held in professed exercise of such a power it is not to be impeached, but the mortgagor may sue for damages if he can show that he was damnified.

We have next to see under what circumstances the agreement for sale was here carried out.

The mortgage deed was executed on the 19th February 1904. In 1907 Plaintiff-Respondent sued Defendant-Appellant in Civil Regular No. 144 of that year for ejectment, alleging a purchase from her mortgagees in March 1907, and she defended the case on the ground that she had not received due notice of the sale and only heard of it some 10 days afterwards. An attempt was made to prove the service of two notices of demand in November 1906 and February 1907, but it was held that they were not proved to have been served. The date of institution was the 27th May 1907, and the date of decree, the 30th September of the same year. Following on that decree, the mortgagors gave Defendant-Appellant precise notice in terms of the mortgage deed on the 9th September 1907, and the sale now in question was held on the 31st October 1907. It is clear that Defendant-Appellant actually had notice that her mortgagees were taking steps to enforce the mortgage-deed from the time she became aware of the first sale. She thus had actually some seven months at least to pay what she owed under the mortgage and save her property from sale. Plaintiff-Respondent on the other hand is a *bonâ fide* purchaser for value. He had bought in March 1907, and had to buy again at an enhanced price in October 1907. This is not disputed.

Defendant-Appellant did her best—if not to prevent the sale, at least to gain time. She objected to the first sale, and protested against the second one being held. But she is not shown to have made any attempt to pay her debt.

It would be going beyond what the Transfer of Property Act would have permitted, if it had been in force, to set aside the sale. The result would be to compel the mortgagees to sue for sale; and though this would undoubtedly give Defendant-Appellant more time—more time than she had any right to expect,—it is very doubtful if it would really benefit her in the end to set the sale aside. It would certainly benefit nobody else, and it appears to me to be impossible to reconcile with any equitable principle in the circumstances mentioned. My conclusion therefore is that I should not interfere with the Lower Court's decision in favour of the Plaintiff-Respondent. The appeal is dismissed with costs. But the decree will be amended into a decree for possession.

Master and Servant.

Civil 2nd Appeal No. 241 of 1907. May 25th, 1908.

Before D. H. R. Twomey, Esq.

NGA MAUNG GYI *vs.* RAMZAN ALI.

Mr. *S. Mukerjee*—for Appellant.

Mr. *A. C. Mukerjee*—for Respondent.

Where the contract of hiring provides for the payment of certain wages, although it may be optional on the part of the master to find work and he may, if he pleases, discontinue his business, yet he must nevertheless pay the wages agreed upon, whether he find work for the servant or not, or he will render himself liable to an action for damages.

References :

Smith's Law of Master and Servant, pages 63, 74, 159, 160.
Indian Contract Act, 1882, section 73.

The Plaintiff-Respondent, Ramzan Ali, is an engineer who built a saw mill for the Defendant-appellant, Maung Gyi. They signed an agreement on the 31st January 1906 containing clauses as follows :—

" From the day the work begins he will not leave for a year. He will work for Rs. 60 a month . . . . If the mill is closed for any reason, he will receive the full monthly pay without deduction for any days (*i.e.*, any days during which the mill is closed).

As a matter of fact he received only three months' wages. In the fourth month the mill was closed altogether.

The Plaintiff sued, *in forma pauperis*, for nine months' wages at Rs. 60 a month, basing his claim on the agreement referred to above.

The Subdivisional Court dismissed the suit, holding that the agreement did not bind Maung Gyi to retain Ramzan Ali's services for a year. The District Court on appeal held that "on the face of the written agreement and the pleadings, the burden of proof should be placed on the Defendant," and decided that he failed to discharge his obligation.

A decree for Rs. 540 or nine months' salary was accordingly granted to the Plaintiff-Respondent, Ramzan Ali, and Maung Gyi now appeals against that decree.

The case turns entirely on the construction of the clauses of the agreement cited above. The agreement expressly binds Ramzan Ali to work for a whole year, the consideration for his promise being Maung Gyi's undertaking to pay him Rs. 60 a month, without deduction for days on which the mill is shut.

There is on the other hand no express undertaking in so many words by Maung Gyi that he will go on employing Ramzan Ali for so long as twelve months. But the learned Additional Judge of the District Court thought that the clauses cited above amounted by implication to such an undertaking on the part of Maung Gyi. He held that the matter is settled by Maung Gyi's promise to pay the full monthly salary, without deduction for days when the mill is closed, when read with the promise of Ramzan Ali to work for 12 months. The Defendant-appellant contends on the other hand that the provision as to non-deduction in respect of non-workig days refers only to temporary closings for repairs and the like, and not to final cessation and abandonment of the mill business.

NGA MAUNG GYI
v.
RAMZAN ALI.

The Defendant, Maung Gyi alleged that the Plaintiff was incompetent, but this plea was not pressed, and in appeal the learned Advocate for the Appellant, in arguing the case, confines himself to the ground that the agreement between the parties did not provide for certain employment for twelve months or for any period.

No authoritative rulings have been cited for my guidance in disposing of this appeal. But I have referred to Smith's Treatise on the Law of Master and Servant (edition 1902) which expounds the English law on the subject. In the absence of any special Indian law, I think the English law may fairly be applied.

In this case the period of hiring is not specified in the contract of hire, and it is specified that wages are to be paid monthly. But it has been held that if there is anything in the contract to show that it was intended to be for a year, the reservation of wages weekly or monthly will not control it. For the mere fact of receiving wages weekly or monthly is not inconsistent with a yearly hiring.* Now it was expressly stipulated that the Plaintiff should work for a year. I think I must hold therefore that the obvious intention of the parties was to hire and to be hired for a year, and such a hiring cannot be put an end to by either party before the end of the year. The text-book already referred to contains the following passage which bears upon the present case :—

"Where the contract of hiring provides for the payment of certain wages (not in proportion to the work done), although it may be optional on the part of the master to find work and he may, if he pleases, discontinue his business, yet he must nevertheless pay the wages agreed upon, whether he find work for the servant or not, or he will render himself liable to an action for such damages as a Jury may think proper to give."†

This appears to be in accordance with equity and good conscience, and there is no reason I think why the rule should not be applied to the present case.

I hold therefore that the Plaintiff-Respondent was entitled to sue for damages for wrongful dismissal. In all such actions the servant seeks compensation, not for services he has rendered previous to his discharge, but *for the injury he has sustained* by such discharge in not being allowed to serve and earn the wages agreed on.‡ The amount of damages must depend on the nature of the contract and the amount of wages agreed to be paid. If there were an express agreement for a month's notice, it might be only a month's wages. But, generally speaking, in England, the amount of damages is a question for the jury to determine. In one case,§ in which a clerk who had been hired for two years was wrongfully dismissed after one quarter's service, the jury awarded him a sum equal to twelve months' salary, and the amount was not considered excessive by a Superior Court.

In the present case where the wages agreed upon were Rs. 60 a month for twelve months, and the contract was broken after three months, I am not prepared to agree with the Lower Appellate Court

* Smith's Law of Master and Servant, p. 63.
† " " " p. 74.
‡ " " " p. 159.
§ " " " p. 160.

that wages should be allowed for the whole of the remaining nine months of the term agreed upon. The explanation to section 73 of the Contract Act lays down the rule that in estimating damages for breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be considered. It would be unreasonable to suppose that the Plaintiff-respondent could not obtain fresh employment under nine months. I hold therefore that it will be sufficient to allow him a sum equal to three months' wages by way of compensation for wrongful dismissal. The decree of the Lower Appellate Court is modified. There will be a decree in favour of the Plaintiff-respondent for Rs. 180 with costs on that amount in all Courts. The amount of Court-fee on Rs. 540 (= Rs. 40-8) for the plaint and the first appeal shall be a first charge on the subject matter of the suit, and shall be recovered in Court-fee stamps, which should be cancelled and placed in the records of the Courts below.

Mahomedan Law.

Civil Appeal No. 222 of 1907. May 25th, 1908.

Before D. H. R. Twomey, Esq.

MA ZAKERIA *vs.* HARUN.

Mr. *S. Mukerjee*—for Applicant.
Mr. *J. C. Chatterjee*—for Respondent.

Held,—*that where the only candidates for the guardianship of the property of a minor are the mother and a paternal uncle, there appears to be no authority, under the Mahomedan law, for preferring the uncle.*

See Guardian and Wards—page 1.

Muhammadan Law--Gift.

Civil 2nd Appeal No. 53 of 1906. February 27th, 1907.

Before G. W. Shaw, Esq.

ABDUL GAFUR AND FATIMA BIBI *vs.* DEYAN SINGH, legal representative of NAN SINGH.

Mr. *A. C. Mukerjee*—for Appellants.

Messrs. *J. C. Chatterjee and S. Mukerjee*—for Respondent.

Actual delivery of possession is not necessary under Muhammadan Law.

See Buddhist Law—Gift, page 1.

Muhammadan Law—Inheritance.

Civil 2nd Appeal No. 53 of 1906. February 27th, 1907.

Before G. W. Shaw, Esq.

ABDUL GAFUR AND FATIMA BIBI *vs.* DEYAN SINGH, legal representative of NAN SINGH.

Mr. *A. C. Mukerjee*—for Appellants.

Messrs. *J. C. Chatterjee* and *S. Mukerjee*—for Respondent.

By Muhammadan Law the husband's share, where there are children, is one-fourth.

See Buddhist Law—Gift, page 1.

Provincial Small Cause Courts Act—16, 33.

Civil Revision No. 181 of 1906. June 24th, 1907.

Before G. W. Shaw, Esq.

NA SHWE THA *vs.* NGA PO.

Mr. *J. C. Chatterjee*—for Applicant.
Mr. *Basu*—for Respondent.

Where the same Judge presided over a Small Cause Court and a District Court, and tried by mistake as Judge of the District Court a case of a Small Cause nature—

Held,—that the mistake did not alter the character of the suit, and that no appeal lay from the decree.

References:

I.L.R., 12 Bom., 486.
—— 25 Bom., 417.

A preliminary objection has been raised by Respondent that this was a suit of a Small Cause nature and therefore no appeal lies.

It is practically admitted that the suit was cognizable by a Small Cause Court. It was to recover certain gold ornaments which had been entrusted to Defendant-Applicant for safe keeping. To suppose that this was a suit relating to a trust within the meaning of Article 18 of the Schedule to the Provincial Small Cause Courts Act is to misconceive what is meant by a trust. The explanation is to be found in section 3 of Act II of 1880 (the Indian Trusts Act), I am under no sort of doubt that this was a Small Cause Suit.

The Judge of the District Court is also the Judge of the Small Cause Court and he tried this case as Judge of the District Court, overlooking the mistake made by the Plaintiff-Respondent in filing the suit "in the District Court."

The learned Advocate for Defendant-Applicant contends that the District Court had jurisdiction concurrently with the Small Cause Court under section 10 (*c*) of the Civil Courts Regulation. But he has clearly overlooked the opening words of section 10 "subject to the provisions of.....the Provincial Small Cause Courts Act," etc.

Even if that saving clause had been omitted the provisions of section 16 of the Provincial Small Cause Courts Act would still have barred the trial of the case by the District Court, since in section 10 (*c*) of the Regulation there is no *express* provision superseding section 16 of the Provincial Small Cause Courts Act.

As to the effect of the mistake that was made, there are two decisions, *Pitambar Vajirshet* vs. *Dhondu Navlapa* (1887) * and *Shankarbhai* vs. *Somabhai* (1900).†

The former dealt with a case under the old Act, and its references to the present Act (IX of 1887) are not very clear. They seem to imply that in view of section 33 the proceedings in a Small Cause case wrongly tried as a regular one by a Judge who presides over a Small Cause Court and also over a Court of ordinary jurisdiction would be void.

* I.L.R., 12 Bom., 486. † I.L.R., 25 Bom., 417.

NGA SHWE THA
v.
NGA PO.

But the Judges responsible for the second decision evidently did not take this view.

I should be sorry to have to hold that the proceedings in the present case were void because the Judge dealt with them, or supposed he was dealing with them, in one capacity instead of in another. I prefer to follow *Shankarbhai's* case. The result is that the character of the suit was not altered by the mistake. It was a Small Cause Case. It was tried by a Judge who was Judge of the Small Cause Court having jurisdiction. The decree was final.

An appeal therefore does not lie under section 540, Civil Procedure Code.

Provincial Small Cause Courts Act—2nd Schedule—15.

Civil 2nd Appeal No. 295 of 1907. July 15th, 1908.

Before D. H. R. Twomey, Esq.

NGA HLA GYI *v.* NGA AUNG YA.

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

Held,—that a suit for an amount due on a bond is not a suit for the specific performance of a contract as contemplated in Article (15) of the 2nd Schedule of the Provincial Small Cause Courts Act.

Also,—the jurisdiction of the Small Cause Courts cannot be ousted merely by asking for an alternative relief to which the plaintiff is not entitled.

References:

Bengal L.R.I., 91.
I.L.R., 21 Bom., 248.
Fry on Specific Performance, 4th Edn., p. 7.
Nelson's Specific Relief Act, 2nd Edn., p. 6.

This suit was for the recovery of 380 baskets of paddy or their value Rs. 304 (at Rs. 80 per 100 baskets) as due upon a bond. The defendant denied execution of the instrument, and denied the transaction *in toto*, but the Township Court, relying chiefly on considerations as to similarity of hanwriting, found that the signature on the pronote was the Defendant's, and granted the Plaintiff a decree. On appeal the District Court reversed the decree and dismissed the suit.

The suit being of a value not exceeding Rs. 500, no second appeal lies under section 13 of the Upper Burma Civil Courts Regulation, unless it is a suit excepted from the cognizance of a Court of Small Causes under the 2nd Schedule of the Provincial Small Cause Courts Act, 1887. It is urged that the suit falls under Article (15) of the Schedule as a suit for the "specific performance of a contract."

It cannot be seriously contended that if the suit were merely for Rs. 304 due on a bond it would be exempted from the jurisdiction of the Small Cause Courts under Article (15). "Claims for money due on bonds" were expressly mentioned among the classes of cases triable by Small Cause Courts under the earlier Act (XI of 1865). The scheme of the present Act is different. It defines by exclusion instead of by inclusion. But it has never been held that a claim for money due on a bond falls under Article (15) of the Schedule of the Act as a suit for specific performance of a contract. Moreover it has been pointed out that "the essence of the recovery of a debt is in the recovery of the amount due and not in the specific restitution of certain coins," and the money recovered is really in the nature of pecuniary *damages* upon a contract for the payment of the money.* Sir E. Fry pointed out that this is not the same thing as specific performance of the promise to pay. Where the amount agreed upon is duly paid according to the contract, the money is paid in *performance* of the contract. But where the contract is broken and the Court decrees the amount agreed upon, the money is paid as *satisfaction* for non-performance.† It is sufficiently clear therefore that the present suit viewed merely as

* Nelson's Specific Relief Act, 2nd Edn., p. 6.
† Fry on Specific Performance, 4th Edn., p. 7.

NGA HLA GYI v. NGA AUNG YA.

a suit for the amount due on the bond is not a suit for specific performance of a contract as contemplated in Article (15) of the Schedule. It remains to consider whether the paddy makes any difference. According to the Plaintiff-Appellant there was a contract to supply 380 baskets of paddy on demand, and he sued for the specific performance of this contract or for Rs. 304, the market value of the grain on the date of the suit. But this is not a contract which could be specifically enforced by the Courts, for compensation in money is clearly an adequate relief [see Specific Relief Act, 1877, section 21 (*a*), illustration 2]. It has been held in several Indian cases that the jurisdiction of the Small Cause Courts cannot be ousted merely by asking for an alternative relief to which the Plaintiff is not entitled. It is sufficient to refer to the Bengal case *N. C. Banerjee* v. *J. C. Banerjee* * and the Bombay case *N. B. Khot* v. *B. B. Khot*.† The former was decided by Chief Justice Sir B. Peacock and the latter by a Bench of the Bombay High Court. From these rulings it is plain that the present suit was one cognizable by a Small Cause Court notwithsanding the prayer for specific performance of the alleged contract to supply paddy.

On the above grounds I decide that no second appeal lies under section 13, Upper Burma Civil Courts Regulation, and it is not contended that there are any grounds for dealing with the case in revision under section 622, Civil Procedure Code.

The appeal is therefore dismissed with costs.

* Bengal L.R.I., 91. † I.L.R., 21 Bom., 248.

Provincial Small Cause Courts—Schedule II—8.

Civil Miscellaneous No. 20 of 1909. June 30th.

Before G. W. Shaw, Esq., C.S.I.

NGA KAN *v.* MI MYA.

Held,—that a stall in a market is a house or part of a house, and that a suit to recover stall rent is a suit to recover house-rent within the meaning of clause 8 of Schedule II to the Provincial Small Cause Courts Act, and is cognizable by a Court of Small Causes.

References :

Wharton's Law Lexicon, 9th Edition, dated 1892.
Stroud's Law Lexicon, 1st Edition, dated 1890.
Tomlins's Law Dictionary, 4th Edition, dated 1835.

THIS is a reference under O. XLVI, r. 6, by the Judge of the Small Cause Court. The point for determination is whether a suit for the recovery of rent for the occupation of a stall in a market is a suit for the recovery of house-rent within the meaning of clause 8 of the Second Schedule to the Provincial Small Cause Courts Act, and therefore cognizable by a Court of Small Causes. The learned Judge is of opinion that a market stall does not come within the definitions of "house" given in Tomlin's Law Dictionary and in Webster's Dictionary, that stall rent is practically rent for the occupation of the land on which the stall is kept, and consequently that a Court of Small Causes has no jurisdiction.

The parties have been unrepresented by Advocates and, of course, have been unable to lend any assistance. I have not succeeded in finding any judicial decision directly bearing on the point in question. But I have little hesitation in coming to a finding.

To begin with, neither the ordinary nor the legal significance of the word "house" is so strictly limited as the learned Judge supposes.

Webster's definition is " a structure intended or used as a habitation or shelter for animals of any kind, but especially a building or edifice for the habitation of man, a dwelling place, a mansion."

Wharton's Law Lexicon gives as the meaning " *prima facie* a dwelling-house," but refers to " 7M. and G., 122 " as modifying that definition. Stroud's Law Lexicon is fuller. It says " a ' house ' is a structure of a permanent character structurally severed from other tenements (and usually but not necessarily under its own separate roof), that is used, or may be used, for the habitation of man, and of which the holding (as distinct from lodgings) is independent." It goes on : " It is not necessary that a house, if adapted for residential purposes, should be actually dwelt in." The authority cited for the last statement and one of those cited for the first is *Daniel* v. *Coulsting*, the reference to which is 7 *M. and G.*, 122.

Tomlins's Law Dictionary to which the Lower Court referred, I find, is a 4th Edition, published in 1835, of what was apparently the only Law Dictionary then in existence. The definition of " house " which it gives is exceedingly brief, and is not supported by authorities.

The copy of Wharton in the Library of this Court is the 9th Edition, dated 1892. The 1st Edition was published in 1848.

NGA KAN v. MI MYA.

The Stroud is the 1st Edition, dated 1890. Both are thus more recent as well as fuller than Tomlins.

The letters " M and G " signify Manning and Granger's Law Reports which cover the years 1840 to 1844. *Daniel* v. *Coulsting* is therefore evidently a decision of later date than Tomlins's work. The report of it is not available here. It was a case decided by the Court of Common Pleas.

In clause 8 of Schedule II to the Provincial Small Cause Courts Act the word " house " must be taken to be used in its ordinary or ordinary legal sense, and what these are has been shown by the Dictionary definitions quoted. A stall or shop in a market in Burma is capable of being used as a residence by the people of the country. I have indeed known at least one case in which stall-holders were permitted to live permanently in their stalls, and no doubt if the same permission were given in other markets the practice would be widely followed.

I cannot agree with the Judge of the Small Cause Court that the rent of a market-stall is practically rent for the occupation of the land on which the stall is built. The difference between the daily rates collected from tray-sellers in the open, and the monthly rent levied for the occupation of stalls, is precisely due to the fact that the latter is a charge for the use of the stalls.

My conclusion is that a stall in a market is a house or part of a house, and that a suit to recover stall-rent is a suit to recover house-rent within the meaning of clause 8 of Schedule II to the Provincial Small Cause Courts Act. My decision on the point referred is that the suit in question is cognizable by a Court of Small Causes.

Stamps—35.

Civil Appeal No. 5 of 1907. October 16th.

Before G. W. Shaw, Esq.

MI TA *vs.* NGA SEIN.

Mr. *J. C. Chatterjee*—for Appellant.
Mr. *A. C. Mukerjee*—for Respondent.

Held,—*that where the Defendant was alleged to be withholding an unstamped parabaik document, that did not render secondary evidence admissible.*

See Execution—Signing, page 5

Stamp—36.

Before G. W. Shaw, Esq., C.S.I.

MI KE *v.* NGA KAN GYI AND NGA PO SIN.

Civil Revision No. 209 of 1908. October 22nd, 1909.

Mr. *J. C. Chatterjee*—for Applicant.
Mr. *S. Mukerjee*—for Respondents.

Where a promissory note bearing a stamp which was not duly cancelled had been admitted in evidence in the Court of First Instance,—

Held,—that the Appellate Court could not question its admissibility.

References :

2 L.B.R., 103, dissented from.
I.L.R., 14 Bom., 102.
——— 18 Bom., 369.
U.B.R., 1897-01, 559, affirmed.
——— 1897-01, II, 556.

PLAINTIFF-APPLICANT sued to recover Rs. 195 principal and interest on a promissory note purporting to have been executed by Kan Gyi and Po Sin in favour of Plaintiff-Applicant and her husband, Myat Tun, since deceased. The Defendants were originally Kan Gyi and Po Sin only. In their written statement they said that they went to Myat Tun to borrow, but he would not lend to them and told them to bring Maung Thin with them and he would lend to Maung Thin. Wherefore they took Maung Thin, and Myat Tun lent Rs. 150 to Maung Thin, who in turn afterwards lent to them ; but they repaid him.

On this the Township Court very properly made Maung Thin a Defendant. In his written statement he admitted having borrowed the money from Myat Tun in the circumstances stated by the other Defendants and having lent to the other Defendants and been repaid by them, but said nothing about the promissory note, and showed no cause why a decree should not be granted to Plaintiff-Applicant against him on his own admission.

It is hardly credible that though the Township Court examined Nga Thin before framing issues it did not question him on these points. In the end the Township Court gave Plaintiff-Applicant a decree against the original Defendants, and *made no order one way or the other* with respect to Defendant, Nga Thin,—another most extraordinary and inexplicable omission.

On appeal by the Defendants, Kan Gyi and Po Sin, the Lower Appellate Court reversed the Township Court's decree and dismissed the suit entirely on grounds which appear to me to be in great part unsound. It is to be noted that Nga Thin was not made a party to the appeal.

The learned Additional Judge of the District Court evidently omitted to observe how and when Nga Thin came to be made a Defendant, and this mistake led him astray altogether. There was nothing " ingenious " or disingenious in the way the plaint was framed.

In overlooking the fact just referred to, I am of opinion that the Lower Appellate Court was guilty of illegality or material irregularity within the meaning of section 115, Civil Procedure Code.

MI KE
v.
NGA KAN GYI.

Again, whether Plaintiff-Applicant was present or was in the house when the money was lent was perfectly immaterial as far as her right to sue was concerned.

Her implied allegation was that the money lent was the joint property of her husband and herself. Strictly speaking it would have been more correct for her to sue expressly in a double capacity—(1) as legal representative of her husband deceased, and (2) in her own person. But in fact, according to the weight of authority, she was at liberty, as a surviving partner, to sue alone in her own name. (*See* Pollock's Contract Act, notes to section 45.) No objection was expressly taken to the Plaintiff-Applicant suing in her own name alone, though perhaps the written statement of Defendant, Nga Thin, intended to raise such an objection. The Defendants adduced evidence to prove that Plaintiff-Applicant was away from home at the time of the loan. The Township Court paid no attention to the point. If there had been any force in the objection, Plaintiff-Applicant might have been and ought to have been allowed to amend the plaint.

Then the Lower Appellate Court on the authority of the Lower Burma case of *Bagywan* v. *Mi Kyi Kyi* (1903)* held that the stamp on Plaintiff-Applicant's promissory note was not properly cancelled, that the Township Court therefore committed an illegality in acting on it by passing a decree on it, and that section 36, Stamp Act, did not prevent a superior Court from dealing with the illegality. On this point it was the duty of the Lower Appellate Court to follow the Ruling of this Court in *Mi Po* v. *Mi Thè On* (1899), † even if it thought the later Lower Burma decision right. The Additional Judge, however, apparently overlooked *Mi Po's* case altogether. As there is a conflict, I have taken the opportunity of referring to the authorities, and reconsidering the question. I find that the learned Judge who decided the Lower Burma case did not refer to *Mi Po* v. *Mi Thè On* or to any of the decisions there cited, and that the authorities on which he relied did not deal with the point for determination. *Ralli* v. *Karamali Fazl* (1890)‡ was a case which was tried by the High Court originally, and the Judge who dealt with it on the Original side held the document to be unstamped. The Appellate Bench merely confirmed that finding. No question of the meaning and effect of the 3rd proviso to section 34 of Act I of 1879, corresponding to section 36 of the present Stamp Act, arose.

In *Chinbasapa* v. *Lakshman Ramachandra* (1893)§ the Court of First Instance had dismissed the claim, holding certain hundis to be unstamped and other evidence to be inadmissible, and the Lower Appellate Court had reversed that decree on the ground that the defendant admitted his liability. It was held by the High Court that the hundis were acted upon when a decree was given upon them on the Defendant's admission; and therefore the Lower Appellate Court was wrong. [On this point this Ruling was followed in *Mi Ein Min* v. *Tun Tha* (1900)¶.]

* 2 L.B.R., 103.
† U.B.R., 1897-01, II, 559.
‡ I.L.R., 14 Bom., 102.
§ I.L.R., 18 Bom., 369.
¶ U.B.R., 1897-01, II, 556.

The question of the meaning and effect of the 3rd proviso to section 34 of the Stamp Act, 1879, did not arise.

On the other hand, the cases cited in *Mi Po* v. *Mi Thè On* dealt directly with that question. I am unable to find any reason for doubting their correctness. If the learned Judge who decided the Lower Burma case had referred to them he would probably have come to a different decision. I am unable, therefore, to concur in the interpretation of section 36, Stamp Act, adopted in that case, and I think that *Mi Po* v. *Mi Thè On* was correctly decided.

It follows that though the Lower Appellate Court was no doubt right in holding that the stamp on the promissory note in the present case was not duly cancelled, it was wrong in holding that it could question the admissibility of the document after the Court of First Instance had admitted it.

The appeal had to be decided on the assumption that the promissory note was duly stamped.

In overlooking the decision in *Mi Po* v. *Mi Thè On*, I am of opinion that the Lower Appellate Court was guilty of illegality or material irregularity within the meaning of section 115, Civil Procedure Code.

As to the execution of the promissory note, the Lower Appellate Court only said, "The execution of the note has not been even proved," which was not a sufficient treatment of the point. In fact, however, there was no evidence of the execution of the promissory note. The Plaintiff-Applicant's evidence only went as far as this, that Defendant Po Thin wrote a promissory note or wrote in a promissory note book. None of the witnesses saw anybody sign a promissory note. None deposed to the particular promissory note which Plaintiff-Applicant sued on. (The Township Court omitted to give it a distinguishing letter or mark, as well as to ask the witnesses about it.) This being so the Lower Appellate Court's finding that the execution of the promissory note was not proved, cannot be impeached in Revision.

The fact remains that the case was disposed of in a very unsatisfactory manner as the foregoing will explain.

I set aside the Lower Appellate Court's decree and direct that it join Nga Thin as a Respondent and, after hearing him, remand the case to the Township Court for Defendant, Nga Thin, to be properly examined and for fresh issues if necessary to be framed and further evidence if necessary to be taken, and the case resubmitted with the additional evidence and the Township Court's findings on the same and the reasons therefor by a date to be fixed to the Lower Appellate Court, which will then proceed to decide the appeal afresh. Costs will abide the final result.

Transfer of Property—55 (2).

Civil 2nd Appeal No. 267 of 1905. February 27th, 1907.

Before G. W. Shaw, Esq.

SADHU *v.* NGA SI GYI, MI MI.

Mr. *C. G. S. Pillay*—for Appellant.

The principle applied as a matter of justice, equity, and good conscience.

Held,—*that where Defendant sold and Plaintiff bought land as a house-site in the belief that it was* bobabaing, *Defendant impliedly guaranteed that he had a good title, and Plaintiff was entitled to recover the purchase money when it turned out that the land was State and he was prevented from building on it.*

See Evidence, page 1.

Tort.

Before G. W. Shaw, Esq.

Civil Revision No. 167 of 1906. August 7th, 1907.

NGA TUN NYO *vs.* NGA THA HMAT.

Mr. *S. Mukerjee*—for Applicant.
Mr. *J. C. Chatterjee*—for Respondent.

Negligence—Contributory Negligence—Tresspass.—Trespass is the infringement of a right and gives a cause of action even when no damage results, and not only substantial but even exemplary damages may be given if the circumstances require.

References :

U.B.R., 1904-06, II, Tort, page 9.
Alderson B's definition of negligence quoted in Alexander's Case Law on Torts, 4th Edition, page 33.
Pollock's Law of Torts, 7th Edition, page 499 *seqq*.

This case was not very satisfactorily dealt with by either of the Lower Courts. Plaintiff-Respondent in his plaint alleged that Defendant-Applicant without his permission took and used a pony of Plaintiff-Respondent's, whereby it became ill and finally died, and he claimed Rs. 70 as the value of the pony.

Defendant-Applicant's written statement was to the effect that the pony did not become ill by reason of his riding it, but died because Plaintiff-Respondent rode it from Pyawbwè to Yamèthin in the sun.

In the preliminary examination of the parties, Plaintiff-Respondent admitted that he left the pony in the stable without any one in charge, and that when he found it ill (suffering from stoppage of urine) after Defendant-Appellant had ridden it, he gave it no medicine except "eye-medicine" (irritants applied to the eyes) and also took it to Yamèthin, a distance of 13 miles, starting at 3-30 P.M. and riding it off and on, and that he found it dead next morning. Defendant-Applicant on his side admitted that he got no permission to use the pony, but he said that constables use one another's ponies when in need.

The parties are both mounted police constables, and both orderlies to the same Subdivisional Officer. The Township Court did not ask Plaintiff-Respondent, but seems to have assumed that what Defendant-Applicant said was correct, *viz.*, that constables used one another's ponies when in need. It framed no issue on the point of trespass. It only framed one issue "Was the pony's illness and death due to the Defendant's using it" : which would have been insufficient even if no question of trespass had arisen. Assuming that Defendant-Applicant, although not a bailee, was not committing a trespass in using the pony, he could not be held liable for its illness and death unless he was guilty of negligence, that is of "omitting to do something that a reasonable man would do, or of doing something that a reasonable man would not do, in either case unintentionally causing mischief to another" (Alderson, B's definition of negligence quoted in Alexander's Case Law on Torts, 4th Edition, page 33).

Again the question of contributory negligence arose. This is well explained in Pollock's Law of Ports (7th Edition, pages 499 *seqq*).

NGA TUN NYO
v.
NGA THA HMAT.

The rule is that "if the Plaintiff could by the exercise of such care and skill, as he was bound to exercise, have avoided the consequence of the Defendant's negligence he cannot recover." What has to be determined is "whether the damage was occasioned entirely by the negligence or improper conduct of the Defendant, or whether the Plaintiff himself so far contributed to the misfortune by his own negligence or want of ordinary and common care and caution that, but for such negligence or want of ordinary care and caution on his part, the misfortune would not have happened."

In short, the true ground of contributory negligence being a bar to recovery is that it is the proximate, or as Pollock prefers to say, the decisive cause of the mischief.

The law looks to the proximate cause, or in other words, will not measure out responsibility in halves or other fractions, but holds that person liable who was in the main responsible, and where the negligent acts are successive, it is he who lost has an opportunity of avoiding the accident who is solely responsible.

Here there is no reason to dissent from the finding of the Township Court as far as it went on the facts, *viz.*, that the animal got sick by the Defendant using it in looking for his lost pony, but the sickness was aggravated, and death ensued because the Plaintiff afterwards rode it in the heat of the sun from Pyawbwè to Yamèthin, and he neglected to treat it properly.

The Township Court in deed said that Defendant-Applicant rode the pony in the heat of the sun, and the Lower Appellate Court repeated this statement and found negligence in it. I may say that there was no evidence whatever that Defendant-Applicant rode the pony in the heat of the sun, or used it in a way that a prudent man would not have used his own, that he omitted to do anything that a reasonable man would have done, or did anything that a reasonable man would not have done.

On the other hand, the Plaintiff-Respondent's failure to treat the pony in a proper manner, and his taking it to Yamèthin as he did, would have undoubtedly amounted to contributory negligence, as just explained, if the Defendant-Applicant had been guilty of negligence, and would, in that case, have debarred Plaintiff-Respondent from recovering any damages.

But the question of trespass remains. It was necessary to remand the case for this to be determined. The Township Court finds that there was a trespass. There can be no doubt on the evidence that this finding is correct. A mounted Policeman's pony is his own property. It is not usual for other mounted policemen to use his pony. Assuming that in a case of emergency it might be legitimate to use a mounted man's pony without his consent, the fact remains that the present was not such a case of emergency. The learned Advocate for Defendant-Applicant relies on the fact that he acted under the orders of his superior officer. If the superior officer had no authority to give such orders, and it is clear from Mr. Warmington's evidence that he had none, that would not help the Defendant-Applicant. But there is nothing whatever on the record to show that

Defendant-Applicant acted under orders in taking the pony. He did not say so himself.

The law is clear enough. It is dealt with in * *Nga Myat Hmwe* vs. *Nga Yi and another.* Trespass is the infringement of a right, and gives a cause of action even when no damage results, and not only substantial but even exemplary damages may be given if the circumstances require. (See Pollock's Law of Torts, 7th Edition, pages 182-187.)

The Township Court originally gave Plaintiff-Respondent a decree for Rs. 30, and he did not appeal. It is evident that Rs. 30 was by no means unreasonable, being in fact less than half the value of the pony.

The application is dismissed with costs.

* U.B.R., 1904-06, II, Tort, page 9.

Upper Burma Civil Courts Regulation—13 (1)-proviso.

Civil 2nd Appeal No. 295 of 1907. July 15th, 1908.

Before D. H. R. Twomey, Esq.

NGA HLA GYI *v.* NGA AUNG YA.

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

Held,—*with reference to sec. 13, Upper Burma Civil Courts Regulation, that a suit for an amount due on a bond is not a suit for the specific performance of a contract as contemplated in article (15) of the 2nd Schedule of the Provincial Small Cause Courts Act.*

Also,—*the jurisdiction of the Small Cause Courts cannot be ousted merely by asking for alternative relief to which the plaintiff is not entitled.*

See Provincial Small Cause Courts—page 3.

Circular Memorandum No. 2 of 1907.

FROM

THE REGISTRAR, COURT OF THE
JUDICIAL COMMISSIONER, UPPER BURMA,

TO

THE DIVISIONAL AND DISTRICT JUDGES,
UPPER BURMA.

Dated Mandalay, the 28th February 1907.

In accordance with the orders of Government contained in General Department letter No. 457—2M.-16, dated 12th February 1907, the Judicial Commissioner directs that Magistrates and Judges should, as far as possible, avoid the trial of cases in which Muhammadans are concerned as parties or witnesses, and that leave of absence shall be granted, if this can be done without suspending the work of the Court, to all Muhammadans employed in Courts in Upper Burma on the following five days held specially sacred by Muhammadans :—

Muharram	...	...	...	...	... 2
Id-uz-zuha	...	...	...	...	... 1
Id-ul-Fitr	...	...	...	...	... 1
Fatiha-i-dowazhdaham		...	...	...	... 1

By order,

ED. MILLAR,
Registrar.

Circular Memorandum No. 3 of 1907.

FROM

THE REGISTRAR, CCURT OF THE
JUDICIAL COMMISSIONER, UPPER BURMA,

TO

COMMISSIONERS AND DEPUTY COMMISSIONERS,
UPPER BURMA.

Dated Mandalay, the 6th March 1907.

The attention of Courts in Upper Burma is drawn to paragraph 475, Upper Burma Courts Manual.

Instances are understood to have occurred in which it has been disregarded.

By order,

ED. MILLAR,
Registrar.

Circular Memorandum No. 4 of 1907.

FROM

THE REGISTRAR, COURT OF THE
JUDICIAL COMMISSIONER, UPPER BURMA,

TO

ALL DIVISIONAL AND DISTRICT JUDGES,
UPPER BURMA.

Dated Mandalay, the 3rd May 1907.

In continuation of this Court's Circular Memorandum No. 2, dated the 28th February 1907, it is hereby notified that the following Muhammadan festivals in the year 1907 will fall on the dates shown against each :—

Id-uz-zuha.—On the 25th January, but if the moon be not visible on the 15th January, then on the 26th January.

Muharram.—On the 23rd and 24th (Sunday) February, but if the moon be visible on the 13th February, then on the 22nd and 23rd February.

Fatiha-i-duwazhdaham.—On the 26th April, but if he moon be visible on the 13th April, then on the 25th April.

Id-ul-fitr.—On the 8th November, but if the moon be not visible on the 7th November, then on the 9th November.

By order,
ED. MILLAR,
Registrar

Circular Memorandum No. 6 of 1907.

FROM

THE REGISTRAR, COURT OF THE
JUDICIAL COMMISSIONER, UPPER BURMA,

TO

ALL DISTRICT AND DIVISIONAL JUDGES,
UPPER BURMA.

Dated Mandalay, the 29th May 1907.

Attention has recently been drawn to the insufficiency of the notice which is given by subordinate Civil Courts for the hearing of suits to which soldiers of the Indian Army serving at stations in China are parties.

It appears that summonses and other notices sent to those places not infrequently reach the persons to whom they are addressed on or after the day of hearing. A liberal allowance of time is, moreover, required in the case of notices, etc., sent to Shanghai, Tientsin, Shanhaikwan, Pekin, or other northern ports, especially in winter when they are ice-bound and navigation is interrupted.

In order to enable men serving at these stations to appear themselves, or to appoint a representative or make such other arrangements as may be necessary, a minimum period of four months from the date of posting the summons or notice should be given by subordinate Civil Courts.

By order,

ED. MILLAR,
Registrar.

Circular Memorandum No. 1 of 1908.

FROM

THE REGISTRAR, COURT OF THE
JUDICIAL COMMISSIONER, UPPER BURMA,

TO

ALL JUDGES AND MAGISTRATES IN UPPER BURMA.

Dated Mandalay, the 27th January 1908.

The following instructions are issued for the observance of Magistrates and Judges in Upper Burma regarding the arrangements to be made for the despatch of lunatics, other than criminal lunatics, to an asylum under sections 4 and 5 or section 8 of Act XXXVI of 1858 :—

(1) The Magistrate or Judge is responsible for the despatch of the lunatic to the asylum.

(2) He must arrange for a Police escort to accompany the lunatic and see that the escort is provided with sufficient means to purchase such articles as milk, coffee, biscuits or any suitable cooked food for the use of the insane during his journey to the asylum, and that it is instructed, in case the insane refuses food or becomes sick, to take him to the nearest hospital for advice and treatment.

(3) If the lunatic is a female, he must arrange for her to be accompanied by a female attendant or relative in addition to the usual Police escort.

(4) He must in all cases see that the lunatic is provided with food, sufficient clothing and bedding for the journey.

By order,

ED. MILLAR,
Registrar.

Circular Memorandum No. 4 of 1908.

FROM

THE REGISTRAR, COURT OF THE
JUDICIAL COMMISSIONER, UPPER BURMA,

TO

ALL JUDGES OF CIVIL COURTS, UPPER BURMA.

Dated Mandalay, the 25th February 1908.

Courts issuing a commission for the examination of a witness to a Court situated in British India are directed to ascertain, if possible, and issue the commission to the local Court of lowest jurisdiction that can conveniently execute such commission. They should not, as a rule, issue the commission to the District Court.

In Mandalay the Court of lowest jurisdiction is the Court of Small Causes, and commissions should therefore be sent to that Court.

By order,

ED. MILLAR,
Registrar.

Circular Memorandum No. 7 of 1908.

To

DIVISIONAL AND DISTRICT JUDGES,
UPPER BURMA.

Mandalay, the 26th May 1908.

The attention of District Courts is invited to the Provincial Insolvency Act, 1907, which has been extended to Upper Burma by Judicial Department Notification No. 51, dated the 29th April 1908.

The provisions of the Civil Procedure Code relating to Insolvency matter are superseded by the Schedule of the Act, and it is necessary that the judges of Civil Courts should acquaint themselves as soon as possible with the new law which is now in force.

It will be seen that the Local Government by Notification No. 54, dated the 29th April 1908, has invested all District Courts with jurisdiction under the Act, and by Notification No. 53, dated the 29th April 1908, has barred the application of certain provisions of the Act to Upper Burma District Courts in general.

Rules under section 51 of the Act will be issued at an early date.

Circular Memorandum No. 8 of 1908.

To

DIVISIONAL AND DISTRICT JUDGES,
UPPER BURMA.

Mandalay, the 12th June 1908.

Several cases having occurred in which the sale proceeds of property sold by Bailiffs and Deputy Bailiffs in execution of decrees have been embezzled, the Judicial Commissioner invites the special attention of all Civil Courts to the Instructions contained in paragraphs 561, 567, 701 and 723 of the Upper Burma Courts Manual and impresses on them the necessity of keeping a close watch over execution proceedings and of fixing dates from time to time on which the proceedings are to be submitted to the Judge, until the amount realized has been paid to the judgment creditor and the fact attested under the judge's signature. The working of the Courts in execution cases should be specially examined by inspecting officers.

2. Judicial officers are also reminded of the provisions of paragraphs 671 and 806 requiring them to see that all money transactions of the Courts are duly entered at the time, and that payments into the Treasury are acknowledged by the Treasury (or Sub-Treasury) Officer, and that chalans are produced and filed with the proceedings. They have also to check the Bailiffs' Registers daily.

3. There should be no exceptions to the rule in paragraph 681 requiring all Bailiffs to furnish sufficient security.

Circular Memorandum No. 10 of 1908.

FROM

THE REGISTRAR, COURT OF THE
JUDICIAL COMMISSIONER, UPPER BURMA,

TO

THE JUDGES OF ALL CIVIL COURTS
IN UPPER BURMA.

Mandalay, the 27th August 1908.

The following instructions are issued with reference to the payment of expenses to Government Officers appearing as witnesses in Civil suits. The Criminal Courts do not pay witnesses' expenses to Government Officers.

Government Officers appearing as witnesses in Civil suits to which Government is a party will receive allowances according to the ordinary scale, and the Presiding Officer of the Court will at the time of payment furnish the officer receiving the allowance with a certificate in T. F. No. 36, of which a sufficient supply should be obtained from the Government Press.

These instructions do not apply to Police Officers.

By order,

ED. MILLAR,
Registrar.

Circular Memorandum No. 12 of 1908.

FROM

THE REGISTRAR, COURT OF THE
JUDICIAL COMMISSIONER, UPPER BURMA,

TO

ALL JUDGES OF CIVIL COURTS IN UPPER BURMA.

Dated Mandalay, the 3rd December 1908.

The attention of all Civil Courts is called to the new Code of Civil Procedure which comes into force on the 1st January 1909. The new Code differs from the old, chiefly in the arrangement of its provisions.

2. The Act itself now contains little beyond the essential principles of procedure. Provisions which are not considered fundamental are placed in the Schedules. **The First Schedule,** comprising 51 Orders or sets of Rules, contains most of the detailed provisions of the present Code. **The Second Schedule** reproduces with slight modifications the law of arbitration as contained in Chapter XXXVII of the present Code. **The Third Schedule** containing rules regarding the execution of decrees by the Collector will not for the present be applicable in Upper Burma. Apart from the re-arrangement, few changes of a radical character have been made. The following notes regarding some of the changes may be found useful to the Courts :—

MORTGAGE SUITS.

Special attention is invited to Order XXXIV relating to Mortgage suits. The Transfer of Property Act, 1882, is not in force in Upper Burma, but by order of the Judicial Commissioner the Courts have long been guided by the provisions of sections 83 to 97 of the Act in dealing with mortgage suits.* The provisions of the Transfer of Property Act regarding suit for foreclosure, sale and redemption of mortgaged property have now been incorporated in the Code of Civil Procedure, and from the 1st January 1909 will therefore have the force of law in Upper Burma.

When the plaintiff succeeds in a suit for foreclosure, it will be incumbent on the Court to pass a **preliminary decree** in terms of Order XXXIV, R. 2, and subsequently if the circumstances of the case require it a **final decree** under Rule 3. Similarly, Rules 4 and 5 provide for preliminary and final decrees in suits for sale, and Rules 7 and 8 for preliminary and final decrees in suits for redemption.

In mortgage suits the **forms of decrees** given as serial Nos. 3 to 11 inclusive in Appendix D to the First Schedule should be used with

* Upper Burma Courts Manual, paragraphs 659 to 661.

such variations as the circumstances of each case may require. (*See* Order XLVIII, R. 3.)

PLEADINGS.

Order VI concerning pleadings (=plaints and written statements) is for the most part new, and its provisions should be carefully studied by all Judges. The **forms of pleadings** in Appendix A to the First Schedule or forms of a like character are prescribed for adoption (Rule 3). The object of the legislature in introducing the new provisions is explained as follows in the Statement of Objects and Reasons :—

"In our opinion it is most necessary that litigants in this country should come to trial with all issues clearly defined, and that cases should not be expanded or grounds shifted without reference to the true facts. For this purpose we think that the present system of pleadings in the mofussil, which is notoriously lax, should be improved, and we have incorporated in the rules an order on pleadings, which it is hoped will lead to sounder and fairer methods of arriving at the real points in dispute. The forms have been revised and we hope that they will be brought into more general use in the mofussil."

It is hoped that these rules will help the Courts to obtain, before a suit is tried, a clear definition of the matter in dispute, and thus save time and expense to all concerned.

ADMISSIONS.

It will be seen that the provisions of Chapter X of the old Code (of Discovery and the Admission, etc., of documents) have been greatly expanded in the new Code, Orders, XI, XII and XIII, and that Order XII provides for the **admission** not only of documents but also **of facts**. It is left to litigants and their advisers to make adequate use of the new provisions; but the Courts should encourage them to take advantage of Order XII, the provisions of which are calculated to obviate delay and expense.

PRODUCTION OF DOCUMENTS AT FIRST HEARING.

Litigants are now required by Order XIII, Rule 1, to actually **produce** at the first hearing **all the documentary evidence** they rely upon. This rule is stricter than the corresponding provision in the old Code, section 138, under which it was sufficient to have the documents in readiness and to produce them only when the Court called for them.

DECREES.

In Order XX the provisions regarding decrees have been amplified and new forms have been added in Appendix D for the guidance of Courts.

EXECUTION.

The following points should be carefully noted in connection with the execution of decrees :—

(i) Rule 11 of Order XXI empowers the Court, on the judgment-creditor's **oral application,** to order the immediate

arrest of the judgment-debtor, if in Court, in execution of any money decree.

(ii) An entirely new provision is contained in section 46 of the Code. It enables the Court which passed the decree to issue a **precept** to any other Court to attach property of the judgment-debtor pending transfer of the decree for execution in the ordinary course. This attachment remains in force for only two months unless the Court which passed the decree takes action as indicated in the proviso to the section.

The object of this provision is to enable a decree-holder to obtain an *ad interim* attachment where there is ground to apprehend that he may otherwise be deprived of the fruits of his decree. It is only in such cases that precepts should be issued under section 46.

(iii) Sections 55 and 62 of the Act give power in certain circumstances to **break open the outer door** of the judgment-debtor's house, for the purpose of arresting him or of attaching moveable property in the house.

(iv) Increased facilities for executing decrees for the delivery of immovable property are given by Rule 35 of Order XXI which provides for delivery of joint possession, and also for **breaking open doors** when the person in possession does not give free access to the decree-holder.

(v) Rules 44, 45, 74 and 75 of Order XXI contain special provisions for the **attachment and sale of agricultural produce,** and particularly growing crops.

(vi) Rule 48 of Order XXI gives extended facilities for **attaching salaries.**

(vii) Rule 32 of Order XXI re-enacts section 260 of the old Code with an addition concerning specific performance of contracts and injunctions. But Rule 33 of the Order is a new provision enabling the Court to order that any particular **decree for restitution of conjugal rights** shall not be enforced by imprisonment.

(viii) An important change in the law is made by section 65 of the Act. Under section 316 of the present Code, when a sale of immovable property in execution of a decree is confirmed and becomes absolute, the property only then vests in the purchaser In future, the property is to be deemed to have **vested in the purchaser from the date of the sale** and not from the later date on which the sale become absolute.

MESNE PROFITS.

It will be noticed that section 47 of the new Code does not reproduce clauses (*a*) and (*b*) of section 244 of the present Code. The intention is that questions regarding the amount of any **mesne profits or interest** should in future be ascertained by the Court **under the decree itself** and not in execution.

ATTACHMENT BEFORE JUDGMENT.

Rule 12 of Order XXXVIII prohibits the attachment before judgment of **agricultural produce** in the possession of an agriculturist.

RECEIVERS.

Under the old Code the power of appointing Receivers was reserved to High Courts and District Courts. The new Code (Order XL) removes this restriction, and a Receiver may now be appointed by any Court. A reference is invited to the case *Nga Kyi Maung* v. *Mi Sin and two** on this subject. The Judges of District Courts are requested to see that careful discretion is used by the subordinate Courts in the exercise of this new power.

APPEALS.

Wider powers are conferred on Appellate Courts by Order XLI, R. 33. Any decree or order may now be passed which the case may require even as regards respondents or parties who have not appealed against or filed objections to the original decree.

An important new provision is also contained in section 97, which prohibits a party from disputing in appeal against a final decree, the correctness of a preliminary decree which he did not appeal against at the time. If parties intend to rely upon objections which could be taken at an early stage they may not in future allow proceedings to be carried on to their final stage and large costs to be incurred, but must appeal against the preliminary decree. The explanation to section 2 of the Act shows what a "preliminary" decree is. A decree for the recovery of possession of immoveable property and for mesne profits is an example of a decree which is partly final and partly preliminary.

3. The above notes are not intended to be in any way exhaustive, but merely to point out the modifications which it is most important for Judges to get a thorough grasp of without delay. Judges should of course study the whole of the new Code and should make themselves familiar with its provisions as soon as possible.

The comparative tables appended to this circular show how each section of the old Code has been dealt with in the new Code and it is hoped that these tables will facilitate reference.

By order,

ED. MILLAR,
Registrar.

* Upper Burma Rulings, 1908, Civil Procedure, paragraph 17.

TABULAR STATEMENT I.

Statement showing the disposal of the provisions of the old Code of Civil Procedure, 1882.

Section of Act XIV of 1882.	Section of Act V of 1908.	Order and Rule, Schedule I.
1	1	
2		
"Chapter"	Omitted.	
"district"	2 (4) and 3	
"District Court" ...		
"pleader"	2 (15)	
"Government pleader" ...	2 (7)	
"Collector"	Omitted.	
"decree"	2 (2)	
"order"	2 (14)	
"judgment" ...	2 (9)	
"judge"	2 (8)	
"judgment-debtor" ...	2 (10)	
"decree-holder" ...	2 (3)	
"written"	Omitted.	
"signed"	2 (20)	
"foreign Court" ...	2 (5)	
"foreign judgment ...	2 (6)	
"public officer" ...	2 (17)	
"Government" ...	Omitted.	
3	154, 156, 157, 158	
4	4	
4A	5	
5	7	
6, paras. (*c*) and (*d*) ...	Omitted.	
6, last para. ...	6	
7	*Cf.* 4	
8	8	
9	Omitted.	
10	"	
11	9	
12	10	
13	11	
Expln. VI	14	
14	13	
15	15	
16	16	
16A	18	
17	20	
Expln. III	Omitted.	
18	19	
19	17	

TABULAR STATEMENT I.

Statement shewing the disposal of the provisions of the old Code of Civil Procedure, 1882—continued.

Section of Act XIV of 1882.	Section of Act V of 1908.	Order and Rule, Schedule I.
20	Omitted.	
21	,,	
22	22, 23 (1)	
23	22, 23 (2)	
24, paras. I and III ..	22, 23 (3)	
24, para II	Omitted.	
25 ...	24	
26	...	O. I, rr. 1, 4 (*a*)
27	...	,, ,, r. 10 (1)
28	...	,, ,, rr. 3, 4 (*b*)
29	...	,, ,, r. 6
30	...	,, ,, ,, 8 (1)
31	...	,, ,, ,, 9
32	...	,, ,, ,, 8 (2), 10 (2) (3) (5), 11
33	...	,, ,, ,, 10 (4)
34	...	,, ,, ,, 13
35	...	,, ,, ,, 12
36	...	III 1
37	...	,, 2
38	...	,, 3
39	...	,, 4
40	...	,, 5
41	...	,, 6
42	...	II 1
43	...	,, 2
44	...	,, 4, 5
45	...	,, 3, 6
46 ... ... }	...	*Cf.* II 6, 7
47 ... ... }		
48	26	IV 1
49	*Cf.* 137	
50	...	VII 1, 2, 4, 5, 6
51	...	VI 14, 15 (1)
52	...	,, 15, (2) (3)
53	...	,, ,, 17. *Cf.* O, VII, r. (11)
54	...	VII 11 *Cf.* O. VI 18
55	...	,, 12
56	..	,, 13
57	...	,, 10
58	...	,, 9

TABULAR STATEMENT I.

Statement showing the disposal of the provisions of the old Code of Civil Procedure, 1882—continued.

Section of Act XIV of 1882.	Section of Act V of 1908.	Order and Rule, Schedule I.
58, last para.	...	IV 2
59	...	VII 14
60	...	,, 15
61	...	,, 16
62	...	,, 17
63	...	,, 18
64	27	V 1
65	...	,, 2
66	...	,, 3
67	...	,, 4
68	...	,, 5
69	...	,, 6
70	...	,, 7
71	...	,, 8
72	...	,, 9
73	...	,, 10
74	...	,, 11 *Cf. O.* XXX, r 3
75	...	,, 12
76	...	,, 13
77	...	,, 14
78	...	,, 15
79	...	,, 16
80	...	,, 17
81	...	,, 18
82	...	,, 19, 20 (1)
83	...	,, 20 (2)
84	...	,, 20 (3)
85	28	,, 21, 23
86	...	,, 22
87	...	,, } 24, 29
88	...	,, }
89	...	,, 25
90	...	,, 26
91	...	,, 30 (1), (2)
92	..	,, 30 (3)
93	...	XLVIII 1
94	142	,, 2
95	143	
96	...	IX 1

TABULAR STATEMENT I.

Statement showing the disposal of the provisions of the old Code of Civil Procedure, 1882—continued.

Section of Act XIV of 1882.	Section of Act V of 1908.	Order and Rule, Schedule I.
97	...	IX 2
98	...	,, 3
99	...	,, 4
99A	...	,, 5
100	...	,, 6
101	...	,, 7
102	...	,, 8
103	...	,, 9
104	Omitted.	
105	...	IX 10
106	...	,, 11
107	...	,, 12
108	...	,, 13
109	...	,, 14
110	...	VIII 1
111	...	,, 6
112	...	,, 9 *Cf.* r. 1
113	...	,, 10
114	...	*Cf.* VI 2
115	...	,, 14, 15
116	...	,, 16, 17
117	...	X 1
118	...	,, 2
119	...	,, 3
120	...	,, 4
121	...	XI 1
122	...	*Cf.* XLVIII 2,
123	...	XI 3
124	...	,, 5
125	...	,, 6
126	...	,, 8
127	...	,, 11
128	...	XII 2
129	...	XI 12, 13
130	...	,, 14
131	...	,, 15
132	...	,, 17
133	...	,, 18 (1)
134	...	,, 18 (2)
135	...	,, 20

TABULAR STATEMENT I.

Statement showing the disposal of the provisions of the old Code of Civil Procedure, 1882—continued.

Section of Act XIV of 1892.	Section of Act V of 1908.	Order and Rule, Schedule I.
136	...	XI 21
137	...	XIII 10
138	...	,, 1 (1)
139	...	,, 2
140		,, 1 (2), 3
141	. .	,, 4
141A	...	,, 5
142	...	,, 6
142A	...	,, 7
143	...	,, 8
144	...	,, 9
145	...	,, 11
146	...	XIV 1, 2
147	...	,, 3
148	...	,, 4
149	...	,, 5
150	...	,, 6
151	...	,, 7
152	...	XV 1
153	...	,, 2
154	...	,, 3
155	...	,, 4
156	...	XVII 1
157	...	,, 2
158	...	,, 3
159	...	XVI 1
160	...	,, 2
161	...	,, 3
162 ...	...	,, 4
163	...	,, 5
164	...	,, 6
165	...	,, 7
166	...	,, 8
167	...	,, 9
168	...	,, 10
169	...	,, 11
170	...	,, 12
171	...	,, 14
172	...	,, 15
173	...	,, 16

TABULAR STATEMENT I.

Statement showing the disposal of the provisions of the old Code of Civil Procedure, 1882—continued.

Section of Act XIV of 1882.	Sertion of Act V of 1908.	Order and Rule, Schedule I.
174	} ...	{ XVI 10 to 13,
175	}	{ 17, 18
176	...	„ 19
177	...	„ 20
178	...	„ 21
179	...	XVIII 1, 2 (1)
180	...	„ 2 (2)(3), 3
181	...	„ 4
182 ...	...	„ 5
183	...	„ 6
184	...	„ 8
185	...	„ 9
185A, first and second paras.	138	
185A, third para.	...	XVIII 7
186	...	„ 10
187	...	„ 11
188	...	„ 12
189	...	„ 13
190	...	„ 14
191	...	„ 15
192	...	„ 16
193	...	„ 17
194	...	XIX 1
195	...	„ 2
196	...	„ 3
197	139	
198	33	XX 1
199	...	„ 2
200	} *Cf.* 137	
201	}	
202	...	XX 3
203	...	„ 4
204	...	„ 5
205	...	„ 7
206, first and second paras.	...	„ 6
206, third para. ...	152	
207	...	XX 9
208	...	„ 10
209	34	
210	...	XX 11

TABULAR STATEMENT I.

Statement showing the disposal of the provisions of the old Code of Civil Procedure, 1882—continued.

Section of Act XIV of 1882.	Section of Act V of 1908.	Order and Rule, Schedule I.
211	2 (12)	XX 12
212		
213	...	„ 13
214	...	„ 14 (1)
215	...	„ 15
215A	...	„ 16
216	...	„ 19
217	...	„ 20
218		
219		
220	*Cf.* 35	„ 6 (3)
221		
222		
223, first para. ...	38	
223, second and third paras.	39	
223, fourth para. ...	41	
223, fifth para. ...	...	XXI 4
223, sixth para. ...	...	„ 5
224	...	„ 6
225	...	„ 7
226	...	„ 8
227	..	„ 9
228	42	
229	43	
229A	45	
229B	44	
230, first para. ...	...	XXI 10
230, second para. ...	...	„ 21
230, third and fourth paras	48	
231	...	XXI 15
232	...	„ 16
233	49	
234	50	
235	...	XXI 11 (2)
236	...	„ 12
237	...	„ 13, 66
238	...	„ 14
239	...	„ 26 (1) (2)
240	...	„ 26 (3)
241	...	„ 27

TABULAR STATEMENT I.

Statement showing the disposal of the provision of the old Code of Civil Procedure, 1882—continued.

Section of Act XIV of 1882.	Section of Act V of 1908.	Order and Rule, Schedule I.
242	...	XXI 28
243	...	,, 29
244	47	
245	...	XXI 17 (1) (3) (4)
245A	56	
245B	...	XXI 37
246	...	,, 18
247	...	,, 19
248	...	,, 22
249	...	,, 23
250	...	,, 24 (1)
251	...	,, 24 (2)(3) 25(1)
252	52	
253	*Cf.* 145	
254	...	XXI 30
255	...	,, 42
256	...	,, 11 (1)
257	...	,, 1
257A	Omitted.	
258	...	XXI 2
259	...	,, 31
260	...	,, 32
261	...	,, 34 (1) to (4)
262	...	,, 34 (5)
263	...	,, 35 (1)
264	...	,, 36
265	54	
266	60	
267	...	*Cf.* XXI 41
268	...	,, 46
269	...	,, 43
270	...	,, 51
271	62	
272	...	XXI 52
273	...	,, 53
274	...	,, 54
275	...	,, 55
276	64	
277	...	XXI 56
278	...	,, 58

TABULAR STATEMENT I.

Statement showing the disposal of the provisions of the old Code of Civil Procedure, 1882—continued.

Section of Act XIV of 1882.	Section of Act V of 1908.	Order and Rule, Schedule I.
279	...	XXI 59
280	...	,, 60
281	...	,, 61
282	...	,, 62
283	...	,, 63
284	...	,, 64
285	63	
286	..	XXI 65
287	...	,, 66, 70
288	Omitted.	
289	...	XXI 67
290	...	,, 68
291	...	,, 69
292	...	,, 73
293	...	,, 71
294	...	,, 72
295	73	
296	...	XXI 76
297	...	,, 77 (1) (2)
298	...	,, 78
299	...	,, 79 (1)
300	...	,, 79 (2)
301	...	,, 79 (3)
302	...	,, 80
303	...	,, 81
304	...	,, 82
305	...	,, 83 (1) (2)
306	...	,, 84 (1)
307	...	,, 85
308	...	,, 86
309	...	,, 87
310	...	,, 88
310A	...	,, 89
311	...	,, 90
312	...	,, 92
313	...	,, 91
314	...	,, 92
315	...	,, 93
316	65	,, 94
317	66	

TABULAR STATEMENT I.

Statement showing the disposal of the provisions of the old Code of Civil Procedure, 1882—continued.

Section of Act XIV of 1882.	Section of Act V of 1908.	Order and Rule, Schedule I.
318	...	XXI 95
319	...	,, 96
320	68, 70 and 71	
321	The Third Schedule.	
322		
322A		
322B		
322C		
322D		
323		
324		
324A		
325		
325A		
325B		
325C		
326	72	
327	67	
328	...	XXI 97
329	...	,, 98
330	...	,, 98
331	...	,, 99
332	...	,, 100, 101, 103
333	...	,, 102
334	...	,, *Cf.* 97, 98
335	...	,, 97, 99, 103
336	... 55	
337	...	XXI 38
337A	...	,, 40
338	57	
339	...	XXI 39 (1) to (4)
340	...	,, 39 (5)
341	58	
342		
343	...	XXI 25
344—360A	Repealed by the Provincial Insolvency Act, 1907.	
361	...	XXII 1

TABULAR STATEMENT I.

Statement showing the disposal of the provisions of the old Code of Civil Procedure, 1882—continued.

Section of Act XIV of 1882.	Section of Act V of 1908.	Order and Rule, Schedule I.
362	...	XXII 2
363	...	„ 3 (1)
365	...	„ 3 (1)
366	...	„ 3 (2)
367	...	„ 5
368	...	„ 4
369	...	„ 7
370	...	„ 8
371	...	„ 9 (1) (2)
372	...	„ 10 (1)
372A	...	„ 9 (3)
373	...	XXIII 1
374	...	„ 2
375	...	„ 3
275A	...	„ 4
376	...	XXIV 1
377	...	„ 2
378	...	„ 3
379	...	„ 4
380	...	XXV 1 (1) (3)
381	...	„ 2
382	...	„ 1 (2)
383	...	XXVI 1
384	...	„ 2
385	...	„ 3
386	76	„ 4
387	...	„ 5
388	...	„ 6
389	...	„ 7
390	...	„ 8
391	78	
392	...	XXVI 9
393	...	„ 10
394	...	„ 11
395	...	„ 12
396	...	„ 13, 14
397	...	„ 15
398	...	„ 16

TABULAR STATEMENT I.

Statement showing the disposal of the provisions of the old Code of Civil Procedure, 1882—continued.

Section of Act XIV of 1882.	Section of Act V of 1908.	Order and Rule, Schedule I.
399	...	XXVI 17 (1)
400	...	,, 18
401	...	XXXIII 1
402	Omitted.	
403	...	XXXIII 2
404	...	,, 3
405	...	,, 5 (*a*)
406	...	,, 4
407	...	,, 5
408	...	,, 6
409	...	,, 7
410	...	,, 8
411	...	,, 10
412	...	,, 11
413	...	,, 15
414	...	,, 9
415	...	,, 16
416	79 (1)	
417	...	XXVII 2
418	...	,, 3
419	...	,, 4
420	...	,, 5
421	...	,, 6
422	...	V 27
423	...	XXVII 7
424	80	
425	*Cf.* 81	
426	...	XXVII 1
427		
428	81	
429	82	
430	83	
431	84	
432	85	
433	86	
434	87	
435	...	XXIX 1
436	...	,, 2, 3
437	...	XXXI 1
438	...	,, 2

TABULAR STATEMENT I.

Statement showing the disposal of the provisions of the old Code of Civil Procedure, 1882—continued.

Section of Act XIV of 1882.	Section of Act V of 1908.	Order and Rule, Schedule I.
439	...	XXXI 3
440	...	XXXII 1, 4 (2)
441	...	,, 5 (1)
442	...	,, 2
443	...	,, 3 (1), 4 (2)
444	...	,, 5 (2)
445	...	,, 4 (1)
446	...	,, 9
447	...	,, 8
448	...	,, 10 (1)
449	...	,, 10 (2)
450	...	,, 12 (1)
451	...	,, 12 (2) (3)
452	...	,, 12 (4)
453	...	,, 12 (5)
454	...	,, 13
455	...	,, 14
456	...	,, 3 (2) (3), 4 (4)
457	...	,, 4 (1)
458	...	,, 11 (1)
459	...	,, 11 (2)
460	Omitted.	
461	...	XXXII 6
462	...	,, 7
463	...	,, 15
464	...	,, 16
465	...	XXVIII 1
466	...	,, 2
467	...	,, 3
468	...	V 28, 29
470	88	
471	...	XXXV 1
472	...	,, 2
473	...	,, 4
474	...	,, 5
475	..	,, 6
476	...	,, 3

TABULAR STATEMENT I.

Statement showing the disposal of the provisions of the old Code of Civil Procedure, 1882—continued.

Section of Act XIV of 1882.	Section of Act V of 1908.	Order and Rule, Schedule I.
477	...	XXXVIII 1
478		
479	...	„ 2
480	...	„ 3
481	...	„ 4
482	...	„ 5
483	...	„ 5 (1) (2), 6 (1)
484	...	„ 5 (1) (3)
485	...	„ 6
486	...	„ 7
487	...	„ 8
488	...	„ 9
489	...	„ 10
490	...	„ 11
491	95	
492	...	XXXIX 1
493	...	„ 2
494	...	„ 3
495	...	„ 5
496	...	„ 4
497	95	
498	...	XXXIX 6
499	...	„ 7
500	...	„ 8
501	...	„ 9
502	...	„ 10
503	...	XL 1 to 3
504	...	„ 5
505	Omitted.	
506		
507		
508		
509		
510	The Second Schedule.	
511		
512		
513		
514		

TABULAR STATEMENT I.

Statement showing the disposal of the provisions of the old Code of Civil Procedure, 1882—continued.

Section of Act XIV of 1882.	Section of Act V of 1908.	Order and Rule, Schedule I.
515	The Second Schedule.	
516		
517		
518		
519		
520		
521		
522		
523		
524		
525		
526		
527	*Cf.* 90	XXXVI 1
528	...	,, 2
529	...	,, 3
530	...	,, 4
531	...	,, 5
532	...	XXXVII 2
533	...	,, 3
534	...	,, 4
535	...	,, 5
536	...	,, 6
537	...	,, 7
538	...	,, 1
539	92 and 93	
540	96 (1)(2)	
541	...	XLI ... 1
542	...	,, 2
543	...	,, 3
544	...	,, 4
545	...	,, 5 (1)(2)(3)
546	...	,, 6
547	...	,, 7
548	...	,, 9
549	...	,, 10
550	...	,, 13
551	...	,, 11
552	...	,, 12
553	...	,, 14
554	...	,, ... 15

TABULAR STATEMENT I.

Statement showing the disposal of the provisions of the old Code of Civil Procedure, 1882—continued.

Section of Act XIV of 1882.	Section of Act V of 1908.	Order and Rule, Schedule I.
555	...	XLI 16
556	...	,, 17
557	...	,, 18
558	...	,, 19
559	...	,, 20
560	...	,, 21
561	...	,, 22 (1) (2) (3) (5)
562	...	,, 23
564	Omitted.	
565	...	XLI 24
566	...	,, 25
567	...	,, 26
568	...	,, 27
569	...	,, 28
570	...	,, 29
571	...	,, 30
572	} *Cf.* 135	
573		
574	...	XLI 31
575	98	
576	...	XLI 34
577	...	,, 32
578	99	
579	...	XLI 35
580	...	,, 36
581	...	,, 37
582	107 (2)	XXII 11
582A	*Cf.* 149	
583	144 (1)	
584	100	
585	101	
586	102	
587	108	
588	104	XLIII 1
589	106	
590	108	XLIII 2
591	105 (1)	
592	...	XLIV 1
593	...	,, 2
594	...	XLV 1

TABULAR STATEMENT I.

Statement showing the disposal of the provisions of the old Code of Civil Procedure, 1882—continued.

Section of Act XIV of 1882.	Section of Act V of 1908.	Order and Rule Schedule I.
595	109	
596	110	
597	111	
598	...	XLIV 2
600	...	,, 3
601	...	,, 6
602	...	,, 7
603	...	,, 8
604	...	,, 9
605	...	,, 10
606	...	,, 11
607	...	,, 12
608	...	,, 13
609	...	,, 14
610	...	,, 15
611	...	,, 16
612	*Cf.* 129	
613	*Cf.* 130	
615	Omitted.	
616	112	
617	130	XLVI 1
618	...	,, 2
619	...	,, 3
620	...	,, 4
621	...	,, 5
622	115	
623	114	XLVII 1
624	...	,, 2
625	...	,, 3
626	...	,, 4
627	...	,, 5
628	...	,, 6
629	...	,, 7, 9
630	...	,, 8
631	116	
632	117	
633	*Cf.* 122	
634	118	
635	119	
636	...	XLIX 1

TABULAR STATEMENT I.

Statement showing the disposal of the provisions of the old Code of Civil Procedure, 1882—concluded.

Section of Act XIV of 1882.	Section of Act V of 1908.	Order and Rule, Schedule I.
637	128 (2) (i)	
638	120 (1)	XLIX 3
639	120 (2)	
640	132	
641	133	
642	135 (1) (2)	
643	Omitted.	
644	...	XLVIII 3
645	137 (1) (4)	
645A	140	
646	Omitted.	
646A	...	XLVI 6
646B	...	,, 7
647	141	
648	136	
649	36, 37	
650	Omitted.	
650A	29	
652	122, 129, 130 and 131	
653	59	

TABULAR STATEMENT II.

Statement showing the provisions of the Code of 1908 *with the corresponding sections of the Code of* 1882.

Section of the Code of 1908.	Corresponding section of the Code of 1882.	Section of the Code of 1908.	Corresponding section of the Code of 1882.
		35 (1) ...	New.
1 ...	1	35 (2) ...	220
2 ...	2	35 (3) ...	222
Expl. 11 ...	New.	36 ...	New.
Expl. 12 ...	211 Explanation.	37 ...	649 Explanation.
Expl. 13 ...	New.	38 ...	223, 1st paragraph.
3 ...	2		
4 ...	4	39 ...	223, 2nd and 3rd paragraphs.
5 ...	4A		
6 ...	6, last paragraph	40 ...	New.
7 ...	5	41 ...	223 4th paragraph.
8 ...	8		
9 ...	11	42 ...	228
10 ...	12	43 ...	229
11 ...	13	44 ...	229B
12 ...	New.	45 ...	229A
13 ...	14	46 ...	New.
14 ...	13 Expl. 6.	47 ...	244
15 ...	15	48 ...	230, 3rd and 4th paragraphs.
16 ...	16		
17 ...	19	49 ...	233
18 (1) ...	16A	50 (1) ...	234
19 ...	18	51 ...	New.
20 ...	17	52 ...	252
21 ...	16A (2)	53 ...	New.
22 ...	22	54 ...	265
23 ...	23, 24	55 ...	336
24 ...	25	56 ...	245A
25 ...	New	57 ...	338
26 ...	48	58 ...	342 and 341
27 ...	64	59 ...	653
28 ...	8	60 ...	266
29 ...	650A	61 ...	New.
30 ...	New	62 ...	271
31 ...	,,	63 ...	285
32 ...	,,	64 ...	276
33 ...	198	65 ...	New. *Cf.* 316
34 ...	209	66 ...	317

TABULAR STATEMENT II.

Statement showing the provisions of the Code of 1908 *with the corresponding sections of the Code of* 1882—continued.

Section of the Code of 1908.	Corresponding section of the Code of 1882.	Section of the Code of 1908.	Corresponding section of the Code of 1882.
67 ...	327	100 ...	584
68 ...	320	101	585
69 ...	New.	102 ...	586
70 (1) ...	320, 2nd and 3rd paragraphs.	103 ...	New.
70 (2) ...	320, 4th paragraph.	104 ...	588, 2nd paragraph.
71 ...	320, 5th paragraph.	105 ...	591
72 ...	326	106 ...	589
73 ...	295	107 (1) ...	New.
74 ...	330	107 (2) ...	582, first part.
75 ...	New.	108 ...	587, 590
76 ...	386	109 ...	595
77 ...	New.	110 ...	596
78 ...	391	111 ...	597
79 ...	416	112 ...	616
80 ...	424	113 ...	617
81 ...	424 and 428	114 ...	623
82 ...	429	115 ...	622
83 ...	430	116 ...	631
84 ...	431	117 ...	632
85 ...	432	118 ...	634
86 ...	433	119 ...	635
87 ...	434	120 (1) ...	638
88 ...	470	120 (2) ...	639
89 ...	506	121 ...	New.
90 ...	527	122 ...	,,
91 ...	New.	123 ...	,,
92 ...	539	124 ...	,,
93 ...	539, last paragraph.	125 ...	,,
94 ...	New.	126 ...	,,
95 ...	491, 497	127 ...	,,
96 ...	540	128 ...	,,
97 ...	New.	129 ...	652, 3rd paragraph.
98 ...	575	130 ...	652, 2nd paragraph.
99 ...	578	131 ...	652, 4th paragraph.

TABULAR STATEMENT II.

Statement showing the provisions of the Code of 1008 *with the corresponding sections of the Code of* 1982—concluded.

Section of the Code of 1908.	Corresponding section of the Code of 1882.	Section of the Code of 1908.	Corresponding section of the Code of 1882.
132 ...	640	146 ...	New.
133 ...	641	147 ..	,,
135 ...	642	148 ...	,,
136 ...	648	149 ...	,,
137 ...	645	150 ...	,,
137 (3) ...	New.	151 ...	,,
138 ...	185A.	152 ...	,,
139 ...	197	153 ...	,,
140 ...	645A	154 (3) ...	3rd paragraph.
141 ...	647	155 ...	New.
142 ...	94	156 ...	3, 1st sentence.
143 ...	95	157 ...	3, 2nd ,,
144 ..	588	158 ...	3, 2nd paragraph
145 ...	253		

TABULAR STATEMENT II.

The First Schedule.

Order and Rule of Schedule I.	Corresponding section of the Code of 1882.	Order and Rule of Schedule I.	Corresponding section of the Code of 1882.
I.—1 ...	26	V.—12 ...	75
2 ...	New.	13 ...	76
3 ...	28	14 ...	77
4 ...	26 and 28	15 ...	78
5 ...		16 ...	79
6 ...	29	17 ...	80
7 ...		18 ...	81
8 ...	30, 32	19 ...	82
9 ...	31	20 ...	82, 2nd paragraph, 83 and 84
10 ...	27, 32		
11 ...	32	21 ...	85
12 ...	35	22 ...	86
13 ...	34	23 ...	85
II.—1 ...	42	24 ...	87 and 88
2 ...	43	25 ...	89
3 ...	45	26 ...	90
4 ...	44	27 ...	422
5 ...	44	28 ...	468
6 ...	*Cf.* 46 and 47	29 ...	408
7 ...	46	30 ...	91 and 92
III.—1 ...	36		
2 ...	37	VI.—1 ...	New.
3 ...	38	2 ...	,,
4 ...	39	3 ...	,,
5 ...	40	4 ...	,,
6 ...	41	5 ...	,,
IV.—1 ...	48	6 ...	,,
2 ...	58	7 ...	,,
V.—1 ...	64	8 ...	,,
2 ...	65	9 ...	,,
3 ...	66	10 ...	,,
4 ...	67	11 ...	,,
5 ...	68	12 ...	,,
6 ...	69	13 ...	,,
7 ...	70	14 ...	51
8 ...	71	15 ...	51
9 ...	72	16 ...	New.
10 ...	73	17 ...	*Cf.* 53
11 ...	74	18 ...	*Cf.* 54

TABULAR STATEMENT II.

The First Schedule—continued.

Order and Rule of Schedule I.	Corresponding section of the Code of 1882.	Order and Rule of Schedule I.	Corresponding section of the Code of 1882.
VII.—1 ...	50	IX.—12 ...	107
2 ...	50	13 ...	108
3 ...	50, paragraph 3	14 ...	109
4 ...	50, paragraph 4	X.—1 ..	117
5 ...	50, paragraph 5	2 ...	118
6 ...	50, paragraph 6	3 ...	119
7 ...	New.	4 ...	120
8 ...	,,	XI.—1 ..	121
9 ...	58	2 ...	New.
10 ...	57	3 ...	123
11 ..	53 and 54	4 ...	123
12 .	55	5 ...	124
13 ...	56	6 ...	125
14 ...	59	7 ...	New.
15 ...	60	8 ...	126
16 ...	61	9 ...	New.
17 ...	62	10 ...	,,
18 ...	63	11 ...	127
VIII.—1 ...	110	12 ..	129
2 ...	New.	13 ...	129
3 ...	,,	14 ...	130
4 ...	,,	15 ...	131
5 ...	,,	16 ...	New.
6 ...	111	17 ...	132
7 ...	New.	18 ...	133, 13
8 ...	,,	19 ...	New.
9 ...	112	20 ...	135
10 ...	113	21 ...	136
IX.—1 ...	96	22 ...	New.
2 ...	97	23 ...	,,
3 ...	98	XII.—1 ...	,,
4 ...	99	2 ...	128
5 ..	99A	3 ...	New.
6 ...	100	4 ...	,,
7 ...	101	5 ...	,,
8 ...	102	6 ...	,,
9 ...	103	7 ...	,,
10 ...	105	8 ...	,,
11 ...	106	9 ...	,,

TABULAR STATEMENT II.

The First Schedule—continued.

Order and Rule of Schedule I.	Corresponding section of the Code of 1882	Order and Rule of Schedule I.	Corresponding section of the Code of 1882.
XIII.—1 ...	138, 140	XVI.—18 ...	174
2 ...	139	19 ...	176
3 ...	140	20 ...	177
4 ...	141	21 ...	178
5 ...	141A	XVII.—1 ...	156
6 ...	142	2 ...	157
7 ...	142A	3 ...	158
8 ...	143		
9 ...	144	XVIII.—1 ...	179, Explanation.
10 ...	137	2 ...	179 and 180
11 ...	145	3 ...	180
XIV.—1 ...	146	4 ...	181
2 ...	146, 6th paragraph.	5 ...	182
		6 ...	183
3 ...	147	7 ...	185A
4 ...	148	8 ...	184
5 ...	149	9 ..	185
6 ...	150	10 ...	186
7 ...	151	11 ...	187
XV.—1 ...	152	12 ...	188
2 ...	153	13 ...	189
3 ...	154	14 ...	190
4 ...	155	15 ...	191
XVI.—1 ...	159	16 ...	192
2 ...	160	17 ...	193
3 ...	161	18 ...	New.
4 ...	162	XIX.—1 ...	194
5 ...	163	2 ...	195
6 ...	164	3 ...	196
7 ...	165	XX.—1 ...	198
8 ...	166	2 ...	199
9 ...	167	3 ...	202
10 ...	168	4 ...	203
11 ...	169	5 ...	204
12 ...	170	6 ...	206 and 221
13 ...	New.	7 ...	205
14 ...	171	8 ...	New.
15 ...	172	9 ...	207
16 ...	173	10 ...	208
17 ...	174, 1st paragraph, and 175.	11 ...	210

TABULAR STATEMENT II.

The First Schedule—continued.

Order and Rule of Schedule I.	Corresponding section of the Code of 1882.	Order and Rule of Schedule I.	Corresponding section of the Code of 1882.
XX.—12 ...	211 and 212	XXI.—27 ...	241
13 ...	213	28 ...	242
14 ...	214	29 ...	243
15 ...	215	30 ...	254
16 ...	215A	31 ...	259
17 ...	New.	32 ...	260
18 ...	,,	33 ...	New.
19 ..	216	34 ...	261 and 262
20 ...	217	35 ...	263
XXI.—1 ...	257	36 ...	264
2 ...	251	37 ...	245P
3 ...	New.	38 ...	337
4 ...	223, 5th paragraph.	39 ...	339 and 340
		40 ...	337A
5 ...	223, 6th paragraph.	41 ...	267
		42 ...	255
6 ...	224	43 ..	269
7 ...	225	44 ...	New.
8 ...	226	45 ...	,,
9 ...	227	46 ...	268
10 ...	230, 1st paragraph.	47 ...	New.
		48 ...	,,
11 ...	235 and 256	49 ...	,,
12 ...	236	50 ...	,,
13 ...	237	51 ...	270
14 ..	238	52 ...	272
15 ...	231	53 ...	273
16 ...	232	54 ...	274
17 ...	245	55 ...	275
18 ...	246	56 ...	277
19 ...	247	57 ...	New.
20 ...	New	58 ...	278
21 ...	230, and paragraph.	59 ...	279
		60 ...	280
22 ...	248	61 ...	281
23 ...	249	62 ...	282
24 ...	250 and 251	63 ...	283
25 ...	243 and 251	64 ...	184
26 ...	239 and 240	65 ...	286

TABULAR STATEMENT II.

The First Schedule—continued.

Order and Rule of Schedule I.	Corresponding section of the Code of 1882.	Order and Rule of Schedule I.	Corresponding section of the Code of 1882.
XXI.—66 ...	287	XXII.—1 ...	361
67 ...	289	2 ...	362
68 ...	290	3 ...	363, 365 and 366
69 ...	291	4 ...	368
70 ...	217, last paragraph.	5 ...	367
		6 ...	New.
71 ...	293	7 ...	359
72 ...	294	8 ...	370
73 ...	292	9 ...	371
74 ...	New.	10 ...	372
75 ...	,,	11 ...	582, last part.
76 ...	296	12 ...	New
77 ...	297	XXIII.—1 ...	373
78 ...	298	2 ...	374
79 ...	299, 300 and 302	3 ...	375
80 ...	302	4 ...	375A
81 ...	303	XXIV.—1 ...	376
82 ...	304	2 ...	377
83 ...	305	3 ...	378
84 ...	306	4 ...	379
85 ...	307	XXV.—1 ...	380 and 382
86 ...	308	2 ...	381
87 ...	309	XXVI.—1 ...	383
88 ...	310	2 ...	384
89 ...	310A	3 ...	385
90 ...	311	4 ...	386
91 ...	313	5 ...	387
92 ...	312 and 314	6 ...	388
93 ...	315	7 ...	389
94 ...	316	8 ...	390
95 ...	318	9 ...	392
96 ...	319	10 ...	393
97 ...	328 and 344	11 ...	394
98 ...	322 and 330	12 ...	395
99 ...	*Cf.* 331 and 335	13 ...	396
100 ...	332	14 ...	396, 2nd and 3rd paragraphs.
101 ...	332 and 335		
102 ...	333	15 ...	397
103 ...	332 and 335	16 ...	398

TABULAR STATEMENT II.

The First Schedule—continued.

Order and Rule of Schedule I.	Corresponding section of the Code of 1882.	Order and Rule of Schedule I.	Corresponding section of the Code of 1882.
XXVI.—17 ...	399	XXXII—11 ...	458 and 459
18 ...	400	12 ...	452 and 453
XXVII.—1 ...	New.	13 ...	454
2 ...	417	14 ...	455
3 ...	418	15 ...	460 and 463
4 ...	419	16 ...	464
5 ...	420	XXXIII.—1 ...	401
6 ...	421	2 ...	403
7 ...	422 and 423	3 ...	404
8 ...	426 and 427	4 ...	406
XXVIII.—1 ...	465	5 ...	405 and 407
2 ...	466	6 ...	408
3 ...	467	7 ...	409
XXIX.—1 ...	435	8 ...	410
2 ...	436	9 ...	414
3 ...	437	10 ...	411
XXX.—1 ...	}	11 ...	412
2 ...		12 ...	New.
3 ...		13 ...	,,
4 ...		14 ...	,,
5 ...	New.	15 ...	413
6 ...		16 ...	415
7 ...		XXXIV.—1 ...	A-IV, 1852, s. 85
8 ...		2 ...	,, s. 86
9 ...		3 ...	,, s. 87
10 ...	}	4 ...	,, s. 88
XXXI.—1 ...	437	5 ...	,, s. 89
2 ...	438	6 ...	,, s. 90
3 ...	439	7 ...	,, s. 92
XXXII.—1 ...	440	8 ...	,, s. 93
2 ...	442	9 ...	New.
3 ...	443 and 456	10 ...	A-IV, 1852, s. 94
4 ...	440, 443, 445, 456	11 ...	New.
5 ...	441 and 444	12 ...	A-IV, 1852, s. 96
6 ...	451	13 ...	,, s. 97
7 ...	462	14 ...	,, s. 100
8 ...	447	XXXV.—1 ...	471
9 ...	446	2 ...	472
10 ...	448 and 449	3 ...	476

TABULAR STATEMENT II.

The First Schedule—continued.

Order and Rule of Schedule I.	Corresponding section of the Code of 1882.	Order and Rule of Schedule I.	Corresponding section of the Code of 1882.
XXXV.—4 ...	476	XL.—3 ...	503
5 ...	474	4 ...	New.
6 ...	475	5 ...	504
XXXVI.—1 ...	527	XLI.—1 ...	541
2 ...	528	2 ...	542
3 ...	529	3 ...	543
4 ...	530	4 ...	544
5 ...	331	5 ...	545
XXXVII.—1 ...	538	6 ...	546
2 ...	532	7 ...	547
3 ...	533	8 ...	New.
4 ...	534	9 ...	548
5 ...	535	10 ...	549
6 ...	536	11 ...	551
7 ...	537	12 ...	552
		13 ...	550
XXXVIII.-1 ...	477 and 478	14 ...	553
2 ...	479	15 ...	554
3 ...	480	16 ...	555
4 ...	481	17 ...	556
5 ...	483 and 484	18 ...	557
6 ...	485	19 ...	558
7 ...	486	20 ...	559
8 ...	487	21 ...	560
9 ...	488	22 ...	561
10 ...	489	23 ...	562
11 ...	498	24 ...	565
12 ...	New.	25 ...	566
XXXIX.—1 ...	492	26 ...	567
2 ...	493	27 ...	568
3 ...	494	28 ...	569
4 ...	496	29 ...	570
5 ...	495	30 ...	571
6 ...	498	31 ...	574
7 ...	499	32 ...	577
8 ...	500	33 ...	New.
9 ...	501	34 ...	576
10 ...	502	35 ...	579
XL.—1 ...	503	36 ...	580
2 ...	303	37 ...	581

TABULAR STATEMENT II.

The First Schedule—concluded.

Order and Rule of Schedule I.	Corresponding section of the Code of 1882.	Order and Rule of Schedule I.	Corresponding section of the Code of 1882.
XLII.—1 ...	New.	XLVI.—3 ..	619
XLIII.—1 ...	588	4 ...	620
2 ...	590	5 ...	621
XLIV.—1 ...	592	6 ...	646A
2 ...	593	7 ...	646B
XLV.—1 ...	594	XLVII.—1 ...	623
2 ...	598	2 .	624
3 ...	600	3 ...	625
4 ...	New.	4 ...	626
5 ..	„	5 ...	627
6 ...	601	6 ...	628
7 ...	602	7 ...	629
8 ...	603	8 ...	630
9 ...	604	9 ...	629, first paragraph.
10 ...	605		
11 ...	606	XLVIII.—1 ...	93
12 ...	607	2 ...	94
13 ...	608	3 ...	New.
14 ...	609	XLIX.—1 ...	636
15 ...	610	2 ...	630
16 ...	611	3 ...	638
XLVI.—1 ...	617	L.—1 ...	New.
2 ...	618	LI.—1 ...	„

TABULAR STATEMENT II.

The Second Schedule.

Clause of Schedule II.	Corresponding section of the Code of 1882.	Clause of Schedule II.	Corresponding section of the Code of 1882.
I ...	506	XIII ...	519
II ...	507	XIV ...	520
III ...	508	XV ...	521
IV ...	509	XVI ...	*Cf.* 9 of 1889, s.
V ...	510-507	XVII ...	522
VI ...	511 and 512	XVIII ..	523
VII ...	513	XIX ...	524
VIII ...	514	XX ...	525
IX ...	515	XXI ...	526
X ...	516	XXII ...	9 of 1889, s. 3
XI ...	517	XXIII ...	New.
XII ...	518		

The Third Schedule.

Clause of Schedule III.	Corresponding section of the Code of 1882.	Clause of Schedule III.	Corresponding section of the Code of 1882.
I ...	321	VIII ...	324
II ...	322	IX ...	324A
III ...	322A	X ...	325
IV ...	322B	XI ...	325A
V ...	322C	XII ...	325B
VI ...	322B	XIII ...	325C
VII ...	323D		

Circular Memorandum No. 1 of 1909.

FROM

THE REGISTRAR, COURT OF THE
JUDICIAL COMMISSIONER, UPPER BURMA,

TO

THE DIVISIONAL AND DISTRICT JUDGES,
UPPER BURMA.

Dated Mandalay, the 21st January 1909.

The Judicial Commissioner invites the attention of all Courts to the New Limitation Act, IX of 1908, which comes into force on the 1st January 1909. Particular notice is required to be paid to sections 30 and 31 of the Act.

By order,

ED. MILLAR,
Registrar.

Circular Memorandum No. 2 of 1909.

FROM

THE REGISTRAR, COURT OF THE
JUDICIAL COMMISSIONER, UPPER BURMA,

TO

THE DIVISIONAL AND DISTRICT JUDGES,
UPPER BURMA.

Dated the 8th February 1909.

It is hereby notified that the following Muhammadan festivals in the year 1909 will fall on the dates shown against each :—

Id-uz-zuha.—On the 4th January, but if the moon be visible on the 24th December 1908, then on the 3rd January (Sunday).

Muharram.—On the 1st and 2nd February, but if the moon be visible on the 22nd January, then on the 31st January (Sunday) and 1st February.

Fatiha-duwazhdaham.—On the 4th April (Sunday), but if the moon be visible on the 22nd March, then on the 3rd April.

Id-ul-Fitr.—On the 17th October (Sunday), but if the moon be visible on the 15th October, then on the 16th October.

Id-ul-zuha.—On the 24th December, but if the moon be visible on the 13th December, then on the 23rd December.

By order,

ED. MILLAR,
Registrar.

Circular Memorandum No. 3 of 1909.

FROM

THE REGISTRAR, COURT OF THE
JUDICIAL COMMISSIONER, UPPER BURMA,

TO

ALL CIVIL AND CRIMINAL COURTS IN
UPPER BURMA.

Mandalay, the *March* 1909.

It having been brought to the notice of the Judicial Commissioner that a summons written in Burmese only, was forwarded for service in a place in the Madras Presidency, and that it was returned unserved owing to its contents not being understood, it is ordered that, in future, when a process is issued for service or execution to any Court outside Burma, it should be accompanied, if not written in English, by a translation in English or in the language of the Court of the locality in which it is to be served.

By order,

ED. MILLAR,
Registrar.

Circular Memorandum No. 4 of 1909.

FROM

THE REGISTRAR, COURT OF THE
JUDICIAL COMMISSIONER, UPPER BURMA,

TO

ALL JUDGES OF CIVIL COURTS IN UPPER BURMA.

Mandalay, the *March* 1909.

Attention is invited to O. V, r. 1 (3), and O. XVI, r. 1, in the new Code of Civil Procedure. Under the first of these rules any Judge has power to appoint an officer to sign summonses for issue to defendants, while the second gives power to appoint an officer to receive applications for the issue of summonses to witnesses and to issue the summonses. The head clerks of Courts may in many cases be suitably appointed to perform these functions.

By order,

ED. MILLAR,
Registrar.

Circular Memorandum No. 9 of 1909.

To

ALL DIVISIONAL AND DISTRICT JUDGES,
UPPER BURMA.

Dated Mandalay, the 18th September 1909.

Much inconvenience is caused by delay in the submission of records in Civil cases pending in this Court in Appeal or Revision.

Judges are requested to see that proceedings are submitted as soon as thy find that copies of judgment and decree have been applied for with a view to invoking the interference of this Court.

Care should be taken that original documents accompany the proceedings.

The Head Judicial Clerk should be made responsible for seeing, before the despatch of the proceedings, that all documentary evidence that ought to be on the record is complete and corresponds with the prescribed lists.

By order,

ED. MILLAR,
Registrar.

G.B.C.P.O.—No. 20, J.C., U.B., 13-2-1918—250