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BEING THE

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VOLUME III

1917—1920

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UPPER BURMA RULINGS

Before A. E. Rigg, Esq., B.A., I.C.S.

Civil Second Appeal No. 220 of 1916. March 19th, 1917.

NGA MEIK AND ONE *v.* NGA GYI.

Mr. C. J. S. Pillay—for appellant.
Mr. S. Mukerjee—for respondent.

Civil Procedure—80.

No appeal lies from a decision on a preliminary issue in a suit where such decision does not determine any of the reliefs claimed in the plaint.

The Respondent, Maung Gyi, was the bench clerk of the Subdivisional Judge, Yamèthin. The Appellants sued him for the recovery of a sum of money they alleged they had lost through his carelessness in losing or concealing an application for an execution of a decree, which became time-barred through the loss. They asserted in the plaint that about the 10th February 1915 they sent the Defendant, Maung Gyi, a notice under section 80, Code of Civil Procedure, but denied that any notice was necessary. The receipt of the notice was not admitted, and a preliminary issue was fixed as to whether such notice was necessary or not. The Subdivisional Judge decided that it was and on appeal the decision was upheld. The date of the decision of the Subdivisional Judge was the 19th January, and the 7th February was fixed for the hearing of evidence. On the 5th February, the appeal was filed and was decided the same day. On the 7th, the Appellants failed to produce any evidence and their suit was dismissed under O. 17, rule 3. The final order was one rejecting the plant O. 7, rule 11 (*d*). The rule did not apply to the case, as there was no statement in the plaint from which it appeared that the suit was barred by law. The District Court dismissed the appeal. In his judgment the District Judge pointed out that O. 17, rule 3, had no application to the case as the hearing had not been adjourned at the instance of the Appellants, but at the same time he said that the Appellants had no valid excuse for not producing their evidence on the date fixed for hearing.

The Appellants appeal to this Court on the ground that there has been a substantial error in the procedure of the

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Subdivisional Court in not granting an adjournment on payment of costs for the issue of subpœnas to their witnesses after the dismissal of the appeal on the 5th February. Two other points have been argued at the hearing:—(1) whether notice was necessary to Maung Gyi under section 80, Code of Civil Procedure, and (2) whether the Lower Appellate Court had power to decide the point, as the decision of the preliminary issue was not, it is contended, a decree. As regards the latter points, I am of opinion that the Lower Appellate Court erred in entertaining the first appeal.

Decree is defined in section 2 (2), Code of Civil Procedure, as the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit, and the decree may be either preliminary or final. In the present case there was no formal expression of adjudication, and none was ever asked for and refused. Undoubtedly if the expression "matters in controversy" be interpreted in its widest sense, it would include every question in dispute between the parties. The result of such an interpretation would be that the parties would be bound to appeal under section 97 of the Code against every issue that was decided against them in the course of the trial, and litigation would be prolonged indefinitely. Order 15, rule 3, provides that where the parties are at issue on some question of law or fact, and issues have been framed, if the Court is satisfied that no further argument or evidence than the parties can at once adduce is required upon such of the issues as may be sufficient for the decision of the suit, the Court may proceed to determine such issues, and if the finding thereon is sufficient for the decision, may pronounce judgment accordingly whether the summons has been issued for the settlement of issues only, or for the final disposal of the case, provided that where the summons has been issued for the settlement of issues only, the parties or their pleaders are present and none of them objects. Under section 33, a decree must follow on the judgment. A decree of this kind may be either a final or preliminary decree: it is based on some preliminary point or points that are held to govern the whole case. Besides this

O. 21, rules 12—18, specify cases where a preliminary decree can be passed. If these provisions are borne in mind, it will be seen that the adjudication referred to in the definition of a decree is an adjudication granting or refusing any of the reliefs claimed in the plaint, and embodied in a formal declaration. All that the decision of the Subdivisional Judge amounted to was to declare that the notice was necessary. The Appellants said that notice had been given, and an appeal against the Subdivisional Judge's decision was clearly premature.

With reference to the necessity of notice, I have no doubt that the Courts below were right in affirming it. Maung Gyi is a public officer and he received the application for execution in that capacity. In the absence of the Judge, paragraph 554, Upper Burma Courts Manual, provides that applications shall be received by a clerk, whose duty it is to note on the application the date of receipt.

There is certainly no proof on the record that notice was ever sent to Maung Gyi of the suit. The question is whether the Lower Courts were right in dismissing the suit without giving the Appellants a further opportunity for calling evidence. The only excuse given for failing to apply for summonses for witnesses is that the Plaintiffs-Appellants were appealing to the District Court. They did not ask the Subdivisional Judge to stay the case pending the result of the appeal, which was only filed two days before the case came on for hearing, and was summarily rejected. I am of opinion that the excuse was a very weak one and that the Appellants ought to have had their witnesses in attendance. They had ample time for applying for the issue of summons. The appeal is dismissed with costs.

Before A. E. Rigg, Esq., B.A., I.C.S.

Criminal Appeal Nos. 24—33 of 1917. March 27th.

NGA SAN NYEIN AND NINE OTHERS *v.* KING-EMPEROR.

Messrs. C. G. S. and *L. Pillay*—for four appellants.
Mr. H. M. Lütter—for the Crown.

Evidence—30, 114.

Held,—that the confession of a co-accused person is not the same thing as the testimony of an accomplice and stands on a different footing. It may be taken into consideration as lending support to other evidence in the

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case. But if there is no other evidence, it is not a proper basis for a conviction. It is not strengthened by the fact that it is supported by other confessions, whether these have been made in such circumstances as to preclude the theory that there has been connivance between the persons making the confessions or not.

I.L.R., 29 All., 434.	I.L.R., 28 Cal., 689.
I.L.R., 38 Bom., 164.	I.L.R., 25 Bom., 168.
I.L.R., 15 Bom., 66.	I.L.R., 17 All., 86.
I.L.R., 33 Mad.. 46.	19 W.R. Cr., 57.
I.L.R., 8 All., 306.	21 W.R., 71.
I.L.R., 4 Cal., 483.	23 W.R., 24.
I.L.R., 10 Bom., 231.	1 L.B.R., 238.
I.L.R., 22 All., 445.	S.J.L.B., 636.

Nga San Nyein, Nga Ngwe Zin, Nga Kyi Byu, Nga Hme, Nga San Byaw, Nga Shin, Nga Yan Nyein, Nga Po Min, Nga Thu Daw and Nga Tet Si have all been convicted by the Sessions Judge, Magwe, of committing dacoity with murder at Kyaungyagan on the 19th September last and with the exception of Nga Tet Si had been sentenced to death. There is no doubt whatever that a dacoity was committed in the course of which Maung Nyi Maung was killed by some of the dacoits. The evidence shows that late at night, six or seven men came armed with *dahs*, sticks and a tube-gun to the house of Maung Shwe Daik. They demanded money and some of them called out that they had caught one of the inmates of the house. Thereupon San Kwin and Nyi Maung attacked the dacoits with *dahs*. Both of them were wounded and Nyi Maung died three days later in the Yenangyaung hospital. The fight took place whilst the dacoits were still near the house of Shwe Daik and not whilst they were retreating after abandoning their attempt to commit the robbery. Section 396 clearly applies to the case. San Kwin and Nyi Maung were justified by the right of private defence in attacking the dacoits, who were not justified by the provocation thus given in killing Nyi Maung. Nyi Maung was cut several times with a *dah*, one of the wounds being a severe one on the back, and there can be no doubt that in causing his death, his assailants committed murder. San Kwin wounded one of the dacoits on the head. The dacoits left behind them Exhibits Nos. 1—7, of which the most important are a *pawa* with a *dah*-cut and some human hair, and three sticks of *dahat* wood. The wounded dacoit managed to escape. Nga San Nyein was found wounded after the

dacoity, and his wounds correspond in respect of position and age with those of the man attacked by San Kwin. The rest of the evidence in the case is found in five confessions, all of which have been retracted in Court. The evidence of corroboration is of very little or no value, and except in the case of San Nyein, the convictions rest upon the credit to be given to the confessions. The Sessions Judge believed that the confessions were voluntary and were true. He failed to consider whether confessions of co-accused persons are proper material upon which to base a conviction unless they are corroborated in material particulars and as regards the identity of the persons alleged to be concerned in the crime. In *Emperor* v. *Kehri and others* (1) it was held that a retracted confession may be taken into consideration against co-accused persons, and although corroborative evidence may be necessary, it is not necessary that such evidence should be by itself sufficient to support a conviction. Richards, J., said that he could see no reason why a Court could not legally convict an accused person on the unsupported confession of a co-accused. He remarked that at the same time it is very seldom that a Court ought to convict on such unsupported evidence. In *Emperor* v. *Gangappa Kardeppa* (2) Heaton, J., thought that the confessions of seven co-accused, who had independently implicated four others, was a sufficient basis for supporting the convictions of these four men, and he referred to illustration (*b*) to section 114, Evidence Act, as affording precisely the kind of corroboration which in certain circumstances is a sound foundation for belief. This view was not however accepted by two other learned Judges of the same Court, who held that it was a rule followed in all the High Courts in India, that a conviction founded solely on the confession of a co-accused could not be sustained. They also held that illustration (*b*) to section 114, Evidence Act, only applies to the testimony of an accomplice. An examination of the authorities leaves no doubt in my mind that the decision of the majority of the learned Judges in *Gangappa Kardeppa's* case is correct: *Queen* v. *Jaffir Ali* (3), *Queen* v. *Naga* (4), *Queen-Empress* v. *Dosa Jiva* (5), *Queen-Empress* v. *Khandia Bin*

(1) I.L.R., 29 All., 434.
(2) I.L.R., 38 Bom., 164.
(3) 19 W.R. Cr., 57.
(4) 23 W.R., 24.
(5) I.L.R., 10 Bom., 231.

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Pandu (1), *Queen-Empress* v. *Ram Saran* (2), *Queen-Empress* v. *Nirmal Das* (3), *Giddigadu* v. *King-Emperor* (4), *Emperor* v. *Ashootosh Chuckerbutty and others* (5), *Yasin* v. *King-Emperor* (6). In *Queen* v. *Sadhu Mundul* (7), Phear, J., said, "It is true that the instance of corroboration which is appended to illustration (*b*) of section 114, Evidence Act, is corroboration to be found in accounts of an occurrence given by the accomplices, but it is noticeable that the Legislature makes it a condition that these accomplices should have been captured on the spot and kept apart from each other and there is not the slightest indication that the Legislature intended in this passage by the term "accounts given by the accomplices" anything other than accounts given in due course of examination as witnesses." Section 133, Evidence Act, modifies the general rule laid down in section 114, but it clearly refers only to accomplices who have been examined as witnesses. The result of the decisions cited above appears to be that the confession of a co-accused person is not the same thing as the testimony of an accomplice and stands on a different footing. It may be taken into consideration as lending support to other evidence in the case. But if there is no other evidence, it is not a proper basis for a conviction. It is not strengthened by the fact that it is supported by the other confessions, whether these have been made in such circumstances as to preclude the theory that there has been connivance between the persons making the confessions or not. Mr. Lütter, who has appeared in this Court for many years, informs me that it has been the rule not to uphold convictions based merely on the confessions of co-accused persons. He is not prepared to support the convictions of Yan Nyein, Po Min, San Byaw or Nga Shin. These convictions rest entirely on the retracted confessions of other Appellants, and are set aside. Nga San Nyein, Nga Po Min, Nga San Byaw and Nga Shin are acquitted and will be set at liberty.

San Nyein, Yan Nyein and Po Min belong to Kyunbosan village, whilst San Byaw, Nga Shin and Nga Hme come from Kyetthaukkwin. Maung Shwe Ge is headman of Kyunbosan.

(1) I.L.R., 15 Bom., 66.
(2) I.L.R., 8 All., 306.
(3) I.L.R., 22 All., 445.
(4) I.L.R., 33 Mad., 46.
(5) I.L.R., 4 Cal., 483.
(6) I.L.R., 28 Cal., 689.
(7) 21 W.R., 71.

Yan Nyein and Po Min are his sons, San Byaw and Nga Shin are brothers and his nephews, whilst San Nyein is another nephew. San Nyein disappeared after the dacoity, and was induced to surrender by Shwe Ge, who seems to have been chiefly instrumental in detecting this case. Maung Chet, a cousin of San Nyein, said in the committing Magistrate's Court that Shwe Ge mentioned the names of all the Appellants to him before San Nyein was arrested, but this piece of evidence was not elicited in the Sessions Court, and Shwe Ge was not questioned about it in either Court. Maung Chet also told the committing Magistrate that Shwe Ge was very anxious and asked him to help him with reference to his sons and nephews, but this important statement was also overlooked in the Sessions Court. San Nyein was arrested on the 7th October, and confessed to his uncle, to Maung Chet, Maung Hmo and the Kama headman Tun Tin. He implicated Ngwe Zin, Thu Daw, Tet Si, Kyi Byu and Nga Hle. He described Nga Hle as a villager of Magyi-yo. The other four men all come from Yeson village. Thu Daw probably is the father of Tet Si, but this relationship has not been clearly ascertained and the conjecture of its existence rests upon the headings of the examination forms. On the 8th, San Nyein confessed to a Magistrate, and stated that he did so as he had no chance of escape. In that confession he suppresses all mention of the visit to Kyetthaukkwin village by the members of the gang, and he puts the gun in the hands of Ngwe Zin. He also says there were six men concerned. As the other four were all relatives, his reason for silence is obvious. There can be no doubt that this confession is a voluntary one. San Nyein was wounded, and the explanation now put forward by him of the way he received those wounds is incredible. They are the kind of wound that one man would receive when fighting with another. The evidence of his identification of his own *pawa* at the Police Station is inadmissible and should not have been recorded, as it is excluded by section 25, Evidence Act. The evidence as to his pointing out the place where sticks were cut is of no value. The sticks found at the scene of crime did not correspond with the stumps. There can be no doubt about San Nyein being one of the dacoits, and he has been rightly convicted.

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Thu Daw and Ngwe Zin were arrested on the 8th of October but did not admit their guilt. On the 13th Kyi Byu was arrested and he confessed the next day. He said that his motive for confessing was that he knew that he could not escape from the Police and San Nyein had already confessed. Prior to this, he had confessed to Tun Tin, who says that he named the Yeson men, San Nyein, Yan Nyein, Po Min, San Byaw, Nga Hme and Nga Shin. Maung Hmo was also present at the confession. In the committing Magistrate's Court he said that Kyi Byu named all the accused, but in the Sessions Court he said that he implicated the Yeson men and Nga Shin. He was not asked to explain the difference between his two statements. He is related to Shwe Ge on his wife's side and he may have intentionally suppressed some names in the Sessions Court. In his confession before the Magistrate, Kyi Byu mentions Nga Shin, San Nyein, Tet Si, Thu Daw, Ngwe Zin and three unknown men from Kyetthaukkwin, and says that ten men were concerned in the dacoity. He has retracted his confession, which he declares was made under ill-treatment by the Police. There is not the slightest reason to suppose that he was in any way ill-treated. He denied that he ever confessed to the village headman. The evidence against Kyi Byu consists solely of these retracted confessions, with such support as they derive from other confessions. The law relating to retracted confessions was fully discussed in *Chit Tun and four* v. *Crown* (1), and I adopt the conclusions of the learned Judges of the Chief Court in that case. The weight to be given to such confessions depends on the circumstances under which they were made, and on the intrinsic credibility of the confessions. In my experience confessions in Burma are seldom the result of physical ill-treatment by the Police.

Sometimes the person confessing is under police surveillance and is induced to confess under threat of prosecution coupled with a promise that, if he confesses, he will be given a pardon. Sometimes the Police have a certain amount of evidence against the man, and induce him to confess under a similar promise. Relatives are not infrequently called in to persuade him that it will be better for him to confess.

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

Others confess in the hope that they will derive some benefit from doing so, and will be less severely punished. Some confessions are made out of resentment against those who have already confessed and with a view of securing their punishment, whatever may happen to the person confessing. Not infrequently confessions are due to a belief that everything is lost, and that the result of deeds in a former state of existence has brought the prisoner into peril. He succumbs to his ill luck and does not attempt to fight against it. It is not possible to enumerate exhaustively all the motives that may lead to a confession but the present case seems to afford illustrations of the motives just suggested. I have no doubt that Kyi Byu's confession was due to a feeling that he could not escape from punishment, and that he might as well yield to his fate. He gave himself up to the headman, and has entirely failed to explain why he did so, if he was not concerned in the crime. I am of opinion that the confession is substantially true, so far as the part played by him in the crime is concerned, although for some reason he has concealed the names of some of his companions. He has been rightly convicted.

The day after Kyi Byu confessed, both Thu Daw and Ngwe Zin, who had been in the same lock-up, confessed. They had been in Police custody for a week. Thu Daw was closely examined by the Magistrate about his reasons for confessing. He said that his mind was in a state of confusion or bewilderment, that he knew he would not escape punishment, and although he was afraid, he could not avoid what he could not keep to himself, and he felt himself unsafe. Nga Zin said that he knew he would be punished, but he wanted all who had taken part in the dacoity to be punished. He was asked why he had delayed and said that he had been considering the matter and wondering whether, if he spoke out, the wives and children of the others concerned would be oppressed or put to trouble. He probably meant to say that he felt a certain amount of sympathy with them. Both men now say that they were ill-treated by the Police. There is not the slightest reason for believing this assertion. They both come from the same village as Kyi Byu and are neighbours. The fact that both confessions were made the day after Kyi Byu confessed is very significant.

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The men were all confined in the same Police Station, and Kyi Byu had mentioned the names of Ngwe Zin and Thu Daw. It was pointed out in *Queen-Empress* v. *Basvanta* (1) that the law in India is not identical with that in England on the relevancy and admissibility of confessions. In England if there is any doubt about the admissibility of a confession, it has to be proved to be free and voluntary. In India the question to be decided is whether the confession appears to have been induced by any of the means mentioned in section 24, Evidence Act. There are no grounds for supposing that the confessions of Thu Daw and Ngwe Zin were induced by any of those means. They are therefore admissible and the only question is whether they are credible. There is very little corroboration. Chit Po says that he saw Ngwe Zin and Tet Si leave the village of Yeson about sunset on the day the dacoity was committed. Maung Kaung says he saw Ngwe Zin leave the gate alone. Ma Kaw states that So Pe told her that he saw blood on Thu Daw's jacket on the night of the dacoity. So Pe and Maung Hla depose to having seen the blood which Thu Daw told them was fowl's blood. There is nothing to show what the nature of the blood was. This evidence does not corroborate any of the incidents mentioned in the confessions. The prosecution must therefore fall back on the inherent credibility of the confessions as sufficient ground for the conviction. The motive for the confessions of Ngwe Zin and Thu Daw seems to me clearly to lie in the fear and annoyance caused by the fact that Kyi Byu had confessed and implicated them. The Sessions Judge remarks that the five confessions in the case differ considerably in the details of the going and coming of the dacoits and the course of the dacoity. But he thought that in spite of these differences, they were correct and true. The greatest differences are between San Nyein's confession and those of the other four men. There are strong reasons for thinking that San Nyein has suppressed much of what he knew to shield his friends if they were concerned.

If the confessions of the other four men are compared carefully, there are no serious discrepancies in the accounts given. Nga Hme says that San Byaw had one of the guns

(1) I.L.R., 25 Bom., 168.

when he went into the village and the other say that Nga Shin had it. The gun may have passed from one hand to another. I have carefully considered whether the confessions were the result of police tuition and I think that it is impossible to believe that they were. The Kyetthaukkwin men were arrested on the confession of Ngwe Zin. It is very unlikely that the names of these men were inserted at the suggestion of any police officer. Four of them were close relatives of Shwe Ge, who had assisted the police to detect the case. There is no reason why the police should wish for the gang to be enlarged. If the Kyetthaukkwin and Kyunbosan men were included in the members of the gang as an after-thought it must have been due to the wish of Kyi Byu, Thu Daw and Ngwe Zin to revenge themselves on Shwe Ge. Kyi Byu only mentions one of the men by name, and Thu Daw only knew two men. If Thu Daw and Ngwe Zin had conspired to confess out of revenge, Thu Daw would probably have mentioned the same names of the Kyetthaukkwin-Kyunbosan party as Ngwe Zin did. But the theory becomes still more difficult to believe when Nga Hme's confession is taken into consideration. He comes from Kyetthaukkwin (Wetchok is the same village) and was only in Police custody for half a day at Yenangyaung before he confessed. He admits that he was kept away from the other men in the lock-up.

His confession therefore was not the result of conference with Thu Daw or Ngwe Zin, and he had no reason whatever for implicating his fellow villagers. He is also known as Hnget Kyi, by which name he was mentioned in Ngwe Zin's confession. He states that he was taught what to say by Min Gyaw, a Sergeant of Police. He was in the charge of the headman after arrest, and if there was tuition, the headman must have been aware of it. It seems to me impossible that any policeman could have taught Nga Hme so well in the short time before he confessed, that he, an ordinary Burman yokel, would have been able to give a detailed account of the crime and of the part played in it by ten men so as to make that account tally with Nga Zin's confession. His reason for confessing is that he thought he could not escape punishment. As was remarked in Chit Tun's case "it is not improbable that a person under arrest may think his fate is certain, and that the

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only hope for him lies in either obtaining a pardon or a less severe punishment by confession and implicating his fellow criminals." This motive is a common one amongst Burmans, who are much influenced by their belief in 'kan' or the result of deeds in a former existence. After careful consideration, I have come to the conclusion that the Sessions Judge is right in believing that the confessions were substantially true as far as they affected those making them. Against Tet Si the only evidence is that of the confessing co-accused and that is an insufficient basis for a conviction. The conviction of Tet Si is set aside and he is acquitted. The Sessions Judge has sentenced the others to death. It was pointed out in *Queen-Empress* v. *Nga Pyon Cho and others* (S.J. 636) that sentences of death should be passed in case, under section 396, Indian Penal Code, unless there are extenuating circumstances. The gang in this case went out armed with the two tube guns and *dahs* and the probability of some villager being killed must have been present to their minds. The persistency with which these offences are committed in Burma calls for the severest punishment. According to the confessions, Nga Hme and Kyu Byu waited outside the village. They were keeping watch there, and according to the map, were 125 yards from the house attacked. They are equally liable under section 37, Indian Penal Code, for the dacoity, and their mere presence at the actual scene of the crime is immaterial: *Queen-Empress* v. *Teja* (1). The *alibis* set up are so weak as not to require serious discussion.

I dismiss the appeals of San Nyein, Ngwe Zin, Kyi Byu, Thu Daw and Nga Hme.

The manner in which the committing Magistrate has examined some of the accused is open to most serious objection. He has cross-examined them and asked such questions as "if you did not commit the dacoity, who did?" It ought not to be necessary to point out that it was for the prosecution to prove who committed the crime. The object of examining an accused person is to afford him an opportunity of explaining away evidence against him. Each point appearing in evidence should be put to the accused and he should be invited to offer his explanation or comment on it. Anything in the nature of cross-examination should be avoided.

(1) I.L.R., 17 All., 86.

Before A. E. Rigg, Esq., B.A., I.C.S.

Civil Revision No. 47 of 1917. 18th May.

MAUNG SAN BA *v.* MAUNG LUN BYE.

Mr. R. K. Banerjee—for Applicant.

Civil Procedure—O. 21, Rr. 58, 63, Section 115.

Held—that where a remedy is provided by a formal suit to displace an order of a summary nature, the High Court will not interfere on revision merely because there has been an error in the misappreciation of evidence or misconstruction of law, unless the extrinsic conditions of the Lower Court's legal activity have been infringed.

I.L.R., 8 Mad., 493. I.L.R., 7 Bom., 341.
—— 15 All., 405. —— 10 All., 122.
—— 18 All., 164. —— 180.
—— 18 Cal., 290. 8 L.B. R., 146.
—— 29 Cal., 543. U.B.R., 1897—01, II, 311.

This is an application in revision against an order passed by the Township Judge, Thazi, directing the removal of attachment on certain lands. The Judge held that the lands were in the possession of the objector at the time of the attachment and not of the judgment-debtor or some person in trust for him. San Ba's grounds for moving this Court in revision are that the Judge has acted with material irregularity in not applying his mind to the provisions of section 110, Evidence Act, and in not considering the evidence produced. An objection is also taken to the amount of costs awarded. Rule 63, Order 21, provides that where a claim or an objection is preferred, the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute, but that subject to the result of such suit, if any, the order shall be conclusive. The first point that has been argued at the bar is whether any revision lies against an order such as the one passed by the Township Judge, and if it does lie, within what limits this Court will interfere in revision. In *Ittilachan* v. *Velappan* (1) the Court appeared to think that it had no power to revise orders in cases investigated under O. 21, R. 58, but the point was not argued and the opinion is merely an *obiter dictum*. In *J. J. Guise and others* v. *Jaisraj and another* (2) Burkitt, J., said that the rule of the Court was that if a party applied to the Court to exercise its powers in revision, he must satisfy the Court that he has no other remedy open to him under the law to set right what has been done illegally, irregularly or

(1) I.L.R. 8 Mad., 493. (2) I.L.R. 15 All., 405.

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without jurisdiction. In *Ghulam Shabbir* v. *Dwarka Prasad and others* (3) a bench of the same Court interfered in revision on the ground that it was doubtful whether a separate suit would lie. In the matter of *Sheoraj Nandan Singh* v. *Gopal Suran Narain Singh* (4) and *Monmohiney Dassee* v. *Radha Kristo Dass* (5) the Calcutta High Court interfered in revision in two cases where the Court had gone beyond the determination of the question of possession only. The decisions proceeded apparently on the ground that the Court below had acted illegally in the exercise of its jurisdiction in directing execution to issue. In *San Tun Pru* v. *Mi Ani Me and 4 others* (6) interference with the lower Court's order was made for similar reasons to those given in the Calcutta cases. The latest reported decision in Lower Burma is that of *Tun U* v. *Palaniappa Chetty and another* (7), where the learned Chief Judge said, "The course which the Plaintiff should have pursued is very clearly indicated in Rule 63 of Order 21 of the Code of Civil Procedure, which says that where a claim or objection is preferred to an attachment, the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute, but subject to the result of such suit the order shall be conclusive. With such plain provisions staring him in the face, it was sheer culpable negligence on the part of the Advocate to incur the risk of the Plaintiff losing all remedy by filing the appeal and the application for revision." The case does not decide that under no circumstances will revision lie. The only reported decision in Upper Burma is *Maung Thaing* v. *Maung Thale Ni* (8), where Thirkell White, J., said, "In a case in which the Court of first instance has acted on insufficient materials, has dealt with the case in a perfunctory manner or has given a decision which is plainly perverse this Court would be justified in interfering in revision." None of the authorities seem to have been brought to the notice of the learned Judge, and I venture to doubt whether the law laid down correctly states the grounds on which revision is justified under section 115, Code of Civil Procedure. The

(3) I.L.R., 18 All., 164.
(4) —— 18 Cal., 290.
(5) —— 29 Cal., 543.
(6) I.L.B. R., 180.
(7) 8 L.B.R., 146.
(8) U.B.R., 1897—01, II. 311.

most fully considered decision that I have been able to find is that of a Full Bench of the Bombay High Court in *Shiva Nathaji* v. *Joma Kahinath* (9), where the question referred for the decision of the full bench was, "whether the High Court should exercise its extraordinary jurisdiction under section 622, Code of Civil Procedure, or otherwise on behalf of persons who feel themselves aggrieved by orders passed by Courts in cases in which it appears the law has specifically prescribed another remedy by suit or otherwise." After a very elaborate discussion of the authorities, seven propositions were laid down of which the most important was the fifth which is as follows:—"Where a decree or order of a subordinate Court is declared by the law to be for its own purposes final or conclusive, though by its nature provisional, as subject to displacement by another decree in a more formal suit, the Court will have regard to the intention of the Legislature that promptness and certainty should in such cases be in some measure accepted instead of juridical perfection. It will rectify the proceedings of the inferior Court where the extrinsic conditions of its legal activity have been plainly infringed, but where the alleged or apparent error consists in a misappreciation of evidence or misconstruction of the law intrinsic to the enquiry and decision, it will respect the intended finality and will intervene peremptorily only when it is manifest that by the ordinary and prescribed method an adequate remedy or the intended remedy cannot be had." The principles laid down in this decision were approved in *Sheo Prasad Singh* v. *Kasture Kuar* (10) by Mahmood, J., who described the judgment as one deserving of the highest respect from the Indian Courts, and I think that it should be followed in this Court. In the present case, I see no reason why the petitioner should not resort to the ordinary remedy by suit. It is not shown that there has been any infringement of the extrinsic conditions of the lower Court's legal activity. The Judge found after taking evidence that the lands in dispute were in the objector's possession on his own account and not on account of the judgment-debtor, and he had power to decide the point. The application for revision is dismissed.

(9) I.L.R. 7 Bom.. 341. (10) I.L.R.. 10 All.. 122.

Criminal Revision No. 287 of 1917. 28th June.

Before A. E. Rigg, Esq., B.A., I.C.S.

NGA MIN DIN *v.* KING-EMPEROR.

Mr. K. Bonerjee—for applicant.

Criminal Procedure—437.

A Court ordering further enquiry to be made against an accused person discharged should record its reasons sufficiently fully to give the accused notice of its grounds for its order.

IV. L.B.R., 233.
VIII. C.W.N., 457,
III. Cal. L. Journal, 45.

This is an application for revision of the order of the District Magistrate directing further enquiry in the case of K. E. *v.* Nga Min Din in Criminal Regular Case No. 51 of 1917 of the Township Magistrate, Pyawbwe.

The first objection taken to the order of the District Magistrate is that he has failed to give reasons for ordering further enquiry. The District Magistrate says " I do not wish to write a judgment in advance, but *primâ facie* it is quite clear that Nga Min Din is the prime mover in this theft and ought never to have been discharged." Section 437 of the Code of Criminal Procedure does not require a court ordering further enquiry to state its reasons. In *Nga Tun Win* v. *K.E.* (1), Irwin, J. held that it was sufficient for a court ordering further enquiry to state as its reasons that it had considered the whole of the evidence in the record. He said that it would be improper for the Magistrate to comment on the evidence in detail, as such a proceeding would tend to prejudice the accused.

This opinion has been dissented from in two cases of the Calcutta High Court, *Nagendra Nath Sen* v. *Mr. Korb*, (2) and *Wahad Ali* v. *Emperor*, (3) in both of which cases it was held that the Magistrate should state his reasons for ordering further enquiry, as in the absence of such reasons it is not possible for the High Court to exercise supervision over the Magistrate or Judge's proceedings.

To the reasons given by the learned Judges of the Calcutta High Court, I may add that it appears to me fair to a person against whom an order for further enquiry is made, that the reasons for directing such enquiry should be made explicit to

(1) IV L.B.R. 233. (2) VIII C.W.N. 457. (3) III Cal. Law Journal, 45.

him and that he should have notice of the ground on which the further enquiry has been directed.

To the objection that the accused may be prejudiced in his trial if the reasons for the superior Court's order are made explicit, it may be replied that while it is not ordinarily desirable that a detailed examination of the evidence and elaborate reasons should be given, enough should be said in the way of reasons to indicate to the Court below in what manner it is thought that its order was incorrect, whether on a point of law or in misappreciation of the weight of the evidence or for want of a complete enquiry.

* * * * *

Before A. E. Rigg, Esq., B.A., I.C.S.

Criminal Revision No. 254 of 1917. 11th May.

NGA PO HMI v. MI SHWE THA.

Maung Su—for Applicant.
Mr. D. Dutt—for Respondent.

Criminal Procedure—144, 145.

Held—that under section 144, Criminal Procedure Code, a Magistrate can proceed to pass an order when one of the rival parties is found to be in possession of the land, but that except in cases of grave emergency, section 145 is the proper section under which to act.

I.L.R., 26 Mad., 471.
—— 32 Cal., 966.
11 C.W.N., 271.

In the present case the Subdivisional Magistrate, Shwebo, purporting to act under section 144, Criminal Procedure Code, has passed an order directing that Mi Shwe Tha should retain possession of some disputed land until evicted therefrom and that Po Hmi should not disturb her possession. The order was passed on the 11th December last and is no longer in force. The section did not empower the Magistrate to make an order for Mi Shwe Tha's retention of the land. As the order is no longer in force it is not necessary for me to consider whether it should be set aside formally nor whether I have power to revise it under section 435, Criminal Procedure Code. Section 144 is intended to apply only to cases of emergency. The Applicant said in her petition that she was about to reap crops on some land in connection with which she had instituted a prosecution under section 447, Indian Penal Code, and been successful. She alleged that there was

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likely to be an affray or riot unless she was protected. Po Hmi denied that Mi Shwe Tha was in possession. The Magistrate's order did not set out the material facts of the case, nor was it served on Po Hmi in the manner provided for by section 134. The Madras High Court has decided that a Magistrate can proceed under this section where one of the rival parties is found to be in actual possession of the land.—*Belagal Ramacharlu* v. *Emperor* (1). This view was approved by a bench of the Calcutta High Court in *Sheorai Roy* v. *Chatter Roy* (2). In *Parkar Mahton* v. *Ram Khelwan and others* (3), it was held that where the question of possession is in dispute between the parties, the proper procedure is for the Magistrate to take proceedings under section 145 and not section 144. In this case an order under the latter section was set aside. Section 145 (4) provides for the attachment of the subject matter in dispute in cases of emergency, but this procedure would not give the necessary relief in a case where unless crops were promptly reaped, they would be ruined. In such a case, I see no reason why action should not be taken under section 144, if one of the parties is found by the Magistrate to be in possession. Except in cases of grave emergency, section 145 is the proper section under which to act.

The papers may be returned with these remarks.

Criminal Revision No. 350 of 1917. 1st June.

Before A. E. Rigg, Esq., B.A., I.C.S.

KING-EMPEROR *v.* NGA PO MYA AND ANOTHER.

Criminal Procedure—342, 364, 537.

Held—that the omission to examine accused persons under the provisions of sections 342 and 364 of the Code of Criminal Procedure is fatal to the validity of a trial. The provisions of section 342 are imperative and failure to comply with them is not a mere irregularity curable under section 537.

The conviction in this case must be quashed. The accused did not admit that they had committed criminal trespass by entering upon the land in dispute. They claimed that they had leased it from the owner.

After the evidence for the prosecution had been recorded, the Magistrate was bound to examine them under the provi-

(1) I.L.R., 26 Mad., 471. (2) I.L.R., 32 Cal., 966.
(3) XI C.W.N., 271.

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sions of sections 342 and 364 of the Code of Criminal Procedure. His omission to do so is fatal to the validity of the trial. The provisions of section 342 are imperative and failure to comply with them is not a mere irregularity curable under section 537 of the Code of Criminal Procedure. Moreover so far as can be ascertained from the diary of the record, the accused were never given an opportunity to produce witnesses on their behalf.

The District Magistrate has commented on the irregularity of the method of trial in this case. The Magistrate fixed the case for the 2nd of December at Pakokku, but proceeded to the village where the land was situated on the 30th of November without giving any notice to the Advocates, and pronounced judgment on the 2nd of December.

The convictions and sentences are set aside, and a retrial is directed. The fines that have been paid will be refunded.

Before A. E. Rigg, Esq., B.A., I.C.S.

Criminal Revision No. 149 of 1917. 17th May.

NGA PO PYAW *v.* NGA PO NWE.

Mr. K. Bonerjee—for Applicant.

Criminal Procedure—439.

Held—that the power of reversing acquittals on revision at the instance of private prosecutors is one that will only be used sparingly and where the interests of public justice demand it.

I.L.R., 42 Cal., 612.
—— 38 Cal., 786.

This is an application in revision at the instance of a private party against the order of acquittal of Nga Po Nwe by the Township Magistrate, Ngazun, on a charge of theft.

The grounds put forward for revising the order of the Magistrate are all based on inferences to be drawn from the facts of the case. The Magistrate tried the case with care and wrote a lengthy judgment dealing with the facts. The only order that this Court could pass under section 439 of the Code of Criminal Procedure would be one directing a retrial of the case, and such an order is *primâ facie* inappropriate in a case where there has already been a full enquiry into the facts, and no further evidence is likely to be forthcoming.

Apart from this, there is a long consensus of opinion in the High Courts of India that although the High Court has

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jurisdiction to set aside an order of acquittal at the instance of a private prosecutor, it will not do so except in exceptional cases, and applications for the purpose should be discouraged on public grounds. The most recent decision on this subject is reported in *Foujdar Thakur* v. *Kasi Chowdhuri* (1). *Kangali Sardar* v. *Bama Charan Bhattacharjee* (2) has been cited as an authority for the interference of the High Court in revision on application made. But in that case the District Magistrate had set aside on appeal a conviction on the ground that the Magistrate had no local jurisdiction to try the case and in so doing had acted contrary to the provisions of section 531, Criminal Procedure Code. That is an entirely different case from entertaining an application in revision on mere facts. The only cases in which it seems to me at all appropriate that applications at the instance of private parties against orders of acquittals should be entertained, are those in which there has been a failure of justice through want of jurisdiction, or a failure to understand the law applicable to the case, or perhaps in personal cases such as those under sections 504 or 497 of the Indian Penal Code. But in any case the power of reversing acquittals is one that will only be used sparingly and where the interests of public justice demand it.

The present case is certainly not a case of that nature. It is one on grounds of evidence, and if the Applicant is advised that the acquittal is an improper one, he can take steps to move the Local Government to appeal if they think fit to do so.

The application is accordingly dismissed.

Before A. E. Rigg, Esq., B.A., I.C.S.

SANTA v. SERGEANT BATTERSBY.

Mr. M. H. Lutter as *Amicus Curiæ.*

Civil Revision No. 249 of 1916 18th June 1917.

Army Act—136, 144.

Held—that the pay of a non-commissioned officer is exempt from attachment by a Civil Court.

I. C. Vol. X, 719; I. C. Vol. XXIII, 935.

This is a reference by the Township Judge, Bhamo, as to whether the pay of a non-commissioned officer in charge of

(1) I.L.R., 42 Cal., 612. (2) I.L.R., 38 Cal., 786.

the Supply and Transport, Bhamo, is liable to attachment in execution of a decree passed by the Court under its Small Cause Court jurisdiction. It is contended on behalf of the judgment-debtor that his pay is exempt from attachment under section 144 of the Army Act (44 and 45 Vict., c. 58). Neither party has been represented by counsel at the hearing, but Mr. Lutter has kindly argued the case as *amicus curiæ*.

The proviso to section 144, Army Act, runs as follows :—

Provided that—(1) "Any person having cause of action or suit against a soldier of the regular forces may, notwithstanding anything in this section, after due notice in writing given to the soldier, or left at his last quarters proceed in such action or suit to judgment and have execution other than against the person, pay, arms, ammunition, equipments, regimental necessaries or clothing of such soldier." . . The section commences by exempting any soldier of His Majesty's forces from being taken out of the service by process execution or order of a Court of law, except in respect of a charge of or conviction for crimes or (*b*) debts damages or money exceeding £ 30 over and above the costs of suit. The section then explains what is meant by a crime, a Court of law, and the method of proof of the debt damages or money and declares that all proceedings in contravention of the section are void. The proviso contains an exception to the privileges conferred by the first four sub-clauses of the section, and although as pointed out in *Murray and Company* v. *Prins* (1) the drafting of the section is open to criticism, I think there is no doubt that the pay of a soldier is exempt from attachment unless there is any other provision of law that is inconsistent with it and prevails. Section 136, Army Act, lays down that the pay of an officer or soldier should be paid without deduction other than the deductions authorised by the Act, etc., or by any law passed by the Governor-General in Council. The last clause was added at the same time as section 151 was repealed, which dealt with the way in which a Civil Court could award execution against persons subject to military law other than soldiers. In *Prins* v. *Murray and Company* (2), it was held that sub-section 2, clause (*b*), section 60, Civil Procedure Code, does not amount to a declaration that the

(1) I. C. Vol. X, 719. (2) I. C. XXIII, 935.

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provisions of sub-section 1 of section 60 do not constitute a law passed by the Governor-General in Council authorising deductions to be made from the pay of an officer of His Majesty's Regular forces. The doubt that existed about the correctness of this view in consequence of the differences in opinion in the High Courts of India has been set at rest by the repeal of sub-section 2 (*b*) of section 60 by Act X of 1914. The question for decision therefore resolves itself into one of whether sub-clause 1, section 60, Code of Civil Procedure, authorises the attachment of soldiers' pay, and if so, how it is to be reconciled with section 144, Army Act. Clause 1 exempts to a certain extent the pay of the public officers or servants referred to in clause (*h*) from attachment, when they are on duty. Public officer is defined in section 2 (17), Code of Civil Procedure, and includes commissioned or gazetted officers in the military forces of His Majesty and every officer in the service or pay of the Government. It is argued that non-commissioned officers fall within the latter description, and that therefore their pay is subject to attachment to the extent allowed in section 60 (1) unless section 144, Army Act, is to override this section. The reply to this argument is that in section 136, Army Act, the term "officer" does not include a non-co mmissioned or warrant officer, who is merely a soldier within the meaning of that section, and the provisions of section 144, Army Act, prevent the operation of section 60 (1), Code of Civil Procedure. This is clear from the definition of "officer" in clause (4), section 190, Army Act. Had the Legislature intended to include non-commissioned officers within the meaning of section 60 (1), Code of Civil Procedure, I think this intention would have been clearly shown by including them in clause C, section 2 (17), Code of Civil Procedure. I am of opinion that Sergeant Battersby's pay is not liable to attachment in execution of the decree in the Township Court, Bhamo.

Before A. E. Rigg, Esq., B.A., I.C.S.

Civil Second Appeal No. 356 *of* 1916. *30th May* 1917.

MA TOK AND THREE OTHERS *v.* MA CHIT.

Mr. C. G. S. Pillay—for Appellants.
Maung Su—for Respondent.

Probate and Administration—98.
Civil Procedure—100.
Buddhist Law—Inheritance.

Held—that if the Administrator of an estate denies the claim of a person to an interest in the estate, that person is entitled to take legal measures to enforce his claim. Ma Hmyin *v.* Ma On Gaing, U.B.R., 1902-03, II, Probate and Administration, 1, explained.

Also—that it is permissible for the High Court in a second appeal to examine the evidence in order to see whether there is any evidence on which the findings of the Lower Appellate Court could properly be based.

Also—that where delivery of property is essential to the validity of the gift, there must be clear evidence of a change of possession.

Also,—that the children of a divorced wife, who live with their mother and do not maintain filial relations with the father, are not entitled to share in his estate where there has been a division of property at the time of divorce.

U.B.R., 1902-03, II, Probate and Administration, 1.
I.A. XVII, 127.
—— VIII, 75.
—— XIV, 101.
I.L.R., 34 Cal., 207.
P.J.L.B., 504.
U.B.R., 1897-01, II, 59, 116.
IV L.B.R., 272.
VI L.B.R., 167.
S.J.L.B., 296.

The Plaintiff, Ma Chit, is the daughter of Maung Kyaw Din by his first wife Ma On Bo. Maung Kyaw Din and Ma Ôn Bo were divorced when the Plaintiff was about ten years of age. Maung Kyaw Din then married Ma Tôk, and the 2nd, 3rd and 4th Defendants are the children of that marriage.

The Plaintiff sued for the possession of a house and its site which she alleged had been given her by her father and in the alternative she claimed this property by right of inheritance on the ground that Ma Tôk was not a wife entitled to any share in her husband's property. A preliminary objection to the frame of the suit on the grounds that the claims were inconsistent and that the Plaintiff could not sue for a part only of the estate was overruled, and the decision was confirmed on appeal by my learned predecessor.

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Objection was also taken to the suit on the ground that Ma Tôk had obtained Letters of Administration and that the filing of the suit was in contravention of the ruling in *Mæ Hmyin* v. *Ma Ôn Gaing* (1). This objection has not been dealt with in the judgments of either of the Courts below, but it has again been urged in second appeal. In the case cited Adamson J. held that when Letters of Administration had been obtained to the estate of an intestate, a co-heir cannot sue the administrator for partition so long as he is performing his duties properly, but must merely present his claim to the administrator. In the present case Letters of Administration had not been issued to Ma Tôk at the time the suit was filed although an order for their issue had been made. The value of the properties of the estate had not been verified and security had not been furnished. Ma Tôk's objection at the time the suit was filed was therefore premature. It was not until May 1916 that Letters were actually issued.

But apart from this, Ma Chit claims that the house and site are not part of the deceased's estate at all, but are her own property of which she has been dispossessed by Ma Tôk. There is no reason why she should not file a suit for its recovery on the basis of such a claim. If her claim as heir was denied by the administratrix, she could have filed a suit for a declaration of her right to inherit in Maung Kyaw Din's estate, or if she was dissatisfied with the administration of the estate, she could have filed a suit for its administration by the Court. The ruling in *Ma Hmyin* v. *Ma Ôn Gaing* only lays down that where an administrator is engaged in the administration of an estate, a suit by a co-heir for partition is premature as interfering with the due administration of the estate. It does not lay down that the fact that section 98 of the Probate and Administration Act gives an administrator six months within which to file an inventory and one year within which to file an account, is a bar to a person claiming an interest in the estate taking legal measures to enforce his claim when that claim is denied. The objection that the suit did not lie is therefore overruled.

(1) U.B.R., 1902-03, II, Probate and Administration, 1.

In her written statement Ma Tôk further took exception to the suit on the ground that the parties had referred their dispute to arbitration. Neither of the Courts below has dealt with this point, and as it has not been urged in appeal in this Court, it must be considered waived.

The two main points argued at the bar on behalf of the Appellants in this Court are that there is no evidence to support the finding that there had been delivery of possession of the subject matter of the gift, and that Ma Chit is not entitled under the Buddhist Law to any share in her father's estate as there had been a partition of the property at the time of the divorce between her father and mother, and she had not resumed filial relations.

The Advocate for the Respondent contends that as this is a second appeal under section 100 of the Code of Civil Procedure, this Court is bound by the findings of fact by the lower Courts that there had been delivery of possession and a valid gift. It is not however every finding of fact by the lower Court which precludes this Court in second appeal from a consideration of the evidence. Their Lordships of the Privy Council have pointed out within what limits interference in second appeal with finding of facts is permitted. In *Massumat Durga Choudrain* v. *Jawahar Singh Choudree* (2) Lord MacNaghten said "It is enough to say that an erroneous finding of fact is a different thing from an error or defect in procedure, and there is no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact, however gross or inexcusable the error may seem to be. Where there is no error or defect in the procedure, the finding of the first Appellate Court is final, if that Court had before it evidence proper for its consideration in support of the finding." And in *Shiva Basava Kom Amin Gabda* v. *Sangappa Bin Amin Gabda* (3) Their Lordships cited with approval the rule laid down in *Ananga Manjari Choudrain* v. *Tripura Soondari Choudhrain* (4) that it is within the jurisdiction of the Judges of second appeal to dismiss the case if they are satisfied that there was, as an English lawyer would express it, no evidence to go to the jury

(2) Indian Appeals, XVII, 127. (3) Indian Appeals, VIII, 75.
(4) Indian Appeals, XIV, 101.

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because that would not raise a question of fact such as arises upon the issue itself, but a question of law for the consideration of the Judge. It is therefore clearly permissible for this Court to examine the evidence in order to see whether there is any evidence on which the findings of the Lower Appellate Court could properly be based.

The gift in the present case was a verbal one and it is admitted that delivery of possession is essential to its validity. In *Sibendrapada Banerji* v. *The Secretary of State* (5) the learned Judges remarked "The essence of a transfer by delivery of the property is that possession is changed." In the case of a gift the donor must put the donee in such relation to the land as he himself occupies. Now what are the facts found proved by the Lower Appellate Court? They are as follows :—

(1) That Maûng Kyaw Din, on marrying again, made a verbal gift of the property in dispute to Ma Chit which he reaffirmed in the presence of three witnesses when Ma Chit was 18 years of age ;

(2) that the house was rented to Sit Hon who was referred by Maung Kyaw Din to U Kyaw Wa, maternal grandfather of Ma Chit, for the leasing of the house ;

(3) that in the quarter of the town where the house is situate, it was a matter of notoriety that the house was Ma Chit's, and

(4) that Maung Kyaw Din and his second wife, Ma Tôk, kept their properties separate, and that Ma Chit also made a gift of part of her property to her son.

On these findings the Divisional Judge thought that it was proved that Ma Chit was in possession of the house and he cited the decision in *Gura* v. *San Tun Baw* (6) as authority for the proposition that because the house was rented in Ma Chit's name it was her property. No such proposition however was laid down in Gura's case. The Judicial Commissioner remarked that if land was rented on behalf of a person and rent was received by that person for the land, it would be reasonable to hold that he was in possession of it. The evidence in the present case however proves that the house was not rented in Ma Chit's name but in Maung Kyaw Din's. She herself says

(5) I.L.R. 34, Cal. 207. (6) P.J.L.B., 504.

that as she was so young her grandfather allowed her father to enter into a written agreement with Sit Hon about renting the house.

The gossip in the town about the house being Ma Chit's was not admissible in evidence and should not have been taken into account by the lower Appellate Court.

So far as the evidence of transfer of possession goes, the whole case for the Plaintiff practically rests upon the reference by Maung Kyaw Din to Maung Kyaw Wa when Sit Hon wished to rent the house. There is no doubt that Maung Kyaw Din frequently stated that he had given the house to Ma Chit, but as Burgess J. said in *Maung Shwe Thwe* v. *Ma Saing* (7) " actual parting with possession is the only true test of the completion of a gift, and Burmans avoid that final and crucial test if they possibly can." These remarks are particularly apposite to the present case. There is no evidence whatever that Maung Kyaw Din put Ma Chit in possession of the house and land; on the contrary he occupied the house with Ma Tôk at times, or, when he was not in occupation, took the whole of the rents. As Sit Hôn says, it was understood that Maung Kyaw Din was to enjoy the rents during his lifetime.

Maung Tha Han, third witness for the Plaintiff, says he paid rent for beans stored in the premises to Maung Kyaw Din who charged him an exorbitant rate. Further, Maung Kyaw Din paid the municipal taxes. The title deeds of the property were with Ma Tôk, and Ma Chit's explanation that she handed them back to her father a month before his death is neither plausible nor credible.

I accordingly find that there was no evidence on the record to justify or support the finding of the lower Appellate Court that there was delivery of possession to Ma Chit of the house and land in suit.

I now come to the second branch of Ma Chit's claim. It is admitted that at the time of her father's divorce with her mother there was a partition of property, and it was quite clear that after that she lived with her mother and not with her father. The general rule governing such a case is laid down in *Ma Pon* v. *Maung Po Kyan* (8) where it was held that the

(7) U.B.R., 1897—01, II, 59. (8) U.B.R. 1897—01, II, 116.

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children of a divorced wife, who live with their mother and do not maintain filial relations with the father, are not entitled to share in his estate where there has been a division of property at the time of divorce. This case was followed in the Lower Burma case of *Ma Paw* v. *Ma Món* (9) where all the authorities were again considered and was approved of in *Ma Yi* v. *Ma Gale* (10) and may be regarded as settled law.

The question therefore is whether Ma Chit, after her parents' divorce, continued to maintain filial relations with her father. By filial relation is meant something more than paying visits to the parent or receiving presents from him which would only indicate a continuance of those relations that are natural between the parent and child. In *Ma Shwe Ge* v. *Maung Lan* (11) filial relation was held to imply living and working and planning with the parent.

The evidence in the present case falls far short of those requirements. Ma Chit continued to live with her mother; there is no evidence that she worked and planned with her father. The Court of first instance has not considered her position at all. It rejected the claim of Ma Tok to inherit her husband's property on the ground that she belonged to the class of wife which is not entitled to inherit from her husband. In particular the Judge mentioned three disqualifications, (1) that she did not eat with her husband, (2) that she did not attend on her husband during his illness, and (3) that Ma Chit performed the funeral ceremonies.

Ma Tok herself says that her husband drank heavily so that she often had to leave him and live at her own house. The Myothugyi and his clerk speak of Maung Kyaw Din and Ma Tôk living together. Ma Ôn Bwin, who was their cook, says that they had their meals together. Ma Kan Me, 12th witness for the Plaintiff, says that Maung Kyaw Din had meals with Ma Tôk.

The evidence adduced by the Plaintiff to show that Maung Kyaw Din and Ma Tôk kept their estates entirely separate and never worked together, is rebutted by that of the two Chetties one of whom, Alagappa, swears that they jointly borrowed

(9) IV, L.B.R., 272. (10) VI, L.B.R., 167.
(11) S.J.L.B., 296.

money from him for about ten years, and these loans were repaid sometimes by one, and sometimes by both. It is quite clear that they were ordinarily regarded as man and wife, and a good deal of the evidence about their separate eating and separate incomes comes from the side of Maung Kyaw Din's relations. Ma Tok admitted that she was unable to look after her husband during his last illness but attributed it to the fact that she herself was ill as she was pregnant. She says that of the Rs. 500 spent on the funeral, Rs. 200 were her money and Rs. 300 were borrowed from Ma Chit. Ma Chit denies making the loan to Ma Tôk's sister, but in cross-examination said that she did not know whether a notice had been issued through a lawyer to recover this sum, and also that she had not yet got it back. If she had made no loan it is strange that she should not be able definitely to deny that any message of demand for its recovery had been issued.

In my opinion it has not been shown that Ma Tôk should be excluded from inheriting her husband's property on the grounds stated by the District Judge.

I accordingly reverse the judgments and decrees of the lower Courts, and direct that the suit be dismissed with costs in both Courts.

Before A. E. Rigg, Esq., B.A., I.C.S.

NGA HMYIN *v.* KING-EMPEROR.

Criminal Revision No. 391 of 1917. 10th July.

Maung Tha Gywe—for applicant.

Criminal Procedure Code,—210, 213, 215.

Held,—that a Committing Magistrate has a discretion to consider the credibility of the evidence and if he entirely disbelieves it, ought to discharge the accused.

If he is in doubt as to the credibility of witnesses, and the evidence if believed, is sufficient to justify a commitment, he should commit the case.

Held also—that the question as to whether there is an absence of evidence to warrant the commitment is a point of law and not of fact.

I.L.R., 5 All., 161. 9 C.W.N., 829.
—— 21 All., 265. 5 C.W.N., 411.
—— 35 Bom., 163. 14 I.A., 101.
7 B.L.T., 26.

This is an application under section 215, Criminal Procedure Code, to quash the order of commitment to Sessions of Nga Hmyin. The grounds for making the application are briefly (1)

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that the evidence is quite insufficient to justify the order of commitment, (2) that the Magistrate has failed to consider whether the evidence is reliable or not, and has not exercised a discretion vested in him by law, and (3) that in his reasons for committal, he has not shown that he has considered the evidence. Section 210, Criminal Procedure Code, directs a Magistrate to frame a charge if after taking evidence he is satisfied that there are sufficient grounds for committing the accused for trial, while section 213 (2) gives him the power to cancel the charge if after hearing the evidence for the defence, he is satisfied that there are not sufficient grounds for the commitment. If he decides to commit, he is also bound to record briefly his reasons for so doing. In his reasons the Magistrate mentions briefly the evidence for the prosecution and defence and then says, "as there is direct evidence against Nga Hmyin, I consider that he should stand his trial before the Court of Session." The fact that there is direct evidence against an accused person, which, if believed, would justify a conviction is not necessarily a sufficient reason for committing a case to Sessions. In the matter of the petition of *Lachman* v. *Juala* (1), Mahmood J. said, "The object of the law in providing that the inquiry shall be held by a Magistrate before the accused has to undergo a trial in the Court of Session, seems to be to prevent the commitment of cases in which there is no reasonable ground for conviction. The provision of the law is calculated on the one hand to save the subjects from prolonged anxiety of undergoing trials for offences not brought home to them and on the other to save the time of the Court of Session from being wasted over cases in which the charge is obviously not supported by such evidence as would justify a conviction. I am of opinion that the power given to Magistrates extends to the weighing of evidence and the expression 'sufficient grounds' must be understood in a wide sense." *In re the petition of Kalyan Singh* (2) it was said that the proposition that Magistrates, who had before them evidence that discloses a case for trial in some Court to which they might commit it, ought to commit, is dangerously large. These

(1) I.L.R., 5 All., 161. (2) I.L.R., 21 All., 265.

cases were followed *in re Bai Parvati* (3) where the High Court held that where a committing Magistrate finds that there is no evidence or that the evidence tendered for the prosecution is unworthy of credit it is his duty to discharge the accused. In *Sheobux Ram* v. *King-Emperor* (4) one of the learned Judges laid down the test to be applied as to whether a commitment ought to be made or not, as this—assuming that the whole of the evidence telling against the accused is true,—is there a case which a judge at a trial could leave to the jury. If there is any evidence that calls for an answer however great the preponderance in favour of the prisoner may be, the commitment is proper. With due respect to the opinion of the learned Judge, I venture to think that the proposition laid down is too wide, and is inconsistent with the provisions of clause (2), section 213.

The Magistrate has a discretion even after he has framed a charge of cancelling it, if after hearing the evidence for the defence he considers that there are no longer sufficient grounds to put the accused on his trial. If he entirely disbelieves the evidence for the prosecution, however numerous the witnesses may be, he ought to discharge the accused. If he is in doubt as to their credibility but the evidence if believed would be sufficient for a conviction, he should not take on himself the functions of a superior Court, but commit the case.

It is however a waste of time and unfair to the accused to commit him to Sessions, where there is no reasonable probability that he will be convicted. The next point for consideration is whether this Court has power to quash a commitment once made on the ground that the evidence is insufficient to justify such a commitment. In *King-Emperor* v. *Nga Taung Thu and others* (5) it was held that although both the police and the committing Magistrate thought that the evidence for the prosecution was not credible, the commitment could not be quashed as no point of law was involved. A different view has been taken by the Calcutta High Court. In *Jogeshwar Ghose* v. *King-Emperor* (6) it was held that the absence of evidence to warrant the commitment is a point of law and may furnish a good ground for

(3) I.L.R., 35 Bom., 163.
(4) 9 C.W.N., 829.
(5) 7 B.L.T., 26.
(6) 5 C.W.N., 411.

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setting aside an order of commitment. The learned Judges said, "Insufficiency of evidence has never been treated as a ground for quashing a commitment, but this Court following the principle laid down by the Courts in England has held that the absence of evidence to warrant the commitment is a point of law and may furnish a good ground for quashing the commitment. This Court has to consider whether there is such evidence as would justify the case going before a jury." In *Sheobux Ram's* case cited above, the Judges also considered the same question. In the determination of fact there may be error of law. It was pointed out by their Lordships of the Privy Council that when there is no evidence to go to a jury that does not raise a question of fact such as arises on the issue itself but a question of law for the consideration of the Judge [*Anangamanjari* v. *Tripurasundari* (7)]. In the present case, there are six eye-witnesses who profess to have seen the accused dash a stone against the deceased man's head. There may be good reason for disbelieving all of them, but the Magistrate has not stated that he did not believe them, and I cannot interfere with the order of commitment. I think however there are sufficient reasons for allowing bail, and I direct that Nga Hmyin be released on his furnishing two sureties in Rs. 150 each for his appearance before the Court of Session.

Criminal Revision No. 194 of 1917. 6th July.

Before A. E. Rigg, Esq., B.A., I.C.S.

KING-EMPEROR *v.* NGA TUN SEIN.

Whipping—3.

Held,—that a Court of Appeal or (in Upper Burma) on revision cannot alter a sentence of imprisonment to one of whipping under section 3 of the Whipping Act, where any portion of such imprisonment has been served.

VIII L.B.R., 466.

Tun Sein, a youth of 19 years of age, was convicted under section 380 of the Indian Penal Code of the theft of property worth Rs. 12-3-0 and sentenced to five months' rigorous imprisonment by the Township Magistrate, Satthwa. The sentence was far too severe, and, in view of the youthfulness of the offender, was unsuitable.

(7) 14 I.A., 101.

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The Magistrate failed to consider whether section 562 of the Code of Criminal Procedure ought to be applied to the case, or whether a sentence of whipping would not be more appropriate than one of imprisonment. The attention of Magistrates have frequently been drawn to the undesirability of sentencing young men to imprisonment where it can possibly be avoided.

On revision before the District Magistrate, the conviction was upheld but the sentence of imprisonment was altered to one of 30 stripes. At the time the order on revision was passed, the accused had already served a month and a half in the Jail, and that term would have been more than sufficient punishment for the offence he had committed. The order of the District Magistrate, in altering the sentence from one of imprisonment to one of whipping, is an illegal order. Under section 3 of the Whipping Act, a sentence of whipping may be passed in lieu of any punishment to which the offender may be liable under the Indian Penal Code, but it cannot be passed in addition to such punishment. The effect of the District Magistrate's order was to sentence the accused both to a term of imprisonment and to whipping. It has recently been pointed out in *King-Emperor* v. *Po Wun* (1) that the intention of the law is clearly infringed by ordering a man to be whipped after he has already served part of a sentence of imprisonment.

Before L. H. Saunders, Esq., I.C.S.

Criminal Revision No. 759 of 1917. 13th November

NGA CHIT *v.* NGA YA AND THREE OTHERS.

Mr. *Vasudevan*—for Applicant.

Mr. *Mitter*—for Respondents.

Criminal Procedure—Sections 145, 435 (3).

Proceedings under section 145, Code of Criminal Procedure, do not constitute a trial and are not in the nature of a trial.

An order therefore refusing to hold an enquiry under that section on the ground that one of the Respondents had been prosecuted and acquitted under section 447, Indian Penal Code, and that therefore section 403, Code

(1) VIII L.B.R., 466.

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of Criminal Procedure, applied was not an order which could be sustained and it was set aside.

I.L.R., 31 All., 150.
I.L.R., 25 Bom., 179.

This is an application to revise an order of the Subdivisional Magistrate, Madaya, passed, or purporting to be passed, under section 145 of the Code of Criminal Procedure.

It is objected that an order passed under the provisions of that section and proceedings under Chapter XII of the Code of Criminal Procedure are not subject to revision in view of the terms of section 435, clause 3 of the Code. This is no doubt the case, but that section does not deprive the High Court of jurisdiction unless the proceedings are in fact, and not merely in name, proceedings under Chapter XII of the Code of Criminal Procedure. There is a very general concensus of opinion of the High Courts in India on this point, see for instance, *Jhingai Singh* v. *Ram Pratap* (1) and *In re Pandurang Govind Pujari* (2). Here there was an application by a person alleging possession of certain land, that his possession was being interfered with by certain persons and that there was likely to be a breach of the peace. The Magistrate upon this in the diary recorded an order "I think I should take action under section 45, Criminal Procedure Code, issue notices to Respondents to put in written statements." A written statement was put in and the Magistrate, then without further enquiry, held that one of the Respondents and one other person having been prosecuted and acquitted under section 447 of the Indian Penal Code, under section 403 of the Code of Criminal Procedure he and the other Respondents were not liable to be tried again in respect of the same subject matter, and he dismissed the application.

The order was clearly wrong. Proceedings under section 145 do not constitute a trial and are not in the nature of a trial. They are in the nature of Police proceedings in order to prevent the commission of offences, and the fact that there have been criminal charges brought by one or other of the parties against each other so far from being a bar to action under Chapter XII, constitutes evidence which may possibly prove the danger of disputes which it is desired to prevent.

(1) I.L.R., 31 All., 150. (2) I.L.R., 25 Bom., 179.

The order of the Magistrate is set aside and he is directed to proceed according to law, that is to say, to follow the procedure laid down in section 145 of the Code of Criminal Procedure, and pass orders.

Before L. H. Saunders, Esq., I.C.S.

Criminal Revision No. 758 of 1917. 13th October.

NGA HPAY AND ONE *v.* NGA AUNG BAW AND TWO OTHERS.

Mr. *Razak*—for Applicants.

Mr. *Mitter*—for Respondents.

Criminal Procedure—Section 145, 435 (3).

Held,—that orders passed under Chapter XII, Code of Criminal Procedure, are not subject to revision being expressly excluded from the operation of section 435 of the Code by clause 3 of that section.

But to deprive the High Court of the power of interference in revision the proceedings must be proceedings under Chapter XII of that Code in fact and not only in name.

I.L.R., 26 All., 144.

This is an application to deal in revision with an order of the Headquarters Magistrate, Yamethin, passed, or purporting to be passed, under the provisions of Chapter XII of the Code of Criminal Procedure.

The application is resisted on the ground that orders passed under Chapter XII are not subject to revision being expressly excluded from the operation of section 435 of the Code by clause 3 of that section. There is no doubt that this is the case and any conflict of opinion which may exist in India appears rather to be due to questions affecting the construction of the charters of Chartered High Courts than the meaning of section 435 of the Code of Criminal Procedure. But there can be no doubt that in order to make the provisions of section 435, clause (3) applicable, that is to say, to deprive the High Court of the power of interference in revision, the proceedings must be proceedings under Chapter XII of that Code in fact and not only in name. For instance in *Maharaj Tewari* v. *Har Charan Rai* (1) it was pointed out that the mere adding as a postscript to proceedings which were throughout taken under Chapter VIII of the Code of Criminal Procedure that a final order has been passed under

(1) I. L. R. 26 All. 144.

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section 45, will not make that order a proceeding under Chapter XII of the Code.

The only point for decision here is whether the proceeding was under Chapter XII of the Code of Criminal Procedure. It is alleged that there is no finding that there was likely to be a breach of the peace. It is true that there was no such finding in the final order, but in an order in the diary under the 19th June 1917, the Magistrate recorded an order that from the papers filed it appeared that a dispute likely to cause a breach of the peace, existed. The procedure followed appears to have been in accordance with that laid down in section 145 of the Code of Criminal Procedure.

The final order is attacked on the ground that the Magistrate went into questions of title and decided accordingly. But it is clear that the Magistrate did endeavour to ascertain and decide which of the parties was in possession and although he would seem to have decided erroneously in coming to a conclusion by questions of title, there is in fact a distinct finding that Aung Baw and Min Din were in possession of the land at the time of the order.

I have no hesitation in holding that the proceedings were under Chapter XII of the Code of Criminal Procedure and this Court is not entitled to interfere in revision.

The application must therefore be dismissed.

Civil 2nd Appeal No. 74 of 1917. 15th October.

Before L. H. Saunders, Esq., I.C.S.

MAUNG KALA AND ONE v. MAUNG MEIK AND ONE.

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

Arbitration—Award.

Held,—that an award is final and cannot be questioned except upon such grounds, *e.g.* corruption or an illegality apparent upon the face of the award as are set out in the Second Schedule of the Code of Civil Procedure and there is no reason for departing from this principle where the Court itself has been appointed and has accepted the office of arbitrator.

I.L.R., 38 Cal., 421.
I.L.R., 26 Mad., 76.

This was a suit to recover possession of a certain piece of land, together with mesne profits. The Defendant filed a written statement in which he traversed the statements in the

plaint and an issue was framed. The parties then filed a number of maps and an application in which they stated that they agreed that after the Judge had examined the documentary evidence and inspected the ground, he should give his decision without any witnesses being called, and they agreed to abide by this decision as final. The Judge accordingly visited the site and gave the Plaintiff a decree as prayed for. The Defendant, Maung Kala, then appealed. The District Judge held that the Judge had been appointed sole arbiter in the dispute, and that the District Court could not question his decision. The Defendant now comes to this Court in second appeal under section 100 of the Code of Civil Procedure.

It is urged that the submission by the parties did not amount to a submission to arbitration, that if it was, the award was subject to the procedure laid down in the second schedule to the Code of Civil Procedure, that the Judge of the first Court exercised a double function as arbitrator and Judge and that the award did not operate by itself and ripen into a decree, that the plaint should have been dismissed upon the Plaintiff-Respondent's producing no evidence, that the alleged wrongful dispossession and damage claimed has not been established, and that the Judge of the Lower Appellate Court should have decided the appeal upon its merits.

There appears to be good authority for the view taken by the District Court. It was held in *Bai Nath Goorswamy* v. *Sita Nath Goorswamy* (1) that when, after the hearing of the suit had commenced before a Munsif, both parties agreed to leave the questions in dispute between them to the determination of the Court after the Court had made a local inspection, and also agreed not to raise an objection to the same or to prefer an appeal, the decision of the Munsif is in the nature of an award and that no appeal lay to the District Judge. Further that no appeal lay from the decision of the District Judge to the High Court though the High Court might interfere under section 115 of the Code of Civil Procedure. Much the same view was taken in the Madras case of *Nida Marthi Mukkhanti* v. *Thamana Ramaya* (2). At page 117 of Sanji's Law of Arbitration, 1916, it is stated that where the Court

(1) I.L.R., 38 Cal., 421. (2) I.L.R., 26 Mad., 76.

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itself is appointed to act as an arbitrator, no separate award need be passed inviting the parties to put in objections before passing a decree, such an award in itself is a decree and an objection to the award can be raised only by way of appeal against the decree to the Appellate Court. The authority for this is said to be *Indian Cases, Volume XXVI, p.* 325, which is not available in this Court. If the law as laid down therein is correctly summarized, this appears to dispose of the objection that the parties should be given an opportunity of putting in objections before passing a decree, and it would seem probable that any appeal could only attack the award upon the grounds set out in the second schedule to the Code of Civil Procedure as grounds for invalidating an award. It does not appear that in the District Court any such grounds were set out. The general principle is that an award is final and cannot be questioned except upon such grounds as corruption or an illegality apparent upon the face of the award as are set out in the second schedule to the Code of Civil Procedure, and I see no reason for departing from the principle where the Court itself has been appointed and has accepted the office of arbitrator. It would seem from a perusal of the maps filed by the parties that they did sufficiently substantiate the Plaintiff's case, and I think the District Court was justified in refusing to interfere.

The appeal must therefore be dismissed with costs.

Civil Appeal No. 256 *of* 1917. *3rd December.*

Before L. H. Saunders, Esq., I.C.S.

MEGHRAJ RAMNIRANJANDAS v. THAKURDAS.

Mr. *J. C. Chatterjee*—for Appellant.
Mr. *D. Dutt*—for Respondent.

Civil Procedure—Section 20 (*b*).

Held—that where the place where a contract was made was not within the jurisdiction of a Court, the Court still had jurisdiction if the place where the contract was to be performed, or where in its performance, the money to which the suit related was expressly or impliedly payable was within the jurisdiction of the Court.

I.L.R., 34 All., 49.
I.L.R., 31 Mad., 223.

This was a suit upon a promissory-note. The suit was filed in the District Court, Mandalay, and the Plaintiff alleged that

the note had been executed in Mandalay. The Defendant denied that he had been present in Mandalay at the time, or had executed the note.

In the course of the hearing the judge had reason to believe that the note was not executed in Mandalay, and framed an issue accordingly. The Plaintiff produced one witness who gave evidence that the note was executed in Taunggyi, and upon this the District Judge returned the plaint under O.VII, r. 10. The Plaintiff now comes to this Court in appeal.

The point does not appear to be free from difficulty, and the rejection of the plaint did not necessarily follow as a matter of course, as the District Judge appeared to think, upon proof that the note had been executed outside the jurisdiction of the Court.

Section 20 of the Code of Civil Procedure provides that a suit may be brought in a Court within the local limits of whose jurisdiction the cause of action wholly or in part arises. What was meant by this was explained in the third explanation to the corresponding section 17 of the old Code, and although that explanation has been omitted in the present Code, it has been omitted because the present Code expressly gives jurisdiction where the cause of action wholly *or in part* arises. Explanation 3 to section 17 of the old Code settled the signification of the term "cause of action" in the case of suits arising out of contract, see *Salig Ram* vs. *Chaha Mal* (1). It is true that the place where the contract in the present suit was made was not within the jurisdiction of the Court; but the Court still had jurisdiction if the place where the contract was to be performed, or where in its performance, the money to which the suit relates was expressly or impliedly payable was within the jurisdiction of the Court.

It is apparently urged by the Plaintiff-Appellant that the cause of action did arise in Mandalay because it was not merely the promissory-note but previous transactions. But it appears to be clear that the plaint as it stands was based upon a promissory-note only; as it was filed within three days of the expiry of the period of limitation, the previous promissory-note in substitution of which the note sued upon is

(1) I.L.R., 34, All. 49.

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said to have been executed, would not have afforded a cause of action, nor would the previous transactions in the course of which the money became due.

The main contention of the Plaintiff-Appellant, however, is that the contract was to be performed in Mandalay or that in its performance the money to which the suit related was impliedly payable in Mandalay. It is clear that the money was not expressly made payable in Mandalay and the Court certainly did not have jurisdiction from any express agreement that the contract was to be performed there.

The only question therefore which remains was whether the money was impliedly payable in Mandalay. The only Indian case which I have been able to find is that of *Raman Chettiar* vs. *Gopala Chari*, (2) but this case appears to be exactly in point. There a note payable on demand and not payable at any specified place—a description to which the note in the present suit answers,—had been executed within the local limits of the jurisdiction of the Tanjore Court by the defendant who resided at Tanjore; the Plaintiff residing at Kumbakonam brought his suit in the Kumbakonam Court, and the question was, had that Court jurisdiction. Both the Judges held that it had not. Sir Arnold White, C.J., said " I do not think it necessary to decide whether the question of the implication of payment in a particular place is to be considered only with reference to the terms of the contract, or whether the circumstances in which the contract was made may also be taken into account. I assume that for the purpose of applying explanation 3 " (section 17 of the old Code of Civil Procedure) " you must look at the contract and at the facts which existed at the time the contract was made, and then determine whether, having regard to the terms, the contract was one which ought to be performed within the jurisdiction." And the judge went on to say that in deciding that the court had jurisdiction, the District Judge appeared to have had only in mind the ordinary rule that a debtor should follow his creditor. He said " I do not think this general rule can be relied on as controlling the express words of a statute prescribing the conditions which give a court local jurisdiction. Such a view would involve the

(2) I.L.R., 31, Mad., 223.

proposition that unless the contract or the circumstances in which the contract was made give rise to a contrary implication a creditor may sue in any court within the local jurisdiction of which he happens to be when his right to sue arises "—a conclusion which I think, there can be no doubt, would be quite inconsistent with the express provisions of section 17.

Miller, J. was also of the same opinion and said " but it seems to me clear that by the phrase 'expressly or impliedly payable' we are to understand payable according to the terms of the contract, which are expressed or can be inferred on a construction of the language, or from the circumstances."

Both judges held that illustration (*b*) to section 17 which is repeated as illustration (*b*) to section 20 of the present Code was a useful guide in interpreting the meaning of the section, since if the plaintiff's place of residence gave rise to an implication as to the place where the money to which the suit relates was payable, A would have been entitled to sue B and C at Simla (Sir Arnold White, C.J.); or, as Miller, J., remarked, the framers of the Code had an excellent opportunity of making it clear in drafting illustration (*b*) that a Plaintiff should be allowed to sue at his place of residence to recover debts due to him in pursuance of contracts made elsewhere, in the absence of a contract to the contrary, and the fact that they did not avail themselves of the opportunity supported, in his opinion the view taken.

I think there is no doubt that this view is correct. The fact that the Defendant had previously bought goods from the Plaintiff in Mandalay and had paid for them in Mandalay if it is a fact, though the evidence of the witnesses called by the defendant to prove transactions which had taken place outside the jurisdiction of the Court seems to throw some doubt on it, was not sufficient in my opinion to show that there was an implied contract to pay the money in Mandalay. The Plaintiff's only witness says that as the Plaintiff asked him to write to the Defendant to pay a debt on an old on-demand note, he took a form from the Plaintiff and sent it to the defendant to Taunggyi who returned it from Taunggyi duly filled in, and he then sent the defendant the old on-demand note.

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This is the contract sued on and the circumstances are not sufficient in my opinion to prove an implied contract to pay in Mandalay.

I may add that, although it is true that under section 64 of the Negotiable Instruments Act, where a promissory-note is payable on demand and is not payable at a specified place no presentment is necessary in order to charge the maker thereof, the ordinary rule that a debtor must seek his creditor is not given effect to in section 70 of the same Act which provides that a promissory-note not made payable at a specified place, must be presented for payment at the place of business, if any, or at the usual residence, not of the holder but of the maker.

I see no reason to interfere and dismiss this appeal with costs.

Civil 2nd Appeal No. 120 of 1917. 2nd November.

Before L. H. Saunders, Esq., I.C.S.

MAUNG NYAN MO *vs.* MA PO AND ONE.

Mr. *M. Johannes*—for Appellant.

Messrs. *Pillay* and *Pershad*—for Respondents.

Contract—34.

Under section 34 of the Contract Act payment to one of joint promisees discharges the debt; and one of several payees can give a valid discharge. The presumption of equity raised in English Law that where there is more than one obligee they are tenants in common and not joint tenants of the debt is of doubtful application in India.

(21) Cal. L.J., 570 I.L.R., 38 Cal., 342 I.L.R., 36 Mad., 544. 22 Q.B.D. (1889), 537.

The Plaintiff's case was that he had mortgaged certain land to the two Defendants and the deceased husband of the 1st Defendant, that he had redeemed the mortgage by payment of the mortgage money to the 1st Defendant but the 2nd Defendant refused to deliver possession. The 1st Defendant admitted the claim, while the 2nd Defendant stated that as he had not received the mortgage money, he was entitled to retain possession of the land.

The Court of first instance held that the Defendants mortgagees were partners and that the 2nd Defendant was bound by the payment to the 1st defendant and decreed the Plaintiff's suit. Upon appeal the District Court apparently held that

there was fraud and dismissed the suit, and the Plaintiff now comes to this Court in second appeal under section 13 of the Upper Burma Civil Courts Regulation.

It is clear that neither in his written statement nor in his examination before issues, did the 2nd Defendant plead fraud, and there does not seem to be any suggestion throughout the evidence that the Plaintiff was acting in collusion with the 1st Defendant. There were in fact no grounds whatever for the conclusion arrived at by the Lower Appellate Court which was clearly wrong.

The facts are not in dispute. The mortgage document was produced and admitted, and in it after the description of the land, it is set out that U Pa Si, Ma Po and Maung Po Mya deliver Rs. 325 to Maung Nyan Mo and receive the said lands in mortgage with possession. "If it is required to redeem the lands, the redemption shall be made only after three years from the date of execution of this document." There is the usual clause as to interference by third parties, and the document is signed by the three persons named, as mortgagees.

The evidence does little more than prove the mortgage and the redemption, though it appears from it that the 2nd Defendant was son-in-law of the 1st Defendant and her deceased husband, that at one time they lived together, and that up to the time of Maung Pa Si's death, the 2nd Defendant worked with the 1st Defendant. The 1st Defendant said in her evidence that the 2nd Defendant was merely an agent of her husband; she did not attempt to prove it, and he is clearly described in the document as mortgagee. The 2nd Defendant gave evidence that the mortgage money belonged jointly to him and to his father-in-law and mother-in-law who had a joint income and did joint business, and no partition had been made up till the time of suit.

There appears to be no authority for the view taken by the Court of first instance that the Defendants were partners, though they may have occupied a position analogous to that of partners. They were co-mortgagees or co-promisees, and in the absence of fraud or collusion, the only question which arises is whether the mortgagor is entitled to redeem by making payment to one of them, and whether payment to a co-mortgagee

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has the effect of discharging the joint debt. Upon this question there appears to be a difference of opinion in the Indian Courts. The latest reported case is that of *Umez Chandra Banerji* vs. *Dinabandhu Mahanti* (1). It was there held that payment to one of several joint mortgagees was not a good payment as against the Plaintiff and another co-mortgagee. Reliance was placed on *Husainara* vs. *Rahmannesa Begum* (2), in which it was stated that the principle of law applicable to cases of this description was fully explained. The explanation referred to shows that the principle is based upon the English presumption of equity, that when a claim is on a money bond to two or more obligees, the presumption is that the obligees are tenants in common, and not joint tenants of the debt, with the consequence that the discharge by one obligee cannot be set up as a defence against the other obligee suing for his share of the debt; and the doctrine stated by Wills, J., in *Steeds* vs. *Steeds* (3) is quoted with approval, that "although the mortgagees take a joint security each means to lend his own money and to take back his own." It was added "there is nothing to indicate that the intention of the parties was that each of the persons in whose favour the mortgage obligation was created was a creditor for the whole." Whether co-promisees are joint or several is a question of fact. In view of the difference in the conditions of social life in India and in England, it appears to me to be doubtful (as stated in Cunningham and Shepherd's Contract Act, 11th Edition, at page 182) whether, and to what extent, this presumption which in England prevails only in cases in which equitable relief is claimed, should have effect given to it in this country. Although in *Umez Chandra Banerji* vs. *Dinabandhu Mahanti* referred to above, the mortgagees are referred to as joint mortgagees, it was held that in view of the terms of the mortgage instrument which stated explicitly that the mortgagors would pay the loan to the two mortgagees, they were thus under an obligation to tender to both the mortgagees. In the present case there is no such stipulation and the presumption (assuming, but not admitting, that it is applicable in India) that the mortgagees were tenants in common which is a

(1) 21 Cal. Law Journal, 570. (2) I.L.R., 38 Cal., 342.
(3) (1889) 22 Q.B.D., 537.

rebuttable presumption, appears to me in the present suit to be rebutted by the evidence. Both the mortgagees agree that at the time of the mortgage they were working together, and the 2nd Defendant's statement that they held their property jointly and that there was no division, has not been contradicted and may be accepted as correct.

But there appears to be a still further conflict of opinion as to whether in the case of joint promisees, payment to one discharges the debt. In *Anna Purnama* vs. *Akkayya* (4), the Full Bench by a majority of two Judges to one, held that one of several payees of a negotiable instrument can give a valid discharge of the debt without the concurrence of the other payees. From this view the Chief Justice dissented, and his opinion has been referred to in the case of *Umez Chandra Banerji* quoted above as a weighty dissent which appeared to the Judges of the Calcutta Bench to enunciate the correct rule on the subject. The learned Chief Justice of Madras held that section 38 of the Contract Act dealt with the case of an offer which was not accepted, and although the last paragraph of the section is general and is not restricted to an offer which has not been accepted, apparently the Legislature were not contemplating the legal consequences of an offer which had been accepted, but the legal consequences of an offer which has been refused; and the Chief Justice thought that it was impossible to infer from this enactment that the Legislature intended to lay down by implication that the acceptance of payment by one of several promisees operated as a discharge of the claims of the others. But I am bound to say that the opinion of the majority of the Bench appears to be more in conformity with reason. If it is admitted that an offer to one of several joint promisees whether accepted or not has the same legal consequences as an offer to all of them, the only possible conclusion appears to be that the acceptance of the offer discharges the obligation. It seems to me that the answer to the question can be found within the four corners of the Contract Act, and that it is not necessary therefore to look to the general law. Even if this view is not correct it appears to me that apart from the presumption referred to above which is of doubtful application in India there

(4) I.L.R., 36 Mad., 544.

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can be no real question as to what the law is: the only question is as to what the facts in each particular case are. I hold therefore that the plaintiff was entitled to succeed. If the presumption is admitted to arise that the creditors were tenants in common, and not joint tenants, it was rebutted in this case, and if the presumption does not arise, *a fortiori* the mortgagees were joint promisees and the payment to one of them discharged the whole debt.

The appeal must therefore be allowed, and the decree of the Court of first instance is restored with costs throughout.

Civil Revision No. 56 of 1917. 25th October.

Before L. H. Saunders, Esq., I.C.S.

MA KIN NYUN *v.* MA TIN.

Mr. *S. Mukerjee*—for Applicant.

Mr. *C. G. S. Pillay*—for Respondent.

Civil Procedure—O. XXII, r. 6.

Held,—that the provisions of O. XXII, r. 6 of the Civil Procedure Code cover not only the case where a judgment is delivered in ignorance of the fact that a party has died between the conclusion of the hearing and the delivery of the decision but also provide for the delivery of judgment when the Court is aware of such death. The death of a party is not sufficient cause for allowing the withdrawal of a suit which has been completed in every respect except for such delivery of judgment.

I.L.R., 21 Bom.. 314.
I.L.R., 33 Bom., 722.

One Ma Tin filed a suit in the District Court, Magwe, sitting at Yenangyaung, against her husband, Maung Po Kan, for divorce and for partition of property. The suit was defended and proceeded to trial, witnesses were examined and arguments heard, and on the 22nd December 1916 was adjourned for judgment till the 3rd January 1917. On that date it was again adjourned for the same purpose till the 20th January 1917. It appears that on the 17th of January 1917 the defendant died, and on the 20th of January the plaintiff applied for leave to withdraw the suit. On this the Judge passed the following order:—" Plaintiff applies to withdraw the suit on the ground that the Defendant died on the 17th January 1917. She applies under O. XXIII, r. 1, and asks for permission to institute a fresh suit in respect of the property. Under O. XXIII, r. 1 (ii), Plaintiff is permitted to withdraw from her suit on payment of the Defendant's costs, with liberty to institute a fresh

suit in respect of the property claimed." On the 26th of January one Ma Kin Nyun, claiming to be adopted daughter of the deceased, applied for pronouncement of judgment making her legal representative in place of the deceased. This application was refused and she now comes to this Court in revision under section 115 of the Code of Civil Procedure.

The application is in effect that the District Judge acted with material irregularity in allowing the withdrawal of the suit without sufficient grounds. The Judge's order does not state why permission was granted to the Plaintiff to withdraw the suit. It is clear that clause (2) (*a*) of O. XXIII, r. 1, did not apply and that he can only have given permission under clause (2) (*b*). This clause lays down that permission may be given where the Court is satisfied that there are other sufficient grounds for allowing a Plaintiff to institute a fresh suit for the subject matter of the suit or part of a claim. It is clear that the meaning of this is that a suit may be withdrawn where there are sufficient grounds for allowing the Plaintiff to withdraw from a suit in order to institute a fresh suit for the subject matter thereof, or to abandon part of a claim continuing the suit as far as the balance of the claim is concerned. It is obvious here that the Defendant having died, there could be no question of the Plaintiff bringing a fresh suit for a divorce, nor did she desire to abandon a part of her claim continuing the suit for the balance. It would seem therefore that O. XXIII, r. 1, under which the Judge purported to act, had no application. Possibly the Judge was under the impression that the suit abated upon the death of the Defendant, but if this was so, he would seem to have been in error in view of the terms of O. XXII, r. 6, and if the suit abated, this was clearly not a reason for allowing its withdrawal. The provisions of O. XXIII, r. 1, are not to be arbitrarily applied. They have been framed to allow a Plaintiff to obtain an adjudication where, owing to some formal defect, or for other sufficient grounds, which must be *bonâ fide* grounds, urged in good time and not to the prejudice of the Defendant, the Plaintiff would but for this rule fail in his suit and be unable to obtain the assistance of the Courts in enforcing a just claim. The provisions of O. XXII, r. 6, though no doubt they cover the case where a judg-

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ment is delivered in ignorance of the fact that a party has died between the conclusion of the hearing and the delivery of the decision, also undoubtedly provide for the delivery of judgment where the Court is aware of such death, and they seem to me to make it clear that the death of a party is not sufficient cause for refusing to deliver judgment or allowing the withdrawal of a suit which has been completed in every respect except for such delivery of judgment. It was pointed out in *Rama Charya* v. *Anata Charya* (1) that the practice in English Courts of equity was in such cases to disregard the fact of the death of a party occurring while the Court was considering, and to deliver judgment and draw up the decree as though he was still living; and the judgment of the Lord Chancellor of Ireland is quoted with approval in which it is stated that "nothing is better settled than that, where a cause is heard and merely stands over for consideration, the Court will pronounce judgment though the Plaintiff or Defendant died"; and in *Surendro* v. *Durga Sundari*, quoted in the same case, the Privy Council, notwithstanding the death of one of the parties pending consideration, delivered judgment and remitted the case to the Indian Courts for disposal without requiring the record to be amended.

It is argued for the Respondent that O. XXII, r. 6, merely lays down that judgment may in such case, *i.e.*, after the death of one of the parties, be pronounced. The rule is not mandatory and this Court should not interfere if the Court fails to pronounce judgment, as a discretion is vested in it to deliver or not to deliver judgment. But this discretion must be exercised judicially, and I think it is clear that the Judge did not have the provisions of O. XXII, r. 6, in his mind at all, nor did he purport to act under that rule. The case of *Mahi Pati* v. *Muttoo* (2) may be referred to. It appears to be on the face of it desirable that judgment should be delivered in the present suit which will then decide various matters in dispute between the parties by which the legal representatives of the Defendant will be bound, whereas, otherwise, it will be necessary for one or the other of the parties to bring a fresh

(1) I.L.R., 21 Bom., 314. (2) I.L.R., 33 Bom., 722.

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suit and to go largely into the same matters though upon a different cause of action.

In allowing the Plaintiff to withdraw her suit, the Court acted in the exercise of its jurisdiction with material irregularity within the meaning of section 115 (*c*) of the Code of Civil Procedure, and there will be an order setting aside the order of the District Court allowing the suit to be withdrawn and directing the Court to proceed to deliver judgment.

The Respondent will pay the costs of this application.

Before L. H. Saunders, Esq., I.C.S.

Civil Appeal No. 225 of 1917. 15th October.

PAUKSI HOW AND COMPANY *v.* SINWA NAUNG.

Messrs. *Lentaigne* and *Pillay*—for Appellant.

Kachin Hill Tribes Regulation—1 (3), 3, 11.

Held,—that the Kachin Hill Tribes Regulation applies to Kachins in the hill-tracts defined and does not affect the jurisdiction of the ordinary Civil Courts as provided for by the Code of Civil Procedure.

This was a suit upon a mortgage which was filed in the District Court, Myitkyina, by the Plaintiffs, a Chinese firm carrying on business in Bhamo and Mogaung. The Defendant is a Kachin described in the plaint as residing in Kansi, Kamaing Subdivision, Myitkyina District. It is apparently admitted that Kansi is a hill-tract as defined in the Kachin Hill Tribes Regulation No. 1 of 1895, that is to say, a hill-tract to which that Regulation has been extended. The plaint was returned by the District Judge to the Plaintiff on the ground that he had no jurisdiction, and the order directs that the plaint be returned for presentation to the proper Court which under the Kachin Hills Regulation, is the Court of the Assistant Superintendent, Kamaing.

This appeal is under O. XLIII, r. 1 (*a*) of the Code of Civil Procedure. The District Judge held that the suit was one between a Kachin as defined in the Kachin Hills Regulation and a non-Kachin, that the subject matter of the suit lay in the Kachin Hills and that the Defendant was a permanent resident there. The suit was therefore, in the opinion of the District Judge, controlled by section 11 of the Kachin Hills Regulation and should be tried by the Special Court established under the Kachin Hills Regulation and under the special law and procedure laid down therein.

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The grounds of appeal are that the District Judge was in error in holding that the District Court, Myitkyina, had no jurisdiction to entertain the suit, that the cause of action arose at Mogaung which is not a hill-tract and as such the District Judge had jurisdiction, that the Judge erred in holding that the suit was barred under section 11 of the Kachin Hills Regulation, and that he should not have returned the plaint for presentation to the Assistant Superintendent, Kachin Hill Tracts, Kamaing.

The extent of the Kachin Hill Tribes Regulation is laid down in section 1 (3) of the Regulation, which declares that it shall extend to such hill-tracts and shall apply to such hill tribes as the Local Government may by notification direct, and sub-section 3 goes on to declare that section 11 shall apply to all persons who may be parties to a suit or other proceeding of a civil nature in which any of the parties is a member of a hill tribe to which the Regulation applies. The wording of this clause is not perhaps very clear, but there seems to be no reason for supposing that it extends, or was intended to extend, the operation of the Regulation beyond the local area to which by clause (3) of section 1 it is specifically extended. The District Judge, Myitkyina, would appear to interpret this clause as extending the operation of the Act to members of a hill tribe outside the hill-tracts. If that is so, apparently a Kachin ordinarily resident in a hill-tract might come to Mandalay, contract debts in the bazaar and plead the Regulation as a bar to the jurisdiction of the local Courts in the Mandalay District. Apart from the actual wording of the Regulation, it appears to me very improbable that it was the intention of Government that this should be possible. It is true that the Regulation is extended to such hill tribes as the Local Government may, by notification in the *Burma Gazette*, direct, and by a notification. Political Department No. 17, dated the 29th July 1914 the Lieutenant-Governor directs that the Regulation shall apply to the undermentioned hill tribes in certain defined tracts, namely Kachins and others. I think that this notification must be taken to mean what it says, that is to say, that it applies to Kachins in the hill-tracts defined and does not apply outside those hill-tracts. Section 3 defines what enactments are

in force and apply to members of a hill tribe in a hill-tract, and declares that no other enactment shall be deemed to apply to members of a hill tribe in a hill-tract. It seems to me that it would be impossible to interpret this section as meaning that the enactments set out in the schedule apply to members of a hill tribe outside a hill-tract without straining the plain meaning of the words.

Section 11, which is referred to in section 1 of the Regulation and on which the learned District Judge relies, lays down that the Deputy Commissioner and every Assistant Commissioner exercising jurisdiction within a hill-tract may try any suit or other proceeding of a civil nature between parties any one of whom is a member of a hill tribe. Nothing is said about the subject matter of the suit or about one of the parties being a permanent resident in a hill-tract. This section therefore clearly applies to suits triable within a hill-tract by an officer exercising jurisdiction therein. It is permissive and gives the Deputy Commissioner or Assistant Commissioner power to try any suit of the nature described, but it does not lay down, and it cannot be inferred, that where a suit is triable outside a hill-tract, the jurisdiction of the ordinary Civil Courts is superseded. Section 9 of the Code of Civil Procedure declares that the Courts shall have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred, and section 20 lays down that subject to certain limitations, every suit shall be instituted in the Court within the local limits of whose jurisdiction, among other things, the cause of action wholly or in part arises, and there can be no doubt that the Plaintiff may select the forum in which to bring his suit provided that he complies with the provisions of section 20. Here it is his case that the mortgage upon which he sues was executed in Mogaung, that is to say, within the jurisdiction of the District Judge of Myitkyina. There is no doubt therefore that even if the Kachin Hill Tribes Regulation extends beyond the limit of a hill-tract, the fact that it lays down that the Deputy Commissioner or Assistant Commissioner may try a suit, cannot be a bar to the jurisdiction of the ordinary Civil Courts.

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There will therefore be an order setting aside the order of the District Judge and directing him to admit the plaint and proceed to deal with it according to law.

Costs will follow the final result.

Criminal Revision No. 687 of 1917. 25th September.

Before L. H. Saunders, Esq., I.C.S.

SHAIK AMANATH MISTRY v. KING-EMPEROR.

Mr. *J. C. Chatterjee*—for Applicant.
Mr. *H. M. Latter*—for Municipality.

Municipal—2 (6).

A "lodging house" need not be let in lodgings; it is still a lodging house if it is occupied to any extent in common by members of more than one family.

The Applicant has been convicted and fined Rs. 30 under section 142 (*d*) of the Burma Municipal Act for failing to take out a license for a lodging-house kept by him.

The application states that the learned Magistrate has erred in law in holding that the Petitioner was bound to take out a license under the Lodging-house Bye-laws, although it was not proved that he received any lodgers in his house or rented any portion of his house to others. Apparently it is the contention of the learned Advocate for the Applicant that a lodger is a person who occupies rooms in a lodging-house upon payment of rent, and that it has not been shown that any rent was paid in respect of the premises here referred to. It is also urged that the premises do not constitute a lodging-house, and that whatever the meaning of the term "lodging-house" might be, the Bye-laws framed by the Mandalay Municipality clearly showed that the Municipality did not contemplate treating a building of the kind here in question as a lodging-house or requiring its owner to take out a license for it.

It appears that the Applicant is the owner of certain hackney carriages and that the premises are occupied by the drivers of these hackney carriages and the syces attending to the ponies which draw them. The Magistrate states that the Applicant admitted that he kept 12 drivers, 6 syces and 2 watermen in the premises. He called witnesses who deposed that they drove the carriages on hire, that charges for food only were deducted from their wages, and that they did not pay any rent for the house.

"Lodging-house" is defined in section 2 (6) of the Municipal Act as a building or part of a building which is let in lodgings or occupied to any extent in common by members of more than one family. It is clear therefore that a lodging-house need not be let in lodgings; it is still a lodging-house if it is occupied to any extent in common by members of more than one family. By a footnote it is explained that if there are kitchens, privies or other conveniences in common, the building will be a lodging-house, and I have no doubt that this is the case whether or no rent is paid either as rent or otherwise. It seems probable here that the fact that the Applicant provides his employees with house room is taken into consideration in fixing their wages, and if this is so, no doubt their wages are less than they would be if they had to find lodgings for themselves, and in that case they certainly pay rent indirectly for the lodgings. But the definition does not make the question whether a building is a lodging-house or not depend upon the letting for rent; it is sufficient that the building is occupied in common by more than one family. I cannot see that the Lodging-house Bye-laws contemplate any condition of affairs inconsistent with, or narrower than the terms of section 2 (6) of the Act. The persons living in the lodging-house are lodgers whether they pay rent or not and the owner of the lodging-house receives them when he allows them to occupy the building. No doubt the definition is extremely wide, and the servants' quarter of a private house having a common latrine or kitchen, would come within it. But this Court has to interpret the law as it is laid down, and it seems to me that there is no doubt as to the meaning of the words of section 2 (6) of the Municipal Act.

The application must be dismissed.

Criminal Appeals Nos. 227, 228, and 229 of 1917. 27th November.

Before L. H. Saunders, Esq., I.C.S.

NGA PO THA AND 2 OTHERS *v.* KING-EMPEROR

Maung Su —for Appellants.

Mr. *H. M. Lütter*—for the Crown.

Penal Code—302, 304A, 304 (2).

Where a woman was beaten to death in the *bonâ fide* belief that she was possessed by an evil spirit.

Held,—that as she did not consent to the method of treatment adopted Section 304A, Indian Penal Code, did not apply.

That although the intention of the persons who inflicted the beating was not to cause death but to exorcise the spirit they must be taken to have known that they were likely to cause death.

That severe punishment is called for in such cases, the view that they are due to ignorance alone and that ignorance cannot be cured by punishment not being the only consideration affecting the question of punishment.

U.B.R., I, 1910-13, 87.

——— 1902-03, I, Penal Code, 1.

This is a case of a kind which though fortunately not common, is not unique. The deceased was believed to be possessed by an evil spirit and was beaten to death by four persons acting, it is alleged, under the mistaken belief that, by beating her, she would be cured of her unnatural illness. The 1st Appellant who is a Burmese *Saya* has been sentenced to death, and the other two Appellants have been sentenced to transportation for life under section 302 of the Indian Penal Code. The 4th Accused was sentenced to pay a fine of Rs. 50 or to suffer three months' rigorous imprisonment under section 323 of the Indian Penal Code and this Accused has not appealed.

The facts of the case are briefly as follows :—

Ma Chôn, mother of Ma Me Te, called in the 1st Appellant who happened to be visiting the village to attend her daughter, Ma Me Te, who had a sore upon her leg. The Appellant who apparently professes to be a specialist in the cure of witchcraft, took with him the two other Appellants, fellow-villagers of the deceased, and one of them, Nga Shwe Pyan, a lover of Ma Me Te. He was also accompanied by Ma Me Tin, the 4th Accused, who was said to be a *natkadaw*, described as a person who acts as a spirit medium, capable of becoming possessed by a *nat*. The 1st Appellant, Po Tha, appears immediately to have assumed that the girl was possessed by an evil spirit and gave her a betel leaf to chew, and when she said that the leaf tasted hot, he declared that she was possessed by a spirit which must

be exorcised by beating her. He and his companions thereupon beat and kicked her for a short time. She received several contusions described by the medical witness, and the treatment was evidently brutal enough to cause the mother, Ma Chôn, to weep. Appellant, Po Tha, thereupon said the spirit had gone into Ma Chôn. She was tested in the same way with a betel leaf and was then beaten from about 10 o'clock that night until just before dawn when she succumbed to her injuries.

Although there is nothing on the record to show that the 1st Appellant was called in to drive out an evil spirit, the evidence in fact being that he was not called to do so but to treat an ulcer, it appears to me possible that there may have been some suspicion on the part of the mother or the girl's relations that she was possessed. The man who was called in the 1st Appellant, says he was called for that purpose, and there seems to be no doubt that he professed to be able to cure such cases. It is also difficult to understand the conduct of the Appellant, Shwe Pyan, in beating the girl to whom he was paying his addresses and subsequently her mother, and of the villagers who, though they say they remonstrated, did not, as they certainly could have done, interfere more effectively and put a stop to the beating, if they had nothing more than 1st Appellant's word to induce them to think that the girl and her mother were "possessed." But whether this is so or not there is no evidence upon the record that either the girl, Ma Me Te, or her mother, Ma Chôn, gave any consent to the treatment to which they were subjected. On the contrary it seems clear that Ma Chôn at least protested that she was not possessed by an evil spirit and that she should not be beaten.

The learned Sessions Judge in convicting the Accused, has referred to the case of *Nga Po Kyaw* vs. *K.E.* (1) in which the persons who inflicted a fatal beating upon a woman alleged to be possessed by an evil spirit, were found to have committed an offence under section 304A of the Indian Penal Code, and the Sessions Judge has questioned the correctness of that decision. But it was expressly stated in the judgment of my learned predecessor in that case that the evidence left no doubt that the girl's mother and her relatives contemplated that she should be beaten.

(1) U.B.R., 1902-03, I, Penal Code, I.

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and that the girl herself voluntarily submitted to that treatment. The girl would seem to have been suffering from hysteria or some similar complaint for years, and among her own people she was universally believed to be under the domination of an evil spirit that had located itself in her body.

The case therefore differs from the present case in important particulars. Here there is no evidence upon the record that the girl was suffering from anything but an ulcer on her leg, or that there was any reason which would lead her relations to suppose that she was possessed of an evil spirit. As I have said above, it is possible that they did so, but there is not a particle of evidence of that effect. The woman whose death was caused it is not suggested and there seems to be no reason whatever to suppose, was afflicted in any way. The only reason given for leading the 1st Appellant and his assistants to suspect that she was possessed and to turn their attention to her was that she performed the perfectly natural act of weeping, probably loudly, when she saw her daughter being severely beaten. Neither she nor her daughter consented, and the evidence indeed goes to show that Ma Chôn, so far from consenting, protested vigorously against being suspected of being possessed and beaten in consequence.

I have read the judgment of the Sessions Judge in Criminal Appeal No. 64 of 1893 which is referred to in Po Kyaw's case. It appears there that the girl had been afflicted for five years or so with hysteria or some form of hysterical mania; she was subjected to a severe beating with sticks while in this condition by her relations. It does not appear that she submitted or consented to the treatment. The learned Sessions Judge held that it was clear that the Accused had no intention of causing bodily injury likely to cause death, nor had they any knowledge that they were likely to cause death. No reason whatever was given for this conclusion, but it was not questioned by the learned Judicial Commissioner who remarked "the fact that the deceased died from the shock of the beating need not necessarily enter into the consideration of the question of punishment, and that death may have been accelerated by disease of the heart, but any how the Appellants have not been convicted of the offence of causing death."

From the extracts of the medical evidence given in the judgment of the Sessions Judge in that case, it was apparent that there were very severe contusions on the body of the woman extending from the nape of the neck down to the thighs, and also on both shoulder joints extending to the elbows, that there must have been a repeated and protracted beating which was dangerous to life and which might have caused death. The medical witness thought that the woman's death was caused by severe shock produced by the injuries sustained. Her heart was a little fatty and that might have accelerated death. The Accused were sentenced by the Sessions Judge to two years' rigorous imprisonment which was reduced by the Judicial Commissioner for the reasons quoted in Po Kyaw's case, to six months' rigorous imprisonment.

Mr. Burgess found that the beating was administered in perfect good faith, but as he went on to say it was carried out to excess and no precautions were taken to guard against misadventure, it is clear that he used the words "good faith" in some other sense than that with which they are used in the Indian Penal Code. As section 52 lays down that nothing is said to be done or believed in good faith which is done or believed without due care and attention, it seems obvious that the beating carried out to excess without precautions to guard against misadventure, cannot have been administered in good faith.

Nor do I think that the finding of the Sessions Judge was necessarily endorsed by the Judicial Commissioner or can be accepted, in the absence of any reasons, as authority for holding that where a number of persons inflict a beating upon a woman which in the ordinary course of nature is sufficient to cause death or which is likely to cause death, it can be assumed that there was no intention to cause death or to cause such injuries. Intention is a question of fact which must be decided upon the circumstances of each particular case. It may be a legal fiction as for instance where knowledge is presumed in the case of a person who is intoxicated and intention is the inference drawn from such knowledge, or it may be proved by evidence of the particular circumstances in each case.

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It appears to me further that in considering the question of sentence in the case referred to, Mr. Burgess, for whose opinion I in common with other Judges of this Court have a great respect did not deal with the whole aspect of the matter. It is no doubt incontrovertible that there is no reason for punishing ignorance as ignorance, but where a person is convicted of a brutal crime of a kind repugnant to the natural instincts of mankind, it is necessary to pass a sentence which will punish such brutality even where it proceeds from ignorance, and I am not aware that any protest has ever been raised against the provisions of the law under which persons who have taken part in proceedings sanctioned possibly by ignorance but also by a belief in certain religious teachings, are subject to very severe penalties, *e.g.* in the case of *suttee*.

It appears clear moreover that the occurrence of a case in 1917 even more brutal than that dealt with in Criminal Appeal No. 64 of 1893, goes to show that the punishment there considered appropriate, has not had the effect of putting a stop to the practice complained of.

The fact in the present case that the deceased woman did not consent to be beaten makes section 304A of the Indian Penal Code inapplicable. If there was no intention to cause death or knowledge that death would ensue, the appropriate section would appear to be section 325 of the Indian Penal Code. If there was, the question is whether section 302 or 304 applies.

As to the 1st Appellant, he described himself as a *Saya* or Doctor, and it must therefore be presumed that he had some knowledge however slight and empirical of the effects of violence upon human beings. The evidence goes to show that the deceased woman actually died while being beaten; the witnesses who went into the house as soon as the Appellants had left it, found her dead. The evidence is that the woman was kicked with the bare heel, beaten and slapped with the fist or open hand, and also that her feet and hands were joined by a rope by which she was lifted from the ground and dropped. Although the witnesses did not depose to this last treatment in the Committing Magistrate's Court, it seems unlikely that they can have invented it, but whether it took place or not it is obvious from the medical evidence that the woman received

injuries from which she could not possibly have recovered. She was a woman of 45 years of age or more, of weakly physique. The ordinary lay person looking at her would consider that she was somewhat weak. Her whole body and head were covered with a mass of bruises. Death was due to internal haemorrhage and shock, and the Medical Officer said that these were sufficient in the ordinary course of nature to cause the death of a normally healthy person.

I think it is impossible to believe that the 1st Appellant did not know that the treatment to which this woman was subjected, was likely to cause her death.

The question whether he intended to cause such injuries is not so easy to answer. Assuming that he did believe that she was possessed by an evil spirit, his primary intention no doubt was not to cause the patient's death but to drive the spirit out. There is no doubt that a belief in witchcraft is extremely common among Burmans, and it is difficult to imagine that if they did not think that the treatment of Ma Chôn was justified and that it would have the desired effect, the villagers would not have interfered early in the proceedings. That they did not interfere is however no evidence that the conduct of the Appellant was not unnecessarily brutal.

Great stress has been laid by the learned Advocate who has argued this appeal on the reply made by the 1st Appellant to remonstrances, that he was not beating the woman but was beating the spirit and that the woman would not be marked by so much as a scratch. But it appears to me that very much stronger evidence would be necessary to prove that the Appellant acted in the *bonâ fide* belief that the laws of nature would be suspended in this particular instance for his convenience. It is necessary to assume a certain standard of common sense among all persons accused of committing crimes in the absence of a plea or evidence of insanity or mental deficiency.

But I do not think that it is necessary to convict the Appellant under section 302 of murder. He certainly had no intention, as far as can be judged, to kill the deceased and the intention which may be inferred from knowledge, is not an intention which must necessarily be inferred in every case. Up

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to a certain point the Appellant's acts though in the circumstances probably criminal, did not endanger life, and I do not think that it is necessary to infer that because he went beyond that point, he intended to cause injuries which he knew to be likely to cause death. Each of the blows struck by itself was probably comparatively light, and the prevailing intention throughout would seem to have been to drive out the spirit. In any case the reasons given by the learned Sessions Judge for passing the capital sentence, appear to me to be too remote to be sound, and it was pointed out in *Nga Tha Kin* v *K. E.* (2) that when the discretion as to punishment is vested in the Judge, it is his duty to exercise it and not to compel the executive Government to interfere by way of remission. The sentence of death may appropriately be passed in cases where for motives of revenge, anger or the like a person causes death by such means as make it clear that it was his intention that his victim should not escape.

In the case of the 2nd and 3rd Appellants, the same remarks apply with this qualification that they were probably acting under the instructions and influence of the 1st Appellant and that they had not the same means as he had of judging of the effect of their acts. I think however that in treating the deceased woman as the evidence shows they did treat her, the woman herself being elderly and weakly, they must have known that they were likely to cause death.

The convictions and sentences are set aside, and in lieu thereof, the 1st Appellant, Po Tha, is convicted of an offence punishable under section 304 of the Indian Penal Code second part, and Nga Po Tha is sentenced to undergo transportation for seven years.

Nga Shwe Pyan and Nga Pyaing are convicted of an offence punishable under section 304 of the Indian Penal Code second part, and sentenced to undergo two years' rigorous imprisonment each.

(2) U.B.R., 1910-13, 87.

Before L. H. Saunders, Esq., I.C.S.

Civil Appeal No. 180 *of* 1917. *16th November.*

MA TU AND ANOTHER *vs.* KUMAR GANGADHAR BAGLA, ETC.

Mr. S. *Vasudevan*—for Appellants.
Mr. D. *Dutt*—for Respondent.

Civil Procedure—24.
Upper Burma Civil Courts Regulation—15.

Held—that an order passed under the provisions of section 24 of the Civil Procedure Code read with section 15 of the Upper Burma Civil Courts Regulation was not a decree and that an order for costs passed as part of such an order was not appealable.

I.L.R., 16 Bom., 676.
—— 27 Mad., 341.
—— 34 Cal., 878.

The Respondent in the course of a suit against the Appellants for an injunction, applied for a temporary injunction, and being dissatisfied with the progress made by the Court which was trying the suit, applied to the Divisional Court praying that the suit should be transferred to the file of the District Judge, and that the Divisional Judge should take upon his own file the application for a temporary injunction. The Divisional Judge, without referring to, or noticing the latter application, transferred the suit to the file of the District Judge and directed that the present Appellants who had opposed the application should pay the costs, fixed at Rs. 50. Against this order requiring them to pay costs, the Defendants appeal.

A preliminary objection is taken by the Respondents that an appeal does not lie against the order of the Divisional Judge directing the Appellants to pay costs. I think there is no doubt that this view is correct. The Appellants relied on various Indian cases, among others *Ranchordas Vithaldas* vs. *Bhai Kasi* (1) where it was held that, where the original Court has made an erroneous order for costs under a misapprehension of fact and law, an appeal lies from such order although the Appellant complains of nothing else but the order for costs so erroneously made. And in other cases, *e.g.*, *Kuppuswamy Chetty* vs. *Zamindar of Kalahasti* (2) and *Dildar Ali Khan* vs. *Bhawani Sahai Singh* (3), it was held that an appeal may

(1) I.L.R., 16 Bom., 676. (2) I.L.R., 27 Mad., 341.
(3) I.L.R., 34 Cal., 878.

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be entertained on a question of costs only, when a matter of principle is involved since costs are awarded in the exercise of the discretion of the Judge with reference to general principles.

But it does not appear to me that any of these cases are authority for holding that where there is no appealable decree the Court may entertain an appeal on a question of costs. In each of the Indian cases which I have referred to, there was an appealable decree and the appeal was entertained as against that part of the decree which dealt with costs. Here the order of the Divisional Judge was an order passed under the provisions of section 24 of the Code of Civil Procedure read with section 15 of the Upper Burma Civil Courts Regulation, and the order was not a decree and was not appealable. No appeal therefore lies.

Civil Revision No. 16 of 1917. 22nd October.

Before L. H. Saunders, Esq., I.C.S.

MAUNG PO U AND ONE *v.* MAUNG KYAW.

Mr. *L. K. Mitter*—for Applicants.
Mr. *C. G. S. Pillay*—for Respondent.

Civil Procedure—O. IX, r. 5.

Held,—that, whereas in a suit against a debtor and his surety for money lent the mere omission of the Plaintiff to pursue his suit against one of the Defendants with the result that that Defendant's name is struck off and the suit dismissed against him under O. IX, r. 5, does not discharge the surety, provided the suit be still in time against the principal, where the Plaintiff expressly waived his claim against the principal debtor and informed the Court that he would obtain decrees against the surety only, it was an act or omission the legal consequence of which was to discharge the principal debtor within the meaning of section 134 and therefore the Plaintiff had no further right of suit against the principal debtor and could not recover from the surety.

I L.B.R., 150.
I.L.R., 39 Bom., 52.
Burma Law Times, VI, 62.

The Plaintiffs sued to recover the price of goods sold. The 2nd Defendant was the principal debtor and the 1st Defendant was the surety. The Plaintiffs were unable to serve the 2nd Defendant, they applied that he should be dismissed from the suit and proceeded against the surety. They obtained a decree in the Court of first instance which was reversed in appeal on the ground that, the principal debtor having been discharged

by the creditor, the creditor could not recover from the surety.

Against this the Plaintiffs now come to this Court in revision on the ground that the ruling relied upon by the Lower Appellate Court was not sound law. The Lower Appellate Court referred to *Maung Pyo Tha* v. *Ko Min Byu* (1).

It is urged that the Defendant did not abandon his claim or waive his claim against the principal debtor but that it should be taken that he was unable to ascertain the principal debtor's residence and that the order of the Court was passed under O. IX, r. 5, of the Code of Civil Procedure, and various Indian rulings of which *Nathabhai Tricamlal* v. *Ranch Hodlah Ramji* (2) is the latest are relied upon. In that suit it was held that there was some difficulty in serving the 1st Defendant whose name was struck out; as a year had not elapsed, presumably this was done if not at the request at least with the consent, of the Plaintiff, and that the striking off of the 1st Defendant's name was a procedure under O IX, r. 5, rather than O. XXIII, r.1. It was said that "all the authorities in all the Courts of India who have had this question under consideration are in agreement that the mere omission of the Plaintiff to pursue his suit against one of the Defendants with the result that Defendant's name is struck off and the suit dismissed against him under O. IX, r. 5, does not discharge the surety, provided the suit be still in time against the principal."

The terms of O. IX, r. 5, of the Code of Civil Procedure are as follows:—"Where, after a summons has been issued to the Defendant, or to one of several Defendants, and returned unserved, the Plaintiff fails for a period of one year from the date of the return made to the Court by the officer ordinarily certifying to the Court returns made by the serving officers, to apply for the issue of a fresh summons and to satisfy the Court that he has used his best endeavours to discover the residence of the Defendant who has not been served or that such Defendant is avoiding service of process, the Court may make an order that the suit be dismissed as against such Defendant." And clause 2 lays down that in such a case the Plaintiff may, subject to the law of limitation, bring a fresh suit.

(1) I. L.B.R., 150. (2) I.L.R., 39 Bom., 52.

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I am at a loss to understand how a Court can be said to be adopting a procedure under this section which expressly enables it to take certain action after the period of one year when it takes that action before the expiry of the year. But assuming the view taken in the Bombay case to be correct, it would appear that there the Court struck the 1st Defendant's name off without any application in that behalf by the Plaintiff. In the Lower Burma case relied upon by the Lower Appellate Court it was pointed out that in the Indian cases there referred to the Plaintiff did not, by his own act, relinquish his claim, whereas in that case he expressly waived his claim against the principal, and the same distinction was drawn in the case of *F. G. Williams* v. *T. King* (3), where the Plaintiff's Advocate told the Judge that his principal debtor had absconded, he would waive claim against the principal and would obtain decrees against the sureties. I think that that distinction is sound. In the present case the diary shows that the Plaintiff informed the Court distinctly that he waived his claim against the principal debtor. The Burmese words are ထရားခံဖောင်ကိုးတိုက်ထိုထရားထိုကဖွန့်ပထ်၍။ မောင်ထျော်တယောတ်ဂုံသာသမ္ဗန်ထုတ်သည်။ This entry in the diary was made on the 26th February 1916, the suit having been filed on the 8th January 1916. I am of opinion that this amounted to much more than mere forbearance within the meaning of section 137 of the Indian Contract Act. It was an act or omission the legal consequence of which was to discharge the principal debtor within the meaning of section 134, for it was a distinct waiver of the Plaintiff's claim against the principal debtor and the Plaintiff had no further right of suit against the principal debtor.

There are no grounds for interference on the facts, and this application must be dismissed with costs.

(3) Burma Law Times, VI, 62.

Before L. H. Saunders, Esq., I.C.S.

Civil 2nd Appeal No. 388 1917. 13th March 1918.

MAUNG SHWE DAING AND MA NGWE NU *v.* MA THET SU.

Mr. *San Wa*—for Appellants.

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

Pointed out that an easement of necessity cannot arise in any other way than on severance of tenements. Facts necessary to prove right-of-way by easement.

4 L.B.R., 246. 2 L.B.R., 134.

The Plaintiff's suit was for the removal of an obstruction from a right-of-way which she claimed across the Defendants' betel garden to her own betel garden. She alleged that this road had been used by herself and her servants for more than 20 years and that it had been closed a few months prior to the institution of the suit. The Defendants denied that there was any such right-of-way, they said that the Plaintiff had used the path occasionally with their permission. Only one issue was framed. Has the Plaintiff been using the way in dispute over 20 years continually? The first Court found that the Plaintiff had failed to prove that she had used this right-of-way for 20 years and dismissed the suit. The Lower Appellate Court agreed with the first Court on the evidence, but held that it was necessary for the Plaintiff to go through the Defendants' garden and that therefore she was entitled to a decree upon the ground that the easement claimed was an easement of necessity. It was pointed out in the case of *Po Kin* v. *Maung Hla* (1) that an easement of necessity cannot arise in any other way than on severance of tenements. There was here no allegation of any such severance. The Defendants' holding was distinct from the Plaintiff's and although they adjoined there was no suggestion that they had ever belonged to the same owner, and they appear to have been bought by the Plaintiff and the Defendants respectively at different times. The only question was whether the Plaintiff had made out that she had peaceably and openly enjoyed the right to go through the Defendants' garden as an easement for 20 years up to a date within two years of suit. As to the latter point there seems to be no doubt that the obstruction had only been put up a few months before the suit.

(1) 4 L.B.R., page 246.

MAUNG SHWE DAING v. MA THET SU.

Neither of the Courts below appear to have had a clear idea of the distinction between a private and public right-of-way. The First Court said the using of a public way is a very prominent matter and there should certainly be more witnesses who knew about it. The District Court said that the Defendant contended that the way in dispute was not a public right-of-way. The distinction between private and public rights-of-way and the remedies allowed in each case respectively was explained at length in *Maung Tha Zan* v. *U San Win* (2). I think it is possible that the Plaintiff herself had not a very clear idea as to whether she claimed the right-of-way as a private right-of-way or a public way since several of her witnesses deposed to having used the path themselves, apparently on their own account and not on account of the Plaintiff. But apart from any question whether the Plaintiff sustained any special damage by the closing of the footpath I am of opinion that whether the path was claimed as a private or public way the evidence of the Plaintiff did not prove her case. She said herself that she had been in possession of her garden to which the path gave access for over 20 years. There is no other evidence to prove that she had been in possession of the garden for over 20 years. Ma Thet Pon sold a portion of it to the Plaintiff 16 years ago. The other portion was sold at some earlier date not specified. Ma Ngwe said she had once been over the path 20 years ago going to Ma Thet Su's garden to pick betel leaves. Ma Thet Pon said she had used the path for 13 years up to a date 16 years ago but had not been there since. Maung Le Yauk used the way in dispute 14 or 15 years ago but he also says that there was another way which had been closed three years ago. Maung Aw Za said that he had been using the way in dispute for the last 18 years and that there was no other way to Ma Thet Su's garden, thus apparently contradicting Maung Le Yauk who says up to three years ago there was another way. He also said that the way was fenced on both sides. This does not appear to be consistent with the rest of the evidence which shows that the path was closed because the Defendants' betel leaves were destroyed by the Plaintiff going through them. The Revenue Surveyor said that there was no road in dispute in September

(2) 2 L.B.R., page 134.

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1916. I think that the evidence was clearly insufficient to prove that the Plaintiff had been using the road through the Defendants' garden as of right, *i.e.*, in the exercise of a right claimed against the will of the person over whose property it was sought to be exercised for more than 20 years, nor does it show that the public used this road. In either case agreeing with the Courts below I am of opinion that more and more convincing evidence should have been available and should have been produced. This being so the appeal must be allowed and the Plaintiff's suit must be dismissed with costs throughout.

Before L. H. Saunders, Esq., I.C.S.

Civil Second Appeal No. 254 of 1917.
February 27th, 1918.

MAUNG PO LUN *v.* MA NYEIN BÔN.

Mr. D. Dutt—for Appellant. *Mr. S. Vasudevan*—for Respondent.

Civil Procedure—13.

Damages—Malice.

Held—that before an action for damages for malicious prosecution can be sustained it is not necessary that the plaintiff should have been formally acquitted, but something more than an inference from the general circumstances of the criminal case is necessary and it must be definitely proved either that there was malice, or that there was such a wilfully false statement to the police as would justify an inference of malice.

I.L.R., 6 Bom., 376.

Civil Second Appeal No. 28 of 1916 (not published).

The Appellant sued the Defendant for damages for malicious prosecution and obtained a decree in the First Court which was reversed in appeal. He now comes to this Court in second appeal under section 13 of the Upper Burma Civil Courts Regulation. The facts which it was necessary to prove were correctly set out in the judgment of the Lower Appellate Court but I think the Judge was wrong in holding that a suit would not lie because the Appellant had been merely discharged and not acquitted and because the original charge having been for theft, proceedings had subsequently been taken upon the same facts for mischief and criminal trespass. The case of *Venu* v. *Coorya Narayan* (1) is authority for the view that the discharge of an accused person is such a termination of the prosecution as entitles the accused to maintain an action for malicious prosecution. I think it is clear that no

(1) I.L.R., 6 Bom., p. 376.

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general distinction between a discharge and an acquittal can be drawn, and that a person cannot be debarred from obtaining a remedy for malicious prosecution because the facts alleged have possibly been so obviously false that a charge could not be sustained against the Plaintiff. The Appellant chose to proceed to trial without placing on the record the actual complaint upon which his prosecution was based, and though it may be possible to infer from the evidence which was upon the record that the prosecution was made without reasonable and probable cause I do not consider it possible to make the further inference that it was a malicious prosecution. In the case of *Maung Po Nyein* v. *Maung Kyaw Gaung*, (2) which has been referred to by the learned Advocate for the Appellant, the judgment of the Privy Council in *Pandit Gaja Pershad Tewari* v. *Sardar Bhagat Singh* was quoted in which their Lordships commented upon the principle laid down by the High Court of Madras, that, as the prosecution of the Plaintiff had been instituted by the police, the Defendant was not liable merely because he had given the information on which they had acted; and their Lordships, while agreeing with this principle, if properly understood, pointed out that it was not of universal application, and that if a complainant does not go beyond giving what he believes to be correct information to the police and the police without further interference on his part think fit to prosecute it would be improper to make him responsible in damages for the failure of the prosecution. But if the charge is false to the knowledge of the complainant, if he misleads the police by bringing suborned witnesses to support it, if he influences the police to assist him by sending an innocent man for trial before the Magistrate it would be equally improper to allow him to escape liability because the prosecution has not technically been conducted by him. I think that before an action for damages could be sustained something more than an inference from the general circumstances of the criminal case is necessary and it must be definitely proved either that there was malice, which has not been proved in this case, or that there was such a wilfully false statement to the police as would justify an inference of

(2) Civil Second Appeal No. 28 of 1916.

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malice. Since the Plaintiff failed to prove what it was that the Defendant alleged to the police, his appeal was in my opinion rightly dismissed and this appeal must be dismissed with costs.

Before L. H. Saunders, Esq., I.C.S.

Civil Second Appeal No. 144 *of* 1917. *23rd January* 1918.

MANIK CHAND *v.* RAI BAHADUR GIRIDHARILAL BY HIS AGENT GOPAL DAS.

Mr. *K. Bonerjee*—for Appellant.
Mr. *L. K. Mitter*—for Respondent.

Contract—240.

Allegations of fraud must be specific and not general and the facts constituting the fraud or from which it is to be inferred must be clearly indicated.

Where two persons combine their money or skill in an undertaking with an agreement to share profits and losses such an agreement is in fact a partnership.

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

Plaintiff-Respondent having obtained a decree against one Bura Ram sought to execute that decree by attaching certain sums of money payable to his judgment-debtor by the Public Works Department in respect of a contract held by Bura Ram. Manik Chand thereupon applied for removal of the attachment on the ground that the monies belonged to a partnership between him and Bura Ram. He was successful and the decree-holder has now brought this suit to obtain a declaration that the Plaintiff was entitled to attach these sums and he also sought to recover the costs which he had to pay in defending the application for removal of the attachment. He has been successful in both the Courts below and the Defendant now comes to this Court in second appeal under section 100 of the Civil Procedure Code. It was the Plaintiffs' case that the partnership deed on which the Defendant rested his claim was not genuine but was fraudulently set up as a cloak to defeat the claims of the creditors of Bura Ram. The Plaintiff further alleged in his plaint that even supposing that the deed was genuine it does not constitute Bura Ram and the Defendant partners, and that no consideration was given by the Defendant to Bura Ram in respect of the partnership deed. Only one issue was framed upon these allegations (1) whether the

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contract of partnership between Defendant and Bura Ram is fraudulent or not? Both the Courts below held that the contract was fraudulent and it is a ground of appeal that in doing so the Courts were wrong. There can be no doubt that allegations of fraud must be specific. It is very difficult here to gather either from the plaint or from the judgments of the Courts below in what the fraud is alleged to have consisted. The allegations of fraud and absence of consideration are distinct in the plaint. It is possible that the Plaintiff meant to allege absence of consideration as a ground for his allegation of fraud. But if so he should not have left this matter in doubt and the issue should have been more definite. The findings of both Courts below are equally vague. The first Court said, after summarising the evidence "Bura Ram admitted that he was indebted in about Rs. 2,200 to three persons, and according to his own showing he was in a position of great embarrassment at the time when the partnership deed was executed. I think the circumstances of the partnership are such as to raise a strong presumption of fraud and it is incumbent on the Defendant to prove that the partnership was a *bonâ fide* contract." It held that the alleged partnership was not *bonâ fide* and was merely the creation of a trust for the benefit of Bura Ram. The meaning of this is not explained. The Judge of the Lower Appellate Court merely repeated what the Judge of the first Court had said. The Judge of the first Court had commented on certain contradictions in the evidence. But the only important point which appears to have any bearing upon the question of fraud is the remark that Manik Chand did not ask him, that is Bura Ram, about the amount of work done or money spent on it when the partnership deed was executed. The Judge of the Lower Appellate Court also commented on certain contradictions and says that Lakki Ram contradicted his former statement made in Civil Miscellaneous Case No. 4 of 1916. But the former statement was never put to this witness nor does it appear that it was put in evidence and the provisions of sections 145 of the Evidence Act were not complied with. As to the other contradictions it does not appear to me that they were important. Manik Chand had evidently some interest in common with his father Lakki Ram and it would

seem that the money advanced actually belonged to Lakki Ram. But there is no finding by either of the Lower Courts that the money was not paid nor can I infer from the judgments that this was their opinion. The Plaintiff-Respondent chose to call Manik Chand and his father, Lakki Ram, as his witnesses and he clearly cannot obtain a decree upon the ground that the evidence of these persons proves the exact contrary of what they stated. The fact that Bura Ram was heavily indebted is not by itself sufficient ground for drawing an inference of fraud. He had obtained a contract which he presumably expected to be lucrative, but he was evidently not in a position to carry it out with his own monies. He had therefore to apply to some one to finance him. The Plaintiff's own witnesses have deposed that this financial assistance was given in the form of advances which were further secured by promissory notes, one of which has been repaid. If the Courts below thought that the whole of this evidence was false and that no such advance had been made, they should certainly have said so and given their reasons for so holding. It is true that the document itself contained a clause that no one shall have any claim on the monies payable to Bura Ram upon the contract for Bura Ram's debts, but no fraud can be inferred from this clause which is not referred to by the Courts below. So far as the Executive Engineer's cheques form part of the property of the partnership, if there was a partnership, they were protected by O. 21 r. 49 of the Civil Procedure Code and no further. Obviously no one would have advanced money to Bura Ram if the whole of his chance of getting it back could be forestalled by other creditors, and it was therefore reasonable that the person who provided the money should insist upon being made a partner. I do not think there are sufficient grounds for imputing fraud to Defendant and in drawing an unjustifiable inference from the facts it appears to me that the Courts below have committed an error of law. It was urged by the Plaintiff-Respondent in his plaint that the document which purported to be an instrument of partnership did not in fact constitute Bura Ram and the Defendant partners. No issue was framed upon this point, nor was any decision arrived at. But the Judge of the Lower Appellate Court referred to section

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240 of the Contract Act and held that there was nothing but an agreement by which the Defendant-Appellant undertook to advance monies to be remunerated by a share of the profits. This however is not correct since clause 4 of the agreement set out that any profits or losses were to be shared equally. It is true that in *Bhaggu Lal* v. *DeGruyther* (1) it was held that a very similar agreement did not constitute a partnership. But I am bound to say that the reasons given for that conclusion appear to me to be very doubtful. It was held there that there was no combination of property, for the property such as it was, was the Government contract. This appears to lose sight of the fact that money is also property and, as the capital of a partnership, probably forms one of the most important items in its property. There was also an agreement in the contract, which was set out at full length, by which the parties undertook that "whatever sum seems requisite to pay on the business shall be laid out in consultation between the two partners, and neither shall be at liberty to incur such outlay without the consent of the other." But whether that decision be correct or not it appears to me that the agreement to share losses is conclusive in this case that if the agreement was genuine it was in fact an agreement of partnership. In Lindley on Partnership, 8th edition, page 48, it is explained that an agreement to share profit and loss in the sense of making good the losses, if any are sustained, may be said to be the type of a partnership contract; and again, that unless the word partner is to be deprived of all definite meaning, its proper application to persons who share profits and losses, in the sense referred to can hardly be questioned. The agreement to share losses clearly took the agreement in question outside the scope of section 240 of the Contract Act. I am of opinion that both the Courts below have drawn incorrect inferences from the evidence and that this appeal must be allowed and the Plaintiffs' suit must be dismissed with costs throughout.

(1) I.L.R., 4 All., p. 74.

Before B. H. Heald, Esq., I.C.S.

Civil Miscellaneous No. 62 of 1917. 25th March 1918.

C.V.C.T.N. NACHIAPPA CHETTY *v.* MAUNG PE.

Messrs. *Pillay* and *Pershad*—for Petitioner.
Mr. *Dutt*—for Respondent.

Limitation—15.

Held,—that stay of execution in respect of part of a decree is sufficient to warrant exclusion of time under this section.

I.L.R., 26 Mad., 780.
20, Indian Cases, 439.

On the 13th of May 1909 petitioner applied for execution of a decree which he held against Respondent.

Execution of that decree, in respect of one of the lands against which execution was claimed, was stayed by order of the Court from the 24th of June 1909 to the 31st of August 1910.

On the 14th of May 1913 petitioner applied for execution by the arrest of Respondent. Respondent was served with notice but failed to appear and petitioner took no further action at that time.

On the 9th of March 1915 petitioner applied for transfer of the decree to another Court for execution and the decree was transferred but execution was not effected.

On the 5th of January 1916 petitioner again applied for transfer of the decree and Respondent set up the defence that execution was time-barred because more than three years had elapsed between the applications of the 13th of May 1909 and the 14th of May 1913.

The District Court missed the point of this defence, and found that the application of the 5th of January 1916 was within time because the application of the 14th of May 1913 was a step in aid of execution.

Respondent appealed to this Court, which held that the application of the 14th of May 1913 was time-barred because it was made more than three years after the application of the 13th of May 1909.

I am now asked to review that decision on the ground that the period between the 24th of June 1909 and the 31st of August 1910, during which execution was stayed by order of the Court, ought, under section 15 of the Limitation Act, to have been

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excluded in computing the period of three years from the 13th of May 1909 allowed by Article 182 for the application of the 14th of May 1913.

I have heard Counsel on both sides and I am of opinion that this contention is correct.

Respondent's learned Advocate suggests that a partial stay of execution, such as occurred in this case, cannot be regarded as a "stay of execution" within the meaning of section 15 of the Act, but he has cited no authority to this effect.

In the case of *Rungiah Gounder v. Nangappa Row* (1), decided before the amendment of section 15 of the Limitation Act, the learned Judges of the Madras High Court said, "It is only reasonable and proper that in computing the period of limitation prescribed for an application for execution of a decree, the time during which the execution of the decree *or a portion of it* has been stayed . . . should be excluded" and that view seems to have been adopted by the Legislature in the amendment of section 15 of the Act.

The case of *Lal Gobind Nath v. Bhikar Sahu* (2) has been cited as an authority for the proposition that "a stay of execution against one judgment-debtor gave the decree-holder the benefit of section 15 as against the other judgment-debtors also" but an examination of the judgment shows that it is not so, and I have been unable to find any case in which the question whether or not a partial stay of execution is sufficient to give rise to the operation of section 15 of the Limitation Act has been decided.

Section 15 says that "in computing the period of limitation prescribed for any application for the execution of a decree the execution of which has been stayed by injunction or order. . . the time of the continuance of the injunction or order shall be excluded," and the question which I have to decide is whether in this particular case execution was "stayed" within the meaning of that section. The section itself does not say that execution must have been wholly stayed, and I do not think that I should be justified in reading into the section more than it actually says. There can be no doubt that in the present case execution was stayed although it was stayed only in

(1) I.L.R., 26 Madras, 780. (2) 20 Indian Cases, 439.

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respect of one particular plot of land and not in respect of any other form of execution which might be open to the decree-holder, and as I can find no authority or reason for holding that the section ought to be construed so as to exclude such a case from the benefit of its provisions, I hold that in the present case the period of such stay, namely the period between the 24th of June 1909 and the 31st of August 1910, ought to have been excluded in computing the period of limitation allowed by Article 182 for the application of the 14th of May 1913.

If that period be excluded, that application was filed well within three years after the application of the 13th of May 1909 and was within time, and if the application of the 14th of May 1913 was in time so also were those of the 9th of March 1915 and the 5th of January 1916.

It follows that the decision of this Court in Civil Appeal No. 7 of 1917 was wrong. That decision is therefore set aside and the Respondent's appeal is dismissed with costs.

Respondent will pay petitioner's costs in respect of the present proceedings : advocate's fee to be one gold mohur.

Before B. H. Heald, Esq., I.C.S.

Civil 2nd Appeal No. 250 *of* 1917. *29th January* 1918.

MAUNG NYEIN, A MINOR BY HIS GUARDIAN MAUNG NAING, *v.* MA MYIN, A MINOR BY HER NEXT FRIEND MA NGWE.

Mr. *Dutt*—for Appellant.

Mr. *Mitter*—for Respondent.

Buddhist Law—Marriage.

Held,—that a Burmese Buddhist youth can make a valid promise of marriage at any time after he is physically competent for marriage and that he can be sued for damages for breach of such promise although he is under 18 years of age.

1 U.B.R., 1907—09, Contract 5.

U.B.R., 1897—01, II, 197.

Ma Myin sued Maung Nyein to recover Rs. 30 as damages for breach of promise of marriage.

Both parties were minors for the purposes of Order 32 of the Code of Civil Procedure and the suit was irregularly instituted, but the mistakes have now been corrected.

The trial Court, holding that Ma Myin proved that Maung Nyein promised to marry her and broke his promise, gave her a decree for Rs. 30.

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Maung Nyein appealed, but the Lower Appellate Court saw no reason to disagree with the view taken by the trial Court and dismissed the appeal.

Maung Nyein now comes to this Court in second appeal on the ground that, being a minor, he could not make a valid promise of marriage.

The ideas underlying this defence are—

(1) that breach of promise of marriage is a matter of contract, and

(2) that a person who is minor under the Indian Majority Act cannot make a valid promise of marriage.

But it has been pointed out in this Court in the case of *Kan Gaung* v. *Ma Hla Chok* (1) that "Marriage under Buddhist Law is not wholly a matter of contract" and that "a suit for damages for breach of promise will be maintainable (apart from the Law of Contract) if the Buddhist Law authorises compensation in such a case."

It was further held in the same case that breach of a promise of marriage is a matter of marriage, and the Majority Act lays down in section 2 that nothing contained in that Act shall affect the capacity of any person to act in matters of marriage.

The defence based on minority must therefore fail unless it can be shown that under the Burmese Buddhist Law of marriage the Appellant was debarred by his youth from making a valid promise of marriage.

No provision of Burmese Buddhist Law which prevents a youth of marriageable age from making a valid promise of marriage has been brought to my notice.

Section 33 of the Digest (Volume II) fixes 16 as the age before which parents should give their children in marriage and provides that a girl, if still unmarried on attaining the age of 20, may marry the man of her choice, whether her parents approve or not. This provision suggests the inference that up to the age of 20 a girl cannot marry without her parents' consent, but there is no similar proviso or inference in the case of a boy, and even in the case of a girl the rule is subject to exception.

(1) I U.B.R., 1907-09, Contract, 5.

In the primitive stages of Burmese Buddhist Law the consent of the parents of both parties was doubtless necessary, whatever the age of the parties, so long as they were unmarried.

Thus the "antique Manussika (2)" Dhammathat cited in section 35 of the Digest (Volume II) says that, where the parties are freeborn, marriage is invalid unless the parents on both sides approve.

But various exceptions to this rule appear in the Dhammathats themselves.

I have already referred to the exception in the case of an unmarried girl of over 20 years of age, mentioned in section 33 of the Digest.

Section 149 of the Digest (Volume II) says that if a youth and a maid have clandestine intercourse, the parents of the youth cannot object to their marriage.

Section 99 says that if the girl's parents connive at intimacy between their daughter and her suitor in their house they cannot refuse their consent to the marriage.

Section 147 allows even a girl under 20 years of age to contract a valid marriage against the wishes of her parents if she has eloped with her suitor three times, and section 313 (Volume I) expressly recognises marriages contracted without parental consent.

It would seem therefore that even the compilers of the later Dhammathats recognised the practical impossibility of preventing children from following their own desires, and it is notable that not a single authority lays down a limit of age up to which the approval of the youth's parents is necessary and that the only Dhammathat which says that such consent is necessary at all is the archaic Manussika.

The Dhammathats say in so many words that children should be married as soon as they are of age to marry, and the inference which in my opinion should be drawn from their omission to prescribe a limit of age below which a youth of marriageable age cannot marry without his parents' consent is that there is practically no such limit. If a girl is released from parental control in matters of marriage at the age of 20,

(2) *See* U.B.R., 1897-01, II, page 197.

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it seems reasonable to suppose that a youth who is ordinarily much less under control should be released much earlier, and there can be no doubt that as a matter of fact Burmese Buddhist boys who are of age to marry do habitually marry the girl of their choice without any regard to their parents' wishes.

I find therefore that there is nothing in Burmese Buddhist Law to prevent a youth from contracting a valid marriage without his parents' consent at any time after he is physically competent for marriage.

But if he can make a valid marriage, there seems to be no reason why he should not be able to make a valid promise of marriage and I have no hesitation in holding that he can.

The authorities cited in the case of *Kan Gaung* v. *Mi Hla Chok* leave no room for doubt that Burmese Buddhist Law does provide for the payment of compensation by the defaulting suitor in cases of breach of promise of marriage, and for the reasons given above I hold that the so-called "minority" of the youth is no defence to a suit for such compensation, since the only age of minority recognised by Burmese Buddhist Law in matters of marriage is, in the case of a boy, the age below which he is physically incompetent to marry.

I know no reason in law why such a suit as the present should not be brought against a minor so long as it is brought in the manner prescribed in Order 32 of the Code, and there is nothing in law to prevent a personal decree being given against a minor for compensation in such a suit.

I hold therefore that Maung Nyein, although he was under the age of 18 when he made the promise of marriage, is personally liable to pay compensation for his breach of that promise and that his appeal, on the ground that his minority invalidated his promise, fails.

I have already dealt with his other grounds of appeal in my earlier order in this case, and have held that they are of no avail and therefore I dismiss the appeal with costs.

Before L. H. Saunders, Esq., I.C.S.

Civil Second Appeal No. 164 of 1917. 30th January 1918.

MAUNG THA AND ANOTHER v. MA PYU AND TWO OTHERS.

Mr. L. K. Mitter—for Appellants.

Mr. L. N. Pershad—for Respondents.

Limitation—165, 181.

Civil Procedure Code—*O. XXI, rr. 100, 101*—*Section 47.*

Where the interpretation sought to be put upon the words of the Limitation Act is arrived at by implication and by reference, the Court ought not to adopt a construction which has a restricting and penalising operation unless it is driven to do so by the irresistible force of language.

An application by a judgment-debtor alleging that land in excess of what is affected by the decree has been made over by the Court is governed by Article 181 and not by Article 165 of the Limitation Act.

I.L.R., 25 All., 343.
—— 21 Mad., 494.
—— 38 All., 339.

The Respondents, having obtained a decree for redemption of a usufructuary mortgage, paid the money into Court and the mortgaged land was made over to them on the 5th of January 1916 by the Bailiff of the Subdivisional Court. On the 20th of May 1916 the judgment-debtors filed an application in the Subdivisional Court alleging that the land made over by the Bailiff was very much in excess of the land affected by the decree. The Judge dismissed the application on the ground that Article 165 of the First Schedule of the Limitation Act applied and that, more than 30 days having elapsed since the judgment-debtors had been dispossessed, the application must fail. The Lower Appellate Court confirmed this decision and the judgment-debtors now come to this Court in second appeal. There is no doubt that the cases relied upon by the Lower Appellate Court were authority for the view taken by it. In both *Har Din Singh* v. *Luchman Singh* (1) and *Ratnam Ayyar* v. *Krishna Doss Vital Doss* (2) it was held that an application by a judgment-debtor who had been dispossessed of immoveable property and disputed the right of the decree-holder to be put into possession was included in the terms of Article 165 as well as an application by a third person dispossessed. This view appears to have been generally entertained until February 1916 when it was expressly dissented from in the case of *Abdul Karim* v. *Islamin-Nissa Bee Bee*(3).

(1) I.L.R., 25 All., 343. (2) I.L.R., 21 Mad., 494.
(3) I.L.R., 38 All., 339.

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It appears to me that the reasoning on which this latter decision is based is sound. The Judges said that in a technical matter of this kind where the language relied upon does not in express terms cover the case it is of the highest importance to realize the position of the parties and the context in which the language is used. Where the interpretation sought to be put upon the words is arrived at by implication and by reference the Court ought not to adopt a construction which has a restricting and penalising operation unless it is driven to do so by the irresistible force of language. It was pointed out that, in the case of a person who was not a party to the suit the decree in which was being executed, an alternative remedy was open, since such person could apply either under Order 21, Rules 100 and 101, or could bring a suit within 12 years. If he adopted the former alternative this was a privilege accompanied by restrictions, *e.g.*, the application must be made within 30 days. The judgment-debtor however is expressly precluded from making an application under the provisions of Rules 100 and 101 of Order 21; nor can he file a separate suit since by the provisions of section 47 of the Civil Procedure Code all matters in question between him and the decree-holder must be decided in execution and not by a separate suit. The effect of the earlier decisions would be that where a decree-holder succeeded in getting possession of a substantial area of immoveable property under colour of the decree the judgment-debtor would be deprived for ever of all title to such property if he did not make a summary application within 30 days. I agree with the learned Judges who decided this case that such a result was certainly never enacted in direct terms and that it is safe to assume that the Legislature never intended it. I am of opinion that this application was governed by Article 181 and not by Article 165 of the First Schedule to the Limitation Act, and in this view the decrees of the Courts below must be set aside and the application must be remanded to the first Court for decision upon the merits. The Respondents will pay the Applicants' costs in this Court. Costs in the Lower Courts will follow the result.

Before L. H. Saunders, Esq., I.C.S.

Criminal Revision No. 52 of 1918. March 26th.

NGA BA THAN AND TWO OTHERS *v.* KING-EMPEROR.

Mr. M. Johannes—for Applicants.
Mr. H. M. Lutter—for the Crown.

Criminal Procedure—162.

Held,—that the statements of witnesses recorded by the police in the course of an investigation cannot be used in any way whatever in the course of the trial which results from that investigation, except in the one way laid down in section 162 of the Code of Criminal Procedure, with the single exception referred to in clause 2.

The three accused have been convicted and sentenced, the first to six months' rigorous imprisonment under section 366 of the Indian Penal Code and the second and third to three months' rigorous imprisonment each under sections 366 and 114 of the Indian Penal Code. The case was tried by the District Magistrate and no appeal lies, but this application for revision proceeds upon the ground that the Magistrate committed irregularities in the trial of the case which resulted in the admission of inadmissible evidence and the exclusion of admissible evidence, that the accused were prejudiced by these irregularities and that the Magistrate took a perverse view of the evidence. There is undoubtedly a tendency on the part of Courts in Upper Burma to ignore the strict provisions of section 162 of the Code of Criminal Procedure or to attempt to give them a meaning which they do not possess. The statements of witnesses recorded by the police in the course of an investigation cannot be used in any way whatever, in the course of the trial which results from that investigation except in the one way laid down in section 162 of the Criminal Procedure Code with the single exception referred to in clause 2. Where therefore the statement taken down in writing by the police does not refer to the cause of the death of the person making it, as set out in section 32, clause 1 of the Evidence Act, such statement can only be used when a witness is called for the prosecution on the request of the accused if the Court thinks it expedient in the interests of justice, after the accused has been furnished with a copy thereof. It is very desirable that the provisions of section 162 of the Criminal Procedure Code should be clearly understood and strictly complied with. Here the witness Ma Nyun was called for the

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prosecution and she made a statement which was evidently thought to be more favourable to the accused than the statement which she had made to the police. Her statement to the police was then read to her by the Court and she was asked whether it was correct and she was cross-examined by the Court after she had admitted the correctness of the statement. This procedure was entirely unwarranted and the whole of this witness's evidence from the time her statement to the police was put to her must be excluded. The investigating Sub-Inspector was also called at the conclusion of the trial and was examined as to the investigation made by him. He was asked whether one of the witnesses for the defence who had deposed in Court to the carrying of letters between the complainant and the accused and who had been examined by the police had made any such statement to him. He was apparently referred to her statement as recorded by the police and stated that she had made no such statement. He was also examined as to admissions and statements made to him by the accused. It is true that under section 172 of the Criminal Procedure Code, the Court may send for the police diaries of a case under enquiry or trial and may use such diaries, not as evidence in the case, but to aid it in such enquiry or trial. It is clear however here that it was not the diaries referred to in section 172 of the Criminal Procedure Code which were referred to and there was no provision of law which allows a police officer to give evidence of admissions made to him by an accused person of the kind here recorded.

As to the admissible evidence upon the record it does not appear to me that there would be good grounds for interference in revision. The prosecution evidence was certainly open to serious criticism but so also was that for the defence. It was open to the Magistrate to believe the one and refuse to believe the other, and the mere fact that he did not give detailed reasons in every case for believing the prosecution witnesses in the face of improbabilities and discrepancies in their evidence, or that he did not give reasons for refusing to believe the defence witnesses in every case would not be sufficient reason for interference in revision. I think there is no doubt that the complainant exaggerated the resistance offered

by her and that she was probably not carried kicking and screaming through the town of Myingyan and into the house of one of the accused. She has probably also not told the truth in denying any previous acquaintance with the accused. The evidence of the witnesses who say that they saw the gharry being driven through the town and deposed to what they say they saw is also open to serious criticism. On the other hand the evidence of a school fellow of the first accused as to his relations with the girl was probably evidence of a person anxious to get his school fellow out of trouble, and the witness Ma Saw Myaing who deposed to the carrying of letters had been selling in the bazaar for about two years at the stall of the first accused's mother and therefore also undoubtedly had cause for trying to help him. There seems to be no doubt that the complainant received a bruise upon her cheek and an abrasion upon her knee and that she was suffering from fever for a day or two after the occurrence. The defence story that she was to all intents and purposes engaged to the first accused and that a marriage was to take place before long does not explain why she should have been taken away by the first accused, with a show of force but really with her own consent, as the defence suggest. The 10th witness for the defence Maung Kywe who was called apparently to prove that the girl's father did not believe the story of the abduction or thought that the accused was justified in behaving as he did seems to me to have gone too far. I find it difficult to believe that the father would have said in order to show his friendship for the first accused "even if he kills my daughter I do not mind." Surely the best person to have proved the wishes of the father would have been the father himself. I think however that the record does show that the father had been at one time if he was not at the time of the abduction on friendly terms with the first accused's family. It is possible that the boy hoped to marry the complainant, that either on account of the winning of a large prize in a lottery or for some other reason he saw little hope of getting his wishes gratified in a legitimate manner and therefore had recourse to force. It appears to me that the evidence apart from that which was not admissible was sufficient to prove the charges

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but the Magistrate undoubtedly committed serious irregularities and from the reference in the judgment to another abduction case which had come to the Magistrate's notice and from the failure to refer to the facts which undoubtedly told in favour of the accused, it does appear to me that he was influenced by what he thought to be the general lawlessness of Burmese youths and failed to give due weight to the circumstances which in this case told in favour of the accused and that the latter were prejudiced thereby. I am of opinion that in the circumstances of the case justice will be done if the convictions are maintained, but the sentences are reduced to the period already undergone and there will be an order accordingly.

Criminal Revision No. 905 of 1917. 19th March 1918.

Before L. H. Saunders, Esq., I.C.S.

NGA YÔN v. KING-EMPEROR.

Mr. *S. Mukerjee*—for Applicant.
Mr. *H. M. Lutter*—for the Crown.

Criminal Procedure—162, 476. *Penal Code*—193.

Held,—that there is no provision of law by which the statement of a witness made to the police can be used against him to impeach his credit when he is called for the defence. The giving of false evidence is only an offence when it is intentional and the intention is usually to be gathered from the surrounding circumstances such as the importance or relevance of the evidence in question.

In the course of an investigation into a charge of theft against one Nga Pya, his father, Nga Yôn, was examined by the police. He was called as a witness for the defence when Nga Pya was put upon his trial. Nga Pya was convicted and the Subdivisional Magistrate of Shwebo has now directed the prosecution of Nga Yôn under section 476 of the Criminal Procedure Code for making a false statement upon oath under section 193 of the Indian Penal Code. Nga Yôn seeks now to have this order set aside. It appears that Nga Pya was charged with the theft of certain gold, that he had visited his father, Nga Yôn, after the theft had taken place, that he had returned to Shwebo and upon his return he was arrested and gold was found in his possession. A letter had been sent by Nga Yôn to Nga Pya's wife and it was alleged that the reading out of this letter in which certain gold was referred to furnished a clue which led to the arrest of Nga Pya. Nga

Yôn was examined by the police and appears to have stated that he directed his son, Nga Pya, to write the letter in question, but he did not see it written. He was examined for the defence on behalf of Nga Pya and then stated that the letter had been written by the accused at his dictation and in his presence. In cross-examination he said he had told the Sub-Inspector that the letter was written by the accused according to his dictation. His statement recorded by the police was then read to him and he said that he had not stated that he had not seen the letter written. This is the false statement complained of. It appears to me that the order directing the prosecution of Nga Yôn cannot be sustained. The Magistrate was clearly wrong in allowing the statement of the applicant to the police to be used for the purpose of impeaching his credit; such a statement can only be used in the manner prescribed by section 162 of the Criminal Procedure Code which provides that, when any witness is called for the prosecution whose statement has been taken down in writing in the course of an investigation, the Court shall, on the request of the accused, refer to such writing and may then direct that the accused be furnished with a copy thereof and such statement may be used to impeach the credit of such witness. There is no provision of law by which the statement of a witness to the police can be used to impeach his credit when he is called for the defence. Nor does it appear upon the merits that the order is justifiable. The offence described in section 193 of the Indian Penal Code is the offence of intentionally giving false evidence and the intention can only as a rule be judged by the surrounding circumstances. If the matter deposed to was irrelevant or of minor importance the Court cannot infer that there was any deliberate intention. Here the applicant has all along admitted responsibility for the letter. It does not appear that it would have made any difference in arriving at a decision as to the guilt of Nga Pya, whether the letter in question had or had not been written in the presence of Nga Yôn. Moreover it is generally extremely unsafe to accept statements recorded by the police as verbally accurate or as containing a full and correct account of a statement made by a witness in matters which are not clearly and obviously

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essential. It seems moreover very improbable that the two witnesses who were examined on the 29th of September who spoke to the fact that the applicant had made a false statement could have remembered, as they said they did, the exact words used by the applicant in an investigation which had taken place more than three months earlier, especially since the relevance or the importance of the question whether the letter had been written in the presence of the applicant or not, was very doubtful. For these reasons the order of the Subdivisional Magistrate must be set aside.

Criminal Revision No. 76 of 1918. 23rd April.

Before L. H. Saunders, Esq., I.C.S.

KING-EMPEROR *v.* NGA PO KYAN.

Mr. *H. H. Lutter*—for the Crown.

Excise Act V of 1917—*Section* 12 (*a*), 37.

Held,—that in a District in which the law does not prohibit or place any restriction upon the manufacture of *tari* it cannot be unlawfully manufactured, and section 37 does not therefore apply to the possession of *tari* manufactured in such a District.

This is one of seven cases in which the Accused have been convicted and sentenced to pay fines under section 37 of the Burma Excise Act (Burma Act No. V of 1917). The charge in each case was that the Accused had been in possession of less than four quarts of *tari* which had been illegally manufactured, and that such possession was within five miles of a licensed *tari* shop. The District Magistrate is doubtful whether the convictions can stand.

Burma Act V of 1917 only came into force on the 1st October 1917, and though the law in respect of the possession of *tari* does not appear to have been materially altered, this result has been arrived at by a somewhat different method to that followed in the Act which has been superseded. For the purpose of the present case it is sufficient to point out that unfermented *tari* has been declared to be alcoholic liquor, and that alcoholic liquor is included in the meaning of the term "excisable article," while "manufacture" includes the tapping of *tari*-producing trees and the drawing of *tari* from trees, section 2, sub-sections (*a*), (*f*) and (*m*). The manufacture of excisable articles is forbidden except under the authority and subject to the conditions of a license granted under the Act by

section 12 (*a*) of the Act, and by a Notification of the Financial Department No. 72, dated the 18th September 1917, the Local Government has been pleased to exempt from the provisions of section 12 of the Act, *tari* where the tree-tax system is not in force.

The District Magistrate reports that the tree-tax system is not in force in his District. The provisions of section 12 (*a*) do not therefore apply to *tari* and there is no other provision in the Act making its manufacture illegal. Section 37 of the Act provides a penalty for the possession of an excisable article which the person possessing it knows or has reason to believe has been unlawfully manufactured. It is clear therefore that in a District in which the law does not prohibit or place any restriction upon the manufacture of *tari*, it cannot be unlawfully manufactured, and section 37 does not therefore apply to the possession of *tari* manufactured in such a District.

The District Magistrate has expressed a doubt as to whether the possession was lawful in view of the fact that it has not been shown that the *tari* had been collected in unsmoked or unlimed pots. This doubt however has reference to another set of facts. Section 16 (1) of the Act provides that the Local Government may, by Notification, prescribe a limit of quantity for possession of any excisable article, and in exercise of the authority so granted the Local Government has, by Financial Department Notification No. 77, dated the 18th September 1917, prescribed a limit of four reputed quart bottles in the case of *tari*; where the quantity of *tari* exceeds four quart bottles, its possession is an offence punishable under section 30 (*a*) of the Act subject to further exceptions made by Notification No. 72 referred to above, of which the first clause permits possession of *tari* intended for the manufacture of *gur*, jaggery, molasses or sugar, in a District where the tree-tax system is not in force, if the *tari* is drawn either in smoked pots or in pots treated with lime. But inasmuch as in each of the cases here referred to the quantity of *tari* found was less than four quart bottles, it is clear that no offence was committed however the *tari* may have been drawn.

The convictions and sentences are set aside and the fines must be refunded.

Civil 2nd Appeal No. 390 of 1917. 6th May 1918.

Before L. H. Saunders, Esq., I.C.S.

MAUNG MYO (*Appellant*) *v.* MAUNG KYWET E (*Respondent*).

Mr. *G. S. Pillay*—for Appellant.
Mr. *Tha Gywe*—for Respondent.

Defamation—Action for—

Held,—that a person who has taken his complaint to the police and to the Court without unreasonable delay was protected from an action for defamation of character in respect of allegations contained in such complaint.

I.L.R., 28 Bom., 226.
I.L.R., 38 Cal., 880.
XX Cal. L.J., 518.

Plaintiff sued for Rs. 100 damages for defamation of character on the ground that the Defendant had falsely charged him with setting fire to his, Defendant's house. The defence was that the charge was true. The first Court gave Plaintiff a decree for Rs. 60. On appeal the Lower Appellate Court stated that the suit was for damages for malicious prosecution according to the Plaintiff-Respondent's Advocate, and on the authority of certain Indian cases dismissed the Plaintiff's suit. The Plaintiff now comes to this Court in second appeal under section 13 of the Upper Burma Civil Courts Regulation.

The Plaintiff-Appellant urges that his suit was not or was not merely for damages for false and malicious prosecution and no statement of his Advocate in the Lower Appellate Court could alter the nature of the suit which was to be ascertained from the record. This is undoubtedly the case. The plaint as filed alleged in paragraph 2 that the Defendant had come to the Plaintiff's house, while the Plaintiff was asleep, with the headman and village elders, and had charged the Plaintiff with having set fire to his house. The plaint went on to state that the Defendant was on bad terms with the Plaintiff, that the charge was false, that the Plaintiff had been defamed thereby and had suffered loss and injury. The case was at first dealt with *ex parte*, but the Defendant appeared later and was allowed to defend the suit. The Judge of the Lower Appellate Court says in his judgment that "the Plaintiff was too premature. He had not even waited to see what the result of the information given to the police would be." But there is nothing

on the record to show when the information was laid with the police; and though the Defendant appeared and was examined before issues on the 21st July 1916, the suit having been filed on the 1st July 1916, and then stated that he had lodged a complaint with the police, in his cross-examination when examined as a witness he admitted that this suit had been filed before he had made his complaint to the police. It would seem therefore that the suit could not have been a suit for damages for a false and malicious prosecution since, at the time it was filed, no step had been taken towards prosecuting the Plaintiff; the cause of action cannot therefore have been a prosecution which had not even reached the stage of a report to the police at the time the plaint was filed.

The judgments relied upon by the Lower Appellate Court appear to lay down that unless and until cognizance is taken of a complaint by a Court and some action is taken to require the Plaintiff to appear and answer a charge, it cannot be said that there is any prosecution and there can therefore be no right of action for damages on the ground that there is a prosecution which is false and malicious. This view appears to have been dissented from in the Bombay case *Ahmed Bhai* v. *Framji Edulji* (1), and in the case of *Bishen Prasad* v. *Phulman Singh* reported at page 518, Volume XX, Calcutta Law Journal, a Bench of the Calcutta High Court in 1914 examined the case law on the subject and expressly dissented from the view taken in the Calcutta and Madras cases relied upon by the Lower Appellate Court. I am bound to say that there appears to me to be much force in the arguments by which the learned Judges in this later case arrived at their conclusions. It is not necessary to refer to them in detail because as has been pointed out above this suit was not a suit for damages for malicious and false prosecution. But I have referred to these cases because there appears to be another question arising in this suit which is referred to in two at least of the cases cited which appears to be of importance, and that is whether an action for defamation would lie against a Defendant in respect of a charge which has formed the subject of a complaint to the police or to Court. In the case of *Bishen*

(1) I.L.R., 28 Bom., 226.

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Prasad cited above the Plaintiff also claimed damages for defamation, but the Judges refused to consider this claim on the ground that it was not put in issue and for other reasons. In the case of *Golap Jan* (2), however, it was held that even if the complaint to the Magistrate was defamatory still the complainant was entitled to protection from suit and this protection was the absolute privilege awarded in the public interest to those who make statements to the Courts in the course of and in relation to judicial proceedings. This view of the law appears to be correct. Defamation of character is not a ground for claiming damages for false and malicious prosecution which may be granted upon proof of actual loss or damage. The law provides sufficient protection for an accused person in the prosecution of a complainant who has deliberately brought a false charge. But if this is the case it appears to me to be more than doubtful whether a Plaintiff is entitled to sue for damages for defamation on the ground that the allegations which formed the subject of the complaint to the police or Magistrate had been previously made outside the Court, and whether if he were so entitled the effect would not be to deprive the complainant of his privilege and would not be opposed to public policy. A person who had reason to believe that an offence had been committed would be very seriously and unfairly handicapped if he were bound to keep his reasons to himself and to go to Court without making any enquiry into the truth of his suspicions under penalty of having to meet an action for damages if he did not follow this course. I am of opinion therefore that the Defendant-Respondent having taken his complaint to the police and to Court so far as the record shows without unreasonable delay was protected from an action for defamation of character in respect of allegations contained in his subsequent complaint. This being so the Plaintiff-Appellant's suit was bound to fail. He had when the complaint was filed and was dismissed two remedies, one by obtaining sanction for the prosecution of the Defendant for bringing a false charge, and the other if he suffered loss or injury, upon the authority of the Calcutta case of 1914 cited above, by a suit for damages for false and malicious prosecution. In this view of the case the appeal is dismissed with costs throughout.

(2) I.L.R., 38 Cal., 880.

Before B. H. Heald, Esq., M.A., I.C.S.

Civil 2nd Appeal No. 370 of 1916. April 22nd, 1918.

MAUNG PWE AND 2 OTHERS (*Appellants*) v. U INGUYA AND ANOTHER (*Respondents*).

Mr. *Pershad* for Mr. *C. G. S. Pillay*—for Appellants.
Mr. *Tha Gywe*—for Respondents.

Buddhist Law—Inheritance.

Held,—that a *pongyi* or Rahan cannot inherit property from his lay relatives after his ordination.

2 Chan Toon's Leading Cases, 235.
II U.B.R., 1897-01, p. 54.
—— 1914-16, p. 61.

Shwe Ton v. *Tun Lin* (Civil Reference No. 1 of 1916 of the Chief Court, Lower Burma), unpublished.

The Plaintiffs, U Inguya and U Nyannawun, are Burmese Buddhist priests. They sue their cousin Maung Pwe for partition and possession of their two-thirds share of the undivided estate of the common grand father Tha Byo. Tha Byo had three children, one son Maung Gyi and two daughters Ma Cheik and Ma Nge. U Inguya is a son of Ma Cheik, U Nyannawun of Ma Nge, and Maung Pwe of Maung Gyi. The Plaintiffs' case is that the lands in suit, which belonged to Tha Byo, remained undivided in the hands of his descendants and are now in the possession of Maung Pwe, and that they, as representing Tha Byo's two daughters, are entitled to recover two-thirds of the estate from Maung Pwe who represents the son. The second Plaintiff U Nyannawun also alleged that Maung Pwe had been paying him one-third of the produce of the land annually as his share of the income, and because Maung Pwe had refused to pay in the year 1275, he claimed to recover twenty baskets of paddy from Maung Pwe as arrears.

Maung Pwe replied that Burmese Buddhist priests cannot inherit from their lay relations, that he had been in adverse possession of the lands for over twenty years, that the Plaintiffs relinquished their rights in his favour some sixteen years ago and that, even if the Plaintiffs could inherit, they would not be entitled to the shares which they claimed.

The trial Court framed issues as to—

(1) Whether the Plaintiffs, being *Pongyis*, could inherit from their lay relatives,

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(2) whether their claim was barred by limitation,

(3) whether they had relinquished their rights in favour of Maung Pwe,

(4) what share they would be entitled to, supposing that they could inherit, and

(5) whether the second Plaintiff was entitled to recover arrears of his share of the produce.

After recording evidence, the Court found on the authority of the ruling of this Court in *Ma Pwe* v. *Maung Myat Tha* (1) that the Plaintiffs, being *pongyis*, could not inherit from their lay relatives and on this finding dismissed their suit.

The Plaintiffs appealed to the District Court which, holding on the authority of *Mi Taik* v. *U Wiseinda* (2) that it was settled law that *pongyis* could inherit, set aside the judgment and decree of the trial Court, and directed that the suit should be re-admitted and decided on the merits.

The trial Court then found that, in view of the fact that the last of Tha Byo's children died some thirty years ago and Maung Pwe had been in undisputed possession ever since, the Plaintiffs' claim was barred by limitation.

The Plaintiffs again appealed, and the District Court held that the claim was not barred by limitation and again remanded the case for trial on the merits.

The trial Court then found that Maung Pwe failed to prove that the Plaintiffs had relinquished their rights in his favour, and holding on the evidence that the Plaintiffs succeeded in proving that they were each entitled to one-third of the estate and that the second Plaintiff was entitled to recover from Maung Pwe one-third of the produce of the lands from 1275 B.E. onwards, gave judgment for Plaintiffs with costs.

Maung Pwe appealed but his appeal was dismissed with costs.

He now comes to this Court in second appeal under the provisions of section 100 of the Code of Civil Procedure and he still alleges that under Burmese Buddhist Law a priest cannot inherit from his lay relatives.

The rulings of this Court on this point have undoubtedly been conflicting.

(1) 11 U.B.R., 1897-01, p. 54. | (2) 2 Chan Toon's Leading Cases, 235.

In *Ma Pwe's* case cited above, the learned Judicial Commissioner, Mr. Burgess, held that a Burman on entering the monastic order retained no interest in the property which he possessed before his ordination.

In *Ma Taik* v. *U Wiseinda* another Judicial Commissioner, Sir George Shaw, expressed the opinion that there was nothing in Burmese Buddhist Law to prevent a monk from acquiring by inheritance property which he proceeds to devote to religious purposes.

In *U Tilawka* v. *Shwe Kan* (3) my learned predecessor Mr. McColl said, "I think it is clear that a monk is debarred by the rules of his order from mortgaging property descended from his ancestors, and indeed from owning such property."

All doubt in the matter seems now to have been set at rest by the decision of the Chief Court of Lower Burma in the case of *Shwe Ton* v. *Tun Lin* (4). In that case the question before the Full Bench for decision was whether the next-of-kin of a *pongyi* are entitled on his death to inherit from him lands which he received after his ordination (*a*) as inheritance, or (*b*) as a gift. In order to decide the first part of this question the learned Judges found it necessary to decide whether a *pongyi* can inherit lands from his lay relatives after his ordination, which is the very question which arises in the present case. On this point the judgment of the Chief Court is as follows "We are not prepared to hold that a *pongyi* can inherit from his lay relatives. When a *pongyi* or Rahan is ordained his severance from his family is so complete that, if he was a married man before, he is regarded as having divorced his wife. He is certainly cut off as completely from his original family as if he had been adopted into another family. We consider it inconsistent with a *pongyi's* personal status that he should inherit from his natural family with whom all ties of relationship have been annulled."

This ruling supports the opinion of my learned predecessor and I have no hesitation in following it.

The first Plaintiff in the present case was admittedly ordained before his mother died, so there can be no doubt that he could not inherit from her and it is as her heir that he

(3) II U.B.R., 1914-16, p. 61. | (4) Civil Reference No. 1 of 1916.

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claims a share in the land in suit. His claim must clearly fail.

The second Plaintiff says that his parents both died when he was a child. If this is true he had already acquired the status of heir before he was ordained, and the question arises whether or not, after his ordination, he can still claim to be heir to his parents. There can be no doubt that Burmese Buddhist priests divest themselves of all worldly possessions at the time of ordination. That being so the second Plaintiff must have divested himself of his rights as heir to his parents and grand-parents when he entered the priesthood, and he cannot now claim to be heir to Tha Byo. His claim to a share of Tha Byo's estate must therefore fail.

But if he had no right to the lands, he clearly had no right to any share of the produce, and the contribution of twenty baskets of paddy which he alleges Maung Pwe paid to him as his share of the produce must be regarded as a charitable gift, which is what Maung Pwe says it was. As a matter of fact it was not Maung Pwe who gave the paddy, but Maung Pwe's tenants, and the evidence goes to show that they gave it not by direction of Maung Pwe but as a result of the influence of the *pongyi*. However that may be, it seems clear that the second Plaintiff had no right to demand the payment and his claim under this head also must be dismissed.

I find therefore that the Plaintiffs were not entitled to claim any share of the estate in suit or of the income thereof and I set aside the judgments and decrees of the Lower Courts and dismiss the Plaintiffs' suit with all costs.

Civil Miscellaneous Case No. 36 *of* 1918. *19th August.*

Before L. H. Saunders, Esq., I.C.S.

S. C. BANERJEE (*Applicant*) *v.* 1. A. C. MUKERJEE, 2. SHEODUTROY BISESURDAS (*Respondents*).

Messrs. Johannes and Lutter—for Respondents.

Civil Procedure—O. III, r. 2.

Upper Burma Civil Courts Regulation—25.

Held,—that section 25 of the Upper Burma Civil Courts Regulation forbids a recognized agent doing such acts as examining and cross-examining a witness or addressing the Court on behalf of his client unless he

has been licensed thereto by the Judicial Commissioner either generally or specially.

7 Burma Law Times, 206.
19 C.W.N., 64.

This is an application for the transfer of a suit now pending in the District Court of Mandalay. The Applicant is one S. C. Banerjee and the application has been presented by the Applicant in person but one S. C. Gupta appears in this Court to support the application.

A preliminary objection was made that under section 25 of the Upper Burma Civil Courts Regulation S. C. Gupta who holds a power of attorney from the Plaintiff but is not himself an Advocate and is not licensed by the Judicial Commissioner is not entitled to appear. The point was considered by the District Judge, Mr. Holme, who passed orders on the 19th March 1916, permitting S. C. Gupta to appear for the Plaintiff. The Judge did not consider the effect of section 25 of the Upper Burma Civil Courts Regulation but held that under O. III of the Code of Civil Procedure, S.C. Gupta being an authorised agent was, in the absence of any provision of law to the contrary, entitled to be heard as agent of the Plaintiff.

For the Respondent the case of *Hurchand Ray Gobourdhon Das* v. *Bengal Nagpur Railway Company* (1) is relied on. No reasons however were given for the order there made and it appears that the rules of the Calcutta High Court expressly forbid any persons but Advocates and Vakils appearing for parties before it. In that case the agent desired to appear in the Court of Small Causes and the Judge of the Small Cause Court appears to have held that although a recognized agent can appear on behalf of the Plaintiff or Defendant by whom he has been authorised to do such things, the law does not give the power to plead on behalf of his principal. The case is not very helpful. The case of *Nga Nyun* v. *Po O* (2) is also cited. That was a case in which the Pleaders practising at a certain Court in Upper Burma complained that the Respondent under cover of special powers of attorney, was appearing for parties in cases in the Township Court and practising as an Advocate. My learned predecessor held that

(1) 19 C.W.N., 64. (2) 7 Burma Law Times, 206.

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it would be absurd if the provision of O. III, r. 2, should enable an unqualified person to practise as an Advocate in spite of the provisions of section 25 of the Upper Burma Civil Courts Regulation. But the Judge appears to have considered that while O. III, r. 2, of the Code of Civil Procedure no longer imposes any restrictions on the appointment of Attorneys to represent parties, the rule does not authorise a person to make a business of appearing as an Attorney for parties in cases, and it was held that a person who constantly and as a means of livelihood appeared as an Attorney, or made a business of appearing as an Attorney was practising as an Advocate and was liable to fine under the provisions of section 26 of the Upper Burma Civil Courts Regulation. But sections 25 and 26 of the Regulation say nothing about a person practising as an Advocate. Section 25 (1) runs as follows:—"No person shall be permitted to appear, plead or act as an Advocate in the Court of the Judicial Commissioner or in any Court whether civil or criminal subordinate thereto unless such person has been licensed thereto by the Judicial Commissioner either generally or specially." Clause 2 provides for the framing of rules for the qualification and admission of proper persons to appear, plead or act as Advocates, and clause 3 provides for the issue of licenses to Advocates, while section 26 provides for the punishment of any person appearing, pleading or acting in any Court in contravention of the foregoing provisions of the Chapter or the rules made thereunder.

It is quite possible that it was not intended that section 25 should have the effect of forbidding a recognized agent, as defined in O.III, r. 2, appearing in any single case, but the section must, I think, be construed without reference to its intention and it appears to me that it does in fact forbid any person who is not an Advocate or generally or specially licensed by the Judicial Commissioner appearing, pleading or acting for his principal in any Court. The words "appear" and "act" as pointed out in the Commentary to O. III, r. 1, by Messrs. Ameer Ali and Woodroffe, have a well-defined and well-known meaning. To appear for a client in Court is to be present and to represent him in various stages of litigation at which it is necessary that the client should be present in Court himself or

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by some representative. To act for a client in Court is to take on his behalf in Court or in the offices of the Court the necessary steps that must be taken in the course of the litigation in order that his case may be properly laid before the Court. The word "act" is however taken to refer to ordinary acts and thus not to include the instituting or defending of a suit which a recognized agent cannot do in his own name.

Accepting these explanations of the terms "appear" and "act" it appears to me that section 25 of the Upper Burma Civil Courts Regulation does forbid a recognized agent doing such acts as examining and cross-examining a witness or addressing the Court on behalf of his client. It would seem to be the duty of the agent to engage an Advocate to do these acts. It is not here necessary to decide what other acts a recognized agent may or may not perform, or what would be the effect of his doing acts which are forbidden by law.

I am of opinion that this Court cannot hear the agent, S. C. Gupta. He will be granted an adjournment in order to enable him to engage an Advocate or to take such action as he thinks proper in the interests of his principal.

Before L. H. Saunders, Esq., I.C.S.

Civil Revision No. 103 of 1918. September 13th.

KO BEIN WA (*Appellant*) *v.* DISTRICT COURT AS RECEIVER AND ONE (*Respondents*).

Mr. Razak for Mr. Vasudevan.

Provincial Insolvency—43-44.

Held,—that there appears to be no reason why the Court's powers under section 43 of the Provincial Insolvency Act should not at any time be put in motion by a creditor and the Court is then bound to consider whether the debtor has made false entries in the inventories or lists, or committed any of the other wrongful acts set out in that section.

10 B.L.T., 25.

The Respondent was adjudicated insolvent in Civil Miscellaneous Case No. 12 of 1914 of the District Court, Myingyan. The Applicant in 1916 filed an application stating that the insolvent disposed of most of his moveable properties about a month or two before his application, that he still possessed property worth Rs. 500 and that he had never rendered any account of his properties.

KO BEIN WA v. DISTRICT COURT.

Upon this the District Judge examined witnesses who were directed entirely to prove that the Respondent had property in his possession at or shortly before the time this application by the creditor was made. The District Judge held that the witnesses did not prove the allegations of the Applicant and the Judge also held that the application was premature. The creditor now comes to this Court in revision.

The Judge of the District Court relied upon the case of *Chhatrapat Singh Dugar* v. *Kharag Singh Lachmiram* (1) in which it is stated that the stage at which to visit with its due consequences any misconduct of a debtor is when his application for discharge comes before the Court, and not on the initial proceedings. But I think the Judge has given to this statement a meaning which it was not intended to have. The case referred to was one in which the District Court had refused an adjudication order although the Applicant was entitled to it, on the ground apparently that the insolvent had not acted honestly.

This is a mistake which appears to have been constantly made in interpreting the provisions of the Provincial Insolvency Act and the judgment of their Lordships of the Privy Council was directed to pointing out the error of the District Court. There is no doubt that where an application for discharge is made, that is the proper time to punish misconduct by a debtor, but it is going in my opinion far beyond what was intended or expressed in the judgment relied upon, to say that an insolvent cannot be punished for dishonesty if he fails to apply for his discharge. This is in effect what the Judge of the District Court has here held. Such a view of the law would put a direct premium upon dishonesty as a fraudulent debtor would be able entirely to escape the consequences of his fraud by the mere abstaining from applying for his discharge. This result does not appear to be contemplated by the provisions of the Provincial Insolvency Act and cannot in my opinion be read into the judgment of their Lordships. The terms of section 43 of the Act are clear and there appears to be no reason why the Court's powers should not at any time be put in motion by a creditor and the Court is then

(1) 10 Burma Law Times, 25.

bound to consider whether the debtor has made false entries in the inventories or lists, or committed any of the other wrongful acts set out in that section.

Section 44 provides an additional punishment where the debtor applies for a discharge. The ordinary procedure contemplated by the Act no doubt is that a debtor should after he has been adjudicated insolvent and his assets have been dealt with, apply for a discharge and be discharged. But, possibly owing to the fact that section 53 of the Act has not been made applicable to any Court in Upper Burma, applications for discharge are the exception rather than the rule here, with the result that there is no direct penalty for an undischarged insolvent acting as if he had never been declared insolvent. I am of opinion therefore that the Judge of the District Court was wrong in his interpretation of the law.

The Judge has however arrived at a conclusion on the merits from which I am not prepared to dissent. The evidence adduced by the Applicant was obviously vague and unsatisfactory; the witnesses were unable to say that the property which they saw in the house in which the insolvent was living was the property of the insolvent, and they were reduced to such expedients as quoting a cooly who was not called as a witness, and referring to boxes which "looked as if they contained whisky." The evidence was obviously worthless for the purpose for which it was produced.

Section 36 of the Provincial Insolvency Act has not been made applicable to the Myingyan District. This application must be dismissed.

There will be no order as to costs.

Before L. H. Saunders, Esq., I.C.S.

Criminal Revision No. 684 of 1918. 27th August.

NGA KYAW v. MI HLA.

Mr. Pershad—for Applicant.

Mr. Mya U—for Respondent.

Mohamedan Law—Divorce.

Held,—A Mohamedan husband who gives his wife the right to divorce him does not by so doing divest himself of the right to divorce her. A

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further urged that if this view be not accepted the words were privileged.

I see no reason for holding in revision that the Magistrate was not justified in concluding that the applicant was not protected by Exception 9 to section 499. Of the two witnesses referred to one was examined for the complainant and stated that he had not been paid any money and had not met Maung Hla Pe before the suit came on for trial. The other Sita Ram was called by the complainant but was not examined by him, he was examined by the Court and gave evidence in support of the Applicant's statement. He, however, contradicted himself and also contradicted the evidence of the two witnesses for the defence who were called to prove an admission made by the first witness Budu.

The Advocate, Maung Hla Pe, had not only interested himself as an Advocate in the proceedings; the wife who was seeking a divorce had put up in his house, and there was some evidence that he was giving her financial support in the prosecution of her suit for a divorce. The Magistrate found that the Applicant was angry on this account and that the statement was made with the intention of defaming the Advocate. There seems to have been no reason why the Applicant should not have called the witness, Sita Ram, in the civil suit since this person said that he had refused the money offered and announced his intention of giving true evidence.

It was of course not necessary that the statement that Maung Hla Pe had bribed the witnesses should have been true to bring it within the 9th Exception, but it was necessary that the accused should have believed it to be true and should have acted in good faith. I am not prepared to interfere on the ground that the Magistrate was wrong in his finding on this point.

The question of privilege is one of considerable difficulty. The Courts in India have differed as to whether, and, if so, how far statements made by parties or witnesses in judicial proceedings are privileged and the persons making them protected. In Calcutta and Allahabad the view has been taken that a defamatory statement made in bad faith by an accused person or by a witness is punishable under section 499 of the Indian

Penal Code, see *Kari Singh* v. *Emperor* (1) and *Emperor* v. *Ganga Prasad* (2).

The Madras High Court has taken a different view and in *In re*: *P. Venkata Reddy* (3) has held that a statement made by an accused person at his trial in reply to a question by a Magistrate is absolutely privileged, and that he is not liable to be punished in respect thereof for an offence under section 499 of the Indian Penal Code, and it appears from the remarks in that judgment and from previous judgments referred to therein that the Madras High Court has extended the same protection to witnesses, Vakils and others. The Bombay High Court appears to have taken a similar view in *Queen Empress* v. *Babaji* (4).

The decision of the question depends upon whether the English Law or doctrine of absolute privilege obtains in the Courts in India, and whether it has the effect of modifying the provisions of the Indian Penal Code. The Courts which have held that the provisions of the Penal Code are not so modified (which appear to include also the Punjab Chief Court) distinguish the case of *Babu Ganesh Dutt Singh* v. *Mugnee Ram Chowdhry* (5) where it was held by their Lordships of the Privy Council that on principles of public policy a witness cannot be sued for damages in respect of defamatory evidence given by him in a judicial proceeding from cases where a criminal prosecution is in question; whereas the Judges of the Madras and Bombay High Courts appear to think that if a witness or a party is protected upon grounds of public policy against a civil action for defamation in respect of statements made by him, it is the more necessary that he should be protected upon the same grounds from a criminal prosecution. I think, however, that the distinction drawn in Kari Singh's case, quoted above, is a real distinction and that much more clear and definite authority is required before it can be held upon general grounds that the provisions of the Indian Penal Code are not exhaustive in the matters in respect of which it declares the law.

(1) I.L.R., 14 Cal. 433.
(2) I.L.R., 29 All. 685.
(3) I.L.R., 36 Mad. 216.
(4) I.L.R., 17 Bom. 127.
(5) 11 Bengal Law Reports 321.

Civil II Appeal No. 24 of 1918. 3rd July.

Before L. H. Saunders, Esq., I.C.S.

MAUNG PO THAW *v.* MAUNG THA HLAING.

Mr. A. C. Mukerjee—for Appellants.

Mr. J. C. Chatterjee—for Respondents.

Buddhist Law—Marriage—Damages for breach of promise.

Held,—that whether there is a betrothal or not the consent of the parties is necessary to a valid marriage, and that an action for damages for breach of promise of marriage cannot be maintained against the parents of a Burmese Buddhist in respect of a promise made by such parents to give their son in marriage.

VIII L.B.R., 347. I.L.R. XXI Bom., 23.

The Plaintiffs sued the Defendants for damages for breach of promise of marriage. The second Plaintiff was the daughter of the first Plaintiff and it was alleged that the first and second Defendants, parents of the third Defendant, had undertaken that their son the third Defendant should marry the second Plaintiff. She accordingly allowed him to have sexual intercourse with her; she has become pregnant and she claimed damages Rs. 60.

The plaint did not allege that there was any promise by the third Defendant and the Court of first instance held that the third Defendant was not a party to the contract, which it held was proved to have been entered into between the first and second Defendants and the Plaintiffs. The Court of first instance gave the Plaintiffs accordingly a decree for Rs. 60 with costs against the first and second Defendants.

The first and second Defendants appealed and the Lower Appellate Court dismissed the suit upon the authority of *Maung Thein and one* v. *Ma Thet Hnin and one* (1). The Plaintiffs now come to this Court in second appeal under section 13 of the Upper Burma Civil Courts Regulation.

For the Appellants it is urged that the case is distinguishable from the Lower Burma case relied upon, that the decision in that case is incorrect and that the Plaintiffs were entitled to damages as prayed for. The third Defendant has dropped out of the proceedings but there is no doubt that neither in the pleadings nor in the evidence is there any allegation that he himself ever made, or was a party to, any promise to the second Plaintiff.

(1) VIII L.B.R., 347.

It is urged that the second Plaintiff here was a minor whereas in the Lower Burma case the woman was of age, that there was here no elopement and that the second Plaintiff allowed the third Defendant liberties in consequence of the promise by the parents. The Bombay case *Purshotamdas Tribhovandas* v. *Purshtamdas Mangaldas Nathubhoy* (2) is referred to by the learned Advocate for the Appellants. That was a case in which the plaintiff having been betrothed to the Defendant's daughter, sued for and obtained a declaration that the contract for the marriage should no longer be binding on the Plaintiff and that the betrothal was void, and for Rs. 25,000 damages for breach of the contract of betrothal and marriage. But it was there distinctly held that the marriage of Hindu children is a contract made by the parents, and the children themselves exercise no volition. This, it was said, is equally true of betrothal, and there is no implied condition that fulfilment of the contract depends on the willingness of the girl at the time of the marriage. It would be difficult to imagine circumstances more widely opposed to the conditions of marriage between Burmese Buddhists. There is no doubt that, as is stated in *Maung Thein's* case, a Burmese Buddhist, whether male or female, adult or minor, cannot be legally married without his or her consent, or against his or her will. The law relating to apprenticeships is referred to in the Bombay case and the learned Advocate for the Appellants suggests that a minor Burmese Buddhist youth who is promised in marriage by his parents is in the position of an apprentice who cannot repudiate the contract of apprenticeship, nor can a father or guardian be relieved of his obligation on the ground that the son or ward is unwilling to serve as contracted. But I think it is clear that the analogy does not hold good. Throughout the texts quoted in the Digest it is assumed that whether there is a betrothal or not the consent of the parties is necessary to a valid marriage, and where such a consent is essential its presence must be an implied condition of any contract of betrothal or other promise made on behalf of the parties by their parents or guardians. The son himself was not examined as a witness in this case, his age is not known,

(2) I.L.R. XXI Bom., 23.

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and it cannot be assumed that he was a minor at the time of the alleged contract.

Since the consent of the parties is essential to a marriage, it appears to me that the arguments upon which it was held in *Maung Thein's* case that the parents could not be made liable in damages for breach of promise given by them are unanswerable. The parents' promise would be fulfilled by their informing the Plaintiffs that they gave their son in marriage, but this would have no legal effect and consequently the Plaintiffs could not be given compensation for breach of a promise, the fulfilment of which would be useless and of no effect. On the other hand, if the promise was to compel the son to marry the girl the Court could not enforce such promise or give compensation for breach of it because by so doing it would infringe the essential principle that the consent of parties to a marriage must be free. Here it appears that the girl after the advances made by the parents of the young man went to the latter's house and while there submitted to sexual intercourse. She does not allege that he himself ever offered any suggestion that they should be married.

As far as the claim is based upon the contract it appears to me that it was clearly one which could not have any legal effect. So far as it is based upon the *Dhammathats* I have been unable to find any text which requires parents to compensate a woman who has suffered at the hands of their son in expectation of marriage. In every case where the son behaves badly it appears to be the latter who is required to compensate the injured person.

The learned Advocate for the Appellants objects to the order requiring the Appellants to pay the respondents' costs, but I see no reason for departing from the ordinary rule in this case.

The appeal must therefore be dismissed with costs throughout.

Before L. H. Saunders, Esq., I.C.S.

Civil Second Appeal No. 81 *of* 1918. *19th July.*

MAUNG PO TOK *v.* MA SWE MI.

Mr. D. Dutt—for Appellant.

Mr. Maung Su—for Respondent.

Provincial Small Cause Courts,—II Schedule, clause 15.

Specific Relief –section 30.

Held,—that a suit for the specific performance of an award is not a suit for the specific performance of a contract.

Held also,—that where a claim has been submitted to arbitration and an award made the claim for compensation is merged in the award and the payment of any money directed by the award appears to be a simple claim for money of a kind cognizable by a Court of Small Causes.

I.L.R., 16 Bom., 267.

——13 Mad., 344.

16 Indian Cases, 868.

This was a suit to recover Rs. 45 awarded to the Plaintiff by arbitrators. The Courts below have differed and the Defendant has filed a second appeal under section 13 of the Upper Burma Civil Courts Regulation.

A preliminary objection has been raised that the suit was of a nature cognizable by a Court of Small Causes and that therefore no second appeal lay. For the Appellant it is urged that the suit is not cognizable by a Court of Small Causes because it is a suit for specific performance of a contract, Clause 15 of the Second Schedule to the Provincial Small Cause Courts Act. But I think there can be no doubt that the view expressed in *Simon* v. *McMaster* (1) is correct and that the effect of section 30 of the Specific Relief Act is merely to apply to awards the provisions of Chapter V, in which it is contained, as to contracts and not to convert an award into a contract. A suit for the specific performance of an award is not therefore a suit for the specific performance of a contract.

The contention that Article 24 applies is obviously not sustainable. A suit to contest an award is not the same thing as a suit to enforce an award, and the fact that the Defendant contests the award does not alter the nature of the suit. This was the view taken in the Madras case referred to as well as in *Kyimandas Mulchand* v. *Manghoomal Hemraj* (2) and appears to be not open to question.

(1) I.L.R., 13 Mad., 344. (2) 16 Indian Cases, 868

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Finally it is argued that the award was upon a claim for damages for breach of promise of marriage and seduction, a claim which is not cognizable by a Court of Small Causes under Article 35 (*f*) and (*g*). But it is quite clear upon the pleadings that the cause of action was not the original breach of promise by the Defendant but was the award of the arbitrators. Certain cases which are not available in this Court have been referred to in which it was held apparently that a suit relating to maintenance, Article 38, in which the arrears of maintenance were claimed on an award of arbitrators fixing the amount, was a suit within the meaning of Article 38 and was not therefore cognizable by a Court of Small Causes. But I think it is clear that the terms of Article 38 " a suit relating to maintenance " are very much wider than the terms of Article 35 (*f*) and (*g*) which runs, " A suit for compensation (*f*) for adultery or seduction, (*g*) for breach of contract of betrothal or promise of marriage." Where a claim for compensation has been submitted to arbitration and an award made, the claim for compensation is merged in the award and the payment of any money directed by the award appears to be a simple claim for money of a kind cognizable by a Court of Small Causes.

On the other hand a suit relating to maintenance would undoubtedly include a suit to enforce an award by which the maintenance was fixed. In *Bhagvan Rao* v. *Ganpat Rao* (3) it was pointed out that whereas suits relating to maintenance claimed on a special bond or other contract were cognizable by a Court of Small Causes before the passing of Act IX of 1887, the Legislature in clause 38 has now used language wide enough to exclude from the jurisdiction of Courts of Small Causes any suit relating to maintenance including that suit which was one upon a bond, and I imagine the same principle would apply to the award of arbitrators fixing the maintenance.

Here the only matters in issue were whether the parties agreed to submit their differences to arbitration, and whether an award was passed. I am of opinion therefore that the suit was cognizable by a Court of Small Causes and that no second appeal lies.

(3) I.L.R. 16 Bom., 267.

Before L. H. Saunders, Esq., I.C.S.

Criminal Revision No. 242 of 1918. 18th July.

NGA PO TOK *v.* KING-EMPEROR (NGA LU KA).

Mr. Mya U—for Applicant.
Mr. San Wa—for Respondent.

Penal Code—441, 447.
Criminal Procedure—522.

Held,—that there is no provision of law in the Indian Penal Code or the Code of Criminal Procedure which restricts the right of a person not in possession to make a complaint to a Magistrate in respect of the offence of trespass even though that offence is alleged to have been committed against a third person, nor does the definition of criminal trespass contained in section 441 of the Indian Penal Code restrict the offence to cases in which the person in actual physical possession is insulted, intimidated or annoyed.

Held, further,—that an order under section 522, Code of Criminal Procedure, need not be made at the time of conviction; it is sufficient if it is made without unreasonable delay, and that an offence attended by criminal force within the meaning of section 522, Criminal Procedure Code, includes an offence in the commission of which there has been a show of force.

U.B.R., 1897-01, I, 352. 49 P.R. Crl., 15.
8 L.B.R., 425. 11 C.W.N., 467.

The Applicant has been convicted in this case under section 447 of the Indian Penal Code and sentenced to one month's rigorous imprisonment and to pay a fine of Rs. 30 or to suffer two weeks' further rigorous imprisonment. The sentence was reduced on appeal.

The Complainant was the owner of certain cultivated land which was let by him yearly to a tenant, Maung Yan, and while in occupation of this tenant, the Accused, forcibly entered upon the land ploughed and sowed seed upon it.

It is objected that the prosecution upon the complaint of a landlord who was not in actual physical possession of the land could not be maintained. The authorities quoted have been set out in this Court's case *Chinkwana and three v. King-Emperor* (1) and it was there held, following the case reported in (21) Bombay, page 536, that it is an ordinary rule of law that any body can complain of a criminal offence subject to specified exemptions. It is true that the case under consideration was one in which the Applicants had been convicted under section 452 of the Indian Penal Code which was not compoundable, and it was also held that the intention of the

(1) U.R.B., 1897-01, I, 352.

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Applicants had been to commit an offence, and that while section 441 makes it an offence to enter upon land with a view to intimidate, insult or annoy the person in possession, it is also an offence to enter upon land to commit an offence even though such offence be not directed against the person in possession. In the Lower Burma case *Tok Gyi* v. *King-Emperor* (2) it was held that where property is in actual physical possession of one person he is the only person whose feelings have to be considered under section 441 of the Indian Penal Code. If that were not so it would be possible for the juridical possessor to prosecute for criminal trespass and the actual possessor to compound the offence under section 345 of the Code of Criminal Procedure, and it was held that this was a result which could never have been contemplated by the Legislature. But it does not appear to me to be necessary to hold that such a result could never have been contemplated. An offence punishable under section 447, Indian Penal Code, is bracketted with an offence punishable under section 448, in the table contained in section 345 of the Code of Criminal Procedure. An offence punishable under section 448, Indian Penal Code, is a warrant case and the Police may arrest and send an accused person for trial upon the information of a person who is not in actual physical possession of the property trespassed on, and the case may be compounded at any time by the person in possession.

The Indian Penal Code does not define what is meant by "possession" except in section 27 where there is a restricted definition which does not include the case of a landlord and tenant. The view that the person annoyed must be the person in actual possession is adopted after a review of the authorities in Gour's commentary on the Indian Penal Code in paragraph 1564 at page 1810. On the other hand Mayne in his commentary at page 735, 4th Edition, holding that possession must be actual and not merely constructive, considers that it must be such a possession as is contemplated by section 145 of the Code of Criminal Procedure, not necessarily a bodily possession, but a possession by means of a servant or a tenant who holds by authority of the person claiming to be in possession.

(2) 8 L.B.R., 425.

It appears to me that it is a question of fact whether the entry of a person accused of committing the offence of trespass is an entry with a view to intimidate, insult or annoy the person in possession and that it is not necessary to restrict the meaning of the word "possession" to actual physical possession. If the person charged has entered upon the property by the leave and license of the tenant he has certainly not committed the offence of trespass as far as the tenant is concerned, but he may still commit an offence against the landlord; where for instance the rights of killing game are reserved to the landlord by a lease, a person who intentionally enters upon the property to annoy the landlord by disturbing or destroying game may commit an offence though he does so with the leave of the tenant. It appears to me therefore that there is no provision of law in the Indian Penal Code or the Code of Criminal Procedure which restricts the right of a person not in possession to make a complaint to a Magistrate in respect of the offence of trespass even though that offence is alleged to have been committed against a third person, nor does the definition of criminal trespass contained in section 441 of the Indian Penal Code restrict the offence to cases in which the person in actual physical possession is insulted, intimidated or annoyed.

Here the Magistrates have found that the act of accused did in fact annoy both the landlord and his tenant. Both the landlord and the tenant were called as witnesses and gave evidence and I see no reason to interfere with the finding on the merits.

The claim that the accused was acting in the assertion of a *bonâ fide* claim of right cannot be accepted.

A further question has been raised that the Magistrates passed an order under section 522 of the Code of Criminal Procedure directing that the complainant be restored to possession of the land although there was no finding of the use of criminal force or dispossession and the order was not made at the time of conviction. But I am of opinion that both these grounds are founded upon restrictions which have been placed upon the clear provisions of section 522 by decisions of doubtful authority. Here the accused was convicted on the 28th February 1918; he appealed and his appeal was disposed of on the 4th

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March 1918, and an application was made on the 4th of April, orders being passed on the 11th of April for the restoration of the property. It was held in *Gulam Muhamad* v. *Karan Singh* (1) where there had been a delay of 20 months in making the order, that the delay was justified by the fact that there had been proceedings in the Civil Court in respect of the property and the complainant seemed to have moved the Court promptly enough.

In *Chakoo Mandal* v. *Emperor* (2) the view was expressed that it was not necessary that criminal force should be used to dispossess a party before the provisions of section 522 of the Code of Criminal Procedure could be applied.

Here the record makes it clear that although no criminal force was used in the sense that no assault was committed and the complainant was not bodily removed from the land, still the entry was forcible: both the complainant and his tenant swore that the accused forcibly entered upon the land and ploughed and sowed it.

The application must be dismissed.

Criminal Revision No. 1050 of 1918. 10th December.

Before L. H. Saunders, Esq., I.C.S.

NGA SHWE BAW v. KING-EMPEROR.

Mr. L. N. Pershad—for Applicant.

Forests—rr. 22, 98.

Held,—that the holder of a license to extract a certain fixed quantity of teak is responsible if under cover of the license something illegal is done and it is immaterial whether that illegal act is done by the licensee or by some one employed by him, provided that the person employed is acting within the scope of his employment.

9 L.B.R., 112.

I admitted this application for revision because it seemed desirable that the question of the liability of a person who holds a license for the extraction of timber from the Forest Department for the acts of his servants should be examined. The point has recently been decided in Lower Burma, *K.-E.* v. *U Gyaw* (3) and I have no doubt that the view taken there is correct. The terms of the license make the holder responsible, if under cover of the license, something illegal is done, Form

(1) 49 Punjab Record Crl., No. 15. (2) 11 C.W.N., 467.
(3) 9 L.B.R., p. 112.

III, condition (8), and it makes no difference whether that illegal act is done by the licensee or by someone employed by him provided the servant is acting within the scope of his employment. Here the accused held two licenses to extract a certain fixed quantity of teak. Presumably as a concession to licensees, they are, according to the evidence, permitted to cut timber in excess of the quantity allowed by the license up to 25 per cent. of that quantity, but no more. Here the quantity extracted was after allowing for this excess, over 24 tons in excess of the amount for which accused held licenses. There can be no doubt that the accused who has admittedly been engaged in the timber business for a great many years cannot be allowed to escape punishment on a plea of ignorance unsupported by any evidence. That the timber was actually extracted by his servant makes no difference. It is suggested that the person who extracted the timber was an agent and not a servant. This does not appear to be the case. The man is referred to in the accused's examination as his *lôk tha* or workman and there is nothing to show that he was anything else. Nor does it appear that if Maung Tha Han, the man in question, had been accused's agent the accused's responsibility would have ceased on that account. If he was an agent at all he was an agent to extract timber for the accused under the terms of the licenses held by accused. The application must be dismissed.

Before L. H. Saunders, Esq., I.C.S.

NGA NGWE GYAW *v.* KING-EMPEROR.

Criminal Revision No. 1063 *of* 1918. *5th December.*

Mr. L. K. Mitter—for Applicant.

Criminal Procedure—432, Gambling—8, 9.

Held,—that an accused person cannot be put on his oath or examined as a witness in the case in which he is accused. The fact that there are several accused persons is immaterial if the accused is himself upon his trial with the other accused at the time when it is sought to make him a witness.

Held also,—that if an incompetent witness is examined inadvertently his statement is not legal evidence and must entirely be ignored.

I.L.R., 23 Bom., 213.

The applicant has been convicted of an offence punishable under section 11 of the Burma Gambling Act. He was tried

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with six other accused persons at one trial. In the course of the trial two of the accused were put into the box and examined as defence witnesses. The Magistrate apparently allowed this to be done inadvertently. That it should have been possible for this to happen would appear to argue a considerable lack of system in the Magistrate's method of conducting the trial.

Having examined the witnesses the Magistrate, finding that they were accused, called upon the Advocate for the accused to satisfy him that their evidence was admissible. He does not appear to have come to any definite conclusion after hearing the arguments of the Advocate but refused to examine as a witness the third accused who was tendered, and in his judgment discarded the evidence of these two accused as unreliable.

It is now urged that their evidence was admissible and should have been considered by the Magistrate. The learned Advocate who puts forward this plea has not however explained how it can be justified. He has referred to section 8 of the Gambling Act which allows an accused person to give evidence on being required to do so by the Magistrate touching any unlawful gaming or anything done with reference to such gaming, etc. Section 9 provides that such person is to be absolved from punishment for any offence under the Act committed by him during such gaming, if the Magistrate is of opinion that he has made a true and faithful discovery to the best of his knowledge of all things as to which he shall be examined. There is no doubt that the evidence given by an accused person under these conditions might be true and yet be favourable to some or all of the accused, but it is not defence evidence and it does not justify the examination of an accused person otherwise than on the requisition of the Magistrate before whom the trial is being conducted.

There is no doubt that an accused person is not a competent witness except in such cases as the law distinctly provides for his being examined as a witness. Section 432 of the Code of Criminal Procedure expressly lays down the manner in which an accused person is to be examined and provides that no oath shall be administered to the accused. The meaning of "Accused" has been decided by authority.—I have no doubt correctly—to be the accused person who is at the time under

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trial and under examination by the Court, *Empress* v. *Durant* (1), or as it is put in another case quoted in that judgment, an accused person cannot be put on his oath or examined as a witness in the case in which he is accused. The fact that there are several accused persons appears to me to be immaterial if the accused is himself upon his trial with the other accused at the time when it is sought to make him a witness. There can I think be no doubt that if an incompetent witness is examined inadvertently his statement is not legal evidence and must entirely be ignored.

Upon the merits there are clearly no grounds for interference. Assuming that two of the prosecution witnesses were accomplices though I think the Magistrate was right in holding that they were not, they were not merely corroborated, but there was the evidence of another witness Maung Ba Pe who has not been discredited in any way and who fully bore out the case for the prosecution.

The application must be dismissed.

Before L. H. Saunders, Esq., I.C.S.

Criminal Revision No. 701 of 1918. 15th October.

LAW KAW *v.* KING-EMPEROR.

Mr. L. Pershad—for Applicant.

Opium Law Amendment Act—3.

An order made by a Magistrate to execute a bond under section 3 of the Burma Opium Law Amendment Act is appealable to the District Magistrate.

U.B.R., 1897-01, I, 227.

This is an application to revise the order of the Subdivisional Magistrate, Bhamo, requiring the Applicant to execute a bond under the provisions of section 3 of the Burma Opium Law Amendment Act.

I suggested to the learned Advocate by whom the application was made that his remedy lay in an appeal to the District Magistrate and have given him time to consider this view. He urges that section 3 of the Opium Law Amendment Act makes no provision for appeals and only deals with the procedure of the Magistrate acting upon the information received.

The terms of section 3 of the Burma Opium Law Amendment Act are however *mutatis mutandis* identical with the

(1) I.L.R., 23 Bom., 213.

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terms of section 17 of the Burma Gambling Act, and in the case of *Q.-E.* v. *Nga Kyauk Maw* (1) it was held that a Magistrate in dealing with a person against whom information is received under that section, should do so as nearly as possible as if the information were of the description mentioned in section 110 of the Code of Criminal Procedure, that is to say, he must record an order under section 112 and proceed in accordance with the following sections of the Code and, if he finds it necessary to demand security, he must make an order under section 118. Against that order an appeal lies to the District Magistrate under section 406 of the Code of Criminal Procedure.

It is I think clear that the same procedure is applicable in cases under section 3 of the Burma Opium Law Amendment Act as under section 17 of the Gambling Act, and this application must be dismissed.

Criminal Revision No. 1008 *of* 1918. 10*th December.*

Before L. H. Saunders, Esq., I.C.S.

NGA PAIK v. NGA SAW HLAING.

Mr. R. K. Banerjee—for Applicant.
Mr. C. G. S. Pillay—for Respondent.

Criminal Procedure—350.

Held,—that section 350, Code of Criminal Procedure, provides the only exception to the general principle that Criminal cases must be decided by the Magistrate who heard the evidence.

I.L.R., 23 Cal., 194.

In this case which was tried by a Bench of Honorary Magistrates, the evidence for the prosecution was heard by two Magistrates, Maung Maung Gale and Hajee Bawa Cooti. The latter did not attend again. The accused called no witnesses but the Advocates were heard and judgment was delivered by a Bench consisting of Maung Maung Gale and Maung Po Sin, the latter of whom had not heard the examination of the witnesses. There is no doubt that both the letter and the spirit of the law require all criminal cases to be decided by Magistrates who have heard the evidence, the only exception being that provided for by section 350, Code of Criminal Procedure, which is not applicable in this case, *Dauri Thakur*

(1) U.B.R., 1897-01, I, 227.

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v. *Bhowari Sahoo* (1). The order of acquittal was therefore an illegal order. It is not necessary to do more than point this out. From the record it is clear that if any offence was committed it was of a kind which would be covered by section 95, Indian Penal Code.

Before L. H. Saunders, Esq., I.C.S.

Civil Revision No. 134 *of* 1918. *6th December.*

MAUNG PYO v. MAUNG PO GYI.

Mr. D. Dutt—for Applicant.

Contract—23.

Held,—that a contract in the nature of a marriage brocage contract is opposed to public policy and should not be enforced.

I.L.R. 23 All., 495.
—— 13 Bom., 131.
—— 17 Mad., 9.

It was the plaintiff's case that he had sold a mare to the defendant for Rs. 100 and he sued to recover the price.

The defence admitted the sale but the defendant claimed not to be liable on the ground that there was a subsequent contract by which in consideration of the defendant's persuading his sister-in-law to marry the plaintiff the plaintiff agreed to forego his claim for this money.

Both the Courts below have found that the defendant has made out his case and dismissed the plaintiff's suit. The plaintiff now comes to this Court in revision.

The findings of the lower Courts may be accepted, but I think it is clear that they have failed to consider the question whether the contract was one which could be enforced and that there is no doubt that it was not. Under section 23 of the Contract Act it appears to me that the consideration was not lawful being opposed to public policy. It was in the nature of a marriage brocage contract. There is ample authority for holding that such contracts are opposed to public policy and should not be enforced. The following Indian cases are to the point: *Baldeo Sahai* v. *Jumna Kumar* (2), *Itumbar Ratansi* v. *Jagjiva Hansraj* (3) and *Vaithya Nathan* v. *Gangarazu* (4).

There has been some doubt in India as to whether a contract of this description is not valid in the case of a minor who is an

(1) I.L.R., 23 Cal., 194.
(2) I.L.R., 23 All., 495.
(3) I.L.R., 13 Bom. 131.
(4) I.L.R., 17 Mad. 9.

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infant where the money is received for the benefit of the minor, but such doubts cannot apply to Burma where a marriage contract is not usually entered into until the children are of an age to marry and is never valid unless with the children's consent. Here, moreover, there is no suggestion that the money was received for the benefit of the wife. This was a case in which the wife was 17 years of age and the husband 67; the marriage only lasted a few months and it appears to me to disclose fairly clearly some of the objections to upholding such a contract.

I am of opinion that the Courts below have erred in failing to consider whether the contract was for a lawful consideration. Their decrees must be set aside and there will be a decree for the plaintiff for Rs. 100 with costs on that amount throughout.

Before L. H. Saunders, Esq., I.C.S.

Civil Revision No. 234 of 1918. 4th December.

MAUNG PO TAW *v.* HARAMDI MISSAY AND 2 OTHERS.

Mr. D. Dutt—for Applicant.
Messrs. Vasudevan and C. G. S. Pillay—for Respondents.

Contract—151.
Carriers Act.

Held—that the responsibility of a common carrier is not within the Contract Act. A common carrier, unless he is protected by a special contract or by statute, is liable as an insurer of goods, that is, he is responsible for every injury to the goods occasioned by any means whatever except only by the act of God and the King's enemies.

I.L.R., 18 Cal., 620.
27 Cal. L.J., 615.
1 C.W.N., 329.

This application was filed as an appeal under section 13 of the Upper Burma Civil Courts Regulation but it was admitted by the learned Advocate for the Applicant that an appeal did not lie and the application has therefore been admitted and argued as an application for revision.

The Plaintiff sued three persons, a ferry licensee and his two servants to recover Rs. 195 the price of 100 baskets of beans made over to the Defendants to be ferried across the river. The beans were sunk in the course of being ferried and the Plaintiff claimed their value.

The Defendants stated that there was no negligence on their part but that the ferry boat had been sunk by an Irrawaddy Flotilla steamer and they prayed that the Captain of the steamer should be made a party. The Captain was accordingly added as a 4th Defendant.

The Court of first instance found that there was negligence on the part of the first three Defendants. It dismissed the suit against the 4th Defendant, and granted the Plaintiff a decree against the first three Defendants only.

The first Defendant then appealed and the Judge of the District Court finding that there was no negligence on the part of the Appellant discharged the Township Court's decree against all three Defendants although the 2nd and 3rd Defendants had not appealed and were not parties to the appeal.

The grounds in revision are that the Lower Appellate Court should not have reversed the decree against the Respondents who did not appeal, that there was proof of negligence and that the Defendants being in the position of common carriers they are liable for the loss and damage sustained.

It does not appear to be necessary to decide in this matter whether the Defendants 1 to 3 were negligent, but upon the evidence I am inclined to agree with the Judge of the Lower Appellate Court. It would appear that their boat was moored to a raft and was therefore stationary when it was struck by the Irrawaddy Flotilla steamer and sunk. It does not appear that by mooring the boat where it was moored the Defendants were guilty of negligence.

If then the law on the subject were merely the law applicable in the case of bailees under the provisions of the Contract Act the Defendants-Respondents might have had a good defence, since by section 151 of that Act the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, etc. But it has not been denied and I think there can be no doubt that the Defendants-Respondents were in the position of common carriers, that is to say, persons holding themselves out as carrying on the business of carrying the goods of all and sundry from place to place, and it has been held by Their Lordships of the Privy

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Council in the case of *Irrawaddy Flotilla Company* v. *Bhagwan Das* (1) that the duties and liabilities of a common carrier in India are governed by the principles of the English common law in conjunction with the provisions of the Carriers Act, and that notwithstanding some general expressions in the Chapter on bailments, the responsibility of a common carrier is not within the Contract Act, while a common carrier unless he is protected by a special contract or by statute, is liable as the insurer of goods, that is, he is responsible for every injury to the goods occasioned by any means whatever except only by the act of God and the King's enemies.

It has been suggested by the learned Advocates who have argued the case for the Respondents that a carrier is only bound to exercise an amount of care, skill and nerve which might reasonably be expected from a person in an emergency, *Dwarkanath Raimchan Choudhury* v. *The Rivers Steam Navigation Company* (2) and again that in the case of a collision a competent sailor being placed, entirely by the erroneous conduct of a vessel under way, in a position of difficulty in which an instant step was imperative, is entitled to claim a favourable consideration for the action which he decided to take, "*Mary*" *Tug Company* v. *The British India Steam Navigation Company* (3). But both of these cases are cases between parties who did not occupy the position of owner of goods and common carrier in respect of goods. There is no doubt here that if the Defendants-Respondents can prove negligence against the Captain of the steamer who was the 4th Defendant, they may be able to recover the loss incurred in consequence of such negligence. As a matter of fact payment has actually been made by the 4th Defendant to the 1st Defendant on account of the accident in question. There is no doubt that as between the Plaintiff-Appellant and the 1st Defendant-Respondent the Plaintiff-Appellant was entitled to recover.

It has not been shown that the 2nd and 3rd Defendants-Respondents were acting outside the scope of their employment or that they were guilty of any acts by which to make themselves responsible, nor does there appear to have been any

(1) I.L.R., 18 Cal., 620. (2) 27 Cal. Law Journal, 615.
(3) 1 C.W.N., 329.

contract between them and the Plaintiff-Appellant. Whether therefore the Lower Appellate Court was right or not in dismissing the Plaintiff's claim against them in their absence, this Court will not interfere in revision since substantial justice has clearly been done.

For the reasons stated I am of opinion that the Courts below have acted with material irregularity in the exercise of their jurisdiction in failing to consider the law applicable in this matter, and in this view of the case the decrees of the Courts below must be set aside and there will be a decree in favour of the Plaintiff-Applicant against the 1st Defendant-Respondent only for Rs. 195 with costs throughout.

The Plaintiff-Applicant will pay the costs of the 2nd and 3rd Defendants-Respondents.

Before L. H. Saunders, Esq., I.C.S.

Civil Revision No. 85 of 1918. 22nd November.

MAUNG MAUNG THAN *v.* L. K. S. M. SOMASUNDRAN CHETTY.

Mr. L. K. Mitter—for Applicant.

Civil Procedure—O. V, r. 17.

Held,—that Rule 17, O. V, of the Civil Procedure Code is intended for cases in which the summons should be affixed in the way required by that rule after a proper attempt has been made to find the Defendant.

U.B.R., 1892-96, II, 262.
I.L.R., 19 Cal., 201.

The Applicant was sued as Defendant in the Township Court, Kyauksè, the plaint being filed on the 1st November 1917 on which date summonses for settlement of issues were ordered for the 12th November 1917. On the 12th of November the summons was returned with an endorsement that this Defendant was not found, that his daughter said he had gone to the jungle to sow seeds, and that the summons had been affixed to the house. The process-server made an affidavit to that effect and the Judge then directed the suit to proceed *ex-parte* and gave the Plaintiff a decree in the absence of this Defendant. An application to set aside the decree was rejected and the Defendant appealed; the appeal was also dismissed. He now comes to this Court in revision.

In rejecting the application to reopen the case the Judge of the Township Court said that he found that the summons was

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duly served by affixing a copy of it on the Defendant's house in his absence under O. V, r. 17. The Judge of the Lower Appellate Court said "Considering the fact that both the Appellant and U Chit Pôn his co-Defendant who was served are well known people in the town, I am of opinion that service of summons under O. V, r. 17, of the Code of Civil Procedure, that is to say, affixing a copy of the summons on the Defendant's house, is quite effective."

The grounds of this application in revision are that there was no effective service of the summons. It is quite clear that O. V, r. 17, was not complied with either in the letter or the spirit. The rule requires the serving officer to use due and reasonable diligence to find the Defendant. It also requires that the summons should be affixed on the outer door or some other conspicuous part of the house in which the Defendant ordinarily resides, or carries on business, or personally works for gain. The endorsement on the summons is dated the 6th of November. The Defendant resides at Kyauksè and there were therefore several days in which the summons might have been served. It is clear that no due and reasonable diligence was used, nor does the return show that there was no other person on whom service could be made, that the summons was affixed on the outer door or some other conspicuous part of the house, nor is it shown that the house was one in which the Defendant ordinarily resided, or carried on business or personally worked for gain.

It was pointed out in the case of *Maung Kywe* v. *Ma Shwe Me* (1) that care must be taken to effect service on the Defendant personally, if possible. The remarks of Petheram, C.J., in *Cohen* v. *Nursing Dass Auddy* (2) are much to the point and should be generally known. The Chief Justice there said "Section 80 of the Code of Civil Procedure" (corresponding with O. V, r. 17, of the present Code) "is intended for cases in which the writ should be affixed in the way required by that section after a proper attempt has been made to find the Defendant. It is true that you may go to a man's house and not find him, but that is not attempting to find him. You should go to his house, make enquiries, and if necessary, follow

(1) U.B.R., 1892-96, II, 262. (2) I.L.R., 19 Cal., 201.

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him. You should make enquiries to find out when he is likely to be at home, and go to the house at a time when he can be found. Before service like this can be effected it must be shown that proper efforts have been made to find out when and where the Defendant is likely to be found, not as seems to be done in this country to go to his house in a perfunctory way, and because he has not been found there, to affix a copy of the summons on the outer door of his house." The Judge thought that the affidavit in that case was insufficient, and it was as well that persons should know that such service is not good service, and that suits should not be tried as undefended suits on service such as had been relied on in that case.

These remarks are commended to the notice of the Judge.

The *ex-parte* decree must be set aside and the Judge will now readmit the suit and proceed to try it according to law.

Costs will follow the final result.

Before L. H. Saunders, Esq., I.C.S.

Civil 2nd Appeal No. 29 of 1918. *22nd November.*

NGA THA ZAN *v.* SUNDER SINGH.

Mr. S. Vasudevan—for Appellant.
Mr. H. M. Lutter—for Respondent.

Possession as title.

Held,—that if a person dispossessed of property does not avail himself of the remedy allowed by section 9 of the Specific Relief Act, he must prove a title which, where it is based on possession only, must be possession for at least twelve years.

U.B.R., 1892-96, II, 375.
U.B.R., 1904-06, II, Evidence 7.
I.L.R., 26 Cal., 579.

The Plaintiff sued to recover possession of certain land with houses situated thereon and a fence. He alleged title and dispossession by the Defendant. The Defendant denied the title and dispossession. Both the Courts below have given the plaintiff a decree and the Defendant now comes to this Court in second appeal under section 100 of the Code of Civil Procedure.

The case was badly tried and the opening remarks in the case of *Maung Nyun* v. *Ma Nyein Zan* (1) which has been cited by the Appellant apply to the proceedings of the Courts below. Both the Courts appear to have given the Plaintiff a

(1) U.B.R., 1892-96, II, 375.

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decree upon the weakness of the Defendant's case. The Court of First Instance discussed the defence evidence at some length, and holding that the houses had been built by the Plaintiff and that the Defendant's title fell to the ground when the auction sale at which he claimed to have purchased the land was set aside, gave the Plaintiff a decree. On appeal the Judge of the District Court said : " I do not think I need make any comment upon the evidence adduced by the Plaintiff since the Defendant has failed to prove that the land belonged to him."

Admittedly, the Plaintiff being out of possession and the disturbance of the Plaintiff's possession having taken place more than six months before the filing of the suit, it was for the Plaintiff to prove both title and dispossession. As to title it appears to me that he failed entirely to prove any title. He claimed to have bought the land in suit from one Maung Chin about six years before the suit was filed ; admittedly the transaction was reduced to writing and the document was not registered. The property was therefore not affected by this transaction and the most the Plaintiff could do was to prove that he had been in possession for some years before the Defendant. It was pointed out in *Mi Ein Kin's* case (2) that previous long possession is evidence of title, and it is urged for the Respondent that the Plaintiff's possession was long and was proof of title. The Plaintiff in his plaint said that he purchased the land about six years ago, he had been dispossessed by the Defendant some fourteen months before the suit was filed, and his possession was therefore less than five years. In any case it appears to me that a possession of less than five years cannot be called previous long possession, and where a Plaintiff can rely upon nothing but possession to prove his title, it appears to me further that that possession must be for twelve years or more, see *Nisa Chand Gaita* v. *Kanchiram Bagani* (3). It was there, I think correctly, pointed out that any other view would lead to anomalous results ; for instance, where the position of the parties was evenly balanced, where for instance plaintiff had been in possession for eight years but was dispossessed by the Defendant and had not brought his suit for seven

(2) U.B.R., 1904-06, II, Ev. 7.

(3) I.L.R., 26 Cal., 579.

years, why should eight years' possession of the Plaintiff entitle him to a decree against the Defendant, whose possession though originating it may be in force, was allowed to continue for seven years peaceably? I think that the view expressed there was correct that if a person dispossessed of property does not avail himself of the remedy allowed by section 9 of the Specific Relief Act, he must prove a title which, where it is based on possession only, must be possession for at least twelve years. In this view of the case the evidence as to who built the house in dispute is immaterial.

The evidence upon the record as to dispossession by the Defendant is also extremely meagre. The Plaintiff said apparently that he had been locked out by the Defendant.

Nga Chin said, "I saw Defendant forcibly took possession of the Plaintiff's two houses and locked them up." He did not explain in what the forcible taking possession consisted, nor did the Headman Maung Cheik who gave similar evidence but who admitted in cross-examination that his evidence as to the building of the houses was what he had been told by the carpenters.

Moreover the plaint was extremely vague and should not have been accepted without amendment since it left the area and position of the land entirely undefined. It is admitted that the parties were allowed to file documents at any time during the hearing of the suit. The plaint did not give the area of the land sued for, but the plan filed by the Plaintiff gives an area of over an acre, whereas the Plaintiff's vendor said he had sold to him an area measuring 120′ by 40.′ It is obvious that grave injustice may be done where the Court allows such looseness in the framing of the suit.

The Defendant being in possession was protected by section 110 of the Evidence Act and was not bound to show any title. Upon the evidence upon the record it appears to me that he was able to show title by purchase at a Court auction in virtue of which he has been in possession of the land although the auction sale has nominally been set aside.

The appeal must be allowed and the Plaintiff's suit is dismissed with costs throughout.

Civil 1st Appeal No 228 of 1918, 31st January 1919.

Before L. H. Saunders, Esq., I.C.S.

SOPHIA BLIN *v.* MARIA DAVID.

Mr. H. M. Lutter—for Appellant.

Messrs. *May Aung* and *Swinhoe*—for Respondent.

Succession Act—27.

Held,—that marriage under the Burmese law being polygamous a union between a Frenchman and a Burmese lady which was a lawful marriage under that law was not a marriage as understood in Christendom.

That the offspring of such a marriage are not legitimate and cannot inherit under the law administered in courts in British India such law being in the case of a suit between East Indian Christians the law contained in the Succession Act.

That the terms "Wife" and "Lineal descendant" used in the Succession Act refer only to the lawful wife and to legitimate children.

1 U.B.R., 1910-13, 111.
1890, 15 P.D., 76.
I.L.R., 30 Bom., 500.
8 L.B.R., 399.
U.B.R., 1892-96, II, 529.

This was a suit by the Plaintiff, Maria David, claiming to be the legitimate daughter of one Theophile Alphonse Blin, deceased, against the widow and administratrix of the said T. A. Blin for a declaration that the Plaintiff is the legitimate daughter of the deceased and for the recovery of a share in the estate put by the Plaintiff at one-third.

The Defendant as administratrix has denied the legitimacy of the Plaintiff and defended the suit upon this ground.

The District Court has found for the Plaintiff and the Defendant now comes to this Court in appeal.

The facts are briefly that the deceased, T. A. Blin, a Frenchman, came to Mandalay about the year 1874 or 1875, and very shortly afterwards formed a union with a Burmese Buddhist lady by the name of Ma Bwin. There were two children of this union, Matilda, since deceased, and the Plaintiff Respondent, Maria, born respectively in 1877 and 1878. The union apparently continued for some years and was then dissolved, but the evidence as to how it was dissolved is unsatisfactory. Subsequently the deceased T. A. Blin married the present Defendant-Appellant. It appears from the evidence that at the time of this marriage Ma Bwin had died.

There is no doubt that the marriage between the Defendant-Appellant and M. Blin was a lawful marriage and it has been admitted by the Plaintiff-Respondent. The question is whether the union between M. Blin and Ma Bwin was that of husband and wife, and whether therefore the Plaintiff-Respondent was born in lawful wedlock. The claim which she has made to one-third of the estate is based upon section 27 of the Succession Act, 1865. M. Blin died intestate and by that section one-third of his property belongs to the widow, and the remaining two-thirds it is provided, shall go to his lineal descendants. It appears that Matilda Blin was married to one Joseph Prazer and has left children surviving her whose title to the remaining third will apparently be governed by the decision in the present suit.

Two issues were framed by the District Court (1) "Is Burmese Law applicable to marriages of Frenchmen or non-Buddhist non-Burmans celebrated according to Burmese ceremonies or customs in Burma in the Burmese King's time" and (2) "Was Plaintiff's mother married to her father according to Burmese ceremonies or custom, or only his mistress *i.e.*, is Plaintiff legitimate or not?" Both these issues were answered in the Plaintiff-Respondent's favour by the District Court.

The written statement was not very satisfactory and a note has been added to the first issue that it is admitted by the Defendant that "if valid then valid now."

The first issue was first argued and decided by a Burmese Judge who was acting as District Judge. After evidence had been recorded and the second issue was for decision by the permanent Judge, the Advocate for the Defendant-Appellant desired to argue the question whether if the marriage was valid at the time it is still valid, that is to say, he did not make the admission which had been made upon the framing of issues when the Defendant-Appellant was represented by another Advocate. The Judge discussed the arguments and held apparently that it was an attempt to reopen the first issue and he also held against the Defendant-Appellant.

The main argument in this Court has been upon this particular point, and though the learned Advocate for the Plaintiff-Respondent has drawn the Court's attention to the fact that

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the point did not arise upon the pleadings, he has not objected to its now being raised and has been heard in reply.

The evidence of the witnesses who were examined must I think be taken as proving that there was a marriage between the deceased, M. Blin, and Ma Bwin which satisfied the requirements of Burmese law. There was a public entertainment when the parties came together to which a number of guests, including M. D'Avera, Madamoiselle Denigri and Maung Kyaw E, who at that time appears to have occupied an official position in the Hlut-daw, were invited. There is evidence that the parties lived openly together as husband and wife and went about together and that Ma Bwin was received at the Royal Court, and that persons who were not lawfully married were not so received. According to the evidence of Maung Kyaw E only one wife, the principal wife, was received in the palace. According to Burmese law no ceremony of any kind is necessary for a marriage, mutual consent is all that is required and consent may be inferred from the conduct of the parties or established by reputation, *Mi Me* v. *Mi Shwe Ma* (1).

I have no doubt that the evidence upon the record was sufficient to justify a finding that there was, according to Burmese law, a marriage between M. Blin and Ma Bwin, and there can also be no doubt that the Plaintiff-Respondent was the issue of that marriage.

The law applicable is stated in section 13 of the Burma Laws Act, 1898, which provides that in questions regarding succession, inheritance and marriage the Buddhist Law in cases where the parties are Buddhists shall form the rule of decision, otherwise where the case is not provided for by any enactment for the time being in force, the decision shall be according to justice, equity and good conscience. The learned Advocate for the Plaintiff-Respondent urges that the decision of the question as to the validity of the marriage should be governed by Buddhist Law, which he prefers to call the Burmese Law, and that inasmuch as one of the parties to it was a Burmese Buddhist the application of that law will be in accordance with justice, equity and good conscience. I understand that he admits that the validity of the marriage

(1) 1 U.B.R., 1910-13, 111.

could not be supported if a claim to property in England were based upon it in an English Court, but that that is not the case here and he urges that there is no reason why it should not be allowed in a Court in British India where the property is situated.

The case for the Appellant is that the term "marriage" has in Christendom an entirely definite and clear meaning, that it implies a voluntary union for life of one man with one woman to the exclusion of all others, that one of the parties to the union being a Frenchman and a Roman Catholic, the parties to this suit being Roman Catholics and the Plaintiff claiming under the Succession Act the word marriage must be taken in that sense, and that if the union between the father and mother of the Plaintiff-Respondent does not answer to that definition she cannot succeed in a Court in British India.

In *Mi Me's* case quoted above their Lordships of the Privy Council stated that in Burma polygamy is undoubtedly lawful and this dictum must be accepted, although Mr. May Aung for the Plaintiff-Respondent has suggested that it might be possible to argue that at the time when the marriage was effected polygamy was either discountenanced or directly contrary to law. In the case of *Brinkley* v. *Attorney-General* (2) which was a petition to establish the validity of a marriage under 21 and 22 Vic., Chapter 93, it was held upon the evidence that the marriage was valid according to the law of Japan and that by such a marriage the Petitioner was precluded from marrying any other woman during the subsistence of the marriage, that the marriage was valid in England.

The learned Judge who decided that case referred to the principle which has been laid down that a marriage which is not that of one man and one woman to the exclusion of all others though it may pass by the name of marriage, is not the status which the English law contemplates in dealing with the subject of marriage.

I think there can be no doubt whatever that the union between the father and mother of the Plaintiff-Respondent did not exclude according to the Burmese law his

(2) 1890, 15 P.D., 76.

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union with other women and that it was not therefore marriage within the meaning of the term as recognized by the English law.

The question then is whether the Plaintiff-Respondent is entitled to a declaration by a Court in British India that the marriage of her father and mother was valid and whether she is entitled to a share in the property which she claims. The share claimed as pointed out above, is that allowed by section 27 of the Succession Act, 1865, and it appears to me that the Plaintiff-Respondent can only succeed if she can prove that she is a lineal descendant of her father within the meaning of the term as used in that Act. It is true that the Act itself makes no distinction between legitimate and illegitimate children except in sections 7 and 8 which deal with domicile, and section 87 which deals with wills; nor is the meaning of the term "wife" defined. But the absence of any definition of the term "wife" or of any distinction between legitimacy and illegitimacy is certainly not due to any intention to recognize the position or status of illegitimate children or to admit the claims of a wife who has not been legally married. It is due to an exactly opposite cause. Illegitimate children, that is to say, the offspring of a union which is not that of a husband and wife in the sense in which the term is used in the Act, are regarded as non-existent or the children of no one. *Smith* v. *Massey*. The Act itself was framed by Commissioners as part of a body of substantive law in preparing which the law of England was used as a basis. It excludes the vast majority of the natives of this country from its operation, it applies to Europans, East Indians, Jews, Armenians, native Christians and partially to Parsis. As to other persons these may be excluded by order of the Governor-General in Council if it is considered inexpedient or impossible to apply the provisions of the Act to them.

I think there can be no doubt that the Plaintiff who is an East Indian professing the Roman Catholic faith and claims under this Act a share in an intestate estate on the ground of the marriage of her parents, has not shown that there was such a marriage as would be recognized by the Courts in

(3) I.L.R., 30 Bom., 500.

which she makes her claim. That the deceased, M. Blin, was a Frenchman does not in my opinion make any difference in the matter of this main and most important requirement.

It is urged that marriages of Frenchmen are governed by the Code Napoleon by which publicity is the only essential in form, that this publicity was present in the union between the father and mother, and that as to the form of marriage the parties were governed by the *lex loci contractus*. But this does not get over the difficulty that the marriage was not in itself a marriage at all as understood in Christendom, and it does not appear that either by the Code Napoleon or any other law, recognition is granted in France to polygamous marriages. On the contrary by Article 6 of the Code Napoleon, it is laid down that private contracts cannot delegate from laws which interest public order or good morals, and the contract of marriage in France as in other European countries is essentially monogamous.

The Judge of the District Court appears to have interpreted the term "polygamous marriage" as meaning a union during the subsistence of which the man and woman were faithful to each other. But this is not the correct interpretation of the term which must be held to include a form of union which permits the taking of more than one wife.

For the respondent an attempt has been made to draw a distinction between cases in which there is a personal disability between the parties to a union *e.g.*, where they are within the degrees prohibited by their personal law, and all other cases in which there is no such disability, but this contention does not get over the difficulty that the marriage set up was in its nature polygamous. The authority for the view that such a marriage is no marriage in the English law is overwhelming and is not disputed. But the defence attempts to get over it by suggesting that the fact that the place where the union was effected where the property is and where the parties now reside is the same, that if the Plaintiff-Respondent was entitled to inherit under Burmese law she is at least similarly entitled by justice, equity and good conscience to obtain her inheritance in a British Court which has succeeded the Burmese Court, and that, as the learned Advocate puts it, she should not suffer a

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grievous wrong on account of the folly or incompetence of the Burmese King; that in deciding the question of marriage between a Burman Buddhist and a foreigner there is no reason which is not consonant with the principles of justice, equity and good conscience, why the Buddhist law should not be applied, and the case of *Sein Chi* v. *Ma E* (4) is referred to in which in the case of a union between a Chinaman and a Burmese woman no strong reason was found why the customary law of the man should be applied and the customary law of the woman should be utterly disregarded.

The case of *Ma Chein* v. *Ma Mo* quoted in Chan Toon's Leading Cases, 224, is also relied upon. But the parties here are not Buddhists, and in a case between East Indian Christians which depends upon the question whether the union between a Frenchman who was a Christian and a Burmese Buddhist was a marriage or not, it certainly does not appear to be opposed to the principles of justice, equity and good conscience that the law administered by a Court in British India should be the law of that country rather than that of the Burmese Courts.

In *Ahmed* v. *Ma Pwa* (5) it was pointed out that in any litigation in which a foreigner found himself involved in Upper Burma before the annexation, he was obliged to submit to its determination by the rules of Buddhist law because the Courts had no other law which the sovereign power permitted them to apply, and the suit having been brought in a Court in British India it was decided by the Muhammadan Law which was the law applicable to the parties. The case of *Ma Chein* v. *Ma Mo* ignores the distinction between the meaning of the word "marriage" as used in Christendom the meaning which is also in my opinion to be applied to the interpretation of the Succession Act, which appears to me to go to the root of the matter. Such a distinction obviously does not exist in the case of a union between a Chinaman and a Burmese woman. It is hardly necessary perhaps to refer to the suggestion that the folly of the Burmese King should not be allowed to lead to injustice by depriving the Plaintiff of her inheritance so far as this argument does not beg the question; the change

(4) 8 L.B.R., 399. (5) U.B.R., 1892-96 II, 529.

in the Government of the country to whatever cause it was attributable has undoubtedly affected the law applicable to a great many persons resident in the country.

The Defendant-Appellant relied upon a letter admittedly written by the Plaintiff to her father and filed as Exhibit 3. In that letter which was written in 1907 when the Plaintiff had been twice married a letter which I may say showed a very proper sense of filial duty and affection,—the Plaintiff after reference to the Defendant as her father's lawful wife says "We are not your legitimate children and without your will we get nothing." No doubt this admission does not prove that the union of the Plaintiff's parents was not a lawful marriage, but it does appear to me to prove that not only did the Plaintiff regard it as no marriage, but that her father held the same view since it is hardly credible that she would have written to her father in these terms if he had regarded his union with her mother as a lawful union.

For the reasons given I am of opinion that the Plaintiff's suit must fail, and I see no reason in the circumstances why the ordinary rule as to costs should be departed from.

The appeal is allowed and the Plaintiff's suit must therefore be dismissed with costs throughout.

Before L. H. Saunders, Esq., I.C.S.

Criminal Revision No. 61 of 1910. 27th March.

MI CHIT *v.* MI NYUN.

Mr. H. M. Lutter—for the Crown.

Village Act—9.

Held,—that an accused convicted of an assault by a village headman is liable subsequently to be tried by a Magistrate for the causing of hurt upon the same facts.

The accused was tried and convicted for an offence under section 323 of the Indian Penal Code by a Subdivisional Magistrate. She then applied to the District Magistrate to set aside the conviction and sentence on the ground that she had already been tried upon the same facts and convicted for assault and criminal trespass by the village headman. The District Magistrate has submitted the proceedings with the recommendation that the conviction and sentence by the Subdivisional Magistrate should be set aside.

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The conviction by the Village Headman was authorised by section 9 of the Burma Village Act which allows a Village Headman to try persons accused of assault, theft, mischief, criminal trespass, and any other offence which the Local Government may by notification declare to be triable by a Headman. No definition is given of any of the offences referred to in section 9. They are offences as defined in section 2, clause (42), of the Burma General Clauses Act, 1898, since they are acts or omissions made punishable by a law for the time being in force, in this case, by the Village Act. They do not however appear to be offences as defined by section 40 of the Indian Penal Code since they are not made punishable by that Code but by the Village Act. The fact that the same words are used in the two Acts to denote the things referred to does not make the things punishable under the Village Act offences because they are punishable under the Indian Penal Code but because they are punishable under the Village Act. The language used in section 9 of the Village Act is somewhat loose. There is no provision in the Indian Penal Code which makes an assault as defined in that Act alone punishable. Under section 352 of the Indian Penal Code an assault or the use of criminal force is made punishable.

The Penal Code moreover deals with various kinds of theft and mischief, for instance, theft in a house as well as simple theft, while there are several offences of mischief, and there would seem to be no reason why the offence of theft wherever or under whatever circumstances it is committed, should not be triable by a Village Headman provided the value of the property does not exceed Rs. 5, and the same inference may be drawn with regard to the offence of mischief. There is no reason why "assault," "theft" and "mischief" should not be given the same interpretation in the Village Act as in the Penal Code. It is, I think, indeed desirable that this should be done but in the absence of any definition of the terms in the Village Act this is a matter of convenience only.

The offences punishable under section 9 of the Village Act are however acts or omissions constituting offences under two or more enactments within the meaning of section 26 of the General Clauses Act, 1897, and the question is whether the

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provisions of section 403 of the Code of Criminal Procedure were or were not a bar to the second trial by the Subdivisional Magistrate. I think the term "assault" used in section 9 of the Village Act must be interpreted strictly as an act which in the words of section 351 of the Indian Penal Code causes the person present to apprehend that the person performing the act is about to use criminal force. The definition in section 351 of the Indian Pena Code appears to be in agreement with the definition of the term "assault" as used elsewhere, see for instance Wharton's Law Lexicon and other similar works. It does not include the use of criminal force nor does it include the causing of hurt. Under section 26 of the General Clauses Act, 1897, the accused having been tried for assault by the Village Headman could not again be tried for assault by a Magistrate.

But I am of opinion that the Subdivisional Magistrate was right in that the Village Headman was not competent to try the offence of voluntarily causing hurt with which the accused was subsequently charged, and that under clause 4 of section 403 of the Code of Criminal Procedure, the accused having been convicted of an assault by the Village Headman was liable subsequently to be tried by a Magistrate for the causing of hurt upon the same facts.

The proceedings will therefore be returned.

Before L. H. Saunders, Esq., I.C.S.

Criminal Appeal No. 38 of 1919. March 13th.

NGA HAN *v.* KING-EMPEROR.

Mr. C. G. S. Pillay—for Appellant.

Penal Code—302. *Plea of guilty.*

Held,—that before a plea of guilty can be accepted and a sentence of death passed, the record should show clearly that the person who is charged understands and admits such facts as would bring his offence within the definition of murder, and that he does not plead any of the exceptions set out in the Indian Penal Code.

Bom. L.R., VII., p. 240.

The Appellant was placed upon his trial for the murder of his child. A plea of guilty was recorded at once; no evidence was taken and the Appellant was sentenced to death. He now appeals on the ground that he did not in fact commit

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murder and did not intend to plead guilty to such a charge, that he did not understand the nature of the charge and that his answer to it was not therefore an answer which should have been accepted.

It was pointed out in the case of *Emperor* v. *Chinia Bhika Koli* (1) that it is not in accordance with the usual practice to accept a plea of guilty in a case where the natural sequence would be a sentence of death. I am not prepared to say that there are no cases in which such a plea should be accepted, but before it can be accepted the record should clearly show that the person who is charged understands and admits such facts as would bring his offence within the definition of murder, and that he does not plead any of the exceptions set out in the Indian Penal Code. It is probably rare that a Burmese cooly, as the accused was in this case, can be in a position to understand the nature of a charge of murder against him, though it is possible that if an accused person, upon being examined, stated that he deliberately and intentionally killed his victim, for the purpose, for example, of robbery, a plea of guilty might be accepted. Here the Appellant was examined in the Committing Magistrate's Court and he stated there that he thought he was the cause of the child's death, he was drunk and did not know what he did. There is no reason to suppose that he adopted a different attitude in the Sessions Court and the judgment shows that his Advocate urged in his defence that he was not responsible for his actions, that he was maddened by drink and did not know what he was doing. Even assuming that the plea of drunkenness was not a good defence it was clearly most undesirable that the Sessions Judge should under the circumstances have convicted the Appellant and sentenced him to death without recording any evidence, and without being in a position from having seen and heard the witnesses to ascertain whether there was or was not anything to justify him in convicting the accused for a lesser offence, or in sentencing him, upon a conviction for murder, to the alternative sentence of [illegible] for life.

(1) Bombay Law Reporter, Vol. VIII., 240.

The appeal must be allowed and the case must be sent back for trial in accordance with law. In view of the examination of the accused recorded in the Committing Magistrate's Court and the arguments urged by his Advocate, the Sessions Judge should record a plea of not guilty.

Before B. H. Heald, Esq., I.C.S.

Civil Revision No. 215 of 1918. March 11th, 1919.

OVANNA PERUMAL CHETTY *v.* MAUNG MYIN AND ONE.

Mr. C. G. S. Pillay—for applicant.
Maung Su—for respondents.

Civil Procedure—O. 21, *r.* 66 (4), *section* 73 (*b*).

Property under usufructuary mortgage is attachable in execution of a decree but the decree-holder has only the right to bring to sale his judgment-debtor's right or equity of redemption.

But unless the mortgagee consents the decree-holder has no right to bring the property to sale. All he can sell is the residual right of the mortgagor, that is the right to recover the property on payment of the mortgage money.

When a Court receives an application for execution against property which is admittedly or is alleged to be subject to mortgage, it should give notice to the mortgagee and ask him whether he consents to the sale of the property free of mortgage. If he consents and there is no dispute as to the fact of the mortgage or the amount of the mortgage money the Court may under section 73 (*b*) of the Code of Civil Procedure direct the sale of the property free of mortgage, giving the mortgagee the same interest in the proceeds of sale as he had in the property sold. In that case no mention of the mortgage should be made in the proclamation of sale.

U.B.R., 1897-01, II, 262.
—— 1892-96, II, 613.

The petitioner obtained a decree against Maung Ka Ya and Ma Hla Min and in execution of that decree applied for attachment and sale of certain lands which he alleged to belong to his judgment-debtors and to be in the possession of the present respondents, Maung Myin and Kyaw Dun, as usufructuary mortgagees for Rs. 300. He asked that the lands might be sold free of mortgage and that out of the proceeds the mortgage money might first be paid to the respondents, and that the balance if any might be paid to him towards satisfaction of his decree.

On this application the Court issued a warrant attaching the lands

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The respondents filed an application for removal of the attachment and produced their registered mortgage deed for Rs. 300. They said that the land being subject to usufructuary mortgage could not be brought to sale.

The lower Court, reading the judgment of this Court in the case of *Moothia Chetty* v. *Maung Gyi* (1) as saying merely that property under mortgage with possession cannot be attached, and overlooking the order of the Court which set aside the order removing the attachment and directed that the attachment should be continued on the equity of redemption, committed the very mistake which was corrected in that case, and removed the attachment.

The petitioner applies for revision on the grounds that the lower Court misunderstood the ruling which it professed to follow and ought, instead of removing the attachment, to have allowed it to continue as against his judgment-debtors' equity of redemption.

There can be no doubt that this contention is correct.

It was pointed out in this Court in the case of *Maung Chit Pon* v. *Maung Hmon* (2) that in such cases the decree-holder has a right to bring to sale his judgment-debtor's right or equity of redemption, and if he has a right to bring it to sale he clearly has a right to attach it.

But unless the mortgagee consents, the decree-holder has no right to bring the property itself to sale. All he can sell is the residual right of the mortgagor, that is the right to recover the property on payment of the mortgage money.

When a Court receives an application for execution against property which is admittedly or is alleged to be subject to mortgage, it should give notice to the mortgagee, and ask him whether he consents to the sale of the property free of mortgage. If he consents and there is no dispute as to the fact of the mortgage or the amount of the mortgage money the Court may under the provisions of section 73 (*b*) of the Code of Civil Procedure direct the sale of the property free of mortgage, giving the mortgagee the same interest in the proceeds of the sale as he had in the property sold. In that case no mention of the mortgage should be made in the proclamation of sale.

(1) U.B.R., 1897-01, (II), p. 262. (2) U.B.R., 1892-96, II, p. 619.

If the mortgagee does not consent to the sale of the property free of his mortgage, but the amount of the mortgage money is not disputed, the proclamation must state that what is sold is the right to redeem the lands for that amount.

If either the fact of the mortgage or the amount of the mortgage money be disputed the proper procedure is for the Court to make a summary enquiry under the provisions of Order 21, rule 66 (4), with a view to ascertaining what the exact nature of the mortgagee's claim is and how far it is admitted by the decree-holder, and then to state the result of the enquiry in the proclamation of sale, which should show clearly that what is to be sold is only the judgment-debtor's interest in the property, and that a mortgage for so much is claimed against the property but is disputed or not admitted, or that the mortgage is admitted but the amount of the mortgage money is disputed or is admitted only in part.

In the present case the mortgage and the amount of the mortgage money are admitted by both parties but the mortgagee does not consent to the sale of the property free of mortgage. All that can be sold therefore is the mortgagor's right to redeem the property for Rs. 300 and the proclamation of sale must make it quite clear that it is not the property itself, but the mortgagor's right to dedeem it for Rs. 300 which is being sold.

The lower Court's order removing the attachment is set aside and it is ordered that the attachment be continued in respect of the judgment-debtor's right to redeem the property for Rs. 300.

Each side will bear its own costs throughout because each has been partially successful.

Before B. H. Heald, Esq., I.C.S.

MAUNG GAW YA *v.* MAUNG TALOK AND ONE.

Civil Revision No. 162B *of* 1918. *23rd January* 1919.

Mr. S. Mukerjee—for Applicant.

Mr. L. K. Mitter—for Respondents.

Transfer of Property—51, 108.

Held,—that a usufructuary mortgagee in Burma has a right to the crops growing on the land at the time of redemption provided that such

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crops were sown or planted by the mortgagee or his tenant without notice of the intended redemption.

I.L.R. 2 Bom., 670.
—— 13 Mad., 15.
—— 8 All., 502.
22 I. Cases, 515.
3 L.B.R., p. 129.
1 U.B.R. 1910-13, p. 14.
1 L.B.R., p. 186.

About 1888 one Maung Shan, father of Ye Gyaw and Maung Talok, mortgaged the land in suit with possession to Shwe Sin, father-in-law of Nyo Mya. Shwe Sin died and in 1904 his son-in-law, Nyo Nya, again mortgaged the land to Po Hnit, who put Gaw Ya into possession as his tenant for the cultivating season of 1915-16. On the 22nd of May 1915 Maung Talok and his sister-in-law, Ma Kaing, who was the widow of Ye Gyaw, sued Nyo Mya and Po Hnit for redemption and obtained a decree. They redeemed the land from Po Hnit under the decree and mortgaged it with possession to Tun E. Tun E took possession of the land, but according to Gaw Ya agreed to let him have the half share of the crops then growing on the land which he would have been entitled to enjoy under his agreement with Po Hnit. Instead, however, of allowing Gaw Ya to get half the crops, Tun E, according to the plaint, reaped and kept all the crops himself. Gaw Ya therefore sued Tun E to recover Rs. 82-8 as being the value of half the crops, Rs. 19-8 as being the value of the seed which he had sown, and Rs. 6-14 paid by Tun E as land revenue which, under the agreement which Gaw Ya alleged to have been made with Tun E, was payable by Gaw Ya. Tun E replied that he never promised to give Gaw Ya half the outturn and did not even know that Gaw Ya had grown any crops on the land. He denied that the yield of the land amounted to 165 baskets and said that he worked it himself as usufructuary mortgagee. It is to be noted that he did not at first deny that he had taken the crops.

On these pleadings the Court framed issues as to whether Gaw Ya worked the land as Po Hnit's tenant, whether Tun E agreed to give Gaw Ya half the produce, and what the yield of the land was.

Gaw Ya gave evidence on his own behalf. He deposed that he was Po Hnit's tenant on an agreement that he was to pay Po Hnit half the produce as rent and that he was to

supply the seed grain and Po Hnit was to pay the revenue. He had actually sowed 13 baskets of seed grain and planted about half the area of the land under that agreement when Maung Talok and Ma Kaing redeemed the land from Po Hnit and mortgaged it to Tun E. He therefore approached Tun E with a proposal that he should continue to work the land as Tun E's tenant on the same terms. Tun E refused to agree to this but did agree to pay the value of the seed grain already sown and half the cost of transplanting already incurred, and to pay half the revenue, on condition apparently that he received half the crops grown on the land which had already been planted. Before the crops were reaped Gaw Ya had them estimated and they were computed at 165 baskets. Tun E refused to accept that estimate and suggested that they should employ six reapers each and each take half the actual crop. Gaw Ya agreed to this but Tun E reaped the whole crop. Gaw Ya protested and Tun E said that it was not he but Maung Talok who had taken the crops. Gaw Ya then protested to Maung Talok who said that, being owner of the land, he was on redemption entitled to the crops then growing thereon.

On this statement the Court ordered Maung Talok to be joined as a Defendant.

Maung Talok was joined and filed a written statement alleging that by reason of his redemption of the land both Po Hnit and his tenant, Gaw Ya, lost any rights they previously had in the land and the growing crops. He admitted that he reaped the crops but said that he did so under instructions from Ma Kaing, who he claimed ought also to be joined as a Defendant. He denied that the crops amonted to more than 45 baskets of paddy and said that it was not true that Gaw Ya had spent Rs. 19-8 on seed grain and Rs. 6-8 on transplaning or that the value of paddy was Rs. 100 per 100 baskets.

On this pleading Ma Kaing was also joined as a Defendant and she said the heirs and legal representatives of Po Hnit who by that time had (died) ought also to be made parties. This suggestion was rightly disregarded by the Court. She said further that she had redeemed the land from Po Hnit and admitted that she had taken possession of the crops which, she said, amounted to only 45 and not 165 baskets. She

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claimed that because she redeemed the land before the crops were reaped, she became owner of the crops as well as of the land and that Po Hnit and his tenant, Gaw Ya, had lost any interest they might previously have had in the crops.

On these additional pleadings the only additional issue framed was as to what amount had been spent by Gaw Ya on the cultivation of the land.

The trial Court, after hearing the evidence, came to the conclusion that Gaw Ya succeeded in establishing all the details of his claim against all three Defendants, and gave him a decree against them all for Rs. 98-6-0, the full amount claimed, with cost on that amount.

Tun E appealed against that decree on the grounds that Gaw Ya had failed to establish his claim and that the judgment of the trial Court was contrary to law and against the weight of evidence.

Maung Talok and Ma Kaing also filed a separate appeal on the grounds (1) that they were not necessary parties, (2) that Ma Kaing was owner of the crops and (3) that Gaw Ya failed to prove his claims and that therefore the judgment of the trial Court was against the weight of evidence.

The Lower Appellate Court heard the two appeals together and finding from the records of the mortgage suit that that suit was instituted on the 22nd of May 1915 and that after the decree for redemption had been passed on the 15th of August in that year it was Po Hnit and not Gaw Ya who applied for postponement of delivery of possession on the ground that the land was under cultivation, came to the conclusion that if Gaw Ya worked the land he did so at his own risk and was not entitled to the crops, and being further of opinion that under the circumstances it was unlikely that Tun E agreed to allow Gaw Ya to enjoy half the crops, dismissed Gaw Ya's suit.

Gaw Ya now comes to this Court in second appeal on the ground that the Lower Appellate Court was wrong in holding that he had no right to the crops which he had grown at his own expense on land which he held under a lawful tenancy.

I have read the records and heard the learned Advocates representing all the parties.

* * * * *

It is clear that the fundamental question in controversy between the parties is "Who was entitled to crops which where growing on mortgaged land at the time when the mortgage was redeemed."

It is ordinarily recognised as contrary to common justice to allow a man to "reap where he has not sown and gather that he had not strewed" or generally to enjoy the fruits of another man's lawful labour. That principle is expressly recognised in sections 51 and 108 of the Transfer of Property Act which provide that where crops were growing on land when a lease of uncertain duration is determined otherwise than by the fault of the lessee, or when a person, who believed himself to be owner, is ousted from possession by a person who establishes a better title, the person who planted the crops and is ousted from the land is entitled to the crops and is entitled also to free ingress or egress to gather them, annual crops being considered not as part of immoveable property but as ordinarily belonging to the tenant who has grown them. This right to crops, which is known in English law as the right to emblements, is recognised in English law on the termination of the tenure of a tenant for life or for another's life and on the termination of a tenancy at will otherwise than by the fault of the tenant and in certain other cases, but it is not, I understand, recognised in the case of mortgages because in an English mortgage the mortgagor theoretically conveys away his entire legal estate and although he ordinarily remains in possession he is, in the absence of any covenant to the contrary, supposed to be liable to be ejected at any moment without notice and without any claim to rent which may be due or to crops which may be growing on the land at the time when he is ejected. He has in theory conveyed away all his right title and interest and has nothing left but a bare equity of redemption, that is an equitable right to have the estate reconveyed to him on payment of the mortgage debt. The Transfer of Property Act is mainly based on English law and the fact that right to emblements is not recognised in English law in respect of mortgages while it is recognised in respect of leases of uncertain duration which are determined otherwise than by the fault of the lessee and in respect of persons who under certain circumstances

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plant crops believing themselves to be owners but are evicted because the land turns out to belong to somebody else, probably accounts for the recognition of the right to crops in sections 51 and 108 of that Act and for its non-recognition in respect of mortgages. But although there is no recognition of the right to crops in the Transfer of Property Act so far as the redemption of mortgages is concerned, there is so far as I know nothing in that or any other law which provents its application in cases where such application is in accordance with justice equity, and good conscience and *prima facie* a principle which is recognised as equitable in the case of the determination of a lease of uncertain duration would seem to be equally equitable in the case of a usufructuary mortgage which is similarly of uncertain duration. If crops could be regarded as "separable accessions" coming under the provisions of section 63 of the Transfer of Property Act there would be no difficulty, but they have never been so regarded and it would seem that, just as a right to compensation for improvements made by a mortgagee has been recognised in India in spite of the fact that the Transfer of Property Act makes no express provision for such compensation, so a mortgagee's right to crops might be recognised in spite of the fact that it is not recognised in the Act and is not recognised in England for technical reasons which do not apply to the kinds of mortgages which are usual in India.

The case-law on the subject is surprisingly meagre. There are two leading cases which are always cited by the commentators when the question of the right to growing crops on the determination of a mortgage is considered, namely the old Bombay Case of the "*Land Mortgage Bank of India* v. *Vishnu Govind Patankar*" (1), which was decided over 40 years ago, before the Transfer of Property Act was enacted, and the Madras Case of *Ramalinga* v. *Samiappa* (2) which was decided 30 years ago.

In the Bombay Case the mortgagee of certain lands brought them to sale in execution of a mortgage decree against his mortgagor who was in possession and having purchased them himself was held entitled as against a creditor of the mortgagor

(1) I.L.R. 2 Bom., 670. (2) I.L.R. 13 Mad., 15.

to the share of produce due as rent by the mortgagor's tenants whose crops were growing on the land at the time of the sale. I do not think that that decision throws much light on the question of the ownership of the crops on the determination of a mortgage, since under the ordinary rule the crops would belong to the tenants who would be bound to pay the share due as rent to the owner, that is to the mortgagee who had purchased the land from their original landlord, so that there would be nothing left for the mortgagor which his creditor could possibly attach.

In the Madras case it was held that a mortgagee in possession (not a usufructuary mortgage) who, while there were crops planted by himself growing on the land, brought the mortgage property to sale under a mortgage decree against his mortgagor could not recover from the auction purchaser the value of the crops, because what he had brought to sale was not only the interest of the mortgagor but also his own interest as mortgagee, and because at the time of the sale the right to the standing crops was not reserved. It is clear that in such a case the mortgagee could have little if any claim to a right to emblements since his tenure was determined by his own act, and I do not think that that case can be taken as authority for the proposition that crops growing on land on the determination of a mortgage do not ordinarily belong to the person who planted them and whose lawful tenure of the lands came to an end by reason of the determination of the mortgage.

In the Allahabad case of *Deo Dat* v. *Ram Autar* (3), which was a case in which lands were mortgaged by conditional sale and a preemptor was held entitled to recover them from the mortgagee, the Lower Courts entered in the decree a condition that the preemptor should not be entitled to possession until the mortgagee had gathered the crops which he had sown, but the High Court, applying to the case the rules of section 51 of the Transfer of Property Act, held that the decree should not have postponed the preemptor's right to possession but should have provided that the mortgagee was entitled as against the preemptor to the crops sown by him and to free ingress or egress to gather and carry them. That case is however

(3) I.L.R. 8 All., 502.

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clearly no authority for the proposition that the mortgagee has a right to crops as against a redeeming mortgagor.

There is a more recent Madras case, that of *K. E. Narayanan Nanbudripad* v. *M. K. Krishna Patter* (4) in which it was held that where in a suit to redeem a "Kanom" mortgage the decree directs the mortgagor to deposit the decretal amount within six months from the date of the decree, the mortgagee thus directed to be redeemed must be deemed to hold the mortgaged property under a lease of uncertain duration and is therefore entitled under the provisions of section 108 (1) of the Transfer of Property Act to cut and carry away the crops grown by him before the decretal amount was deposited. The decision proceeds on the special circumstances of "Kanom" mortgages which in addition to being mortgaged are said to partake of the nature of leases and therefore it could not be generally applied.

In the Lower Burma Case of *Aung Baw* v. *Tun Gaung*, (5) a mortgagor got a decree for redemption and was put into possession of the mortgaged property under the provisions of section 263 of the Code of Civil Procedure, 1882, while there were crops grown by the mortgagee standing on the land. The mortgagee subsequently applied to the Court for permission to reap the crops which he had sown, and the Court held that he ought to have applied for his right to the crops to be reserved before the decree was passed, and that because he failed to do so, he, being bound by the decree which as passed did not reserve his right to the crops, had lost any right he might have had in respect of the crops. It might reasonably be inferred from that judgment that a mortgagee whose crops might be growing on the mortgaged land at the time of redemption could not assert any right to those crops unless that right was established in the redemption suit and recognised in the decree, but it cannot be inferred that the mortgagee, or the mortgagee's tenant who might not be bound by the decree, has no right to the crops.

There is a case in this Court, *Nyan Gyi* v. *Kyaw Nya* (6) in which it was held that the tenant of a usufructuary mortgagee

(4) 22 Indian Cases, 515. (5) 3 L.B.R., 129.
(6) I U.B.R., 1910-13, page 14.

whose mortgage had been redeemed after the tenancy agreement had been made but before the tenant had planted any crops was not entitled by virtue of his tenancy agreement to keep the mortgagor out of possession and was liable to damages for having done so. No question of any right to crops arose in that case, but the question whether it is equitable that the mortgagor should be permitted to oust the tenant at any time of the year without letting him gather his crop was considered and was decided in the affirmative and therefore it is necessary to consider that ruling. The grounds of the decision were that a lessor cannot transfer a larger estate than he has himself, and that, if the lessor's interest is dependent on any contingency, the lessee's interest cannot enure beyond the termination of his lessor's interest by the happening of that contingency. The learned Judicial Commissioner said practically what was said in the Bombay case cited above, namely that the contingency of redemption is one which the mortgagee must reckon with and may provide against, but it seems to me that the only way in which the mortgagee in such a case could, in the absence of an express covenant about the crops which is unusual in this country, safeguard himself against loss would be by refraining from cultivating the land himself or letting it out to a tenant, since if he did either he would run the risk of losing either the crops or their value. The result of this view of the law would, it seems to me, be either that no reasonably cautious mortgagee would cultivate mortgaged lands, or that, if he did cultivate them, or have them cultivated, the mortgagor would wait until the crops were ready for harvest and then redeem, getting the crops for nothing, and causing wrongful loss to either the mortgagee or the tenant, to say nothing of the litigation between the mortgagee and his tenant which would be almost certain to result. It has been suggested that the mortgagor in an English mortgage takes that risk without inconvenience, but I do not think that the facts would warrant that assertion. It is true that in theory an English mortgagor is supposed to take the risk of losing any crops he may plant on the land but in fact he takes practically no such risk because the theory has been modified both by practice and by statute. The Judicature Act,

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1873, for instance recognised the right of a mortgagor in possession to take rents and profits of the mortgaged land unless he had notice of the mortgagee's intention to take possession of the property or to enter into receipt of the rents and profits, and the Conveyancing and Law of Property Act, 1881, gave to the person in possession, whether mortgagor or mortgagee power under certain conditions and in the absence of a covenant to the contrary to make leases binding on the other party to the mortgage. Again, the Tenants' Compensation Act, 1890, gave an occupier of mortgaged lands a right to recover from a mortgagee taking possession compensation in respect of crops so that although the occupier might lose the actual crops he did not lose the entire fruits of his labour. Further, the conditions of an English mortgage are entirely different from those of the ordinary usufructuary mortgage in Burma. In an English mortgage the date for redemption is fixed but in the ordinary mortgage in this country no date is fixed and the mortgage runs on indefinitely. As the learned Judicial Commissioner said in *Myan Gyi* v. *Kyaw Mya*. "The usufructuary mortgagee of Upper Burma takes the profits towards interest and has no accounts to render. The contract is that he restores the land on payment of the principal mortgage money. A mortgage of this kind, kept alive by further advances, often lasts much longer than 60 years and the mortgaged property is handed down by inheritance in the family of the mortgagee. The mortgagee therefore enjoys all the advantages of an owner except that he must allow redemption if the mortgagor pays the mortgage money within limitation. While he has the land he deals with it practically in the same way as he would deal with land of his own and he very frequently leases it to tenants." The learned Judicial Commissioner also went on to say "My experience in this Court affords some indication of a custom, at least in parts, by which land is redeemed only at certain seasons of the year so as not to deprive the tenant or mortgagee of the crops," and I may say that my experience is the same and that within the last week I have dealt with a somewhat similar case in which that custom was admitted by both parties. All this seems to me to show that the claim of the

mortgagee or his tenant to reap the crop which he has sown has been recognised both judicially and generally as being in accordance with justice, equity and good conscience, and that any argument based on the inconvenience of the contrary view that the mortgagee or his tenant must be held to take the risk of losing his crops is not met by the assertion that under an English mortgage the mortgagor without inconvenience takes exactly the same risk. The unfairness and inconvenience of the view that the mortgagor on redemption becomes owner of any crops which may be growing on the land at that time was expressly recognised in the Lower Burma Case of *Mo Gale* v. *Ma Sa U* (7) where the learned Judge directed that the date fixed for redemption should in the case of cultivated land be fixed so that the party who has sown the crop shall have the benefit of it, and in the Madras Case (*Ramalinga* v. *Samiappa*) where the Court said "It was open to the mortgagee to have asked the Court to postpone the sale so as to enable him to take the standing crop."

Such devices as those suggested in these two cases for safeguarding interests which the Courts recognise as equitable are unsatisfactory and as the experience of the present case shows inadequate, and I do not think that the view of the law which necessitates them is sound. It is of course true as a general rule that when an interest is determined all rights arising in respect of that interest ordinarily come to an end, but what may be called the residual rights recognised in sections 51 and 108 of the Transfer of Property Act are equitable exceptions to that rule and if a similar right is recognised in respect of those usufructuary mortgages which are usual in this country and are in my opinion exactly analogous to leases of uncertain duration, such devices become unnecessary.

I have already said that, so far as I am aware, there is no enactment in force in India which prevents such recognition and on grounds of justice, equity and good conscience as well as of practical convenience I consider it expedient that the right of the ordinary usufructuary mortgagee in this country or his tenant to the crops growing on the land at the time of

(7) I L.B.R., p. 186.

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redemption should be recognised, provided of course that such crops were sown or planted before the person who grew them had notice of the intended redemption. I hold therefore that in the present case the tenant Gaw Ya was entitled as against the mortgagors who redeemed, that is against Maung Talok and Ma Kaing, to all the crops planted or sown by him on the land which were growing thereon at the time of redemption and to free ingress and egress to gather and carry them. He admits that he would have to pay half the crops to them as rent and therefore he claims only the other half. The fact that the lands were subsequently mortgaged to Tun E would make no difference because he merely stepped into the shoes of Maung Talok and Ma Kaing, to the extent of the interest which he acquired by the mortgage, and it was they and not he who took the crops.

It has been suggested in argument in this Court that the tenancy agreement between Po Hnit and Gaw Ya was made after Maung Talok and Ma Kaing had instituted their mortgage suit and that the doctrine of "Lis pendens" applies, but there is no evidence to support that argument, and it is, I think, too late in any case to raise it for the first time in this Court.

Maung Talok and Ma Kaing admit that they reaped the crops and as I have held that although they were owners of the land they were not entitled to the crops. I am of opinion that Gaw Ya was entitled to recover from them the value of those crops less the value of the half share which would be payable by him as rent.

That being decided, there remain for decision the two questions (1) what was the amount and value of the crops and (2) did Gaw Ya establish his claims in respect of the cost of seed grain and labour.

As for the second of these two questions I may say at once that Gaw Ya offered no evidence beyond his own bare word and that I consider that insufficient.

As for the first, Gaw Ya's statement that the crops were estimated at 165 baskets of paddy was corroborated by the evidence of Maung Kan, who is said to be Headman of the Village, and who swore that he was one of the four men who

estimated the outturn of the lands planted by Gaw Ya before the crops were reaped and that after visiting the lands they came to the conclusion that the outturn would be 165 baskets. That evidence was not rebutted. None of the Respondents gave any evidence on their own behalf and the evidence of their witnesses was of little weight. Maung Tha Dun who was employed by Tun E to thresh certain paddy, which he says Tun E told him was paddy from the lands in question, deposed that the outturn of the paddy he threshed was only 45 baskets, but there is nothing to show that that was the whole produce of the land in suit and no admissible evidence to show that it came from that land at all. Maung Nge who is Tun E's brother-in-law said merely that he thought that the yield of the land would be about 40 or 45 baskets.

On this evidence I think that the trial Court was justified in accepting 165 baskets as the outturn.

As for the price of paddy neither side gave any evidence but as Rs. 100 per 100 baskets is the rate usually accepted in the Courts in Upper Burma in the absence of any evidence to the contrary, I see no reason to object to the trial Court's assessment of the value of the produce at that rate.

In view of the fact that Maung Talok and Ma Kaing admit that they took the crops and that Gaw Ya does not deny this I see no reason why a decree should be given against Tun E.

I therefore dismiss Gaw Ya's application so far as Tun E is concerned but in view of the fact that Tun E has made common cause with Maung Talok and Ma Kaing throughout I direct that he pay his own costs in all Courts.

As against Maung Talok and Ma Kaing Gaw Ya was entitled to half the value of the crops that is Rs. 82-8 and as in my opinion the Appellate Court acted illegally in finding that he worked the land at his own risk and was not entitled to any crops, I set aside the judgment and decree of the Appellate Court dismissing his suit with costs and vary the decree of the trial Court by giving judgment for Gaw Ya against Maung Talok and Ma Kaing for Rs. 82-8 with costs throughout on that amount.

I note that I have not overlooked the fact that Gaw Ya was willing to give credit to Tun E for Rs. 6-14 paid by Tun

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E as land revenue, but I have held that he was not entitled t any decree against Tun E and the decree which I have give him is based not on his alleged subsequent agreement with Tu E but on his original agreement with Po Hnit under which th land revenue was alleged to be and would naturally be payabl by the landlord.

Before B. H. Heald, Esq., I.C.S.

Civil 2nd Appeal No. 229 of 1918. 4th February 1919.

MAUNG PU ZA AND 3 OTHERS v. MA NGE MA ANI OTHERS.

Mr. J. C. Chatterjee—for appellants.
Mr. S. Mukerjee—for Respondents.

Buddhist Law—Inheritance—Pre-emption.

Held,—that co-heirs have a right of pre-emption in respect of the share of other coheirs in undivided inherited property so long as the property remains undivided but that after partition there is no right of pre-emption in respect of the separated shares.

VIII, L.B.R., 466.
U.B.R., 1907—09, II Buddhist Law, Preemption I.
1 L.B.R., 144. L.B. Selected Judgments 76.
U.B.R., 1897-01, II, 162. L.B. Selected Judgments 41
U.B.R., 1897—01, II, 155. L.B. Selected Judgments 39.

The Plaintiffs represent Shwe On, one of the five children of Maung Tu and Ma Mi Gyi, and the Defendants, except the 1st and 2nd, represent the other four children of the same parents.

The Plaintiffs' case is that the lands in suits belonged to Maung Tu and Ma Mi Gyi, that on Maung Tu's death many years ago those lands passed to his widow, Ma Mi Gyi, that on Ma Mi Gyi's death some 20 years ago they passed into the possession of the eldest surviving son, Shwe Kon, that some ten years ago the lands passed from the possession of Shwe Kon to that of his niece, Ma Tin, daughter of his sister Ma Kyaw, Shwe Kon being understood to have sold his interest in the lands to Ma Tin, that Ma Tin bought from her cousins, Tun Win, On Haing and Po Mya, who represented Ma Kaing and Ma E Mya, two other children of Maung Tu and Ma Mi Gyi, their interest in the lands so that she became entitled to the interest of four out of the five children of Maung Tu and Ma Mi Gyi, that Tun Hla, the son of Shwe On the fifth child of Maung Tu and Ma

holding the entire land on condition that he also should be entitled to hold it in his turn, that Ma Tin died in the following year and was succeeded in possession of the entire estate by her children, Po Thaung and Ma Hla Win, that Tun Hla died subsequently, leaving his wife and children, the Plaintiffs themselves as his heirs, that on the 9th of May 1915 after the death of Ma Tin and Tun Hla, Ma Tin's children sold the whole estate by registered deed for Rs. 1,000 to Maung Pu Za and Ma Bwin Pyu, who were strangers to the family, and that therefore the Plaintiffs, as representing Tun Hla, son of Shwe On, one of the five original co-heirs, were entitled to have the sale set aside so far as it affected their one-fifth share of the estate and had a right to pre-emption in respect of the other four-fifth shares. The suit was instituted on the 9th of July 1915.

The 1st and 2nd Defendants, Pu Za and Ma Bwin Pyu, who were the purchasers of the property, said merely that the Plaintiffs were aware of the sale when it took place and that therefore they were not entitled to have it set aside.

The 3rd and 4th Defendants, Po Thaung and Ma Hla Win the children of Ma Tin, who were the vendors, said that their mother Ma Tin bought the interest of Tun Hla, whom the Plaintiffs represent, for Rs. 30, as well as the shares of all the other co-heirs, and that therefore she became sole owner of the estate and the Plaintiffs had no interest in it. They also said that the Plaintiffs knew of their sale of the estate to the 1st and 2nd Defendants at the time when it took place and made no objection and no claim to pre-emption at that time.

The rest of the Defendants, except the 6th, Tun Win, who did not appear or contest the suit in any way, filed a joint written statement saying that they did not sell their interests in the estate to Ma Tin but only mortgaged them and that they too were still entitled to be regarded as heirs and should have been made co-Plaintiffs in the suit.

The trial Court, after hearing the evidence, came to the conclusion that the Plaintiffs succeeded in proving that they still retained their right to Tun Hla's one-fifth share of the estate and that therefore the sale to the 1st and 2nd Defendants, so far as it affected that share, was invalid, and further

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that the Plaintiffs established their right to preemption in respect of the other four-fifth shares of the estate. It therefore gave them a decree setting aside the sale and declaring that the Plaintiffs were entitled to pre-emption on paying such sum not exceeding Rs. 1,600, that is four-fifths of the value of the whole estate, as might be accepted by the other co-heirs.

All the parties objected to this order and either appealed or filed cross-objections and the Lower Appellate Court framed fresh issues and referred them to the lower Court for trial.

The trial Court, after taking further evidence, recorded findings that the lands were first mortgaged to one Maung Nyan by all the co-heirs, who divided the mortgage money between them, each receiving Rs. 30, and that Ma Tin redeemed the land from Maung Nyan and also paid the representives of all the other four co-heirs for their interest in the estateso that she became sole owner of the estate.

The Lower Appellate Court did not accept these findings but held that it was not proved that Tun Hla's interest in the estate was bought by Ma Tin. It found therefore that the original decision of the trial Court was correct and dismissed the appeal of the first four Defendants with costs, but passed no order on the cross-objection filed by the Plaintiffs and the other Defendants.

The Plaintiffs and the other Defendants then asked the Lower Appellate Court to review its judgment on the ground that it had failed to deal with their cross-objection, which was to the effect that the amount payable for pre-emption was Rs. 800 only and not Rs. 1,600.

The Court allowed the application for review, presumably because it had, as alleged, overlooked the cross-objection, and reviewed its judgment to the extent of fixing the amount payable for pre-emption at Rs. 800 instead of Rs. 1,600.

The present appeal, which purports to be filed on behalf of all the four parties to the registered conveyance, that is the first four Defendants, regardless of the fact that the 2nd Defendant died before the application for review was filed is said to be a first appeal against the order granting a review and also a second appeal against the final judgment and decree of the Appellate Court passed on review.

So far as it is supposed to be an appeal against the order granting a review it may be disregarded. There can be no doubt from the Lower Appellate Court's judgment that it did overlook the fact that a cross-objection had been filed and when that mistake was brought to its notice it had every right to review its judgment.

The grounds of appeal against the final decree of the lower Appellate Court are:—

(1) that the Plaintiffs' claim is barred by limitation,

(2) that there is no right of pre-emption in the case of an ancestral estate which has been partitioned, and that the estate in suit has been partitioned,

(3) that it is proved that all the co-heirs sold their interest in the estate to Ma Tin and that therefore she was the sole owner of the estate and the Plaintiffs have no interest in it,

(4) that pre-emption requires the consent of all the co-heirs and that because the 3rd and 4th Defendants, who if the Plaintiffs' contention is correct are co-heirs with them in respect of the estate, do not consent to the Plaintiffs' exercising the right of pre-emption, the Plaintiffs cannot preempt, and

(5) that the trial Court was right in fixing the amount payable for pre-emption at Rs. 1,600.

I have read the record and heard Counsel, and it seems to me that as the lower Courts have come to divergent findings on the facts the first thing to be done is to see what facts ought to be found on the evidence.

* * * * *

It is clear from the evidence that Ma Tin and her children had been in exclusive possession of the land for a good many years, apparently at least ten years, when the suit was filed and that the initial burden of proof was on the Plaintiffs. But I think that it was proved that Ma Tin's possession was originally permissive, that is to say that after she redeemed the land from Maung Nyun she held it on behalf of the whole body of the coheirs who would be entitled to obtain their shares of the estate on paying their shares of the Rs. 150 which she had paid to Maung Nyun.

It is admitted that Ma Tin subsequently paid the representatives of three of the five coheirs Rs. 30 each for their

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remaining interest in the land, and her children naturally say that the transaction was a purchase of the interest of the other co-heirs for that amount. The representatives of the other co-heirs on the other hand say that it was a mortgage and not a sale of their interests. Neither side can prove its allegations but if Ma Tin's children could prove that their possession for the last twelve years had been adverse they would establish a good title by prescription as against these three coheirs.

The case of Tun Hla is different. It is said that he was living with Ma Tin at the time of the transaction and that for that reason he did not take his share of the mortgage money paid by Ma Tin, and there is no sufficient evidence to prove that he did take it. I see no reason why the witnesses should be lying when they say that he was living with Ma Tin or when they say that he did not transfer his interest in the property to her and if he was living with her there would seem to be no particular reason why he should transfer it. The question whether or not the various Defendants who claim interests in the estate still have interests does not arise in this case and all I have to decide is whether or not Tun Hla retained his interest. There is no evidence that he parted with it and it is not proved that the possession of Ma Tin and her children was adverse to Tun Hla for more than 12 years. It is proved that their possession when it began was permissive and in the absence of any reliable evidence to the contrary I am bound to hold that Tun Hla retained his interest in the estate, which on the evidence would be a right to recover one-fifth of the land on payment of Rs. 30, that is one-fifth of the amount which Ma Tin paid for redemption. Ma Tin's children had no right to sell Tun Hla's interest in the estate and, as no question of ostensible ownership has been raised, the sale of Tun Hla's share of the land to the 1st and 2nd Defendants was invalid except to the extent to which the 3rd and 4th Defendants were entitled to transfer their right to possession of that share subject to the Plaintiffs' right to recover it on payment of Rs. 30.

The question of the Plaintiffs' right to preemption in respect of the rest of the estate remains for consideration.

Appellants' learned Advocate says that supposing that co-heirs have a right of preemption in respect of the interests of other co-heirs in the estate in which they are coheirs, and supposing that the Plaintiffs and the 3rd and 4th Defendants are coheirs in the estate in suit, and supposing further that preemption is a matter of inheritance, which he denies, even then the Plaintiffs cannot exercise their right of pre-emption because that right can be exercised only with the consent of all the co-heirs, and the 3rd and 4th Defendants, who according to the Plaintiffs are their coheirs, do not consent.

As for the question whether preemption is a matter of inheritance, it has been pointed out by Sir Charles Fox in *Ye Nan O Aung Myat San* (1) that it does not matter whether preemption be regarded as a question of inheritance or as a matter of custom since the right would be recognized by the Courts in either case, but I may say that although pre-emption is not necessarily a matter of inheritance it is in my opinion clearly a matter of inheritance in cases where it is a right to which heirs are entitled solely on account of their status as heirs and not on any other account.

I have already held that the Plaintiffs are coheirs with the 3rd and 4th Defendants and therefore the argument resolves itself into the questions (1) whether any right of pre-emption is recognized in Burmese Buddhist Law, (2) if so, whether co-heirs have a right of pre-emption in respect of the interests of other co-heirs in the estate in which they are all co-heirs, (3) whether that right continues after partition of the estate, and (4) whether the right can be exercised by any coheir or coheirs without the consent of all.

The first two of these questions were raised in the Lower Burma case cited above and were answered in the affirmative, while the third was also raised but was answered in the negative.

The proposition that the consent of all the co-heirs is necessary before the right of preemption can be exercised is based on the cases of *Lu Dok* v *Ma Po* (2) in this Court and *Mi Te* v *Po Maung* (3) in Lower Burma.

(1) 8 L.B.R., 466. (2) U.B.R., 1897-01, II, 162.
(3) S.J.L.B., 41.

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Unfortunately the Burmese Buddhist Law of pre-emption has been differently interpreted in Upper and Lower Burma. The latest ruling of this Court, which is at present binding on all Courts in Upper Burma, is the case of *Nga Tin* v. *Shwe On* (4) in which Sir George Shaw held that after an ancestral estate has been partitioned among the co-heirs, a co-heir who on such partition has received his share retains a right of pre-emption in respect of the shares which his co-heirs have similarly received and that his widow who succeeds to his share on his death succeeds also to his right of preemption. Sir George Shaw expressly followed the earlier rulings of this Court in the cases of *Lu Dok* v. *Ma Po* (2) and *Shwe Nyun* v. *Ma So*, (5) which he said were based on the Lower Burma decisions in *Mi Ngwe* v. *Lu Bu*, (6) *Mi Te* v. *Po Maung* (3) and *Nga Myaing* v. *Mi Baw*, (7) and he came to the conclusion that the Buddhist Dhammathats contain provisions which give a right of preemption to coheirs in respect of divided as well as undivided property. That conclusion, so far as it concerns divided property, is directly opposed to the ruling of Sir Charles Fox in the Lower Burma case of *Shwe Eik Ke* v. *Tha Hla Aung* (8) which Sir George Shaw considered and refused to follow.

Sir George Shaw's judgment was considered by a Full Bench of the Chief Court of Lower Burma in *Ye Nan O* v. *Aung Myat San* where Sir Daniel Twomey pointed out that the learned Judicial Commissioner did not mention the portions of the Dhammathats on which he relied as establishing his proposition in respect of divided property. The original texts on which the previous rulings purported to have been based were considered and Ormond J. pointed out that the passage from Manu Thara Shwemyin on which Sandford J. relied in the leading case of *Nga Myaing* v. *Mi Baw*, applied only to special lands which in Burmese Buddhist Law were ; known as " dead " lands (*myethe*) and not to ordinary lands which were known as " live " lands (*myeshin*). Twomey J. went a step further and pointed out that on reference to the original Dhammathats it appears that the passage from Manu

(4) U.B.R., 1907—09, II, B.L. Pre-emption I.
(5) U.B.R., 1897—01-II, 155. (6) S.J.L.B. 76.
(7) S.J.L.B., 39. (8) I.L.B.R., 144.

Wunnana, on which Sandford J. also relied, similarly referred to "dead" lands (*myethe*) and not to ordinary lands.

This disposes of the authorities from Manu Thara Shwe-myin and Manu Wunnana.

The only other authorities cited by Sandford J. for his decisions in *Nga Myaing* v. *Mi Baw*, *Mi Te* v. *Po Maung* and *Ma Ngwe* v. *Lu Bu* were two passages from Manugye. With reference to the first of these Sir Charles Fox pointed out that it applied to all property which had been bought and sold, that it had nothing to do with inheritance, or rights of co-heirs, or inherited property, and that in any case the rule embodied in it was admittedly long obsolete. I agree with all this and I would add that in view of the fact that the rule given in that passage (7 *Manugye'* 36) is exactly the same as that given in Manu Wunnana 458 (*c*) which applies only to "dead" lands (*myethe*) it is probable that the rule in Manugye also applied only to "dead" lands and not to ordinary lands.

I agree therefore that no right of pre-emption in respect of ordinary lands can be inferred from the first of the two passages from Manugye on which Sandford J. based it.

In respect of the second passage many difficulties have arisen mainly through mistranslation, and although I accept the translation given by Twomey J. in *Ye Nan O's* case as substantially correct I think it desirable to give, so far as possible, a literal version.

As I read the passage (excluding the second paragraph) which expressly deals with "dead" lands the wording is as follows :—

"As regards right of ownership lands are of two kinds, "dead" and "live."

"Dead" lands are soldiers' lands, lands given as allotments, lands of definite area given by the King to Headmen, Governors, Surveyors, Forester's, Secretaries and Stewards for their subsistence, and lands anciently held for their subsistence by a line of hereditary officials in succession.

"Live" lands are all lands except "dead" lands, and include lands received from parents as inheritance, lands purchased from someone else, lands got by someone else absconding, lands openly worked and owned without objection for ten years, lands got by clearing and cultivating forest,

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and lands given by Survey Officers, lands worked without the paddy land owner's objecting, and land worked by clearing and cultivating forest, these lands the owners can sell outright. If they are bought let the buyer have an undisputed right to work, enjoy, and own them while the seller is alive, if redemption is claimed, redemption shall not be allowed, but if the buyer die while the seller is alive, let the seller redeem and if he is dead and there is an "office bearer" let him redeem. . . . . As for all the aforesaid " dead " and " live " lands, parents, grand-fathers, and great grand-fathers, relations, sons, grand-sons, and great grand-sons, and though it be between younger and elder brothers or brothers and sisters only, they shall not redeem. If the sale was outright, let the buyer be owner. Though they be truly relations within the seven degrees and none others, even sons or grand-sons, they shall not redeem. According to the original sale let the ownership be. Suppose, among relations only a sale of any of the aforesaid is intended those interested as relations or (and) heirs having been asked generally, let the person who says " I will not buy " be. Let the person who says " I will buy " buy. If the matter is between relations then although one who when asked said " I will not buy " should say after another has bought " Let me share equally in the purchase," if this be said after the other has bought and worked for a year, the original buyer alone shall be owner. Because the one who said " I will not buy " has delayed, he cannot buy, let him lose his right. But if in the day or month when he said " I will not buy " he says again " At the time of selling and buying " I said " I will not buy ", now I will buy, let there be no objection to his buying because he said in the sight and knowledge of the buyer that he would not buy. The matter is between relations and the selling and buying must be carried out as becomes relations. Suppose a sale to a person who has an interest is intended and the seller says to all those who have an interest " Buy I am in debt to some one and shall have to pay up," if they say " we will buy " let them all buy together equally. But if one of the purchasers say " It ought to be sold to me alone, I alone ought to buy the whole," let the discussion as to who ought or ought not to buy be among the purchasers. Let it not be said to the

seller. But supppose the seller desiring one only to have the property has sold without telling another who has said " I will buy," the seller is wrong. As for the buyer turn him out and let them then discuss who ought or ought not to buy. Let the owner take back his property and let those who say they ought to buy say among themselves who ought to buy. Let the property be sold to the one who ought to buy and if the owner say " I will not sell," let him bear the law costs and let him not sell to another. As for those costs let him not say " we are relations "; let him pay to them."

The distinction between " dead " and " live " lands is now, as Twomey J. said in *Ye Nan O's* case, of merely historical interest because the lands in respect of which pre-emption is claimed in the Courts nowadays are always " live " lands.

It is therefore unnecessary to consider the passage from Manugye so far as it deals with " dead " lands.

So far as it refers to " live " lands what the passage says in plain English seems to me to be as follows :—

" (1) lands allotted by Survey Officers, lands occupied without objection on the part of a former occupier, and lands obtained by clearing waste can be sold outright by the person who has occupied them and the seller has no right to redeem them unless the buyer dies in his lifetime."

The passage about redemption by an " office bearer " after the death of the seller is obscure. Judson's Dictionary gives the meaning of the words translated " office bearer " as " one who has a Civil office," and so the passage might possibly mean that an " Officer ", possibly the Revenue Officer, has a right to redeem. I think however that this is unlikely and probably the translation which regards the words as meaning a " representative of the seller " is correct.

" (2) Relations as such have no right to redeem any lands.

" (3) If the sole owner of any lands wishes to sell them to a relation, he must offer them not to one but to the whole body of his relations. Any of them who may wish to buy may do so but if any one has bought and another claim to do so within a year he should be allowed to join in the purchase."

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"(4) If one of a number of co-sharers in any lands wishes to sell his share to another of the co-sharers, he may not sell it to whom he likes but must leave the decision as to who is to buy to the whole body of co-sharers, and must either accept their decision or not sell at all."

The first of these provisions seems to me to give no right of pre-emption to heirs.

The second says merely that relations as such have no right to redeem. It does not refer to pre-emption.

The third says that if a sole owner of any lands wishes to sell these lands as a whole to relations he must offer them to all his relations without distinction, but does not say that the relations have any right of preemption if the owner chooses to sell to a stranger.

The fourth similarly says that if a co-sharer wishes to sell his interest in any lands in respect of which he is a co-sharer to another co-sharer in those lands he shall not himself decide to which of the co-sharers he will sell but must allow the co-sharers to decide among themselves and must abide by their decision.

There is no express provision for pre-emption in any of these cases but the existence of a right of pre-emption might be inferred from the direction in the last case that the seller must abide by the decision of his co-sharers. So far as the express words go all that the passage says is that if one co-sharer wishes to sell his share to another he must abide by the decision of all. It does not actually say that he must sell his share to another co-sharer, but possibly that might be inferred.

That inference is apparenly the sole basis for the law of pre-emption as found by Sandford J. in the three rulings on which all the subsequent case law has been founded, and as Sir Charles Fox said in the Lower Burma case already cited, "If the question of the right of pre-emption among co-heirs depended solely on the reasons given in favour of it in Mr. Sandford's judgments, I should be prepared to hold that those were decisions which should not be followed because they were not founded on materials recognized by law as the basis for a decision that a binding custom prevailed at the time the question as to its existence had to be decided."

I entirely agree with that view. I think that although the passages from Manugye to which reference has been made do suggest a custom of preemption among co-heirs, they do not contain any express statement of any such custom, and I should be loth to say that they are by themselves sufficient to establish the existence of a right to pre-emption among co-heirs in Burmese Buddhist Law.

But Sir Charles Fox went on to refer to section 97 of the "Civil Code of the Province of Pegu sanctioned by Resolutions of His Honour the President in Council" commonly referred to as "Sparks Code," and he remarked that the rules embodied in it were at the time equivalent to legislation.

Section 97 of that Code is headed "sale and right of pre-emption" and runs as follows:—

"If a person wish to sell his share in an undivided ancestral estate, he should first offer it to all the co-heirs. They may buy his share jointly, or each buy his separate portion of the share, or one may buy in trust for the whole, according as the co-heirs shall decide among themselves; the seller shall have no voice in the decision and shall not be at liberty to sell his share otherwise than they or the majority of them shall decide."

That statement of the law purports to be based on the passage of Manugye translated above and is clearly a paraphrase of the part beginning "Suppose a sale to a person who has an interest is intended" that is to say it corresponds to my fourth paragraph above.

In this connection I may note that Richardson's translation of the preceding passages which says that relations "shall not redeem" omits the word "not" and says that if relations wish to redeem "they shall have a right to do so." Now Richardson's translation was published in 1847 and Sparks' Code was prepared in the fifties, so it seems possible that Major Sparks' reading into the paragraph in Manugye about co-sharers a definite rule of pre-emption in favour of co-heirs may have been induced by Richardson's mistranslation of the preceding passage about relations. It may be remarked also that the Kinwun Mingyi in compiling his Digest of the Dhammathats omitted to include any texts on pre-emption except those referring to the

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now probably obsolete right of the relatives of one of a married couple who predeceases the other to pre-empt the "hereditary belongings" probably "heirlooms" of the deceased to which the survivor has succeeded in case there are no children of the marriage and the surviving spouse proposes to sell them. Twomey, J., has suggested that that omission might be due to the learned author's regarding matters of pre-emption as relating to inheritance only in a secondary sense, but it is clear that another possible explanation would be that the Kinwun Mingyi was of opinion there were no passages in the Dhammathats which gave any other right of pre-emption than the one which he mentioned.

If the matter were *res integra* I should be inclined to hold on the materials which are available that the right of coheirs to pre-emption under Burmese Buddhist Law in respect of the shares of other co-heirs in thee state in which they are co-heirs is not established, but in view of the fact that the right of persons who are co-heirs in undivided inherited property to pre-emption in respect of the unseparated interest of any particular co-heir in that property was recognised in Sparks' Code 60 years ago and has not, so far as appears from the published rulings ever been questioned in the Courts until recently and that the Full Bench of the Chief Court of Lower Burma before whom it was lately questioned recognized it in a judgment in which the whole question was considered with the greatest care and learning, I agree with Sir Charles Fox that to the extent to which it was laid down in Sparks' Code, and to that extent only, the right of pre-emption amongst co-heirs must be recognized. I agree also with Sir Daniel Twomey that the right belongs to all those who are co-heirs in respect of undivided lands and that the whole body of co-heirs excepting those in respect of whose interest the exercise of the right is claimed, are entitled to settle among themselves which of them shall exercise it in any particular case, but in case there are conflicting claims among the co-heirs and they fail to come to any agreement, any of them may institute a suit to establish his claim as against the others and also of course against any purchaser who may have bought or be proposing to buy in disregard of their rights.

Possibly I have failed to grasp what was in the learned Judge's mind when he made the further deduction that the right can be enforced only against the person who inherited the land jointly with the claimants, that it lapses with his death, and that his heirs take the land free from all obligation as regards preemption, but I do not think that there is any authority for the limitation suggested and I would hold that so long as inherited land is undivided all the heirs whatever their degree of relationship to the original owner, have a right of pre-emption in respect of the interest of any particular co-heir in the undivided inherited property in which they are all co-heirs.

I agree of course that the right must be claimed promptly, but I would interpret "promptly" as meaning within the period limited by Article 10 of the First Schedule to the Limitation Act.

One effect of this decision is to overrule the judgment of this Court in the case of *Lu Dok* v. *Ma Po* in so far as that judgment can be regarded as suggesting that no heir can enforce pre-emption unless the actual consent of the other co-heirs has been obtained, but I think that the learned Judicial Commissioner's addition of the words " or unless they have been made parties to the suit " shows that he did not intend to rule that no co-heir can succeed in a suit for preemption if any of the other co-heirs who are made parties to his suit object.

The Lower Burma case on which Appellants' learned Advocate also relies, namely the case of *Mi Te* v. *Po Maung* has already been overruled and therefore is no basis for the fourth ground of appeal.

I have already found that the Appellants failed to prove that the Plaintiffs' claim was barred by limitation by reason of adverse possession on the part of the 3rd and 4th Defendants and no other question of limitation arises.

I agree that there is no right of pre-emption in respect of an inherited estate after it has been partitioned but I have found that in this case, so far as the Plaintiffs are concerned, the estate has not been partitioned.

These findings dispose of the first three grounds of appeal.

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The fifth ground, that the amount payable for pre-emption is the whole value of the share in respect of which pre-emption is claimed and not the amount offered or paid for that share by the purchaser at the sale against which pre-emption is claimed, has not been seriously argued and is manifestly baseless. The amount payable for pre-emption in such a case as the present is of course the amount which the vendor has agreed to receive or has received from the purchaser, whose purchase is avoided, for the share in respect of which pre-emption is claimed and that amount in this case is Rs. 800 being four-fifths of Rs. 1,000 the amount which the 1st and 2nd Defendants paid for the whole estate.

I hold therefore that the Plaintiffs are entitled to pre-emption in respect of four-fifths of the estate for Rs. 800 and that as regards the other one-fifth share they are entitled to recover the lands which represent that share on payment of Rs. 30.

The decrees of the lower Courts are set aside and in substitution of the trial Court's decree there will be a decree directing as regards four-fifths of the estate that on the Plaintiffs paying into Court the sum of Rs. 800 within three months from this date, together with the costs of the 1st and 2nd Defendants, the 1st Defendant shall deliver possession of the property to the Plaintiffs whose title thereto shall be deemed to have accrued from the date of such payment, but that if the said sum of Rs. 800 and costs are not so paid the suit shall be dismissed with costs for the 1st, 2nd 3rd and 4th Defendants against the Plaintiffs, and as regards the other one-fifth share that the 1st Defendant shall deliver it to the Plaintiffs on receipt of Rs. 30.

I think it equitable under the circumstances that the Plaintiffs whose long delay in asserting their claim to an interest in the property has occasioned this litigation so far as the 1st and 2nd Defendants are concerned should, if they recover the property pay the 1st and 2nd Defendants' costs, and that the parties, other than the 1st and 2nd Defendants, should bear their own costs unless the Plaintiffs fail to pay the amount found due, in which case I think the Plaintiffs should pay the costs of the 3rd and 4th Defendants also.

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I note that if on the expiry of the three months allowed by this decree the decretal amount and the costs have not been paid into Court, the trial Court should pass a final decree dismissing the Plaintiffs' suit with costs for the 1st, 2nd, 3rd and 4th Defendants throughout.

I note also that the Rs. 830 will be payable to the 1st Defendant not to the 3rd and 4th Defendants as the lower Courts seem to have thought.

Civil 2nd Appeal No. 45 of 1919, 30th June 1919.

Before H. S. Pratt, Esq., M.A., I.C.S.

MAUNG ON MYIT *v.* MAUNG SHWE PI.

Mr. D. Dutt—for Appellant.

Messrs. *Mya U* and *Chaudhury*—for Respondent.

Limitation—174, 1st schedule, and Civil Procedure, section 18—*O. XXI, r.* 2.

Where a decree-holder promised to certify an adjustment made out of Court but failed to do so and the judgment-debtor made an application after the 90 days allowed by Article 174 of the First Schedule to the Limitation Act.

Held,—that section 18 of the Limitation Act applies only to cases where a person had been kept from the knowledge of his right to make the application and not to cases in which he had been kept by fraud from the exercise of his right.

U.B.R., I. 1910-13, 191.
16 C.W.N., p. 923 at p. 927.

In Civil Regular Suit No. 9 of 1915 in the Subdivisional Court, Kyauksè, the judgment-debtor, Maung Shwe Pi, obtained an order for record of an adjustment of the decree made out of Court.

The application falls within Order XXI, Rule 2 (2), and ordinarily Article 174 of the First Schedule to the Limitation Act would apply.

The application was not made within the 90 days allowed by that article, but both Courts have found that section 18 of the Limitation Act applies, because decree-holder had fraudulently promised to certify the adjustment and had failed to do so.

It was held therefore that the date from which limitation began to run was the date on which the judgment-debtor became aware that the decree-holder had acted fraudulently.

Neither of the Courts, however, seem to have considered with sufficient care the actual wording of section 18.

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It is quite clear that the section only refers to cases where the person having a right to make an application has by means of fraud been kept from the knowledge of such right or the title on which it is founded.

In the present instance it is equally clear that the judgment-debtor was not kept by the alleged fraud from the knowledge of his right to make the application, but *from the exercise* of his *right* which is quite a different matter.

Section 18 does not apply to the facts in the present appeal.

This was the view taken in *Sayyid Muhammed Nur* v. *Ko Law Pan* (1).

As in *Biroo Gorain* v. *Musstt. Jaimurat Koer* (2) the grievance of the Applicant was that he had been kept by fraud from the exercise of his right to apply to have the adjustment certified; consequently in order to accede to his contention it would be necessary to substitute, "from the exercise of such right" for the phrase "from the knowledge of such right," in section 18.

As pointed out in the Upper Burma Case quoted the judgment-debtor will be at liberty to institute a regular suit, if through the decree-holder's failure to certify adjustment, he should have to pay a second time.

The Madras cases cited do not affect the present case, as one was a suit for damages against the decree-holder for failure to certify satisfaction and the other related to a petition to set aside a sale on the ground of the decree-holder's fraud.

I know of no authority for allowing the judgment-debtor to prove an adjustment out of Court in contravention of Article 172 of the First Schedule to the Limitation Act and Order XXI, Rule 2.

The application was clearly time-barred and should have been dismissed.

The appeal will be allowed and the orders of the lower Court set aside and the application dismissed with all costs.

(1) U.B.R., I, 1910-13, p. 191.
(2) 16 C.W.N., p. 923 at page 927.

Before H. S. Pratt, Esq., M.A., I.C.S.

Civil Second Appeal No. 217 of 1918. 16th June 1919.

MA NYUN *v.* MAUNG SHWE KAUNG AND TWO OTHERS.

Mr. S. Mukerjee—for Appellant.

Mr. J. C. Chatterjee—for second Respondent.

Civil Procedure—O. VI, r, 17.

Held,—"A plaint cannot be amended so as to convert a suit on a promissory note into a suit on a mortgage bond."

Plaintiff sued for Rs. 270 alleged to be due on a promissory note for Rs. 125 executed about January 1914.

Subsequently he filed an amended plaint in which the cause of action was said to be on a mortgage for Rs. 125 of a house, bullocks and cart executed about the same date as the promissory note set forth in the original plaint.

The claim was for the same sum of Rs. 270.

Defendant denied executing any such mortgage or promissory note but admitted borrowing a distinct sum of Rs. 225 on a mortgage of land.

The Appellate Court set aside the decree against the second Defendant on the ground that the amendment of the plaint involved a fresh cause of action based on Defendant's admission that he had borrowed Rs. 225 on a mortgage.

I consider the view of the Lower Appellate Court was correct.

It was not suggested that the words promissory note was used by mistake for mortgage.

Plaintiff could not be allowed to substitute a plaint on a separate cause of action for the plaint as originally framed.

The appeal so far as second Defendant is concerned will be dismissed with costs.

The first and third Defendants confessed judgment and did not appeal. The Court had therefore no jurisdiction to set aside the decree against them. They have not appeared to contest the present appeal. So far as they are concerned the appeal must be allowed and plaintiff will be given a decree against them for Rs. 270 with costs on the uncontested scale in the Court of first instance.

As they did not appeal Appellant-Plaintiff is not entitled to costs against them in the first Appellate and this Court.

Criminal Revision No. 794 of 1919. 18th September.

Before H. S. Pratt, Esq., M.A., I.C.S.

ABDUL SALAM *v.* RAMNEWAL SINGH.

Mr. *C. H. Campagnac*—for Applicant.
Mr. *P. N. Bose*—for Respondents.

Criminal Procedure 179, 181 (2).

Held,—that when an alleged breach of trust took place in Rangoon, the accused could not be tried at Maymyo in consequence of his failure to remit money there as he had agreed to do.

The resultant loss to complainant at Maymyo was not an ensuing consequence by reason of which the Applicant was accused of the commission of the offence of criminal breach of trust and therefore section 179, Criminal Procedure Code, does not apply.

I.L.R. 19 All., 111. I.L.R. 38 Mad., 639
—— 34 All., 487. —— 41 Cal., 305.

Ramnewal Singh, Contractor of Maymyo, filed a complaint against Abdul Salam of Rangoon before the Subdivisional Magistrate, Maymyo, charging him with criminal breach of trust under section 406 of the Penal Code.

Complainant's case was that he deposited Rs. 9,000 with the Superintendent of Police Supplies, Rangoon, in connection with tenders for certain contracts.

He gave Abdul Salam a power of attorney to withdraw this Rs. 9,000 from the Superintendent of Supplies on an express agreement that he was to remit half the money to Complainant at Maymyo and deposit the other half as security for a rice contract with the Superintendent of Police Supplies. The accused drew the money but failed to remit or bring any to Maymyo and failed to account for it.

The allegation is that accused has misappropriated the money and that part of it has been paid without authority to one Haji Rahamat Ulla.

The alleged breach of trust took place in Rangoon. Objection was taken to the jurisdiction of the Magistrate at Maymyo but the Magistrate on the authority of *Queen-Empress v. O'Brien* (1) held that section 179 of the Code of Criminal Procedure gave him jurisdiction.

Accused is at present within the local limits of the appellate jurisdiction of this Court, which is now asked to revise the order of the Subdivisional Magistrate and decide under the

(1) I.L.R. 19 All., 111.

provisions of section 185 of the Procedure Code by what Court the offence should be tried.

Section 181 (2) of the Criminal Procedure Code provides that the offence of criminal misappropriation or of criminal breach of trust may be inquired into or tried by a Court within the local limits of whose jurisdiction any part of the property which is the subject of the offence was received or retained by the accused person, or the offence was committed.

According to the allegations of Complainant the money was received, retained and misappropriated in whole or in part in Rangoon and therefore there is no doubt that under section 181 (2) the Rangoon Courts have jurisdiction to try the case.

It is argued, however, that under section 179 the case is triable in Maymyo, because the failure to remit the money to Complainant there has caused a loss to him at Maymyo.

Section 179 runs as follows, "when a person is accused of the commission of an offence by reason of anything which has been done, and of any consequence, which has ensued, such offence may be inquired into or tried by a Court within the local limits of whose jurisdiction any such thing has been done, or any such consequence has ensued."

If section 179 is read as it stands in connection with the definition of criminal breach of trust given in section 405 of the Penal Code, it would appear that the Applicant, Abdul Salam, is accused of the commission of the offence of criminal breach of trust by reason of the misappropriation of the money in Rangoon and not because of the consequent loss, which has ensued to Complainant at Maymyo.

The gist of the offence of criminal breach of trust is the dishonest misappropriation, conversion or disposal of the property which in the present case is alleged to have taken place in Rangoon.

The loss to the Complainant, which has accrued in Maymyo, is a consequence of the alleged breach of trust and not necessarily an integral part of it.

In *Queen-Empress* v. *O'Brien* (1), however, Sir John Edge, C.J., took the view that where B being in charge on behalf of

(1) I.L.R. 19 All., 111.

ABDUL SALAM v. RAMNEWAL SINGH.

a Company at a place in Bengal, of certain goods belonging to the Company and being ordered to return the goods to Cawnpore, where the office of the Company was, did not do so and failed to account for the goods or their value, the Courts at Cawnpore had jurisdiction to inquire into the charge, inasmuch as the consequence of B's acts, *viz.* loss to the Company, occurred in Cawnpore.

To my mind this view is hardly in accordance with what appears to be the obvious construction of section 179 of the Criminal Procedure Code. No doubt the loss, which is the consequence of B's acts, occurred in Cawnpore, but the loss was the consequence of the misappropriation elsewhere, and B was accused primarily on account of the misappropriation and only secondarily on account of the consequence of his act.

It was the dishonest misappropriation elsewhere and not the resulting loss at Cawnpore, which constituted his offence.

This was the view taken in the later Allahabad case of *Ganeshi Lall* v. *Nand Kishore* (2) by Karamat Husain, J., who in the course of his judgment observes "The word 'consequence' in this section, *i.e.*, 179, Criminal Procedure Code, in my opinion, means a consequence, which forms a part and parcel of the offence. It does not mean a consequence, which is not such a direct result of the act of the offender as to form no part of the offence."

With this expression of opinion, I am entirely in agreement, and it was approved by a Bench of the Madras High Court in the leading case of *Re Rambilas and* 3 (3), where the effect of various Allahabad rulings on the point in question was discussed.

It was there pointed out that "the offence of criminal breach of trust is completed (assuming a preliminary trust) by the misappropriation or conversion of the property dishonestly. It is only the intention which is essential. Whether wrongful gain or loss actually results is immaterial, it is a consequence, but no essential part of the offence, and a person is not accused of the offence by reason of it."

The judgment is particularly apposite to the facts of the present case and the continuing portion may well be quoted.

(2) I.L.R. 34 All., 487. (3) I.L.R. 38 Mad., 639.

"The learned Public Prosecutor has drawn our attention to the second part of section 405, which deals with dishonest use or disposal of property in violation of law or contract. He says accused had contracted by letters received in Dharapuram to remit the amounts to the Complainants there; and argues that the contract was broken by failure to deliver the money at Dharapuram, and that this fact gives jurisdiction to the Erode Court.

We are unable to follow this reasoning. In the first place the present case falls under the first, and not the second part of the section; the Complainant clearly charges dishonest misappropriation to accused's own use, and not use or disposal in violation of law or contract.

Secondly, if it were otherwise, the offence would be committed where the dishonest use or disposal took place, not where the contract was made or should have been performed."

On behalf of Complainant *Rajani Benode Chakravarti* v. *All India Banking and Insurance Co.* (4) is cited but the circumstances of the two cases are not parallel. The complaint in the Calcutta case contained allegations of cheating, forgery and fraudulent tampering with a document and the Court was of opinion that there was no doubt on the allegations that the Courts at Lahore and Chittagong were equally competent to exercise jurisdiction.

There was therefore no doubt as to the Court by which the offences could be tried or enquired into.

In the present case it is not disputed that the offence is triable at Rangoon, whereas it is more than doubtful, if the Maymyo Court has jurisdiction.

Section 181, sub-section 2, expressly lays down, where the offence of criminal breach of trust can be tried and under that section the Maymyo Court certainly has no jurisdiction.

It does not appear to be justifiable to appeal to section 179 and strain what I take to be its plain construction in order to give the Maymyo Court jurisdiction, simply because Complainant resides in Maymyo and it would suit his personal convenience to have the case tried there.

My decision is that the offence must be inquired into or tried by a Court in Rangoon.

(4) I.L.R. 41 Cal., 305.

Criminal Appeal No. 66 of 1919. 24th July.

Before H. S. Pratt, Esq., M.A., I.C.S.

NGA NAN DA *v.* KING-EMPEROR.

Mr. H. M. Lutter—for the Crown.

Penal Code, section 99—Criminal Procedure, section 46 (3)—Right of private defence.

An Excise Inspector pursued an armed smuggler, and on coming up with him ordered him to stop and fired his revolver twice to frighten him, whereupon the smuggler drew a sword and cut the Inspector on the thigh.

Held,—that the smuggler had reasonable ground for believing that the Inspector intended to cause death or grievous hurt and did not exceed the girth of private defence;

but that when subsequently he was in the grip of the Inspector and an Excise peon came up and tried to disarm him, he had no right of private defence, as he was no longer under a reasonable apprehension of death or grievous hurt.

Excise Inspector, Mahomed Wali, laid a trap for a party of Shan opium smugglers.

He lay in wait in uniform with Excise peon, Maung Maung and others. When the smugglers, who were being detained in conversation as arranged, became restless, the Inspector gave orders for their arrest.

When one of their number was arrested, Appellant, Nan Da and his companions fled pursued by the Inspector.

The Inspector according to his own account, and there is no other direct evidence, came up with Nan Da, ordered him to stop and fired his revolver twice to frighten him. When he was about to overtake Nan Da the latter drew his Shan sword from its sheath and cut the Inspector on the thigh but did not cause a severe wound.

The Inspector caught hold of Appellant by the top-knot, and in response to his shouts for help peon, Maung Maung, came to his assistance and tried to seize Nan Da by the wrist with the intention of disarming him. Before he could do so Nan Da slashed him on the forearm, severing his wrist and inflicting a wound, which might easily have proved fatal.

The Excise Inspector was entitled to arrest accused, who was armed and in possession of opium, and for that purpose to use all necessary means.

He was not justified in causing death in effecting the arrest under section 46 (3) of the Criminal Procedure Code.

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It is clear that until the Inspector fired the shots Appellant did not unsheath his sword or make any show of resistance. All he did was to run away as fast as possible.

If the Shan had reasonable ground for believing that the Inspector intended to cause death or grievous hurt he had a right of private defence against him (section 99, Penal Code).

Accepting the Inspector's statement that he fired into the air and not at the Shan, the fact remains that he did fire his revolver twice at close quarters, when chasing Appellant. It may be remarked that the enconiums of the Magistrate on the Inspector's coolness seem hardly called for.

Appellant is a wild Shan and as the shots came from behind would not unnaturally conclude that the shots were fired at him with intent to kill or wound him, and that the only way to save his life was to stand at bay and fight.

Under the circumstances it must be held in my opinion that the act of the Inspector in firing the revolver twice at close quarters from behind Appellant would reasonably cause the apprehension of death or grievous hurt.

Under this apprehension the Shan had a right of self defence and it was not exceeded. In cutting the Inspector therefore I hold that he committed no offence.

As regards the injury to peon, Maung Maung, the case is quite different.

He came up after Appellant had been caught by the Inspector and under his instructions tried to disarm him. He was armed with a *dahlwe* but made no attempt to use it. The Appellant alleges that Maung Maung struck him with a stick and I see no reason to doubt that it is true.

The Shan undoubtedly received a contused wound on the head, and the probability is that Maung Maung would use force in his attempt to disarm him.

He was, however, entitled to do so to effect his arrest and did not use unnecessary force, so far as can be deduced from the evidence.

The Excise Inspector was holding Appellant by the hair at the time and the latter still had a naked sword in his hand and was waving it and fro.

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I do not consider there is any justification for holding on the facts that at the time he cut the Excise peon Appellant had a reasonable apprehension of death or grievous hurt. It is clear the Inspector made no further attempt to use his revolver.

What really seems to have happened is that when he found himself caught, Appellant lost his head completely and when the peon closed with him struck at him with his sword with the intention of disabling him. In doing so he had no right of private defence and has been correctly convicted of causing grievous hurt to a public servant in the discharge of his duty.

At the same time it is necessary to take into consideration that he is a wild Shan and was probably terrified at having had a revolver fired twice within close proximity to his back. When assistance came he may have thought he would be still further ill-treated and that any measures were justifiable in a frantic last attempt to escape.

He had a cut on his leg and I am very sceptical as to its having been the result of an accident, though it is not quite clear, when he received it.

Possibly it was after his arrest. It is unfortunate that the evidence is all on one side.

In any case it is certainly a legitimate inference that Appellant was struck on the head before he slashed at Maung Maung.

On the evidence the conviction under section 333 was justified and is confirmed.

The question of sentence is not easy.

Appellant is an elderly man. He no doubt was under the influence of terror, when he wounded the Excise peon, but it is impossible to overlook the fact that he was a member of an armed gang of smugglers.

Taking the whole of the circumstances into consideration I am of opinion substantial justice will be done, if the sentence is reduced to four years' rigorous imprisonment.

The conviction and sentence under section 332 are set aside.

Before H. S. Pratt, Esq., M.A., I.C.S.

Civil Revision No. 115 of 1919. 7th August.

MA E KO v. MA PWA HMI AND ONE.

Mr. *Maung Su*—for Applicant.

Civil Procedure—115 (c).

Held,—that a material irregularity or illegality is not in itself a sufficient ground for revision under clause (c) of section 115 of the Civil Procedure Code. There must have been at the same time a wrong or irregular exercise of jurisdiction.

B.L.T., XI, 48. 2 L.B.R., p. 333.
B.L.T., XII, 5. 22 C.W.N., 627.

This is an application for revision of the decree of the District Court, Shwebo, under section 115 of the Code of Civil Procedure.

The two main grounds on which the application is based are, first, that there was an illegality or material irregularity in not duly considering the point as to whether under Buddhist Law husband and wife should be regarded as partners in business; and, secondly, that the lower Court was wrong in law in holding that the husband was not responsible for his wife's debts.

As a matter of fact the Judge considered the law on the point and came to the conclusion that there was no partnership between the husband and wife in the case in question.

This Court is therefore simply asked to revise the finding of the District Court on the ground that it was wrong in law

It seems clear that this is a quite insufficient ground for interference on revision.

The law as to the scope of section 115, Civil Procedure Code, is explicitly laid down by the Lords of the Privy Council in *Balakrishna Udayar* v. *Vasudeva Aiyar* (1).

In the course of the judgment in that case it is remarked "The 115th section of the Civil Procedure Code enables the High Court, in a case in which no appeal lies, to call for the record of any case, if the Court by which the case was decided appears to have acted in the exercise of a jurisdiction not vested in it by law, or to have failed to have exercised a jurisdiction vested in it, exercised its jurisdiction illegally or with material irregularity, and further enables it to pass such order in the case as the Court may think fit.

(1) B.L.T., XI, 48.

MA E KO v. MA PWA HMI.

It will be observed that the section applies to jurisdiction alone, the irregular exercise, or non-exercise of it, or the illegal assumption of it. The section is not directed against conclusions of law or fact in which the question of jurisdiction is not involved."

In the present instance the ground on which the Court is asked to interfere is solely that certain conclusions of law on the part of the District Court are wrong.

There is no question of jurisdiction involved.

Counsel for applicant relies upon a recent ruling of the Chief Court of Lower Burma in *Babu Goridut Bagla* v. *Babu H. Rookmanand* (2).

In that case Ormond, J., referring to the judgment of the Privy Council cited above, remarked, "The judgment does not deal with clause (c) of section 115 beyond paraphrasing it as the irregular exercise of jurisdiction." I can find nothing in this judgment which is inconsistent with the decision in *Zeya's case* (3).

The ruling in Zeya's case, it should be noted, was to the effect that if the Lower Court has failed to take into account some proposition of law or some material fact in evidence, it has acted illegally and its decision may be revised.

Towards the end of the judgment in *Babu Goridut Bagla*, Ormond, J., sums up his view of the meaning of the third clause of section 115 as follows :—The question I think resolves itself into this : *was the method irregular by which the conclusion of fact or of law was arrived at ?* If the Judge arrives at a conclusion of law or fact without having considered the law or a material part of the evidence or by misunderstanding or erroneously recording the statements of pleaders or witnesses, the method of arriving at such conclusion is illegal and irregular, and is a good ground for revision, provided that the irregularity is material and the petitioner has suffered an injustice thereby.

The language used is very guarded, but with all due deference to the authority of the learned Judge, it seems to me he has travelled beyond the limits of interference under section 115 as interpreted by the Privy Council. He practi-

(2) B.L.T., XII, 5. (3) 2. L.B.R., p. 333.

cally holds that, if the method by which a conclusion of law or fact is arrived at is irregular, this is in itself a sufficient ground for revision, provided that the irregularity is material and the petitioner has suffered an injustice. This view seems in effect to ignore the question of jurisdiction altogether and treats clause (*c*) of section 115 as if the words in the exercise of its jurisdiction were not present.

In the Privy Council judgment referred to it was definitely laid down that section 115 refers to jurisdiction alone, and is not directed against conclusions of law or fact in which the question of jurisdiction is not involved.

There is no suggestion that this exposition of its meaning is confined to the first two clauses of the section.

Clause (*c*) of the section is paraphrased "to have exercised its jurisdiction illegally or with material irregularity. (The actual wording of the clause is to have acted in the exercise of its jurisdiction illegally or with material irregularity.)

It appears to my mind perfectly clear, therefore, that clause (*c*) must be held to refer to jurisdiction equally with clauses (*a*) and (*b*) of section 115.

It is not permissible to construe the words "in the exercise of its jurisdiction" as though they meant no more than "in its capacity as a Court." If that is all they mean, the words are superfluous and could be dispensed with, since in one sense a Court always passes orders in the exercise of its jurisdiction.

Clause (*c*) cannot be divorced from the other two clauses of the section, but must be read in its relation to them.

It is impossible to escape from the conclusion that acting illegally or with material irregularity in the exercise of its jurisdiction connotes an illegality or irregularity in a matter touching jurisdiction. In other words, there must be a question of jurisdiction involved. A mere illegality or material irregularity, in which no question of jurisdiction is involved, does not justify interference.

There must have been a misuse or abuse of its jurisdiction by the Court to warrant interference on revision.

This is in accordance with the view taken by a Bench of the Calcutta High Court in the case of *Chandra Kishore*

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Roy (4) where the facts were much stronger than in the present instance, since the decree, which it was sought to revise, was admittedly based on a wrong assumption of fact.

The application of section 115 is very limited and its provisions must be construed strictly.

It is not intended that it should take the place of a second appeal, which would be the practical effect, if it were held that a mistake of law or a wrong view of the law justified the interference of the High Court on revision, even though the question of jurisdiction was not involved.

It may be desirable, especially in Upper Burma, that the power of revision should be extensive, but that does not make it permissible to construe the section in a manner which I hold to be clearly opposed to the interpretation of its meaning given in *Balakrishna's* case.

To summarise my view of the position :—a material irregularity or illegality is not in itself a sufficient ground for revision under clause (c) of section 115. There must have been at the same time a wrong or irregular exercise of jurisdiction.

The application is dismissed.

Criminal Revision No. 142 of 1919. 8th July.

Before H. S. Pratt, Esq., M.A., I.C.S.

MAUNG PO LAT *v.* MA NGWE MA.

Mr. A. C. Mukerjee —for Applicant.
Mr. L. Pillay—for Respondent.

Buddhist Law—Divorce.

Mere clandestine intercourse after a divorce is not sufficient to revive the marriage under Buddhist law.

Ma Ngwe Ma obtained an order for maintenance against Maung Po Lat as his wife. The Magistrate found that there had been a divorce, but that the parties had been reunited.

The respondent in the lower Court admitted a reunion after the first divorce but alleged that a second divorce took place a year ago after which there had been no reunion.

There was evidence of a second divorce about March 1918 and applicant herself had to admit the fact of a second divorce. There was some evidence that Maung Po Lat paid clandestine visits at night to his divorced wife after the second divorce.

(4) 22 C.W.N., 627.

He was at that time living with another wife and it is clear that after the second divorce he never again lived openly with Ma Nge Ma as his wife.

The mere fact that he paid clandestine visits to Ma Ngwe Ma after the divorce would not in my opinion be sufficient to constitute a valid re-marriage.

No authority is cited for the proposition that under Buddhist law mere physical reunion with a divorced wife is sufficient to revive the status of marriage.

It seems clear that the reunion must be of such a nature that had there been no divorce it would have amounted to a valid marriage. On the facts it is not satisfactorily established that Ma Ngwe Ma regained the status of wife after her second divorce. This being so she was not entitled to maintenance.

I set aside the order of the Subdivisional Magistrate. Applicant will be allowed costs.

Before H. S. Pratt, Esq., M.A., I.C.S.

Civil Second Appeal No. 104 of 1919. July 18th.

MAUNG TUN MAUNG AND ONE *v.* MA YWE AND THREE.

Mr. C. G. S. Pillay—for Appellants.

Maung Su—for Respondents.

Civil Procedure—O. XXXIV, rr. 7 (c) and 8.

Redemption of usufructuary mortgage after the date fixed in preliminary decree.

The District Court on appeal gave a decree for redemption of a usufructuary mortgage and fixed a date for payment of the money into Court under Order XXXIV, Rule 7 (c).

The money was paid into Court after the date specified in the decree and in execution proceedings the Court attached the land and made it over to the decree-holders.

No extension of time had been asked for and no notice was given to the judgment-debtors.

Held,—that, although a decree-holder may not be precluded from redeeming it at any time before a final decree is passed under Order XXXIV, Rule 8, there is no provision for the execution of a preliminary decree and a final decree cannot be dispensed with.

The correct course in such a case is to apply for an extension of the time. If the Court proposes to accept a payment after due date, it could not pass a final decree without giving judgment-debtor an opportunity of being heard.

U.B.R., 1897-01, II, p. 582.
I.L.R., 36 Cal., 122.

Appellants were Defendants in Civil Regular Case No. 88 of 1917 of the Township Court of Sale.

MAUNG TUN MAUNG v. MA YWE.

Plaintiffs sued for redemption under a usufructuary mortgage and were granted a decree in Civil Appeal No. 10 of 1918 of the District Court of Magwe.

In accordance with the provisions of Order XXXIV, Rule 7 (*d*), the decree ought to have contained a direction that if the money was not paid on or before the date fixed, the mortgage property be sold.

In the appeal decree a date was rightly fixed for the payment of the money into Court under Order XXXIV, Rule 7, sub-rule (*c*), and I do not understand the remark of the learned Additional Judge of this Court on second appeal that it is unnecessary to fix a date for redemption in usufructuary mortgages.

Rule 7 is quite clear and applies to usufructuary mortgages. The first Appellate Court fixed the 9th of September 1918 as the date on or before which the money was to be paid into Court.

On the 4th of October 1918 the decree-holders paid the money into Court and applied for the land to be attached and made over to them. Although the time specified in the decree for the payment of the money into Court had elapsed the Court ordered the land to be attached and made over to the decree-holders and this was done.

The judgment debtors were given no notice of the application, nor were they given any opportunity to show cause against the order being made.

The judgment-debtors appealed against the order in execution without success the Court holding that respondent could redeem at any time he was in a position to pay the money into Court.

The Judge appears to have been led to state the case in such unqualified terms by the remark as to the absence of necessity to fix a date already referred to.

He saw that under the circumstances it was inequitable that the decree-holders should reap a crop, which they had not sown, without paying compensation, but could think of no remedy.

An appeal has now been preferred to this Court against the order in execution on the ground that as the time specified for

redemption had elapsed and no extension had been applied for or granted the Court was in error in holding that the decree-holders could pay the money into Court at any time they could afford to do so.

It was also contended that Appellants ought to be allowed to reap their crop or an order made to that effect before redemption was allowed.

There are numerous authorities for holding that the first decree in a mortgage suit is provisional and that until it is made final redemption cannot be permitted.

The subject was discussed exhaustively in *Maung Lu Tha* v. *Maung Hman* (1) and it was held that until an order has been made under section 93 of the Transfer of Property Act the decree-holder may redeem at any time subject to the law of limitation. It was further pointed out that a decree under section 92 of the Transfer of Property Act is of the nature of a decree *nisi* and that it does not foreclose the decree-holder until an order to that effect has been passed under section 93.

The latest Calcutta ruling cited is in 1908. *Bepin Behary Shaha* v. *Mokunda Lal Ghosh* (2) in which it was held that a person, who does not deposit the redemption money within the time allowed, can redeem afterwards before a final order is made under section 93 of the Transfer of Property Act.

The foreclosure adopted in that case was different to the present as the Plaintiff applied to have the decree made absolute, whereas in the present case there was no application for a final decree but an application was made for execution of the decree by attachment and delivery of possession.

Rules 7 and 8 of Order XXXIV have replaced sections 92 and 93 of the Transfer of Property Act and provision is made for preliminary and final decrees in redemption suits. The principles involved remain the same.

Both sections 93 of the Transfer of Property Act and rule 8 of Order XXXIV provide for an extension of time on good cause shown.

Ordinarily therefore where the decree-holder wishes to pay in the redemption money after the time specified but before

(1) U.B.R., 1897-1901, II, p. 582. (2) I.L.R., 36 Cal., 122.

the final decree the correct course would seem to be for him to apply for an extension.

Apparently, however, in view of the array of authorities on the subject, the Court would be justified in treating an application to pay in the money as tantamount to an application for extension of the time.

The Court, however, is not absolved from the necessity for passing a final decree and there is no provision for the execution of the preliminary decree before it has been made final.

The position therefore is that the decree-holders were entitled to redeem, but that the Court was bound to pass a final decree before allowing redemption and must pass a final decree in the terms specified in Rule 8.

This has not been done and the procedure adopted by the Court was wholly irregular, in consequence of which it seems certain an injustice has been done to the mortgagees, who have been deprived of their crop.

As the money was not paid into Court until after the date fixed in the preliminary decree, I consider the Court ought to have issued a notice to the judgment debtors to show cause why a final decree should not be passed.

It would then have been able to put the decree holders on terms as to the disposal of the crop before passing the final decree having regard to the provisions of section 51 of the Transfer of Property Act.

I accordingly set aside the decree of the District Court on appeal and the order of the Township Court in execution.

There is as yet no final decree but the money has been paid into court.

Payment must be entered *in the original mortgage* proceedings and the Township Court will call upon the judgment-debtors to show cause why a final decree should not be passed under Order XXXIV, Rule 8. Orders must then be passed according to law, after hearing both parties, in the light of the remarks made in this judgment.

Appellants will be granted costs throughout.

Before H. S. Pratt, Esq., M.A., I.C.S.

Criminal Revision No. 85 of 1919. July 15th.

NGA SAN PA AND ONE v. KING-EMPEROR.

Mr. L. Pillay—for Applicants.

Criminal Procedure—234.

Held,—that section 234 of the Code of Criminal Procedure only applies to the trial of a single person for separate offences of the same kind and not to cases in which more persons than one are tried jointly.

I.L.R., 33 Cal., 292.

This case has been tried in a slovenly manner. Two trials have been amalgamated quite unjustifiably. San Pa was involved in each but Po Sein was only involved in one.

The offences were entirely distinct transactions.

San Pa was charged with receiving a gratification for the recovery of stolen cattle belonging to different owners on different occasions under section 215.

Po Sein was charged in connection with the second offence under section 215 only.

Both accused were convicted under section 379, the first of two offences and the second of one, although neither had been charged under section 379.

I am of opinion that on the record the convictions were not justified as neither accused was called upon to answer a charge of theft.

As regards the first transaction there was evidence to justify a conviction under section 215 but as regards the second there was no independent evidence and the conviction is on the merits difficult to justify.

* * * *

Apart from the merits of the case it is clear that the joint trial was illegal. Section 234 only applies to the trial of a single person for separate offences of the same kind and not to cases in which more persons than one are tried jointly.

Budhai Sheik v. *Emperor* (1) is one of the many authorities for this view.

In this case not only have two accused been tried together but one of them is not concerned with the first offence for which the other has been tried and convicted.

The conviction and sentences are set aside.

* * * *

Retrial of San Pa ordered on one charge under section 215.

(1) I.L.R., 33 Cal., 292.

Criminal Revision No. 618 of 1919. 15th September.

Before H. S. Pratt, Esq., M.A., I.C.S.

SOHAN SINGH *v.* KING-EMPEROR.

Mr. *J. C. Chatterjee*—for Applicant.

Municipal—180 (1).

Held,—there is nothing in Chapter VI of the Burma Municipal Act, which empowers a Town Committee to pass a general resolution directing how sulliage or surface water is to be disposed of.

An infraction of the directions embodied in such a resolution is not therefore punishable under section 180 (1) of the Act.

Sohan Singh has been convicted by the Headquarters Magistrate, Meiktila, under section 180 (1) of the Municipal Act of disobeying a lawful direction given by the Committee under the powers conferred by the previous chapter. (Chapter VI.)

The direction was passed at a meeting of the Committee in July 1918 and was as follows :—

" No house-owner shall allow sulliage or other water to be discharged from his house on any Municipal road or property, but must carry out a connection with the nearest drain or dispose of such refuse water in some other way as may be approved by the President or Vice-President of the Town Committee."

This direction of the Committee is obviously a bye-law, even if it is called by another name, and has not been confirmed by the Local Government.

It is therefore not valid as a bye-law.

I can find nothing in Chapter VI of the Municipal Act, which empowers a Town Committee to pass general orders or directions of this nature regarding the disposal of sulliage or surface water.

Sections 114, 115 and kindred sections provide for special notices regarding drainage, sewage and water-supply.

The notice in question, however, was based on a general order for which there is, so far as I can find, no legal authority.

I remanded the case for evidence as to the section or rule of law under which the order in question purported to be passed.

The evidence of the Vice-President does not answer the problem but explains that the resolution dated 31st July 1918

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is really a direction to the officials of the Town Committee as regards their duties under section 115 of the Municipal Act.

This is not the obvious interpretation of the resolution, but, assuming its correctness *argumenti causa*, it is clear that a house-owner cannot be convicted under section 180 because he disobeys a direction issued to officials of the Town Committee regarding their duties. The notice issued by the Vice-President called attention to the order of the Town Committee, pointed out that it was infringed by the Applicant and requested him to take steps to carry out the order within a month.

As the Committee had no power to pass such a general order, the neglect to comply with it on receipt of a notice was no offence.

I set aside the conviction and sentence.

Before L. H. Saunders, Esq., I.C.S.

Civil Revision No. 113 of 1918. 28th March 1919.

MAUNG TAW v. MOOSAJI AHMED & Co.

Mr. J. C. Chatterjee—for Applicant.
Mr. L. K. Mitter—for Respondents.

Partnership.

There is no justification either in the Buddhist law or in the published rulings for holding that in every case in which a husband and wife borrowed money it must be presumed, until the contrary is proved, that there is a partnership between the two and that the money is borrowed for the purpose of that partnership.

I.L.R., 39 Bom., 261.
—— 40 Mad., 727.
U.B.R., 1892-96, II, 204.

This was one of three suits brought by the Plaintiffs-Respondents upon three separate promissory notes executed by one Ma Zôn. The Plaintiffs made Ma Zôn and her husband, Maung Taw, Defendants claiming against Maung Taw on the ground that he was a partner with his wife, Ma Zôn, and therefore liable, although he had not executed the note.

The Judge of the Small Cause Court held that the husband and wife were partners and gave the Plaintiffs a decree. The husband now comes to this Court in revision under section 25 of the Provincial Small Cause Courts Act.

The question whether a member of a partnership firm who has not signed a promissory-note is liable in a suit upon that

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note signed by one of the partners for money lent upon the security of the note for the purposes of the partnership business has been decided by authority—see the case of *Karmali Abdulla* v. *Karimji Jivaji* (1)—a decision which was referred to and commented on in *Shanmuganatha Chettiar* v. *Srinivasa Ayyar* (2). There can now be no doubt that under these circumstances each of the partners is liable, although he did not sign the note for money borrowed for the purposes of the partnership business.

The learned Judge of the Small Cause Court decided that the Defendants were partners upon the ground that Burmese Buddhists who are husband and wife are ordinarily to be presumed to be partners in the absence of evidence to the contrary, and that the evidence in this case did not show that they were not partners. As the Judge puts it, the union as husband and wife constitutes under the Buddhist law a partnership unless it is shown that the wife lives and has a separate establishment of her own and takes no share in the management of her husband's house. As authority for this view a quotation from the notes by Sir John Jardine given in a Selection of Leading Cases, Part I, Matrimonial Law, page 50, by U Me Aung, is referred to. Under the head "Incidents of Marriage" the learned author says: "With respect to the management and acquisition of property the Buddhist law in distinctly recognising the status, treats the husband and wife as if they were partners in the profits, unless perhaps the woman lives and has an establishment separate from her husband and takes no share either in the management of his business or in his household affairs." In the case of *U Guna* v. *U Kyaw Gaung* (3) the Judicial Commissioner (Mr. Burgess) said: "It might have far-reaching and inconvenient consequences to hold that such a union, that is to say, the union of a husband and wife, invariably constitutes a partnership, but there is no doubt that it very commonly does so in effect to many intents and purposes," and in that case it was pointed out that the husband and wife had been carrying on a business very much after the character of a partnership.

(1) I.L.R., 39 Bom., 261. (2) I.L.R., 40 Mad., 727.
(3) U.B.R., 1892-96, II, 204.

But to say that the union of a husband and wife very commonly constitutes a partnership to many intents and purposes is by no means the same as laying down the principle that it generally does so, and should be presumed to do so unless the contrary is proved, and it is clear that Mr. Burgess was not willing to lay down the broader proposition. Nor do I think that the note by Sir John Jardine can be interpreted as meaning more than this, that where a husband and wife live together and carry on business they ordinarily share the profits as partners. Here it appears that the wife kept a shop in the bazaar for the sale of dried prawns and the like. The husband was a clerk in Whiteaway Laidlaw's. The husband gave the wife Rs. 500 to start business, but she already had a stall when he married her, with her mother, and it was only a year after her marriage because she wanted to have a separate shop of her own, according to the husband, that he provided her with this sum as capital.

The Plaintiff in his evidence said that the Defendants lived together and carried on business jointly, but he did not explain what he meant by this. He said he had made a demand for settlement of accounts from both the Defendants and both the Defendants asked him to give them time. He admitted that the wife alone had come and bought goods.

Ismail, an employee of the Plaintiff, said that he collected outstandings and the wife paid money; sometimes she did not pay and said that she would pay on receipt of her husband's salary. He saw Maung Taw about the money due but Maung Taw said that he had anything (? nothing) to do with the money.

I am of opinion that it would be introducing an entirely new principle, for which there is no justification either in the Buddhist law or in the published rulings, to hold that in every case in which a husband and wife borrow money it must be presumed, until the contrary is proved that there is a partnership between the two and that the money is borrowed for the purposes of that partnership. Every case must be decided on its merits. In the present case there is nothing to show that the husband took any part whatever in the wife's business beyond the supply of the capital of Rs. 500 with which to set

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her up in a stall. He has been shown to have a separate and entirely distinct source of income in a shop in which apparently his services are fully employed. The mere fact, if it is a fact, that profits from one or other business are used for the maintenance of both husband and wife certainly cannot constitute the business a partnership. It would be as reasonable in the present case to hold that the wife was a partner in the husband's business as a clerk in the firm of Whiteaway Laidlaw as to hold that the husband was a partner in the wife's business of selling dried comestibles in the bazaar.

The application must be allowed and the decree, as far as the Applicant is concerned, must be set aside with costs.

Civil 2nd Appeal No. 214 of 1919. 1st December.

Before H. S. Pratt, Esq., M.A., I.C.S.

MA YE BAW AND ONE *v.* MAUNG SHWE HMAN AND ONE.

Mr. G. G. S. Pillay—for Appellant.
Mr. P. N. Bose—for Respondent.

Sale—Validity of—

Plaintiff sued for redemption of certain land relying on a mortgage effected by him.

The defence was that Plaintiff had converted the mortgage into a sale. The trial Court, taking this view of the facts, dismissed the suit.

The first Appellate Court found the sale proved but held that it was invalid, by reason of the consent of the co-heirs not having been obtained, and granted a mortgage decree.

Held,—that as the question of the validity of the sale did not arise in the pleadings, Plaintiff was not entitled to succeed on a case which he had not set up.

Plaintiff, Maung Shwe Hman, sued for redemption of two plots of land.

His case was that the land had been mortgaged orally by his father, Maung Te, to Defendant, Ma Ye Baw, and her deceased husband, Maung San, for Rs. 10 fifteen years previously.

Subsequently after Maung Te's death Maung Shwe Hman took a further advance of Rs. 50 from Maung San on the same land. The land being undivided ancestral estate Plaintiff asked that his two sisters and co-heirs, Ma Ein Zan and Ma Me

Nyan, might be given an opportunity to be added as Plaintiffs.

Ma Me Nyan was brought on as Plaintiff by her own desire and nominated Shwe Hman as her attorney. The plaint was not otherwise changed. The Court of first instance found that five years ago there was a dispute between Shwe Hman and Maung San because the latter refused to allow redemption of the land. On the suggestion of the village *pôngyi* the matter was referred to arbitration and in accordance with the decision of the elders Maung San paid a further sum of Rs. 50 and converted the mortgage into an outright sale. The suit was accordingly dismissed.

In the first Court the advocate for Plaintiff argued that in any case there could be no valid sale without the consent of the co-heirs.

The Court, however, found that as they were in the village and did not object, this contention had no weight and in any case they could still sue to set aside the sale transaction.

As a matter of fact Plaintiffs were not entitled to be heard on the question of the validity of the sale, which was not in issue, without first amending the plaint.

Plaintiff, Shwe Hman, relied on a mortgage effected by him. The defence was that he had converted the mortgage into a sale and this was proved. Plaintiff having alleged a mortgage and the transaction having been proved to be a sale had no *locus standi* to impugn the validity of the sale. Obviously, if he had power to effect a mortgage, he could effect a sale and in any case he could not be allowed to take advantage of his own malfeasance.

The first Appellate Court found that the sale was proved but that, the consent of the co-heirs not having been obtained, it was invalid and granted a mortgage decree.

This was to my mind entirely without justification. There can be no doubt at all that in the transaction Shwe Hman acted as head of the family and for his sisters. They must have been well aware of the transaction, which was referred to the arbitration of the elders at the suggestion of the *pôngyi*. They did not protest nor did they take any steps to set aside the sale.

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Even when one of them joined Plaintiff's suit she did not suggest that her brother had not the power to mortgage the property.

It must be assumed therefore that the sale was effected by Shwe Hman with the consent of the co-heirs.

Apart from the question of consent the question of the validity of the sale did not arise in the pleadings and Plaintiffs were not entitled to succeed on a case, which they had not set up.

I reverse the finding and decree of the District Court and restore the finding and decree of the Township Court with all costs.

Before H. S. Pratt, Esq., M.A., I.C.S.

Revision No. 889 of 1919. 19th November.

CHATTER SINGH DAMAI *v.* KING-EMPEROR.

Mr. R. C. J. Swinhoe—for Applicant.

Penal Code—447-448, Criminal Trespass.

The complainant suspected his wife of an intrigue and set a trap to catch the delinquent. The accused was caught in the house at night and there was no doubt that he went with the intention of committing an offence and on the invitation of the complainant's wife. The accused was convicted of criminal trespass.

Held,—that although the wife was in actual physical possession of the house and invited the accused there, the husband did not cease to be in possession by reason of his temporary absence, and that as the intention was to commit an offence which constituted an infringement of the rights of the husband the conviction was correct.

8 L.B.R., 425.
U.B.R. 1897-01, I, 354.
1 L.B. 355.
I.L.R. 23 All., 83.
VI Bengal L.R., Appendix 80.

Applicant, Havildar Chatter Singh Damai of the Military Police Band, has been convicted of criminal trespass and sentenced to one year's rigorous imprisonment.

The facts are that complainant, a lance-naik in the Myitkyina Battalion, suspected his wife of an intrigue and set a trap to catch the delinquent. He announced his intention of going on a shooting expedition and then set a watch on his house.

Applicant was caught in the house at night and there is no doubt that he went with the intention of committing an offence and on the invitation of complainant's wife.

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The sole point for consideration is whether he is guilty of house-trespass, when he entered on the invitation of the wife, who was in actual physical possession of the house.

The learned Sessions Judge has solved the difficulty by holding that possession by the wife is possession of the husband, but the objection to this solution is that the logical corollary to his view would seem to be that an invitation by the wife would be an invitation by the husband. Although the wife was in actual physical possession, it cannot be held that the husband ceased to be in possession of the house because of his temporary absence.

This would lead to the obviously impracticable position that a man ceased to be in possession of property, as soon as he leaves it temporarily, and on this view supposing the wife in her husband's absence invited a man to the house, and the man came, while she was also out for the time being, the house would be in no-one's possession.

I have not been able to find any precisely similar case, though one would imagine many such have been before the Courts.

Tok Gyi v. *King-Emperor* (1) on which the learned advocate relies does not appear to be of much assistance, as the alleged trespasser in that case entered by permission of the *pôngyi* in actual possession and moreover there was no intention to commit an offence. The present is not a case of juridical as opposed to actual possession.

The Upper Burma case of *Queen-Empress* v. *Ngâ Tun Bye* (2) and the Lower Burma case of *Po Kin* v. *Crown* (3) are not parallel, because in those cases, although the accused entered the house on the invitation of an inmate, his intention was merely to keep an assignation and not, as in the present case, to actually commit an offence.

The nearest parallel I have been able to find is the case of *Queen-Empress* v. *Kangla* (4), where accused was found to have entered complainant's house with intent to commit adultery. In that case the conviction was upheld, but there is

(1) 8 L.B.R., 425.
(2) U.B.R., 1897-01, I, 354.
(3) I L.B.R., 355.
(4) I.L.R. 23. All., 82.

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nothing to show whether the husband was actually in the house at the time or not, and the record is silent as to whether the accused came on the wife's invitation.

The definition of criminal trespass in section 441 of the Penal Code runs :—

"Whoever enters into or upon property *in the possession of another* with intent to commit an offence, or to intimidate, assault or annoy any person in possession of such property, or having lawfully entered into or upon such property, unlawfully remains there with intent thereby to intimidate, insult or annoy such person, or with intent to commit an offence, is said to commit 'criminal trespass.'"

It is to my mind clear that the essentials of the section have been complied with.

Applicant undoubtedly entered into property in the possession of another and with intent to commit an offence.

Even if it can be assumed that the original entry was lawful, because it was in possession of the wife, it ceased to be lawful, when applicant remained on the house with intent to commit adultery.

If the section is construed literally the offence was committed as soon as the house was entered even on the view that the wife was in possession, since it cannot be said possession by the wife was possession by her lover, or that it was not the possession of another so far as applicant is concerned.

I hold, however, that although the wife was in actual physical possession, the husband did not cease to be in possession.

The section does not lay down that the property must be in the sole possession of another.

The rejoinder to this argument is to quote the case of *Prankrishna Chandra* (5), wherein it was held that the entry of a stranger into a family dwelling-house, with the permission and license of one of the members, is not criminal trespass.

I see no reason to doubt that the law as laid down in that ruling is sound so far as it goes, but unfortunately there was no intention to commit an offence in that particular case.

(5) VI Bengal Law Reports, Appendix 80.

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Although in the present instance the wife was in possession of the house and invited the accused there, the husband was legally in possession as well, and the intention was to commit an offence, which constituted an infringement of the rights of the husband.

Applicant must have known full well that the house owner would not consent to his entry for the purpose of committing adultery with his wife.

I see no reason to suppose that the conviction was wrong in law.

Applicant has, however, been sentenced to the maximum sentence of imprisonment admissible by law.

The offence is a serious one, but I do not think undue stress can be laid upon the point that the accused was a person of inferior caste.

I reduce the sentence to six months' rigorous imprisonment, which is to my mind sufficiently severe to meet the merits of the case.

Before H. S. Pratt, Esq., M.A., I.C.S.

Criminal Revision No. 715 of 1919. 29th October.

KAUNG KI *v.* KING-EMPEROR.

Mr. A. C. Mukerjee—for appellant.

Mr. H. M. Lutter—for the Crown.

Excise—41 (c), 63 (1) (*a*).

The Collector, on a report from the District Superintendent of Police, sanctioned the prosecution of an excise licensee under section 41 (c) of the Excise Act but did not pass orders authorising any particular Excise Officer to make a report or complaint.

A report was then made to a Magistrate by a Sub-Inspector of Police.

Held,—"that this was not a compliance with the provisions of section 63 (1) (*a*) of the Excise Act."

Kaung Ki was convicted by the Headquarters Magistrate, Shwebo, of an offence under section 41 (c) of the Excise Act.

Section 63 (1) (*a*) of the Act expressly provides that no Magistrate shall take cognisance of an offence punishable under section 41 except on the complaint or report of the Collector or of an Excise Officer authorised by him in this behalf.

In the present instance the Collector, on a report from the District Superintendent of Police, sanctioned the prosecution

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of the applicant but did not pass an order authorising any particular Excise Officer to make a report or complaint.

A report was then made to the Magistrate by a Sub-Inspector of Police.

The provisions of the law must be construed strictly and in the present instance, I must hold that the requirements of section 63 (1) (*a*) have not been satisfied.

If the Collector did not wish to make a report or complaint himself, it was for him to authorise some particular Excise Officer to make the report or complaint.

A mere order sanctioning the prosecution on the report of the District Superintendent of Police is not sufficient.

For this reason the conviction cannot be maintained and must be set aside.

It is not necessary to go into the facts of the case under the circumstances but I would point out that there is no evidence that any particular employé of the licensee sold the brandy.

Civil Appeal No. 239 of 1919.
20th November.

Before H. S. Pratt, Esq., M.A., I.C.S.

MA ON ME *v.* MA PYA GYI AND THREE OTHERS.

Mr. S. Mukerjee—for Appellant.
Mr. P. N. Bose—for Respondents.

Civil Procedure—O. 41, r. 23.

Held,—that apart from O. 41, r. 23, Civil Procedure Code, an Appellate Court has inherent power when a suit has been decreed against the defendant *ex-parte* not only to reverse a decree passed on evidence given by the plaintiff only, but also to direct a retrial of the case.

I.L.R., 23 Mad., 445. 21 C.W.N., 877.
—— 30 Mad., 54. C.A. No. 120 of 1918 (unpublished).

Plaintiff obtained an *ex-parte* decree against Defendants.

On appeal the District Court held that the case ought not to have been proceeded with *ex-parte* and remanded the case for hearing of evidence for the defence and judgment on the merits.

It is not necessary to recapitulate the facts of the case, suffice it to say that I entirely agree with the first Appellate Court that the trying Court ought not to have proceeded *ex-parte*, still less to have refused to allow Defendants to

contest the suit, when they petitioned against the *ex-parte* trial.

It is contended on appeal in this Court that as the suit had not been disposed of on a preliminary point the Lower Court of appeal had no power to remand the suit under Order XLI, Rule 23. This is on the face of it a correct view of the law. The Judge in his order does not, however, quote any particular rule of law and apparently considered he was entitled to remand the suit for hearing on its merits under his inherent powers as a Court.

There is ample authority for this view.

In *Perumbra Nayar* v. *Subrahmanian Patter* (1) a bench of the Madras High Court held that notwithstanding sections 562 and 564 of the Code an Appellate Court has inherent power under such circumstances, not only to reverse a decree passed on evidence given by the Plaintiff only, the Defendant being *ex-parte*, but also to direct a retrial of the case.

This ruling was followed by a full bench of the same Court in *Sadhu Krishna Ayyar* v. *Kuppan Ayyangar* (2) and I fully agree with the reasoning of the learned Chief Justice in that case.

A similar view was taken by a full bench of the Calcutta High Court in *Ghuznavi* v. *The Allahabad Bank Limited* (3).

It was there laid down that the question whether it is necessary for the ends of justice to exercise such power of remand must depend upon the circumstances of the particular case and in exercising such jurisdiction the Court must be careful to see that its decision is based on general legal principles and subject to the rule, that if the Code does contain specific provisions which would meet the necessities of the case in question, such provisions should be followed and the inherent jurisdiction should not be involved.

Accepting these reservations, the present case was one, where a remand for disposal on its merits was clearly the most satisfactory solution of the case.

Defendants were entitled to have the case reopened, whilst a mere remand for further evidence and a decision of the case

(1) I.L.R., 23 Mad., 445. (2) I.L.R., 30 Mad., 54.
(3) 21 C.W.N., p. 877.

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on its merits by the first Appellate Court would not have been satisfactory.

The facts in *Maung Htu* v. *Maung Che* (4) were different as the evidence on both sides was recorded and the trial complete before the remand by the Appellate Court was made. There is nothing in that judgment, which conflicts with the view that the first Appellate Court has in a case like the present inherent power to remand a suit for hearing and disposal on its merits. I hold the Court had inherent power to pass the order which it did and that the exercise of the power was justified by the circumstances of the case.

The appeal is dismissed with costs.

Civil Revision No. 53 of 1919. 8th December.

Before H. S. Pratt, Esq., M.A., I.C.S.

MAUNG SAW v. INGRASWAMY BY HIS ASSIGNEE E. V. MAHOMED EBRAHIM.

Mr. L. Pillay—for Applicant.

Mr. S. Vasudevan—for Respondent.

Negotiable Instruments—8.

Held,—that section 8 of the Negotiable Instruments Act prevents any person suing on a negotiable instrument, who is not named therein as the payee, or has not become entitled as endorsee or assignee.

Plaintiff Ingraswamy sued and obtained a decree on a promissory-note drawn in favour of one Mahomed Ebrahim. The note had neither been assigned to nor endorsed in favour of Plaintiff.

Evidence was adduced to show that Plaintiff really lent the money and not Ebrahim. Both the Lower Courts have entirely overlooked the effect of section 92 of the Evidence Act. The evidence that Plaintiff lent the money was in contradiction of the terms of the document. There was no allegation of fraud or misrepresentation on the part of Defendant and the evidence was therefore inadmissible.

Plaintiff was not entitled in his own name to the possession of the note and was not therefore the holder of the note under section 8 of the Negotiable Instruments Act.

The effect of the section is quite clear and prevents any person suing on a negotiable instrument, who is not named

(4) C.A. No. 132 of 1918 (unpublished).

therein as the payee, or has not become entitled as endorsee or assignee.

I consider the matter is one of jurisdiction and that the Courts had no jurisdiction to give Plaintiff a decree, unless the note had been endorsed in his favour or assigned to him by the nominal payee.

I set aside the finding and decrees of the Lower Courts and direct that the suit be dismissed with costs throughout.

Before H. S. Pratt, Esq., M.A., I.C.S.

HAJI CHIT AND FIVE OTHERS v. HAJI KYAW.

Civil Second Appeal No. 180 of 1919. 5th February 1920.

Mr. D. Dutt—for Appellants.

Mr. L. K. Mitter—for Respondent.

Civil Procedure—Order 6—Pleadings.

Held,—that the determination in a cause must be founded upon a case set up in the pleading or involved in or consistent with the pleading.

5 L.B.R., 76.
8 L.B.R., 334.

Appellants were the original plaintiffs and sued their coheirs for partition of an undivided estate. Haji Kyaw, the present respondent, applied to be made a defendant on the ground that he was an heir of the estate-owners U Shwe Yauk and Ma Apu. In evidence, however, he alleged that the land had been gifted to him by Shwe Yauk and fought the case on this ground and not on the ground that he was entitled to inherit.

He did not file a written statement.

It is admitted that under Mahomedan law he has no claim to inherit, because his father predeceased Shwe Yauk.

The Court of first instance found that Haji Kyaw had failed to prove the gift to him and gave plaintiffs a decree for two-fifths.

On appeal the District Court was not satisfied with the issues framed and remanded the case for a finding on fresh issues, the most important being whether the land shown in plan E was gifted to (Haji) Saya Kyaw. The Township Court again found the gift not proved and the District Court concurred in this finding but on the ground that plaintiffs had all along been treating Haji Kyaw and the other children of Maung Po as coheirs and allowing Haji Kyaw to work the land in rotation and on payment of a share of the mortgage debt gave Haji Kyaw a decree for one-fourth.

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In so doing the District Court was wholly unjustified.

Haji Kyaw was admittedly not an heir. He based his claim on an alleged gift, which was not proved.

He cannot be allowed to succeed on a claim, which he did not set up, but which has been put forward for him by the Court of first appeal. The mere fact that the heirs were kind-hearted enough to allow Haji Kyaw to work the land in turn, as if he had been an heir, did not convert him into an heir, nor could it operate as an estoppel against his coheirs. Haji Kyaw had to stand or fall by the case he set up. He fell and his claim disappeared.

The Judge of the District Court does not appear to be aware of the many authorities to the effect that the determination in a cause must be founded upon a case set up in the pleading or involved in or consistent with the pleading.

It will be sufficient if I refer him to *Christensen* v. *Shuti* (1) and *Ma Htwe* v. *Maung Lun* (2).

The advocate for respondent now contends that his client has been in adverse possession for over twelve years. This is not borne out by the evidence and is not in accordance with the finding of the District Court, to which respondent has filed no objection.

There is no necessity to remand the case for a finding on this point as suggested.

The appeal will be allowed. The decree of the District Court is reversed and the decree of the trial Court restored with all costs.

Criminal Revision No. 17 of 1920. 27th January.

Before H. S. Pratt, Esq., M.A., I.C.S.

G. ZAPANTIS AND ONE *v.* KING-EMPEROR.

Mr. J. N. Basu—for Applicants.
Mr. H. M. Lutter—for the Crown.

Penal Code—173.

Held,—that a refusal to accept a summons, when tendered, does not amount to intentionally preventing service of summons, since under both the Civil and Criminal Codes of Procedure service can be effected by tender. I.L.R., 5 Mad., 199.

Applicants G. Zapantis and C. W. Pike were convicted by the Subdivisional Magistrate, Maymyo, under section 186 of the

(1) 5 L.B.R. p. 76. (2) 8 L.B.R., p. 334.

Penal Code of obstructing a public servant in the discharge of his public functions. On appeal the District Magistrate set aside the convictions under section 186 and holding that there was a *primâ facie* case of an offence under section 173 ordered a retrial under that section for preventing service of summons.

The account of the transaction as given by the process-server was that he went to the house of Zapantis with a summons and tendered it to him but the latter refused to take it.

When it was tendered a second time Zapantis crumpled it up and threw it on the floor. When tendered a third time he refused to accept it.

It was alleged that Pike subsequently ejected the process-server from the shop.

A refusal to accept a summons. when tendered does not amount to intentionally preventing service of summons, since under both the Civil and Criminal Codes of Procedure service can be effected by tender.

This was the view taken by a Bench of the Madras High Court in *Queen* v. *Punamalai Nadan* (1), which quoted with approval the previous case of Queen v. Arumuga Nadan in which the facts were almost identical with those of the present case. It was pointed out in the earlier case that the accused cannot be said to have prevented service of the summons, because it was actually served upon him. His throwing it down was no offence. In order to commit an offence under section 173 it would have been necessary for Zapantis to prevent the process-server from tendering the summons. This he did not do.

I am therefore of opinion that the order of the District Magistrate directing a new trial was not justified, and set it aside accordingly.

(1) I.L.R. 5, Mad., 19

Criminal Revision No. 82 of 1920. 4th March.

Before H. S. Pratt, Esq., M.A., I.C.S.,

KING-EMPEROR *v.* NGA PO LWIN.

Penal Code—203.

Held,—that section 203 of the Indian Penal Code applies only to information volunteered by the informant and not to a false statement made in the course of a examination by a Police Officer.

Nga Po Lwin has been convicted under section 203 of the Penal Code of giving false information with respect to an offence.

The alleged false information was contained in a statement made by the accused, when he was examined by the Police in connection with a murder case.

It has repeatedly been ruled that section 203 only applies to information volunteered by the informant and not to a false statement made in the course of an examination by a Police Officer. The conviction was wrong and must be set aside.

Civil Second Appeal No. 287 of 1919. 22nd December.

Before H. S. Pratt, Esq., M.A., I.C.S.

MA NYI MA *v.* MAUNG YAN SHIN.

Mr. J. C. Chatterjee—for Appellant.

Mr. C. G. S. Pillay and *Mr. Samson*—for Respondent.

Negotiable Instruments—8.

Specific Relief—42.

Plaintiff sued the widow of his deceased son for a declaration of title to certain promissory-notes drawn in favour of his son and to an injunction restraining the widow, who was in possession, from invading his rights thereto. His allegation was that the monies lent were his and lent on his behalf by his son.

Held,—that as Plaintiff was not the holder of the notes within the meaning of section 8 of the Negotiable Instruments Act and had no right of suit thereon he was not entitled to the declaration sought.

Plaintiff Maung Yan Shin sued for a declaration that he was the rightful owner and possessor of landed and other properties, moveable and immoveable, as set forth in the schedule to the plaint, and for an injunction restraining the Defendant Ma Nyi Ma from invading his right to and enjoyment thereof.

The declaration and injunction was granted, except with respect to certain unimportant items, and confirmed on appeal.

This appeal is concerned mainly with the landed properties and promissory-notes.

Plaintiff is the father and Defendant the widow of the deceased Maung On.

Defendant Ma Nyi Ma has obtained letters of administration to her husband's estate. The facts are that father and son lived together and the son managed his father's business and estate and dealt with his property exactly as if it had been his own.

Maung Yan Shin was an old man and expecting that his son would succeed to his estate on his death appears to have allowed him an absolutely free hand in monetary matters and to have made no distinction between what was his and what was his son's.

The son lent out large sums on promissory-notes which were drawn in his favour and not in his father's.

As the District Court remarked there is not "the slightest doubt that the Plaintiff as he grew increasingly aged, left matters more and more to Maung On, and even consented to have Maung On's name on the business documents to save trouble and expense, if at the time of realisation he should be dead."

One of the main objections to the findings of the lower Court is that Plaintiff having sued for a declaration under section 42 of the Specific Relief Act was bound by the proviso to seek for consequential relief and should have sued for possession.

It is argued that there being no prayer for possession the suit was not maintainable.

The plaint was framed on the basis of Plaintiff's possession and the District Court held that Plaintiff was in physical and constructive possession at the time of filing the suit, because Defendant was a mere trespasser.

As regards the promissory-notes I do not think this position is tenable.

Physical possession was undoubtedly with the Defendant and it was her removal and appropriation of the notes that really led to the present suit.

The prayer for an injunction was consequential relief and I am not prepared to hold that as regards the property other than the promissory-notes, the suit was bad for failure to ask

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for consequential relief. As regards the eighteen plots of land in suit, the first six are not now in dispute.

As regards the other twelve there is evidence as to Plaintiff being the owner, which has been accepted by both Courts. There is no reason to go behind the finding of the lower Courts as to the ownership of the lands.

The case of the promissory-notes is, however, entirely different and neither the trial nor the first Appellate Court has considered the effect of section 8 of the Negotiable Instruments Act, which defines the holder of a promissory-note as any person *entitled in his own name* to the possession thereof and to receive or recover the amount due thereon from the parties thereto.

As pointed out in Bhashyam and Adiga's Commentary (2nd Edition, page 60) the use of the words "entitled in his own name" in the definition is most significant, and they were inserted by the legislature for the purpose of preventing any one from claiming the rights of a holder under the Act on the ground that the ostensible owner was a mere benamidar.

The notes are drawn in favour of Maung On, deceased by name and Plaintiff cannot therefore be the holder, so long as the notes have not been endorsed or assigned in his favour.

He cannot sue on them even, if he is granted a decree declaring his title to them.

The only person who can do so is the legal representative of deceased, and that undoubtedly is the Defendant, his widow and administratrix of his estate.

The presumption is ordinarily that when a man lends money in his own name and a negotiable instrument is executed in his favour, the money lent is his, unless fraud or misrepresentation is alleged.

There is no question of fraud since the money was undeniably lent by the son in his own name with the full concurrence of his father.

I should be inclined to hold that, when the father allowed his son to lend the money in his own name, the property in the loans passed to the son, even if the money was originally the father's, but it is not necessary to decide this point for the purposes of this appeal.

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I do not see how the father can possibly have any right to a declaration of title in promissory-notes drawn in favour of his son with his consent as against the legal representative of the son.

I am of opinion that so far as the promissory-notes, which are the most important items in the suit, are concerned the Plaintiff was not entitled to a declaration of title.

The decree of the lower Courts is modified and it is ordered that the suit be dismissed so far as the promissory-notes are concerned.

Appellant will be allowed proportional costs throughout.

Before B. H. Heald, Esq., I.C.S.

U NE MEIN *v.* MA HNIN ON.

Civil Appeal No. 368 *of* 1918. 31*st October* 1919.

U KYUN KYAW
HIGHER GRADE
MYINGYAN.

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

Transfer of Property—123.

Held,—that Buddhist religious gifts are not excepted from the operation of section 123 of the Transfer of Property Act.

9 L.B.R., 258.

The respondent Ma Hnin On claimed letters of administration to the estate of her sister Ma Wa Bauk who died without other heirs.

The Appellant U Ne Mein, who is a *pongyi* admitted that Respondent was Ma Wa Bauk's sole heir, but objected to the grant of letters to her on the ground that there was no estate to administer, Ma Wa Bauk having given all her property to him as a "poggalika" gift before her death.

The District Court tried issues as to whether or not Ma Wa Bauk did give her property to Appellant as alleged and whether if so the gift was valid, and after hearing the evidence came to the conclusion that no properties were ever given to Appellant.

Letters were accordingly granted to Respondent.

The *pongyi* now comes to this Court on appeal on the following grounds:—

(1) that there was a valid gift, and

(2) that the judgment of the Lower Court was against the weight of evidence.

Appellant's learned Advocate suggests that a gift made by a Burmese Buddhist layman to a Buddhist priest for the good

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of the giver's soul is a matter of religious usage and that therefore the provisions of section 123 of the Transfer of Property Act do not apply to it. This suggestion is met by a reference to the Lower Burma case of *U Zeyanta* v. *U Naga* (1) where it was said that "Burmese Buddhist religious gifts are not excepted from the operation of that section."

I entirely agree with that ruling which disposes of Appellant's entire case, since he does not allege that the gift was effected by registered instrument, and if the gift was invalid there was clearly an estate to administer.

I therefore see no reason to interfere with the order of the Lower Court granting letters to Respondent and I dismiss the appeal with costs, Advocate's fee to be one gold mohur.

Civil Appeal Case No. 103 *of* 1919. 31*st October.*

Before B. H. Heald, Esq., I.C.S.

MA PE PO *v.* MA LAT GYI.

Mr. L. Pillay—for Applicant.

Probate and Administration—45, 46, 94.
Indian Succession—229, 230, 273.

On the death of the executor or administrator of a deceased person, the heir of the executor or administrator does not succeed to his rights as executor or administrator, and the deceased person's estate is unrepresented until new Letters of Administration are granted.

12 B.L.R., 423.
25 W.R., 489.

The present Appellant, Ma Pe Po, applied for Letters of Administration to the estate of Maung Thi Gaung on the ground that she was his adoptive daughter.

Ma Lat Gyi, wife of the present Respondent, also applied for Letters on the ground that she was Thi Gaung's sister.

The District Court framed two issues, namely,

(1) Who is the fitter person to obtain Letters, Ma Lat Gyi or Ma Pe Po?

(2) Is Ma Pe Po entitled to Letters?

After hearing the evidence the Court held that Appellant failed to prove her adoption and passed an order granting Letters to Ma Lat Gyi.

Appellant appeals on several grounds, but the sole ground argued is that the issues framed were not sufficiently definite to

(1) 9 L.B.R., 258.

give Appellant notice of what facts she had to prove. There is clearly no substance in that ground. Appellant claimed Letters solely on the strength of her adoption and all her evidence was obviously called to prove that she was adopted. The second issue was clearly intended to raise the question of her adoption and she was certainly not prejudiced by the fact that it did not mention that adoption in so many words. As for the rest of the grounds I agree with the trial Court that she failed to prove the adoption she alleged and that she was not entitled to Letters as against Ma Lat Gyi.

I therefore dismiss the appeal summarily.

I note, however, for the information of the District Court that the ruling of the Chief Court of Lower Burma in the case of *Shwe Yin* v. *Ma On* (1) is not in my opinion to be read as warranting the issue of Letters as a matter of course to the Respondent, Maung Yun, as heir and legal representative of his deceased wife, Ma Lat Gyi. The right to claim Letters is, I think, purely personal and does not survive to the heir and legal representative of the claimant. Provisions for the grant of Letters in respect of effects unadministered (*de bonis non*) are contained in sections 45, 46 and 94 of the Probate and Administration Act which correspond word for word with sections 229, 230 and 273 of the Indian Succession Act, and under the latter Act it has been held in the case of *De Souza* v. *The Secretary of State* (2) that the English Law of "Derivative Executorship" does not apply and that "upon the death of the executor or administrator of a deceased person, the estate of the latter is absolutely unrepresented until some one comes forward and gets a grant of Letters."

The death of the person to whom a grant has been made before Letters have been actually issued is said by Kinney in his Commentary on the Probate and Administration Act (2nd Edition, page 87) to be a good ground for revoking the grant under the provisions of section 50 (4) of the Act, but it seems to me that in any case the administratorship comes to an end with the death of the administrator and that whether Letters have actually been issued or not, no revocation is necessary.

(1) 12 B.L.R., 423. (2) 25 W.R., 489.

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In the present case all that has been decided is that Ma Lat Gyi personally was entitled to Letters and that, as against her Ma Pe Po was not entitled.

Any claim to Letters which Maung Yun or any one else may make will clearly be different from Ma Lat Gyi's claim and will need to be scrutinised afresh under the provisions of section 23 (or possibly section 46) of the Act.

Civil 2nd Appeal No. 158 *of* 1919. *March 15th,* 1920.

Before H. S. Pratt, Esq., M.A., I.C.S.

MA HLA YE AND TWO *v.* MAUNG TUN MAUNG.

Mr. D. Dutt—for Appellants.

Mr. S. Mukerjee—for Respondent.

Specific Relief—21.—*Award by Arbitrators—Effect of*—.

The existence of an award made by arbitrators in consequence of a reference to arbitration by mutual agreement bars the decision of the subject matter thereof in a civil suit until the award has been set aside by the decree of a competent Court.

U.B.R., 1897-1901, II, 542.
I.L.R. 33 Bom., 401.
8 L.B.R. 157.
C. A. No. 440 of 1914 (unpublished).

Appellants were some of the Plaintiffs in Civil Suit No. 8 of 1917 in the Subdivisional Court, Myingyan.

On the 15th January 1918 the suit was adjourned for settlement out of Court, and the following day the Advocate for Plaintiff, with Plaintiff Maung Hmwe, and the Defendant, with his Advocate, filed an application to have the suit dismissed on the ground that the parties had agreed to refer the matter to arbitration.

The Subdivisional Judge should have dismissed the suit as the Advocates by consent asked him to do so, but declined, because Maung Lôn, 1st Plaintiff, had not actually signed the agreement of reference to arbitration and only his cross mark appeared thereon. He overlooked the fact that his Advocate had ample authority to consent to or ask for the dismissal of the suit on behalf of his client.

The agreement of reference was filed on 16th January 1918.

The Court proceeded to issue notice to 1st Plaintiff, who appeared and denied his assent to the petition. The Court thereupon proceeded, in spite of Defendant's objection, to try

the case as if there had been no reference to arbitration, and pronounced the award of the arbitrators, which was produced, invalid.

On appeal the District Court found that Maung Lôn had signed the agreement of reference, that the award had not been proved to be invalid, and held that the reference was still good and, under section 21 of the Specific Relief Act, the suit must be dismissed, the Plaintiffs being left to file a suit to set aside the award.

The award was dated 14th March 1918 and was given by three out of the five arbitrators.

Their evidence was that, as by the terms of the reference, the decision of a majority of the arbitrators was to prevail, they considered that an award by three was a compliance with the reference.

The learned Judge of the District Court has overlooked the fact that the final clause of section 21 to the Specific Relief Act has been superseded by paragraph 18 of the Second Schedule to the Civil Procedure Code of 1908. There is, however, ample authority for the view taken by him that the existence of the award was a complete bar to the suit, until it had been set aside by a Court of competent jurisdiction. This was the view taken by this Court in *Maung Shwe Nyo's case* (1).

In *Bhaurao* v. *Radhabai* (2) a bench of the Bombay High Court held that an award is equivalent to a judgment whether it has passed into a decree or not, and is binding upon the parties. In *San Nyein* v. *Ma Kyaw* (3), Twomey, J., pointed out that a complete and final award is equivalent to a final judgment binding on the parties, and bars a civil suit relating to the matters decided by the arbitrators.

In *Maung Aung Myat* v. *Maung Kaung Kyaw* (4) the Additional Judge of this Court held that the subsistence of an award barred a civil suit, and that if the award was an improper one the remedy was to sue to have it set aside. There is no doubt that Maung Lôn was a party to the reference to arbitration and he has not appealed.

(1) U.B.R., 1897-1901, p. 542.
(2) I.L.R. 33 Bom., 401.
(3) 8 L.B.R., 157.
(4) Civil Second Appeal No. 440 of 1914.

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The present Appellants were all parties to the reference, and one of them actually appeared with his Advocate and applied to have the suit dismissed in consequence of the agreement of reference.

An award was made by a majority of the arbitrators and the evidence does not prove its invalidity, even supposing that this question could be determined in the suit during the pendency of which the reference to arbitration was made.

I am of opinion that the existence of the award bars the decision of the subject matter thereof in a civil suit, until the award has been set aside by the decree of a competent Court.

The appeal is dismissed with costs.

Civil Miscellaneous Case No. 11 *of* 1920, *dated 26th April.*

Before B. H. Heald, Esq., M.A., I.C.S.

THE BURMA OIL CO., LTD., *v.* BAIJNATH SINGH AND ONE.

Messrs. Lentaigne and Swinhoe—for Applicants.

Mr. Higginbotham—for Respondent.

Upper Burma Land and Revenue Regulation—Section—53 (2) (ii).

Held—that section 53 (2) (ii) of the Upper Burma Land and Revenue Regulation does not bar the jurisdiction of the ordinary Civil Courts in respect of disputes between private persons regarding the ownership or possession of State land or any lien upon or other interest in such land or the rents, profits or produce thereof.

8 L.B.R., 227.
U.B.R., 1892-96, II, 327, 634.
U.B.R., 1897-01, II, 207, 209, 211, 443.
U.B.R., 1902-03, II, Civ. Proc. 1.
U.B.R., 1904-06, II, Land and Revenue 1, 5.
II U.B.R., 1914-16, 157.
Upper Burma Land and Revenue Manual, 1911, p. 83.
7 L.B.R., 10.

Petitioners' learned Advocate says that on this application he desires to raise two questions only—

(1) whether the word "claims" in section 53 (2) (ii) of the Upper Burma Land and Revenue Regulation (III of 1889) can be read as including disputes between private individuals or must (as he contends) be interpreted as excluding such disputes and as meaning only "claims as against the State,' and

(2) whether the enactment of section 53 (2) (ii) of the Regulation was *ultra vires* of the Legislature.

He admits that if the first of these two questions be decided in his favour the second will not arise in this case because the present litigation involves only a dispute between private persons, and such a dispute will not be excluded from the cognisance of the ordinary Civil Courts unless the word "claims" in section 53 (2) (ii) is to be interpreted as including such disputes.

It is a well recognised principle of judicial interpretation that the language of Acts which deprive the subject of the right of recourse to the ordinary Civil Courts must not be extended beyond its least onerous meaning unless clear words are used to justify such extension, and this principle must be borne in mind in deciding what meaning must be attached to the word "claims" in the section under consideration since that section expressly limits the right of recourse to the ordinary Civil Courts.

The relevant parts of the section are as follows:—"Except as otherwise provided by this Regulation—

"(1) A Civil Court shall not have jurisdiction in any matter which * * * * a Revenue Officer is empowered by or under this Regulation to dispose of * * * * * and in particular

"(2) A Civil Court shall not exercise jurisdiction over any of the following matters, which shall be cognisable exclusively by Revenue Officers, namely,—

* * * * *

"(ii) any claims to the ownership or possession of any State land or to hold such land free of land revenue or at a favourable rate of land revenue or to establish any lien upon, or other interest in, such land, or the rents, profits, or produce thereof."

That section was adapted from section 158 (2) of the Punjab Land and Revenue Act (1887) and somewhat similar provisions occur in section 56 of the Lower Burma Land and Revenue Act (1876) and in section 41 of the Lower Burma Town and Village Lands Act, 1898.

Both the Lower Burma Land and Revenue Act and the Upper Burma Regulation have been differently interpreted by the Courts at different times, but a Full Bench of the Chief

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Court of Lower Burma has recently decided (1) that the word "claims" as used in section 56 of the Lower Burma Act means claims against Government and not disputes between private persons.

It does not of course follow that because "claims" is so interpreted in the Lower Burma Act it must be similarly interpreted in the Regulation, since the wording of the two enactments is different, and some of the arguments on which the interpretation in the Lower Burma case was based do not apply to the Upper Burma Regulation. It is necessary therefore to consider the matter independently.

In the earliest reported cases in this Court in which the question was raised (2) it was held on general grounds that the Civil Courts have jurisdiction to decide disputes between private individuals relating to State lands, but the particular wording of Section 53 (2) (ii) was not considered.

In several cases in 1897-98 (3) it was held that where one private person claimed possession of, or an interest in, State land as against another, section 53 (2) (ii) barred the jurisdiction of the Civil Courts.

It was probably on the strength of those rulings that the Financial Commissioner amended his Notification No. 384 of 1914 (4) so as to include "claims between private individuals" as well as "claims against the State."

The same interpretation of section 53 (2) (ii) of the Regulation was adopted by this Court in all the reported cases (5) up to 1916, but in that year the learned Judicial Commissioner came to the conclusion (6) that that section does not bar the jurisdiction of Civil Courts except as regards claims made under section 24 (2) of the Regulation. He based that conclusion on a consideration of the wording of section 53 itself, but he also suggested that it was probable that the claims referred to in section 24 were claims against the State and not disputes

(1) 8 L.B.R., p. 227.
(2) U.B.R., 1892-96, II, 327, 634.
(3) U.B.R., 1897-1901, II, 207, 209, 211.
(4) Page 83, Upper Burma Land and Revenue Manual, 1911.
(5) U.B.R., 1897-1901, II, 443, 1902-03, II, Civ. Proc. 1, 1904-06, II, Land and Revenue Regulation 1 and 5.
(6) II U.B.R., 1914-16, 151.

between private individuals. It seems to me that that suggestion gives the clue to the solution of the whole difficulty. It is obvious that section 53 (2) (ii) relates back to section 24 (2). Section 24 gives Revenue Officers power to dispose of certain "claims" and section 53 (2) in summarising the matters which Revenue Officers are empowered by or under the Regulation to dispose of, naturally includes the claims mentioned in section 24. The words used in describing the claims in the two sections are identical except that section 24 described the lands to which the claims referred as land "declared" and "deemed to be" State, while section 53 (2) (ii) called the land merely "State land." The wording of section 53 (2) (ii) was undoubtedly taken direct from section 24 (2) and when the same word was used in the same context in two sections of the same enactment, it seems reasonable to suppose that it was used in the same sense in both. But the word "claims" as used in section 24 must clearly be restricted to "claims as against the State" since the claims mentioned in that section are claims contesting declarations by the State that the land is State land, and the period of limitation provided by that section would be entirely inappropriate to disputes between private individuals. I have no doubt therefore that the word "claims" in section 53 (2) (ii) also means "claims as against the State" and does not include disputes between private individuals and that the "claims" referred to in section 53 (2) (ii) are neither more nor less than the claims mentioned in section 24 (2). The wider interpretation which has been put on section 53 (2) (ii) has, I think, been due partly to reading that section alone, without considering its relation to section 24 (2) and partly to the interpolation of the words "which shall be cognisable exclusively by Revenue Officers" in section 53 (2). Those words, which do not occur in the corresponding section of the Punjab Act, do not in my opinion add anything to the meaning of the section and if the Regulation had been carefully drafted would have been unnecessary. They were, I think, obviously added by a diffident draughtsman *ex abundanti cautela* to guard against possible omissions to state expressly elsewhere in the Regulation or Rules that Revenue Officers were empowered to dispose of each and every one of the matters mentioned in the section as

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particular instances of matters which Revenue Officers were empowered by or under the Regulation to dispose of.

It would appear therefore from a consideration of sections 24 and 53 (2) (ii) together that the word "claims" in those sections must be interpreted as meaning only "claims as against the State," and not as including disputes between private persons, and this conclusion is corroborated by the facts that in section 30 of the Regulation where the contest is between private persons the word used is not "claim" but "dispute," that in the Lower Burma Land and Revenue Act the same distinction between "claims" and "disputes" is made in a similar context, and that in the Lower Burma Town and Village Lands Act it is expressly stated that the "claims" excluded from the jurisdiction of the Civil Courts are "claims as against the Government."

Although, therefore, at first sight it might appear that the word "claims" in section 53 (2) (ii) of the Regulation was wide enough to include claims arising between private individuals as well as claims against the State, nevertheless I am constrained to hold that it cannot bear that meaning and that it must be restricted to claims against the State.

I hold accordingly that section 53 (2) (ii) does not bar the jurisdiction of the ordinary Civil Courts over disputes between private persons regarding the ownership or possession of State land or any lien upon or other interest in such land or the rents, profits, or produce thereof.

On this finding the question whether the enactment of section 53 (2) (ii) of the Regulation was *ultra vires* of the Legislature does not arise so far as the present litigation is concerned, but I may perhaps note, with reference to the arguments on the subject in this Court, that what Their Lordships of the Privy Council said in the Moment case (7), which is always cited in this connection, was that the effect of section 65 of the Government of India Act of 1858 "was to debar the Government of India from passing any Act which could prevent a subject from suing the Secretary of State in Council in a Civil Court in any case in which he could have similarly sued the East India Company," and that although Their Lordships seem to have gone beyond the previous decisions in holding that a subject

(7) 7 L.B.R., 10.

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could sue the Secretary of State for damage done by Government not as a private Corporation succeeding to the rights and liabilities of the East India Company but as representing the Crown, they have not decided that it is beyond the powers of the Government of India or the Local Government to bar the jurisdiction of the Civil Courts provided that provision is made, as it is made in the Upper Burma Land and Revenue Regulation, for recourse to Revenue Courts or Officers as a substitute for recourse to the ordinary Civil Courts.

Before B. H. Heald, Esq., M.A., I.C.S.

Civil Appeal Case No. 231 *of* 1919. *9th January* 1920.

[DULABDASS AND ONE *v.* MA WIN.]

Mr. A. C. Mukerjee—for Appellant.

Mr. H. M. Lutter—for Respondent.

Contract—108.

Held,—that Exception 1 to section 108 of the Contract Act applies to sales of goods made by an agent in defiance of his principal's instructions, provided that the buyer acts in good faith and that the circumstances are not such as to raise a reasonable presumption that the agent has no right to sell the goods.

I.L.R. 38 Mad., 783. I.L.R. 27 Mad., 424.
12 Ben. L.R., 42. 22 C.W.N., 1042.
I.L.R. 24 Bom., 458. 37 P.R. 107, 129.
I.L.R. 11 Bom., 704.

The Respondent Ma Win sued the Appellant Dulabdass to recover a diamond ring or its value Rs. 2,673. Her case was that on the 13th of October 1914, she bought the ring for Rs. 2,673 from one Ma Chôn whom she believed to be owner of the ring and who delivered possession of it to her, giving her a receipt for the price, that in November 1914, the police, while investigating a criminal charge against Ma Chôn, took possession of the ring and sent it to the Criminal Court as an exhibit, that the Magistrate convicted Ma Chôn and delivered the ring to Dulabdass, and that she being owner of the ring was entitled to recover it or its value from Dulabdass.

Dulabdass in his written statement said that Ma Chôn was a mere broker of his who had no right to sell the ring, that she was convicted of criminal breach of trust in respect of the ring so that Respondent's transaction with Ma Chôn gave her no title to the ring, that although he entrusted the ring to Ma Chôn and received it back from the Criminal Court, he was not

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owner but was only an agent of the owner with limited authority, that he had returned the ring to the owner, and that the Respondent could not recover either the ring or its value from him.

The Respondent then amended her plaint so as to implead the second appellant, Magnanlal Pranjivan and Company, to whom the ring was said to have been delivered by Dulabdass.

The second appellant filed a written statement alleging that he too was merely an agent of the real owner of the ring, that he had delivered the ring to the real owner, and that Respondent could not recover either the ring or its value from him. He also, like the 1st Appellant, alleged that Ma Chôn had no right to sell the ring and that Respondent acquired no title to it by her transaction with Ma Chôn.

The trial Court, after hearing the evidence, came to the conclusion that Respondent bought the ring from Ma Chôn in good faith believing that Ma Chôn had power to sell it, that Ma Chôn was an agent of the owner of the ring and was in possession of the ring by the consent of the owner and that therefore the Respondent acquired a good title to the ring by her transaction with Ma Chôn and was entitled to recover either the ring or its value from both the Appellants.

Appellants file a joint appeal on the following grounds, namely:—

(1) that Respondent had no cause of action against them because they were not owners of the ring and were not in possession of it but were only agents of the owner, to whom they had returned the ring;

(2) that in any case they could not be jointly liable;

(3) that Ma Chôn's possession of the ring was not such as to enable her to give Respondent a good title to it;

(4) that it was not proved that the Respondent acted in good faith in her transaction with Ma Chôn;

(5) that the lower Court failed to frame proper issues;

(6) that the lower Court failed to give due weight to their evidence;

(7) that the lower Court ought not to have referred to the record of the proceedings of the Criminal Court;

(8) that the lower Court was influenced by the decisions in other cases concerning articles disposed of by Ma Chôn: and

(9) that the decision of the lower Court was contrary to law and to the weight of evidence and the probabilities ;

I have read the record and heard the learned Advocates on both sides at considerable length.

The first and second grounds of appeal are met by a consideration of the principles embodied in sections 230 and 231 of the Contract Act. Respondent bought the ring from Ma Chôn believing her to be a principal, but according to the Appellants Ma Chôn was merely an agent with limited powers. But if she was an agent, she was agent of an undisclosed principal and when Respondent had paid the money and failed to get back the ring, she was entitled to sue either Ma Chôn or the 1st Appellant or both. Similarly since the 1st Appellant again claims to have been the agent of an undisclosed principal, namely the 2nd Appellant, Respondent instead of suing the 1st Appellant alone was entitled to sue both the 1st and the 2nd Appellants and that is what she did. The fact that the 2nd Appellant claims to be agent of still another undisclosed principal does not affect Respondent's right of suit as against him. It merely gives her a right to sue his principal also if she chooses and she has chosen not to exercise that right. She undoubtedly had a right to sue both the Appellants, and, if they have to pay, they may have their remedy against their principal, but that remedy does not concern Respondent.

I hold therefore that there is nothing in the first two grounds of appeal.

The third ground is admittedly based on the Madras case of *Seshappier* v. *Subramonia Chettiar* (1) which has already been considered both by my learned predecessor and by the Judicial Commissioner himself in connection with other transactions of Ma Chôn's. In Civil Appeal No. 146 of 1916 my learned predecessor distinguished that case on the grounds (1) that it dealt with pawning and not with sale and that the language of section 178 of the Contract Act is different from that of section 108, (2) that in that case it was clear that the person who pawned the jewel got possession of it by means of an offence, and (3) that in that case it was not clear whether or not the transaction on which the suit was based was effected in good faith. The learned Judicial Commissioner before

(1) I.L.R. 38 Madras, 783.

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whom the case came in review went further and said th appeared to him that the Judge who decided the Madras went beyond the provisions of the law contained in section and 178 of the Contract Act in holding that in such case purchaser must prove that by some act or omission the owner has forfeited his right to recover possession.

A number of cases have been cited before me as sho that the learned Judicial Commissioner was wrong and the word "possession" is used in sections 108 and 178 o Contract Act in a special sense.

The earliest of these cases is *Greenwood* v. *Holquett* in which it was held that the possession of the hirers of a p on a hire-purchase agreement was not such possession as w validate a sale of the piano by the hirers to an inno purchaser. The learned Judges who decided that case that the words "notwithstanding any instructions of the o to the contrary" in Exception 1 to section 108 of the Cont Act "appear to show that the possession which is meant by first part of the exception is a possession which is unqual and not to be restricted otherwise than by the owner gi instructions to the person who has it. It is the kind of pos sion which a factor or an agent has where the owner of goods, although he has parted with the possession, may instructions to the person in possession what to do with goods . . . . . It is such possession as an owner has an such a case it seems to have been intended that the pe selling contrary to his instructions should give a title to buyer if the buyer acted in good faith. We think that exception does not apply where there is only a qualified pos sion such as a hirer of goods has, or where the possession is a specific purpose. In such a case the owner has no righ give instructions. The nature of the possession and the pow of the person having it are determined by . . . . the conti under which possession was taken."

The next case cited is that of *Shankar* v. *Mohanlal* (3 which a person entrusted with the custody of cattle sold th and the owner was allowed to recover them from an innoc purchaser. In that case the learned Judge said that "tho the general rule of a person's not being able to transfer a ri

(2) 12 Bengal Law Reports, 42. (3) I.L.R. 11 Bombay, 704.

not belonging to him is qualified by Exception 1 to section 108 . . . . . yet it is plain that "possession by consent of the owner" in that section is far from extending to every case of detention of chattels with the owner's consent. The exception has particular relation to the cases of persons allowed by the owners to have the *indicia* of property or possession under such circumstances as may naturally induce others to regard them as owners and constituting some degree of negligence or defect of precaution imputable to the true owners."

The next case is that of *Seager* v. *Hukma Kessa* (4) in which a husband was held entitled to recover jewellery belonging to him but kept in the possession of his wife and pledged by her without his knowledge. In that case the learned Chief Justice said that "to create a pledge under section 178 of the Indian Contract Act the pledger must be in "juridical possession . . . . . that mere custody will not suffice," and that the words of the section "mark a clear distinction between possession and custody."

In the case of *Naganada* v. *Bappu* (5) the owner was allowed to recover an article of jewellery which he had hired out and which the hirer had pledged. In that case one of the learned Judges said, "The word possession in the section (178) is clearly not intended to cover all cases in which the goods, etc., are in the physical control of the pledger because the 'possession' in the first part of the section is distinguished from the custody of them in the last paragraph of the same section."

The case of *Seshappier* v. *Subramonia Chettiar* has already been mentioned. In that case the owner of an article of jewellery gave it to a person to find a purchaser for it on an understanding that the sale was to be made by the owner himself and not by the agent. The person who took the jewel pledged it and the owner was allowed to recover it, the learned Judge remarking "that sections 108 and 178 of the Contract Act . . . . . proceed on the principle that *primâ facie* the rights of the legal owner should be protected unless he has done something to induce innocent purchasers or pledgees into the belief that the immediate possessor is the true owner: mere *bonâ fides* on the part of the purchaser or pledgee is not

(4) I.L.R. 24 Bombay, 458. (5) I.L.R. 27 Madras, 424.

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enough, he will have to prove that by some act or omission the true owner has forfeited his right to recover possession."

The next case is that of *Roop Chand Jankidas* v. *The National Bank of India* (6) in which certain share certificates with blank transfer deeds which belonged to the Bank and were in the custody of their Head Clerk were sold by him and were held to be recoverable by the Bank from an innocent purchaser on the ground that the word "possession" in Exception 1 to section 108 of the Contract Act did not include dishonest possession such as the Clerk's was when he sold the certificates.

After going through all these cases carefully I agree with the learned Judicial Commissioner that the interpretation which they put on sections 108 and 178 of the Contract Act strains the plain meaning of those sections.

Taking the cases seriatim I note as follows.

I do not agree with the learned Judges who decided *Greenwood* v. *Holquette* that the use of the words "notwithstanding any instructions of the owner to the contrary" suggest any inference that in every case covered by the Exception the possession must be such that the owner is in a position to give instructions. No such inference can possibly arise on any logical method of interpretation.

Similarly the distinction drawn in *Shankar* v. *Mohanlal* between possession and custody in respect of the *indicia* of property is unreal. Every person who has detention of a chattel has the "*indicia* of property" in that chattel and although by reason of extraneous circumstances such as the fact that he is not a person who is likely to be owner of such a chattel, the inference arising from his having those "*indicia* of property" may be weakened or destroyed, nevertheless, so far as the chattel itself is concerned he has all the "*indicia* of property" which possession of any sort can confer. Further, there is in my opinion no foundation whatever in the section itself for the learned Judge's suggestion that before the Exception can come into operation there must be any degree of negligence or defect of precaution imputable to the true owners beyond that involved in their consent to another person's possession.

(6) 22 C.W.N., 1042.

Coming to the case of *Seager* v. *Hukna Kessa* I am entirely unable to see that the fact that the word "custody" as used in the second proviso to section 178 suggests any inference that the word "possession" as used in the earlier part of the section means anything different from what possession ordinarily means. It might however be held that a wife's custody of her husband's property, while it is in his house, is not her possession but his, and this is probably what is meant in this particular case by saying that the wife's possession was not "juridical," it being regarded as analogous to the possession of a tenant or a borrower in Roman Law.

Similar remarks apply to the case of *Naganada* v. *Bappu* but in that case I am entirely unable to grasp the distinction which is sought to be made between possession and juridical possession. It seems to me clear that in English law the hirer of an article has "possession" and not that bare custody which a wife may be regarded as having in respect of her husband's goods or which the Clerk of a Bank has in securities which are in the possession of the Bank but are in his care.

The remarks made above on the case of *Shankar* v. *Mohan-lal* apply with equal force to the case of *Seshappier* v. *Subramonia Chettiar*. I do not think that there is any foundation in the section itself for the view that the purchaser has to prove anything beyond the owner's consent to the intermediate possession and his own *bonâ fides*, including of course the absence of circumstances raising a presumption that the person in possession had no right to sell.

Regarding the case of *Roop Chand Jankidas* v. *The National Bank of India* all that need be said is that the Clerk in that case was clearly not by the consent of the owner in the particular possession, which enabled him to dispose of the securities and therefore the case did not fall within the purview of Exception 1 to section 108 of the Contract Act.

The decisions in nearly all these cases seem to me to be unconvincing attempts to show that sections 108 and 178 of the Contract Act do not really mean what they say and that the word "possession" was used in them in a restricted sense. It is common knowledge that the section does not exactly reproduce the provisions of the English law and that it was the subject of much controversy at the time when the Contract

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Act was passed. The Commissioners, who originally drafted the section, said, "with regard to goods sold by a person who has no right to sell, the general rule of English law is that the owner of the goods retains the ownership notwithstanding his having lost the possession of them and their having been sold to a third person. But from this rule there is an exception in the case of goods sold in open market . . . . It cannot be denied that the subject is difficult. We have to consider, on the one hand, the hardship suffered by an innocent person who loses in this way his right to recover what was his undoubted property. But, on the other hand, still greater weight appears to us to be due to the hardship which a *bonâ fide* purchaser would suffer were he to be deprived of what he bought. The former is very often justly chargeable with remissness or negligence in the custody of the property. The conduct of the latter has been blameless. The balance of equitable consideration is therefore on the side of a rule favourable to the purchaser; and we think that sound policy with respect to the interest of commerce points to the same conclusion. We have therefore provided that the ownership of goods may be acquired by buying them from any person who is in possession of them, if the buyer acts in good faith and under circumstances which are not such as to raise a reasonable presumption that the person in possession has no right to sell them." That was clearly a very wide extension of the English law and it did not command itself to the Select Committee, who therefore omitted the reference to "goods" in Exception 1 and thus confined the operation of the exception to the case of goods transferred by certain mercantile documents, the transfer of which had by mercantile usage come to be regarded as effecting a transfer of the goods to which the documents referred and was so recognised in English law. If that amendment had been accepted the provisions of the section would have corresponded with those of the English law with the omission of the exception in favour of goods sold in open market and of goods sold by a former owner who had remained in possession. But the learned legislators who passed the Act did not approve of the omission and therefore re-inserted the word "goods" in the Exception. The collocation of that word with the list of mercantile documents which

immediately follows it in the Exception possibly diverted attention from the extremely wide definition of "goods" which had been given in section 76 of the Act and may have led the Legislature to imagine that they were doing little more than giving effect to the exceptions which were already recognised in English law, and to overlook the fact that, as passed, the first Exception to section 108 applied practically to any sale of any moveable property by any person in any kind of possession so long as that possession was by consent of the owner and the transferee acted in good faith. It seems unconceivable that the legislature intended to enact a provision from which it would follow that, if I hand over my bicycle to a friend's servant to be taken to my friend or to the keeper of a bicycle shop to be repaired, I should not be able to recover it in case the servant or shop-keeper subsequently proved dishonest and sold the machine, and therefore ever since the Act was passed the Courts have found it necessary to devise pretexts for excluding from the scope of the Exception cases which were covered by its express terms but which, they assumed, could not possibly have been contemplated as falling within its application. The line which the Courts have taken has been to impose various restrictions on the meaning of the word "possession." In this they have followed the lead given in the case of *Greenwood* v. *Holquette* which has come to be regarded as a leading case on the subject. It is, I think, unfortunate that that case was not argued by Council. If it had been I think that the whole course of the subsequent decisions would have been different. It would in my opinion have been better if the Courts instead of trying to strain the meaning of the words so as to exclude cases which presumably were not intended to come within the scope of the sections had expressly recognised the fact that the wording of the sections was wider than could possibly have been intended and had pointed out the difficulties which arise with a view to their being amended by legislation. It is to be noted that the Chief Court of the Punjab has not followed the other High Courts in explaining away the meaning of the word "possession" in these sections. In the case of *Framjee* v. *McGregor* (7) it held that Exception 1 of section 108 applied to a case where an owner of horses left

(7) 37 Punjab Record, 107.

Before B. H. Heald, Esquire, M.A., I.C.S.

Civil Second Appeal No. 444 of 1919 Dated 31st March 1920

MA ME I *v.* MAUNG LAUK HNYA AND TWO OTHERS.

Mr. N. M. Mukerjee—for Appellant.

Mr. Maung Su—for 1st and 2nd Respondents.

Buddhist—Law—Gift.

Held,—that gifts made by grandparents to grandchildren like gifts made by parents to sons entering the priesthood are merely contingent gifts and that the rules for such gifts are intended to operate merely as rules of inheritance and do not give the donee any claim as against the donor during the latter's life time.

S.J.L.B. 30 8 L.B.R. 190.

Appellant's case was that about 25 years ago, when she was a child of about eight, her grandparents U Kyi and Ma Kan sent for her from Lower Burma after her father's death and gave her the palm-grove, now in dispute, along with other property so as to ensure that she should receive a proper share of their inheritance, that she left all the property so given in the custody of her grandparents and returned at once to Lower Burma, that about ten years ago her grandmother, without her knowledge or consent, mortgaged the palm grove to Lauk Hnya and Ma Ein Yin, who are the present second and third Respondents, and that she was entitled to recover the grove from her grandmother on the strength of the gift and from the other Respondents on the ground that her grandmother, having given the property to her, had at the time of her transaction with those Respondents no interest which she could transfer to them.

So far as Appellant's claim as against her grandmother is concerned, her suit was clearly collusive, since it was admitted that she and her grandmother had together attempted to redeem the property from Lauk Hnya and Ma Ein Yin, and had been resisted on the ground that the transaction was a sale and not a mortgage. It was admitted also that Appellant and her grandmother on the one side and Lauk Hnya and Ma Ein Yin on the other had referred the dispute between them to arbitration, and it is clear that, when the attempt at arbitration proved abortive, Appellant adopted the device of framing her suit as a claim against her grandmother so as to avoid raising the question whether the transaction by which Lauk Hnya and Ma Ein Yin came into possession of the property was a mortgage or a sale.

The grandmother, Ma Kan, died soon after the institution of the suit and her daughter, Ma Tun Gywe, who was of course Appellant's aunt, being her father's own sister, was brought on the record as her legal representative. She filed a written statement alleging merely that the transaction with Lauk Hnya and Ma Ein Yin was a mortgage, but as that statement was manifestly inadequate, she was examined on oath before issues were framed and she then said that on her brother's death, about twenty years ago, her parents gave the palm grove to Appellant, that Appellant was put into possession of the property but returned it at once to the custody of her grandparents and returned to Lower Burma, and that about ten years ago her mother, Ma Kan, mortgaged the grove to Lauk Hnya and Ma Ein Yin. She admitted that her mother and Appellant had attempted to redeem the mortgage and that Lauk Hnya and Ma Ein Yin then alleged that the transaction was a sale and not a mortgage.

Lauk Hnya and Ma Ein Yin filed a written statement putting Appellant to proof of her title ; which they expressly denied. They said that Ma Kan was owner of the grove and sold it to them outright for Rs. 80 about the year 1897.

It is clear that on Appellant's suit as framed she had to prove not only the fact but also the validity of the gift which she alleged.

The trial Court, after hearing the evidence, came to the conclusion that there was an oral gift and that the change of possession which was alleged to have accompanied it was merely verbal, but held nevertheless that such a gift was sufficient to give Appellant a good title to the property, and that Ma Kan, who by the gift to Appellant had divested herself of all interest, had no power to transfer that property to Lauk Hnya and Ma Ein Yin. The learned Judge therefore gave Appellant a decree for possession of the property and for costs as against Lauk Hnya and Ma Ein Yin.

Lauk Hnya and Ma Ein Yin appealed, making both Appellant and her aunt Respondents, and the lower Appellate Court pointed out that in view of the fact that Appellant was a mere child at the time of the alleged gift, it was doubtful whether she was capable either of accepting a gift of immoveable property on her own behalf or of making a valid transfer of

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possession of such property to her grandparents. The learned Judge also pointed out that the crucial test of the completion of gifts under Burmese Buddhist Law is actual delivery of possession, and that in the present case no such delivery of possession could possibly be held to have been made. He therefore held that the gift was invalid, and he went on to say that in view of the fact that Appellant's grandmother, Ma Kan, was in possession of the property as owner up to the time of the alleged gift and remained in possession as ostensible owner with Appellant's consent during the 25 years which have elapsed since that gift. Lauk Hnya and Ma Ein Yin would be in the position of *bonâ fide* transferees without notice from an ostensible owner so that even if Appellant's story of the gift were true and if she could prove that the transaction was a mortgage and not a sale she would still have to redeem their mortgage before she could obtain possession of the property. Appellant's suit was therefore dismissed with costs.

Appellant now comes to this Court on second appeal on the following grounds, namely—

(1) that the gift was valid,

(2) that the lower Appellate Court was wrong in holding that a minor acting on his own behalf cannot legally either accept a gift of a immoveable property, or transfer possession of such property,

(3) that the Lower Court had no right to decide such questions as to the capacity of a minor without specific issues,

(4) that delivery of possession was not necessary to validate such a gift as Appellant alleged,

(5) that in any case delivery of possession was proved, and

(6) that, even if the gift was invalid, Appellant was entitled to redeem the mortgage and ought to have been allowed to amend her plaint so as to claim redemption.

I have read the records and heard Appellant's learned Advocate.

The argument on which the first and fourth of the grounds of appeal are based is raised for the first time in this Court and is based on a passage in May Oung's "Burman Buddhist

Law" recently published. That argument is that gifts made by grandparents to grandchildren are an exception to the ordinary rule of Buddhist Law under which an actual delivery of possession is necessary to validate a gift, and that such gifts are valid without any transfer of possession. I have no hesitation in accepting that as a true statement of the Burmese Buddhist Law. In the miscellaneous collection of rules to be found at the end of the 10th book of *Manugye*, where gifts generally are considered with reference to inheritance, the rule about gifts made by grandparents to grandchildren is clearly laid down in the following passage:—

"As for property divided by grandparents let there be no question whether possession was given or was not given. As the property is given, so let the grandchild have it."

The other texts on the same subject collected in Section 130 of Volume I of the Kinwun *Mingyi's* Digest give the same rule, which is also mentioned in the texts collected in Section 256 of the same volume of the Digest. I think therefore that there can be no doubt that the kind of gift mentioned in those passages is valid without transfer of possession.

But it does not follow that such a gift is a gift in the sense in which the word is ordinarily used in English law or even in ordinary parlance.

Twelve kinds of gifts are mentioned in the passage from *Manugye* referred to, and for the validity of all but two of them actual transfer of possession is necessary. The two exceptions are gifts made to a son on his entering the priesthood, which are commonly known as "Shinbyu" gifts, and gifts made by grandparents. The rules governing "Shinbyu" gifts are clearly laid down in the 10th book of *Manugye*, and have been judicially recognized in the cases of *Pan U v. Mi Kyu* (1) and *Pan Nyun* v. *Hla Sein* (2). In the latter of these two cases it was held that such gifts are merely contingent, not actual, and that the property so given remains absolutely at the disposal of the parents for their lifetime, the rules for such gifts operating not as between donor and donee, but as between the donee and his co-heirs, and affecting only the partition of the estate on the parents' death. Such gifts would seem therefore to be mainly if not entirely a mere

(1) L.B. Selected Judgments, 30. (2) 8 L.B.R., 190.

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apportionment of inheritance and not gifts in any strict sense at all.

The question then arises whether the effect of the only other kind of gift which as excepted from the general rule as to delivery of possession, namely, gifts by grandparents to grandchildren, is similar to that of "Shinbyu" gifts. Both are gifts to potential heirs, and the object of gifts to grandchildren is obviously a matter of inheritance; the intention of such gifts being apparently to secure that the grandchildren who, being presumably younger, might fare badly in competition with their elder uncles and aunts, shall receive such share of the inheritance as the grandparents consider fair.

Section 3 of the 8th book of *Manugye* says, that "if parents from affection have made gifts to their children, so long as those children are alive if the parents take back the gifts they shall be entitled to do so," and a similar rule is laid down generally as applying to gifts made from affection in Section 9 of the 2nd book of *Manugye* which says: "Property given through affection may be taken back if the property given is still in existence but if it has been used up and has disappeared, then, because the original property is no longer in existence, it shall not be taken back."

These rules apply even to gifts made by strangers and to cases where possession has actually been transferred, so it seems clear that there can be nothing repugnant to the principles of Burmese Buddhist Law in applying them to gifts where the parties are relative and to cases where possession has not been transferred, and as I have already pointed out, they are expressly applied to "Shinbyu" gifts which, being to some extent at least gifts made with a view to spiritual advantage, might have been expected to be excluded from their operation.

There is therefore in my opinion every reason to believe that gifts made by grandparents to grandchildren, like gifts made by parents to sons entering the priesthood, are merely contingent gifts and that the rules for such gifts are intended to operate merely as rules of inheritance and do not give the donee any claim as against the donor during the latter's lifetime.

This view seems to be borne out by the references to such gifts in the extracts from the *Dhammathats* collected in

Section 256 of the 1st Volume of the Kinwun *Mingyi's* Digest, where the rules for such gifts are clearly regarded as rules of inheritance, and by the heading of the 10th book of *Manugye*, in which those rules occur, as "The Law of Inheritance."

I see no reason therefore to believe that such a gift by grandparents as is alleged in the present case would give the grandchild any right to sue the grandparent for possession of the property given and I hold that the Appellant's suit as framed, that is as a suit by a grandchild as against a grandparent to obtain possession of property given but nevertheless retained in possession would not lie.

It is unnecessary for the purposes of the present suit to determine whether such a "gift" would give the Appellant such an interest in the property as would entitle her to redeem a mortgage made by her grandmother since in this suit Appellant did not claim to redeem the mortgage.

It is unnecessary also to decide whether, now that Section 123 of the Transfer of Property Act is in force in Upper Burma, a registered and attested instrument would be necessary to validate such a gift, since the transaction with which this suit deals took place long before that section was brought into force.

I fail to see that Appellant, who obviously framed her suit with a view to avoiding redemption, ought to have been directed or allowed to amend her plaint so as to sue for redemption since such amendment would have converted her suit into one of an entirely different character in respect of a different cause of action and would have involved the trial of an entirely different set of issues.

I find that under Burmese Buddhist Law the gift which Appellant set up, even if proved, would not give her the right of action which she claimed and therefore I confirm the decree of the lower Appellate Court dismissing her suit with costs.

The appeal is dismissed with costs.

Criminal Revision No. 383 *of* 1920, *dated* 10*th May.*

Before B. H. Heald, Esq., M.A., I.C.S.

KING-EMPEROR *v.* NGA PO SIN.

Towns Act—7, 9 (2).

It is not part of the ordinary duty of a Ward Headman to provide coolies to take an official's letter out to him when he is on tour and in the absence of proof of any emergency a requisition calling on a ward headman to perform that duty is not warranted by the provisions of section 7 of the Towns Act.

U.B.R., 1892-96, I, 321. 4 L.B.R., p. 150.

The Headman of Mingyaunggon Ward in Bhamo Town was ordered by the Subdivisional Officer of Bhamo to provide a cooly to take letters to the Deputy Commissioner, who was on tour. The ward headman ordered one Po Sin, who is a fisherman, to go, but Po Sin failed to go, because, as he says, he was footsore and his daughter was ill. The headman complained to the Subdivisional Magistrate, who transferred the complaint to the Additional Township Magistrate "for trial under section 9 (2) of the Burma Towns Act." The Magistrate tried Po Sin and convicted him under that section, fining him Rs. 5.

The District Magistrate, who is of course also Deputy Commissioner, called for the record in revision, and reported it to this Court for a ruling as to whether or not Po Sin was rightly convicted.

Section 9 of the Towns Act says that every person residing in a ward shall, on the requisition of the headman, be bound to assist him in the execution of his public duties and that if he refuses or neglects to comply with any lawful requisition of the headman he shall in the absence of reasonable excuse be liable to fine.

Section 7 specifies the public duties of a headman and the District Magistrate suggests that the duty "generally to assist all officers of the Government in the execution of their public duties," may possibly cover the present case.

There seems to be no ruling in either Upper or Lower Burma exactly on the point.

The case of *Q.-E.* v. *Nga Kauk* (1) was in some respects similar, but the wording of the clause on which the decision was based was different.

(1) I. U.B.R., 1892-96, p. 321.

The meaning of clause (*n*) of section 8 of the Village Act, which corresponds to the clause (*l*) of section 7 of the Towns Act to which the District Magistrate refers was considered in the case of *K.-E.* v. *Lu Pe* (2), but the circumstances of that case were different and the ruling is of little if any help towards the decision of the point raised in the present case.

It seems to me that it is impossible to lay down any general rule and that each case must be decided on its own merits.

It is possible to conceive circumstances under which the refusal of a villager or resident of a ward to take a message from the headman to the Deputy Commissioner would be punishable under section 9 (2) of the Towns Act, but it seems to me that it is no part of the ordinary duty of a ward headman to provide coolies to take out a Deputy Commissioner's letters from his headquarters, and that in the absence of proof of any emergency the Subdivisional Officer's requisition calling on the headman to perform that duty was not warranted by the provisions of section 7 of the Towns Act.

The clause (*k*) of section 7 to which the Township Magistrate referred, was obviously inapplicable. It says merely that it is the duty of a ward headman to collect and furnish guides, carriage, and means of transport for troops or police and provides that payment for those services must be made in advance. In the present case there is no suggestion that any payment was ever tendered, and the services required were not those mentioned in that clause.

I am of opinion that the conviction in this case was mistaken, and as the case has been reported by the District Magistrate, I set aside the conviction and sentence and direct that the accused be acquitted and that the fine which has been paid be refunded.

(2) 4 L.B.R., p. 150.

Civil Revision Case No. 188 *of* 1919, *dated* 10*th January* 1920.

Before B. H. Heald, Esq., M.A., I.C.S.

MAUNG MEIK AND ONE *v.* U KUMARA.

Mr. *J. N. Basu*—for Applicants.

Court Fees Act—Section 7 (v) (c).

Held—that the provisions of section 7(v) (c) of the Court Fees Act apply to the valuation of "religious" land, and that its value must be deemed to be the amount at which the Court estimates it with reference to the value of similar "non-religious" lands in the neighbourhood.

The petitioners sued the 1st two respondents who are *pongyis* for possession of a certain *kyaung* and its close on the strength of a decision of the "Gaingdauk Sayadaw" of Myingyan and joined the 3rd respondent as being also bound by that decision.

A question of the amount of Court-fees payable on the plaint arose and the trial Court held that under the provisions of section 7 (v) (c) of the Court Fees Act the value of the subject matter must be deemed to be "the amount at which the Court shall estimate the land with reference to the value of similar land in the neighbourhood."

The petitioners allege that this decision is wrong and apply to me to set it aside in revision. They allege that because the land is religious land it is incapable of valuation and their learned Advocate argues that Article 17 (vi) of the Second Schedule of the Court Fees Act should be applied.

It is quite clear that that article cannot apply to the present case because it applies only to cases which are not otherwise provided for by the Act, and section 7 (v) (c) of the Act makes express provision for such a case as the present. The present case is clearly a suit for possession of land. In such suits the plaint must be stamped according to the value of the subject matter, and where the subject matter is land which pays no revenue and has produced no profits during the year next before the date of presenting the plaint, the value must be deemed to be the amount at which the Court shall estimate the land with reference to the value of similar land in the neighbourhood.

The learned Advocate argues that no other land in the neighbourhood can be similar to religious land, and that therefore section 7 cannot apply. I cannot accept this argument. The difference between the land in suit and other lands in the

neighbourhood is merely a difference of ownership, and that difference is merely accidental and not essential. There is the same difference between lands belonging to different private owners, but no one would be found to argue that that difference prevented the lands from being "similar" within the meaning of the Act.

I therefore see no reason to believe that the lower Court was wrong in its interpretation of the Act and I dismiss the application summarily.

Before B. H. Heald, Esq., M.A., I.C.S.

Civil Second Appeal No. 302 of 1918, dated 5th January 1920.

MA NYEIN AND ONE *v.* MA THA GAUNG.

Mr. C. G. S. Pillay—for Appellants.
Mr. A. C. Mukerjee—for Respondent.

Buddhist—Law—Inheritance.

Held,—that where there are no children of the marriage of their step-father with their mother and no children of the step-father by any other marriage, step-children are entitled as against their step-father to a one-fourth share of the jointly acquired property of the marriage of their mother with the step-father and also to one-fourth of property inherited by the step-father during his marriage with their mother.

Held also,—that as against their step-father's widow the step-children of the deceased step-father by an earlier wife are entitled to the same share of the jointly acquired and inherited property of the marriage of their mother with their step-father to which they would have been entitled as against their step-father himself.

Held further,—that as against their step-father's widow, the step-children are not entitled to any share in the jointly acquired property of the marriage of their step-father with the widow.

S.J.L.B., 18, 177, 110.
U.B.R., 1892-96, II, 93.
U.B.R., 1897-1901, II, 66, 122, 126, 164, 185, 531.
U.B.R., 1904-06, II, B.L. In., 1.
II U.B.R., 1914-16, 74.
L.B.P.J., 299.
2 L.B.R., 174.
3 L.B.R., 219.
4 L.B.R., 110.
9 L.B.R., 176.

The respondent, Ma Tha Gaung, as widow of one Chet Su, sued Chet Su's step-daughter, Ma Nyein, and Ma Nyein's husband San U to recover two plots of land which she claimed as having belonged to Chet Su but which were in the possession of the appellants. She alleged that they had wrongfully dispossessed her but my learned predecessor has found that that allegation was not established and therefore it need not now be considered.

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The appellants alleged that one of the pieces of land known as "Kaingdaunggyi" originally belonged to Chet Su and his wife Ma Thaing, who was the appellant Ma Nyein's mother, that over 20 years ago Chet Su and Ma Thaing gave it to them to work as their own, and that about three years ago, not long before his death, Chet Su confirmed that gift by reporting the transfer to the Revenue Surveyor. In support of this story they produce a "*pyatpaing*" which recorded the transfer as having been reported by Chet Su and Ma Nyein's husband San U in 1914.

As for the other piece of land known as "Letpanbin," the appellants alleged that it never belonged to Chet Su at all but had been brought under cultivation by them and belonged to them, and they explained the fact that it stood in the name of the respondent by saying that they lived in her house and that she, being an elderly woman, would be regarded as head of the household. There is, however, no difficulty in accounting for the fact that it stands in respondent's name since before Chet Su died it stood in the joint names of him and his wife Ma Thaing and after Chet Su's death it would in the ordinary course be transferred to the name of his widow, the respondent, his earlier wife Ma Thaing having predeceased him.

The trial Court after hearing the evidence came to the conclusion that the respondent established her case on all points and gave judgment in her favour.

Appellants appealed but the lower Appellate Court dismissed their appeal.

They then came to this Court on second appeal on the following grounds, namely:—

(1) that the finding of the lower Appellate Court that Ma Nyein as Chit Su's step-daughter could not claim any share in the property left by Chet Su as against Chet Su's widow was contrary to Burmese Buddhist law;

(2) that the respondent's suit to recover the lands was not maintainable in view of the fact that appellants had been in possession of the lands for 20 years either on their own account or jointly with Chet Su;

(3) that the burden of proving title to the lands was on respondent; and

(d) that the Appellate Court was wrong on the evidence in holding that they were in possession of the lands by the permission of Chet Su or as his tenants, and in finding that their present possession as against the respondent was wrongful.

My learned predecessor, after hearing the learned Advocates framed the following issues and referred them to the Court of first instance for trial.

(1) Did Chet Su's father Po Hnyin die before or after Chet Su married Ma Nyein's mother Ma Thaing, and

(2) when did Chet Su first exercise dominion over the two lands in dispute?

On these issues the trial Court, after taking further evidence, found—

(1) that Po Hnyin died after Chet Su married Ma Thaing;

(2) that Chet Su came into the possession of the first of the two lands which respondent claimed, namely "Kaingdaunggyi," on the death of his father Po Hnyin, from whom he inherited it; and

(3) that Chet Su and Ma Thaing acquired the other land namely "Letpanbin," while they were husband and wife.

The lower Appellate Court accepted these findings and after a careful perusal of the evidence, I too accept them. It is, I think, clear that Chet Su's father first occupied the "Kaingdaunggyi" land and cleared it, probably with Chet Su's help, and that after his father's death Chet Su occupied also the "Letpanbin" land, which is separated from the "Kaingdaunggyi" land merely by a creek, and cleared it similarly with the help of his step-daughter and her husband, the present appellants. I have no doubt that both the lands belonged to Chet Su and that they were "*lettetpwa*" of his marriage with Ma Thaing.

As for the share of such property to which respondent as widow of Chet Su would be entitled as against Ma Nyein as Chet Su's step-daughter, very little has been said in argument and the learned Advocates themselves admit that they are in doubt on the point.

The case law seems to be conflicting and inconclusive.

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In the case of *Po Thit* v. *Mi Thaing* (1) it was held that a son as against his father's children by his step-mother is entitled to a one eighth share of the jointly acquired property of his father's marriage with the step-mother. That ruling obviously cannot be applied to a case like the present where there are no children of the step-father's marriage with the mother and the contest is practically one between the step-daughter and the step-father.

In the case of *Shwe Ngon* v. *Ma Min Dwe* (2) it was held that a step-daughter whose step-mother survived her father may sue the step-mother for a share of properties inherited by the father during his marriage with the step-mother and may recover from the step-mother half those properties. That ruling is authority for the proposition that the step-child can claim and recover from the step-parent its interest in property inherited by the parent during the marriage between the parent and the step-parent, but it is no authority for the rule of partition in the present case since in this case the properties were inherited not by the mother but by the step-father.

In the case of *Mi So* v. *Mi Hmat Tha* (3) the learned Judicial Commissioner of Lower Burma held with some diffidence that as against the step-child the step-mother takes seven-eighths of the jointly acquired property of the marriage between the father and the step-mother.

The case of *Chitsaya* v. *Ma Meinkale* (4) was a contest between the children of two marriages and the widow of a third marriage which was childless and there was no evidence as to whether the property was *lettetpwa* of any particular marriage or was *payin* of the husband or of any of the wives. The learned Judicial Commissioner referred the question as to the rule of partition involved to the "Kinwunmingyi" and the "Wetmasuk Wundauk" and in accordance with their opinion decided that the children of the first marriage were to get half the property, the children of the second marriage one quarter, and the surviving widow one quarter. I doubt whether a detailed examination of the opinions of the two learned authorities on Buddhist law to whom that case was referred

(1) S.J.L.B., 18. (2) S.J.L.B., 110.

would shed much light on the simpler question which arises in the present case.

The judgment in *Ba Kyu* v. *Ma Zan Byu* (5) merely followed Po Thit's case in so far as it referred to a rule of partition between the son of a first wife and his deceased father's second wife.

The case of *Ma Gun Bon* v. *Po Kywe* (6) dealt with the case of the children of step-children and did not mention the specific shares to which they would be entitled. It did however lay down that step-children are to be regarded as heirs without limitation except in the case of ancestral property, that is, inherited property which is still undivided, and even in that they are granted a share provided the step-parent has lived to have a vested interest in it. This *dictum* of course applies only to a case where there are neither widow nor own children of the step-parent to inherit.

The case of *Ma Sa* v. *Ma Thet Hnon* (7) dealt with the shares of the children of step-children and not with those of step-children themselves, and as the rules for partition in the two cases are different it throws little if any light on the question which arises in the present case.

In *Ma Hnin Dok* v. *Ma U* (8) it was held that the share of a child of a step child in the jointly acquired property of the marriage of the step-child's parent and step-parent is one-eighth. If this ruling and that in Mi So's case are both correct it would seem that the shares of the step-child and of the child of the step-child are the same and that is hardly what one would expect since the share of an out-of-time grand-child is one-fourth of that of its parent.

In *Maung Kado* v. *Ma Kyin* (9) the daughter of a step-child sued her step-mother's second husband for her share of her own mother's separate property and it was held that she was entitled to half that property. That decision throws little light on the present case.

The case of *Tun Gyaw* v. *Ma Balo* (10) seems to be important for the purposes of the present discussion. It was a suit between a step-mother and her step-sons for her share of the

(5) L.B.P.J., 299

(6) U.B.R., 1897-1901, II, p. 66. (7) U.B.R., 1897-1901, II, 122.

(8) U.B.R., 1897-1901, II, 126. (9) U.B.R., 1897-1901, II, 164.

(10) U.B.R., 1897-1901, II, 185.

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property left by her husband, who was father of the step-children. It resembled the present case in the fact that there were no children of the marriage between the parent and the step-parent. The rule of partition adopted was that the step-mother was entitled to a half share of the property which her husband inherited during his marriage with her and the step-children were entitled to the other half share. The authority on which that rule of partition was based is Manugye X 8 which it may be noted goes on to say that the step-son is entitled to one sixth of the jointly acquired property of the marriage of his mother and step-father. That case is, however to be distinguished from the present case in that in the present case the property was inherited not by the parent but by the step-parent, which would probably make a difference to the rule for partition.

The case of *Nga Son* v. *Ma Nyo* (11) merely followed Ma Gun Bon's case in regarding a step-child as an heir of the step-parent.

The case of *Ma Ba We* v. *Mi Se U* (12) was a Full Bench case of the Lower Burma Chief Court. It dealt with a contest between a childless widow and the children of her deceased husband's two earlier marriages and decided that the widow is entitled to a one-fourth share of any "*payin*" property brought by her husband to his marriage with her, and to a seven-eighths share of the property jointly acquired by her and her husband during their marriage. The decision in that case merely followed the rulings of this Court in the cases of Chitsaya and Mi So which the learned Judges in Lower Burma were content to accept as good law, and therefore threw no new light on the question now under consideration.

Kyaw Yan v. *Po Win* (13) merely followed Mi Gun Bon's case in recognising step-children as heirs.

In *Sein Tun* v. *Mi On Kra Zan* (14) the contest was between a grandchild of the first wife on the one side and the second wife and her child on the other, and it was held that the grandchild is entitled to a one-eighth share of the jointly acquired property of the second marriage, and the second wife to seven-eighths, and that in the property brought by the grandfather to

(11) U.B.R., 1897-1901, II, p. 531. (12) 2 L.B.R., 174.
(13) U.B.R., 1904-06, II, Buddhist Law: Inheritance, 1.
(14) 3 L.B.R., 219.

the second marriage the second wife gets one-quarter, the grandchild three-fifths of the remaining three-quarters, and the second wife's child the remaining two-fifths. That rule of partition obviously does not apply in a case like the present.

The case of *Ma Leik* v. *Maung Nwa* (15) involved a contest between the son of a first wife on the one side and the second wife and her family on the other, and decided that as against his step-mother and her family the son is entitled to a half share in property inherited by the father after the death of the first wife and before marriage to the second, and that such property is an exception to the ordinary rule that the children of the first marriage as against their step-mother take a three-quarter share of the property which their father took to the second marriage. It is clear that that case is of little use as a guide in the present case.

In *Mi Chan Mya* v. *Mi Ngwe Yon* (16) the child of the first wife sued her father's second wife and the child of the second marriage for her share of the property left by the father and it was held that in such a case the child of the first marriage takes a three-fourths share of the property taken by the father to the second marriage and one-eighth of the jointly acquired property of the second marriage, but it is to be noted that my learned predecessor did not refer to any authorities in support of the latter rule but said merely that the texts were almost unanimous and that in the case before him the rule was not disputed.

In *San Pe* v. *Ma Shwe Zin* (17) the step-children sued their step-father's second wife and her children for their share of the property left by their step-father, claiming that that property was partly jointly acquired property of their own parents and partly jointly acquired property of their mother and step-father.

As for the jointly acquired property of the first marriage it was held that although the children of that marriage could have claimed their share in it from their mother on her marriage to the step-father, nevertheless after their step-father's death all they could claim from his widow and her children would be their own mother's separate property taken to her

(15) 4 L.B.R., 110.

(16) U.B.R., 1914-16, II, p. 74. (17) 9 L.B.R., 176.

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marriage with the step-father, and that they had no claim to the jointly acquired property of that marriage. As for the jointly acquired property of the marriage of the step-father with his later wife it was held that "it is only when the surviving step-parent dies leaving no natural issue and no widow surviving that the children of the step-father's deceased wife by a former husband are entitled to the step-parents' property."

If the first part of the decision is good law it would apparently suffice for the disposal of the present case since the lands in dispute here are both "*lettetpwa*" of the marriage of the mother with the step-father, one being ordinary jointly acquired property and the other what is known as "inherited *lettetpwa*," that is property inherited by one of the married couple, in this case the step-father, during the subsistence of the marriage. Neither of the lands was the separate property of Ma Thaing and therefore if this ruling is correct, her children could not claim it from their step-father's widow. It seems to me however that that decision is not in accordance with previous rulings and is contrary to the authority of the recognised Dhammathats. It is based on the solitary "Panam" text cited in section 216 of the Digest and seems to me to misinterpret or misapply the extract from "Pyu" given in section 222. Both these texts start by saying that the step-children have no interest as against the step-father's surviving widow in the jointly acquired property of the step-father and his last wife and this is of course reasonable because the step-children are not related by blood to either of the couple. But the view that the step-children have no interest in the property which the step-father took to that marriage and which as in the present case may include the "*lettetpwa*" property of the marriage of the step-father and their own mother, seems to me unreasonable and contrary to the principles of Burmese Buddhist law. Rules for partition between a step-father and his step-children are contained in section 211 of the Digest and of the Dhammathats cited there the Kungya, Yazathat, Dhamma, Rajabala and Kungyalinga give the step-child one-fourth and the step-father three-fourths of the ordinary "*lettetpwa*" property of the marriage of the step-father with the mother.

On the other hand, the Manussika, Dhamma, Manugye, Manu, Dayajja, Ambwebon and Chittara give the step-children one-sixth and the step-parent five-sixths.

The reason for the division into three-fourths and one-fourth is intelligible. The step-father takes his own half share of the jointly acquired property and half his wife's half share, that is three-fourths of the whole, while the step-son gets half his mother's half share, that is one-fourth as being coheir with his father in respect of that half share.

The justification for the division into five-sixths and one-sixth is difficult to understand if only the step-father and the step-children are concerned.

It has been suggested that the one-sixth share was chosen as a sort of mean between the share allotted to the child of a step-child which is one-eighth and the share which the children of the marriage would receive if there were no step-children, but I do not think that this is probable, particularly as this rule appears in the Manussika, which is, I believe, one of the oldest of the Dhammathats.

The only explanations of the rule which I can offer are either that it may be a survival from a time when the husband was regarded as having two shares in jointly acquired property to his wife's one, or else that it is based on some passage in an old Dammathat which dealt with the shares of the step-children and step-father in a case where there were also children of the marriage with the step-father. In such a case the step-father might be regarded as representing not only himself but his children, those children not being entitled to claim partition while he was alive, so that he would receive his own half-share on his own account while on behalf of his children, who would inherit from both parents, he would receive two shares out of his wife's half-share as against one share taken by the children who inherited from one parent only. That mode of partition would give the step-father five-sixths and the step-children one-sixth but as I have said it involves the assumption that there are two families and not only one. The rule in Manúgye X, 10, which deals with a case where there are three families is somewhat similar, the step-father taking on his own account his own half-share of the jointly acquired property and one-quarter of his wife's separate half-share,

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that is five-eighths of the whole, while the children take three-quarters of their mother's separate half-share divided between them in the proportion of two shares to those who inherit through both parents, that is two-eighths, and one share to those who inherit through one parent only, that is one-eighth. If the same principle were applied to the case where there are only step-children and step-father, the result would be that the step-father would take his own half-share on his own account and one-fourth of his wife's half-share as her heir, that is five-eighths while the step-children would take three-quarters of their mother's half-share, that is three-eighths of the whole. One is tempted to suggest that the true explanation of the one-sixth share might be that some scribe converted eight into eighteen, and so made the step-children's share three-eighteenths, that is one-sixth, instead of three-eighths and that "five-eighths" was then altered to five-sixths to make it agree, but I think that the explanation I have suggested above is more probable and that the passages which give the step-children one-sixth tacitly assume that the marriage between the mother and step-father had its natural results and that there were children of that marriage. This view possibly receives some slight support from the reference to children of the second marriage in the very passage of Manugye X 8 which gives the step-father a five-sixths share. That passage runs as follows: "If while the step-son is living with the step-father and mother, the mother dies, let all the property which is with the mother be divided into four shares and let the husband take one. If while the mother has been living with her second husband she has received her parents' properties as inheritance, the said properties, because the husband has a right to the wife's property, though there is no child, shall belong half to the step-father and half to the former son. If the grandson's share comes into possession in the step-father's time the step-father shall not enjoy it. It shall belong to the former son. If there are debts, let them pay them in the same proportions. If there is any property acquired while the mother and step-father are living together, divide it into six shares and let the former son have one." The specific provision that the step-father is to have half the mother's inherited property even though there is no child of the marriage seems to me to suggest

that possibly in the other cases mentioned in that passage and particularly in the case of the five-sixths share, the father was regarded as taking the share allotted to him not on his own account merely but on account of himself and his children by the mother, and that therefore it was necessary to say that the step-father got half the inherited property on his own account even though there might be no children whom he could represent.

However that may be, it is clear that we have to choose between the authorities which give the step-children a one-fourth share and those which give them one-sixth, and in view of the fact that the division into one-fourths and three-fourths is intelligible as following principles of partition which are recognised by the authorities and that the division into one-sixth and five-sixths does not seem to be consonant with any recognised principle unless it be assumed that it deals with a case where there are two families, and further that that rule of division would lead to the result that in respect of property inherited by the step-father, which is differentiated from ordinary "*lettetpwa*" property, because the step-father, as original owner of the property is regarded as having a larger interest in it than he has in ordinary jointly-acquired property, the step-son would have a larger share than he would have in ordinary "*lettetpwa*" property, I am of opinion that in spite of the authority of Manugye the former rule ought to be followed.

I shall therefore hold that as regards ordinary "*lettetpwa*" that is the jointly-acquired property of the marriage between the mother and the step-father, where, as in the present case, there are no children of that marriage and no children of the step-father by any other marriage, the share of the step-child is one-fourth.

There remains for consideration the question as to what rule of partition is to be applied to property inherited by the step-parent during marriage with the parent, which is differentiated from ordinary "*lettetpwa.*" In all the reported cases where the rule of equal division between the step-children and the step-parent has been followed the property has been inherited by the parent and not by the step-parent and I have been unable to find either in the Dhammathats or in the rulings

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any express rule for cases where the property was inherited by the step-parent.

The rule of equal shares obviously could not be fairly applied where the step-parent himself is the original owner of the property, and the first question to be decided is whether the step-child as heir of the parent takes any interest in property inherited by the step-parent, and, if so, what is the extent of that interest. There can be no doubt I think that the parent acquires by reason of the status of husband or wife some interest in such property, and, if so, one would expect the step-child as one of the heirs of the parent to have a share in that interest.

It has been held that in cases where it is necessary to determine the interests of husband and wife in such property on divorce the rule is that two-thirds of the property belongs to the person who inherited it, and the remaining one-third to the other, but it has been suggested that that rule cannot be applied to cases of inheritance. It seems to me however that that very rule may itself be regarded as the basis of the rule for equal partition in the case of property inherited by the parent. In such a case the step-parent would be entitled to one-third in his or her own right and to one-fourth of the remaining two-thirds as heir of the parent, that two-thirds share being regarded as the parents' separate property after the deduction of the step-parent's one-third share. Similarly the step-child as heir to the parent would be entitled to three-fourths of the parent's two-thirds share, the result being that the step-parent and the step-child would each receive half since one-third plus one-fourth of two-thirds is half and so is three-fourths of two-thirds.

I think therefore that the two-thirds and one-third rule may safely be applied to cases where the property was inherited by the step-parent no less than to cases where it was inherited by the parent.

The result of the adoption of that rule would be that as against the step-parent the step-child is entitled to three-fourths of one-third, that is to one-quarter of the property inherited by the step-parent during marriage with the parent, and that the step-parent by whom the property was inherited is entitled to two-thirds and one-fourth of one-third, that is to

three-fourths. These shares, it will be noticed, are the same as would have been obtained by regarding the property as ordinary "*lettetpwa*" and by applying the one-fourth and three-fourths rule, so that it might simplify matters to say that the rule of equal division applies only when the property has been inherited by the parent, and that if it has been inherited by the step-parent it is treated as ordinary "*lettetpwa*" property in which the step-child takes one-fourth and the step-father three-fourths. Strictly speaking however that would not be true because although the result is the same, the shares are based on a different rule of partition.

I have now found that the step-children are entitled as against the step-father to one-fourth of the jointly-acquired property of his marriage with their mother and to one-fourth of property inherited by him during that marriage, and if they are so entitled as against the step-father himself, it is difficult to see on what principles of law or justice the fact that the step-father has married another wife should deprive them of that right. It seems to me that the wording of the passage from "Pyu" cited in section 222 of the Digest indicates that the step-children can recover from their step-father's widow the interest which they, as heirs of their mother, have in property left by their step-father and that the single passage from Panam cited in section 216 of the Digest is not sufficient authority for the contrary view.

As for the jointly-acquired property of the marriage between the step-father and his later wife both those passages expressly lay down the rule that the step-children have no interest in that property and as that rule is clear and reasonable, it must be accepted.

I hold therefore that as against the step-father's widow the step-children are entitled to the share of the "*lettetpwa*" property of the marriage between their mother and the step-father, to which they were entitled as against their step-father, and that they are not entitled to any share in the "*lettetpwa*" property of the marriage between their step-father and his later wife.

Accordingly in the present case I hold that Ma Nyein's interest in both the lands in dispute is one-fourth and that the respondent's interest is three-fourths.

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On the first ground of appeal therefore I find that the lower Courts were mistaken in holding that the appellants had no interest in the property in dispute and that the respondent was entitled to the whole of it.

As for the second ground of appeal I do not think that the appellants established either that Chet Su gave them the "Kaingdaunggyi" land or that they were themselves the owners of the "Letpanbin" land. I have no doubt that they worked both lands, or at any rate a considerable part of both lands, for many years but in my opinion they must be held to have worked them as children of Chet Su and not as being themselves owners of them and they would acquire no title adverse to Chet Su or to respondent by so working them. I may however note in this connection that I do not think that the aspersions which both the Lower Courts cast on the genuineness of the "*pyatpaing*" in suit were warranted by the facts. The trial Court said that one important particular, namely the character of the transaction, was not entered in the form and this was one of the grounds on which both Courts held that the document was a forgery. If the learned Judges had been more familiar with the way in which these documents are prepared they would have known that Revenue Surveyors commonly enter in the space in which the nature of the transaction is intended to be inserted a reference to the list of kinds of transactions given on the back of the form. Frequently they enter merely the number of the entry relating to that class of transactions in the list, but quite as often they enter the first words of that entry, and that is what was done in this case, the word "ayadaw" being merely the first word of entry No. 12, *see* Note 1 of the form. There was therefore nothing suspicious in the form so far as this matter was concerned and as a matter of fact I think that it was possibly quite genuine. As however the appellants did not take the trouble to offer any evidence of the transaction beyond the form itself I do not think that they can complain if their case so far as it was based on that transaction failed. There was another matter also which they do not seem to have thought it worth while to put in evidence. It appears from the documents filed at the trial that the dispute between Ma Nyein and Chet Su about the property left in Chet Su's possession on Ma Thaing's death had been referred to

arbitration, and if, as appears to have been the case, an award was made, that award probably settled the matter now in dispute. As however neither side pleaded that award or offered any evidence of it, it cannot now be considered.

The third ground of appeal needs no discussion and the fourth has already been dealt with in considering the second.

On the case as a whole I hold that the respondent was entitled to recover three-quarters of each of the two plots of land from the appellants and therefore I set aside the judgments and decrees of the lower Courts and give judgment for the respondent for partition and possession of three-quarters of the lands and not as the lower Courts did for possession of the whole lands.

As for respondent's claim to mesne profits, all that she could claim would be a fair rent for her share of the lands and as there is on the record nothing to show what a fair rent would be I do not see how I can give her a decree for mesne profits.

As the respondent has succeeded in respect of three-quarters of her claim, she will get three-quarters of her costs throughout.

Before B. H. Heald, Esq., M.A., I.C.S.

Civil 2nd Appeal No. 259 of 1919, 5th January 1920.

MAUNG NGA *v.* MA PYU.

Mr. *L. Pillay*—for Appellants.

Mr. *S. Mukerjee*—for Respondent.

Buddhist—Law—Divorce.

Held,—that in a suit for divorce between Burman Buddhists it is not necessary to claim partition of property.

Held also,—that in such a suit it is the kind of divorce granted which determines the rule to be followed at partition.

I U.B.R., 1910-13, p. 30.
II U.B.R., 1914-16, p. 32.
6 L.B.R., 18.
8 L.B.R., 1.
U.B.R., 1897-1901, II, 34.
U.B.R., 1902-03, B.L. Div., 6.
—— 1904-06, B.L. Div., 7.
—— 1902-03, B.L. Div., 1.
—— 1904-06, B.L. Div., 13-6.

Appellant and respondent had been husband and wife for some eight or ten years and respondent sued for divorce on the grounds that appellant was addicted to drink and to gambling and threatened and ill-used her. She alleged that there was no jointly acquired property and claimed divorce as by mutual consent, that is on terms of her being allowed to take

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back her own separate property. She said that of her separate property a house and a cart and two bullocks were in appellant's possession and that she proposed to sue him separately for possession of them. She admitted that there were certain, presumably joint, debts but she did not say whether or not she proposed to undertake liability for half of those debts.

Appellant objected to the divorce and denied the illtreatment. He denied that there were any debts and said that the house, cart, and bullocks which respondent claimed as her separate property were really jointly-acquired property, that there was also other jointly-acquired property consisting of another house, two pieces of land and the produce thereof, besides Rs. 300 in money which was in respondent's possession. He said further that he had had to sell the cart for Rs. 45 to defray his expenses in connection with the suit.

The trial Court dismissed respondent's suit on the ground that it was proved that there was jointly-acquired property and that respondent could not sue for divorce without claiming partition of that property. The learned Judge also expressed an opinion that the cruelty proved or alleged was not sufficient under Burmese Buddhist law to justify divorce.

Respondent appealed and the Lower Appellate Court held that the trial Court was not justified in dismissing the suit on the ground given, and finding that cruelty sufficient to warrant a divorce as by mutual consent was proved gave respondent a decree for divorce and remanded the case to the trial Court for an enquiry about the jointly-acquired property. Naturally the respondent who had got all she claimed, namely a divorce as by mutual consent, and who had already in her plaint said that she did not allege that there was any jointly-acquired property, did not take any further trouble in the matter, and the Court holding, quite wrongly of course, that the burden of proof was on her, found that it was not proved that there was any jointly-acquired property.

Meanwhile however the appellant had appealed to this Court against the Lower Appellate Court's decree granting respondent a divorce.

His grounds of appeal are as follows:—

(1) that the Lower Appellate Court was not competent to pass a decree for divorce until a finding had

been recorded on the question whether or not there was jointly-acquired property;

(2) that respondent's suit, being a suit for bare divorce without partition, was not maintainable; and

(3) that there was no proof of such cruelty as would warrant a decree for divorce.

I have read the records and heard the learned Advocates on both sides.

The case seems to me to illustrate the inconvenience of the view which has been held by this Court that under Burmese Buddhist law no suit for divorce without partition of property lies. That view was last affirmed in the case of *Mi Sa Bwin* v. *San Nyun* (1), in which the Privy Council's Ruling in *Maung Pe* v. *Lôn Ma Gale* (2) was discussed and an attempt was made to show that it did not affect the previous ruling of this Court in *Chit Nyo* v. *Mi Nyo Tu* (3). That attempt was not in my opinion successful. Their Lordships of the Privy Council were dealing with a case in which the husband obtained a decree for bare divorce against his wife and then filed a separate suit for partition of the property. In the latter suit it was decided by the Chief Court of Lower Burma that he could not succeed because he could have sued for partition at the time when he sued for divorce and that because he failed at that time to obtain the leave of the Court under Order 2, Rule 2 to institute a separate suit for partition he could not be allowed to institute such a suit. The Privy Council set aside this decision on the ground that "the cause of action for the divorce was the misconduct of the wife, but the cause of action for the partition was the divorce of the wife founded on that misconduct." Their Lordships went on to say that "The partition may no doubt be treated as relief consequential on divorce and therefore dealt with in the same suit, but the evidence is different and the ground of divorce must be first and separately proved as a distinct cause of action before any question of partition can properly arise. There is therefore not necessarily any hardship on the defendant in severing the two matters. Indeed it may and generally would be the more convenient course finally to settle the question of the divorce and the

(1) U.B.R., 14-16, II, p. 32. (2) 6 L.B.R., p. 18.
(3) U.B.R. 1910-13, I, p. 30.

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misconduct before entering upon the enquiry as to partition which would be altogether unnecessary if the decree were refused or would be put on a different basis if the misconduct were disproved." With reference to these remarks the learned Judicial Commissioner who dealt with the case of *Mi Sa Bwin* v. *San Nyun* said that their Lordships "made some general observations in regard to divorce and partition which probably apply to most systems of marriage law but are not consistent with the particular provisions of the Burmese Buddhist marriage law." It is with these last words that I venture to disagree. I think that there can be no doubt that Sir George Shaw read into the texts from section 441 of the Kinwun Mingyi's Digest, on which he relied, more meaning than they were intended to bear. The rule that after divorce the parties should not remarry until the property had been divided was obviously one of convenience, not of law. If quarrels which would bring in fresh parties were to be avoided, it was clearly desirable that partition should be effected before the divorced couple entered into fresh connubial relations, but the extract from Manugye says without ambiguity that the absence of partition is no legal bar to re-marriage, and in view of the remarks of the Privy Council as to the authority of Manugye made in the case of *Ma Hnin Bwin* v. *U Shwe Gôn* (4), there can I think be no further doubt on the point. Further, the Manugye makes the proper procedure clear when it says that "the division can be made according to the terms of the divorce." So far as the cases which ordinarily come before the Courts are concerned it may be said that in Burmese Buddhist law three kinds of divorce are recognised and all three of them are mentioned in the case of *Mi Sa Bwin* v. *San Nyun*. These three kinds of divorce differ from each other as to the grounds necessary to be proved and as to the effect of proof of those grounds on the method of partition.

The first kind is divorce for gross misconduct of the party sought to be divorced. The case of *Yin Maung* v. *Ma So* (5) in this Court is a case of that kind and in such a case the guilty party forfeits all property including his own separate property brought to the marriage as well as his interest in the property jointly acquired.

(4) 8 L. B. R. 1. (5) U. B. R. 1897-1901, II, 24.

The second kind of divorce is what is generally called divorce by mutual consent or "as by mutual consent." The cases of *Maung Hmôn* v. *Ma Meik* (6) and *Maung Pye* v. *Ma Me* (7), are cases of this kind. In such cases the parties each take back what they brought to the marriage and ordinarily divide the jontly-acquired property equally but there are certain exceptions to the rule of equal division in respect of particular property and under particular circumstances, see the cases of *Kin Kin Gyi* v. *Maung Kan Gyi* (8) and *Mi Myin* v. *Nga Twe* (9).

The third kind of divorce is that in which divorce is granted on the petition of one party without any grounds except the desire of the petitioner for divorce, and without any fault or consent on the part of the other party. The leading case of this kind of divorce, which it may be remarked has not been recognised in Lower Burma, is the case of *Ma Kin Lat* v. *Ba So* (10). The rule of partition in respect of this kind of divorce would seem to be that the petitioner relinquished all claim to any share in the jointly-acquired property and has to pay all the joint debts.

Between these three forms of divorce there are no intermediate stages or gradations.

There are only the three methods of partition mentioned, namely :—

(1) forfeiture of all property by the guilty party;

(2) equal division subject to the rules for particular property and a particular relationship between the parties;

(3) forfeiture of all interest in the jointly-acquired property to the party divorced.

This being so it is clear that when once it has been decided which of the three forms of divorce is to be granted, there can be no doubt as to which method of partition is to be adopted. There is therefore no reason whatever why a suit for any particular form of divorce should not be instituted and decree without any reference to any property which the parties may

(6) U.B.R., 1904-06, B.L. II Divorce, 1.
(7) U.B.R., 1902-03, II, B.L. D., 6.
(8) U.B.R., 1902-03, II, B.L.D., 1.
(9) U.B. R., 1904-06, II, B.L.D., 6.
(10) U.B.R., 1904-06, II, B.L.D., 3.

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possess and why the partition of the property should not be left to be made as Manugye says, "according to the terms of the divorce." This was doubtless what their Lordships of the Privy Council had in mind when they said that the enquiry as to partition "would be put on a different basis if the misconduct were disproved."

It seems necessary however to note in view of cases which have recently been before me, that it would not in my opinion be open to the Court to decree a divorce say of the second kind on a suit by a party who claimed a divorce of the first kind unless that party consented to accept such a decree and it would be still less open for the Court to give a decree of the first kind *against* a wife who sued for a decree of the first kind where the husband had not sued for divorce at all.

For the reasons set forth above I venture with all respect to suggest that it is not true that the observations of the Privy Council in Nga Pe's case are not consistent with the particular provisions of Burmese Buddhist law and cannot be applied to those provisions. On the contrary, I think, that it would avoid delay, which in such matters is particularly inconvenient, and would also avoid much confusion of issues, if suits for divorce were ordinarily framed and tried as suits for one or other of the three kinds of divorce specified above or for one or more of those kinds of divorce in the alternative, and if question of the exsistence or status of the property to be partitioned were left to be decided after the decree for divorce had been given. I see no reason therefore to believe that a decree for divorce ought not to be passed until a finding has been recorded on the question whether or not there was jointly-acquired property, provided that that decree be read, as the Lower Appellate Court's decree in this case was evidently intended to be read, as a decree for a particular kind of divorce, that kind being in this case divorce of the second kind, which was clearly what the respondent intended to claim.

This finding disposes of the first ground of appeal.

As for the second ground I see no reason to believe that if the respondent's suit was as appellant alleges a suit for bare divorce without partition such a suit would not lie. I have given reasons for this opinion in considering the first ground and all that I need now say is that the decision of the Privy

Council in Nga Pe's case seems to me to suggest strongly that such a suit would lie.

The third ground deals with matters of fact and evidence on which the two Lower Courts are at variance. The evidence is almost entirely that of persons who might be expected to be favourably disposed to appellant. His own sister gave evidence of his coming to her house and abusing respondent and attempting to assault her. Another sister or cousin living in the same house gave similar evidence and said that he sharpened a *da* and threatened to kill them for taking her into their house. She is the wife of a pensioned Extra Assistant Commissioner and her evidence is presumably trustworthy Still another relation living in the same house gave similar evidence. Maung Yun, an Advocate, said that on one occasion respondent took refuge in his house and appellant came there drunk and abused her. About a month later again appellant came there again and used filthy abuse to respondent. This witness also said that he had often seen appellant drunk.

Appellant called no evidence and did not even go into the box himself to deny the allegations made against him.

On this evidence I think that the Lower Appellate Court was right in holding that the respondent was entitled to a divorce as by mutual consent and in giving her a decree for such a divorce. Such a decree, as I have already said, normally involves each party's taking back the property which he or she brought to the marriage and an equal division of the jointly-acquired property, but in this particular case there was no need for the Lower Appellate Court to frame issues as to what property there was. All that was necessary was to give a decree for divorce as by mutual consent and to leave the parties either to divide any property there might be amicably or to sue for partition or recovery of any property to which he or she might claim to be entitled as a result of the divorce.

I therefore confirm the decree for divorce as by mutual consent, but set aside the Lower Court's order remanding the case for trial of further issues.

I note that the Lower Appellate Court's order granting a certificate under section 13 of the Court-fees Act was illegal in view of the fact that the order of remand did not cover the whole of the subject matter of the suit, and that if the Court-

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fee has been refunded to the respondent it should now be recovered from her.

The appellant will pay the respondent's costs throughout.

Civil Miscellaneous No. 25 of 1920, dated 7th June.

Before B. H. Heald, Esq., M.A., I.C.S.

MA SAT PU *v.* MA SIN.

Mr. J. C. Chatterjee—for Applicant.

Upper Burma Registration Regulation—4.

Held,—that documents completed in the Burmese fashion without being signed are "executed" within the meaning of section 4 of the Upper Burma Registration Regulation.

U.B.R., 1892-96, I, 303. U.B.R., 1907-09, II, Ex. 5.

In the suit which I dealt in Civil Second Appeal No. 372 of 1919 of this Court, the Plaintiff sued on a mortgage which she said had been recorded in a stamped document, and she called on the Defendant to produce the deed.

The Defendant denied the mortgage and naturally did not produce the writing recording it.

The Plaintiff had no personal knowledge of the document but said that she got her information about it from her sister. She admitted that the document was not registered.

The sister, who was called as a witness, said that she was present when the document was written, that it was written on an impressed sheet stamped with Rs. 3 but that it was not signed by the parties because they said "It is all right if agreed."

In my judgment I suggested that the statement that the document was not signed was probably false and was intended to account for the failure to have the document registered, since the document was admittedly written on a stamped sheet with a view to its being used as a record of the transaction, and as the transaction was admittedly completed, there was no reason why the document also should not have been completed. I went on to say that even if the document was not signed it would still be compulsorily registrable and I held that because it was not registered, neither the document itself nor secondary evidence of its contents could be received as evidence of the mortgage. I held further that under Section 91 of the Evidence Act no evidence of the mortgage

except the document itself or secondary evidence of its contents could be admitted to prove the mortgage, and that because neither the document nor secondary evidence of its contents was admissible, the mortgage could not be proved.

I am now asked to review that judgment on the ground that I ought to have held that the document was unsigned because it was not customary among Burmans to sign the documentary records of their transactions and that therefore the document was a nullity and might be regarded as non-existent.

This argument seems to me to involve a *non-sequitur*. If, as is suggested, Burmese records were complete without signature, it would not by any means follow that they were to be treated as nullities or as non-existent. It is true that *parabaiks* or palm-leaf documents were not usually signed, but this Court continually accepts and has always accepted such documents as complete records of the transactions embodied in them and as excluding oral evidence of those transactions. Section 91 of the Evidence Act says nothing about signing or execution. What it says is that when the terms of a disposition of property have been reduced to the form of a document, no evidence shall be given in proof of the terms of such disposition except the document itself or secondary evidence of its contents in cases in which secondary evidence is admissible. The provisions of that section are sufficient to meet the argument that the document in this case could be disregarded, and as a matter of fact the Plaintiff herself did not claim to disregard it but on the contrary made it the basis of her suit and called on the Defendant to produce it.

In his argument in Court the Plaintiff's learned Advocate has taken a different ground, and has suggested that the document in suit ought not to be excluded from evidence by reason of its being unregistered. He says that it cannot possibly have been the intention of the Upper Burma Registration Regulation that the unsigned records of transactions which were usual among Burmans at the time when the Regulation was brought into force should be registered or that failure to have them registered should have the effect of making them inadmissible in evidence.

The Registration Regulation, which came into force at the end of 1897, expressly stated that a document which was

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required to be registered should not affect any immoveable property comprised in it or be received as evidence of any transaction affecting that property unless it had been registered.

Under the Local Government's General Department Notification No. 25, dated the 17th February 1898, which was issued in exercise of the power conferred by Section 4 of the Regulation, all non-testamentary instruments executed on or after the 1st of July 1898, and purporting or operating to create, declare, assign, limit or extinguish any right, title, or interest in immoveable property were required to be registered.

The question whether documents which according to Burmese custom were complete without signature could be said to be "executed" was considered by this Court in *Queen-Empress* v. *Mi Nan Tha* (1), and in *Mi Ta* v. *Nga Sein* (2), and it was decided that such documents were "executed" at any rate within the meaning of the Stamp Act of 1879. I have not been able to trace any published ruling in which the meaning of the word "executed" in Section 4 of the Regulation or in Notifications under that section has been considered, but this Court has always held that such unsigned documents were compulsorily registrable and were inadmissible in evidence if unregistered and I see no reason to believe that that view is incorrect. It might possibly have been open to the Courts to hold that the intention of the Regulation and of the Local Government's Notification was to encourage the substitution of a more regular form of execution for the form then customary by allowing registration and its privileges to documents regularly executed and by denying those privileges to documents not so executed, but the Courts have never taken that view, and in my opinion it is clear from the Regulation and the Notification themselves that the actual intention was that for the future all non-testamentary documents affecting immoveable property should be registered and if unregistered should be inadmissible in evidence.

The document in this case was not a *parabaik* or palm-leaf document but was apparently a formal record written on stamped paper. Parties who recognized the necessity for a

(1) U.B.R., 1892-96, I, p. 303. (2) U.B.R., 1907-09, II, Execution, p. 5.

stamp rarely if ever adopted the Burmese form of recording their transactions without signatures and there was therefore some presumption that the present document was in the modern form and was signed. But even if it was in the old form and was unsigned it would still in my view be compulsorily registrable and would be inadmissible in evidence because it was admittedly unregistered.

I am of opinion therefore that my former judgment was correct and that sufficient reason for review has not been established.

The application is rejected.

Before R. C. J. Swinhoe, Esq.

Civil Appeal No. 169 *of* 1919, *dated* 26*th May* 1920.

YINKE SUPAYA AND ONE *v.* MAUNG KIN.

Mr. A. C. Mukerjee—for Appellant.

Mr. S. Mukerjee—for Respondent.

Limitation Act, First Schedule, Article 182, *Explanation I, Article* 81.

Held,—that a decree against two mortgagors for payment of money and sale of property in default and against a third person as surety for the mortgagee who has joined in the covenant to repay the amount is a joint decree and an application for execution against the mortgagors takes effect against the surety by virtue of Explanation I to Article 182 of the Limitation Act.

Held also,—that where money is paid into Court to the credit of suit there has been payment to the creditor and in a suit by the surety against the principal debtor time runs from the date of such payment in under Article 81 of the Limitation Act, and not from the time when the creditor draws it out.

I.L.R. 31 Bom., 50.
I.L.R. 23 Bom., 478.
I.L.R. 4 Cal., 529.
I.L.R. 20 Mad., 23.
I.L.R. 13 Cal., 155.

Since this appeal was filed Yinke Supaya has died and the 2nd appellant Maung Maung Gale carries it on as her legal representative as well as on his own account.

In Civil Suit No. 141 of 1907 of the District Court, Mandalay, C. T. P. A. Chetty obtained a decree dated 3rd July 1907 against the two appellants and respondent in the following terms:—

"It is ordered and decreed that the defendants 1 and 2 (Yinke Supaya and Maung Maung Gale) do pay to plaintiff the sum of Rs. 1,157 (Rupees one thousand one hundred and

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fifty-seven only) and costs with further interest at one per cent. per mensem. Time to redeem till 3rd January 1908.

In default of payment on or before the above period the mortgaged property being Holding No. $\frac{18}{10}$ in Block No. 50, situated at Mawyagiwa Quarter, Mandalay, together with all the buildings thereon may be sold by auction and the proceeds applied in and towards payment of decree and costs. If there be any deficiency the defendants Nos. 1 and 2 are ordered to pay it.

Against Maung Po Kin there is only a money decree as surety in case defendants 1 and 2, wife and husband, default."

In the mortgage document it was stated that the defendants 1 and 2 alone mortgaged the property, and the covenant for repayment was made jointly by them and the 3rd defendant as surety. The meaning of the last clause of the above decree therefore clearly is that all three are in the last event liable for the amount due but the mortgaged property is to be first sold before the 3rd defendant becomes liable. What is then left over is a money decree for any balance against all three according to the covenant for repayment, with an order that defendants 1 and 2 are to pay it and if they "default" the 3rd defendant is liable as a surety.

As the amount was not paid within the time fixed, the mortgaged property was sold in Civil Execution No. 368 of 1908 the application being dated 24th August 1908, and realised Rs. 437 on 4th November 1908, and the sale was confirmed on 7th December 1908 and the amount paid out on a chellan dated 12th December 1908.

It is not suggested that the mortgagors had any other property from which the Chetty could have made up the deficiency and it is also quite clear that, once the mortgaged property was sold and out of the way, the Chetty could hold the surety liable on his money decree and leave him to recover from the principal debtors. The Chetty then applied on 24th July 1911 against the surety (Civil Execution No. 159 of 1911) by attachment of his pay—he being a Government Clerk—and, as there were other attaching creditors, a *pro-rata* share was credited each month to the Chetty's decree. When this amounted to

Rs. 1,130-9-0 Maung Kin filed Civil Suit No. 32 of 1919 against the principal debtors to recover Rs. 842-9-0 only as he admitted that as to Rs. 288 his claim was time-barred. His suit was dated 20th February 1919 and he claimed that the cause of action (leaving aside the Rs. 288) arose as to Rs. 824-3-0 on the 20th September 1918 and as to Rs. 18-6-0 on the 29th October 1918 those being the dates on which the Chetty had withdrawn the amounts from the Court. He claimed to recover as he had been compelled to pay under process.

The defendants pleaded that the Chetty's decree was barred as against the surety at the time when he executed it and that the surety should have raised this objection. In other words they said that it was a voluntary payment by the surety and they were not liable to refund it. They also pleaded that the payments to the Chetty were made by monthly instalments and that only those made within three years of suit were within time. It is now said that on this basis, instead of counting from the dates of withdrawal, Rs. 661-8-0 would be recoverable at Rs. 18-6-0 a month but this requires correction as will be seen as the amounts credited monthly were Rs. 18 for most of the period and varied for the remainder. The plea amounted to this that limitation began to run from the payment into, and not the payment out of, Court. They also said the calculations of interest were wrong but this is not now urged. The only issue fixed was "is the present suit time-barred as regards sums paid into Court in execution by plaintiff more than three years previous to this suit."

There was no issue on the plea that the Chetty's decree was time-barred and that the surety had made a voluntary payment, and the diary shows that the single issue was framed in the presence of the Advocates for both sides on a date previously given for fixing issues. The Advocates were heard in argument on a subsequent date and orders passed on the following day. There is nothing to show that the defendants' advocate asked for another issue and in the judgment the Judge dismisses the matter with the remark "the Chetty proceeded against Maung Kin in Execution Case No. 159 of 1911 on 24th July 1911. That application was clearly in time under Article 182, Limitation Act." It is therefore obvious that the Advocate did not press

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the point in the Lower Court and gave up the plea of the voluntary payment of a time-barred debt, on being convinced that it was not sustainable. On the point put in issue the Lower Court held that limitation ran from the date of withdrawal, following the rulings in I.L.R. 4 Calcutta, 529, and I.L.R. 20 Madras, 23, and it decreed the amount sued for.

It is now objected on appeal that the Chetty's decree was barred by the 24th July 1911, and the surety's payment was a voluntary one and further that the above Indian cases were wrongly decided on the point as to when limitation begins to run.

There is, as I have pointed out, no issue on the former objection and it must be presumed that the Court fixed the only issue that was found to arise, and there is no note by the Judge that any other issue was suggested.

The Advocates could only argue on the one legal issue fixed, and if an objection had been raised here against the revival of an argument which had been abandoned at the hearing I should have allowed the objection.

It has not however been raised. The Chetty's application for execution against Yinke Supaya and Maung Maung Gale is dated 24th August 1908 and that against Maung Kin the surety is 24th July 1911, that is within three years but it is urged that the decree is not joint but several, and that, according to the latter part of explanation 1 to Article 182, First Schedule, Limitation Act, the application made under Article 182 (5) on 24th August 1908 has effect only against the persons it was made against. If so this means that it does not keep the decree alive as regards Maung Kin so that it cannot be used as a fresh starting point when applying against him; and to this it is replied that the decree was joint, but was not executable against Maung Kin until the Chetty had sold the mortgaged property at any rate, as that was to be exhausted before any liability began to attach to Maung Kin, and he would not be liable for anything if the mortgaged property had realised the full amount due.

To show that the decree in this case is not joint I am referred to the cases of *Narayan* v. *Timmaya* (1) and *Kusaji* v. *Vingayati* (2).

(1) I.L.R. 31 Bom., 50. (2) I.L.R. 23 Bom., 478.

The first of these cases does not apply here, as the surety there became such only after the suit was filed and before the decree and it was held that the words "passed jointly" in Article 179 (corresponding to the present Article 182) do not refer to a case where the surety was not a party, but became liable by the aid of section 253 (now section 145), Civil Procedure Code. In the present case the surety was a defendant in the suit and the decree is against him too. In the second case a surety made himself liable for the principal sum of money only but not for interest and costs for which the principal debtor was the only person liable. The decree-holder applied for execution against the surety for principal and also interest and costs, and, when he failed to get the latter, he applied for them against the principal debtor, more than three years after the decree.

It was held that the decree was one that distinguished portions of the subject-matter as payable or deliverable by each and that the former application could not support the second which was therefore time-barred. In the judgment it was remarked "The authorities cited on behalf of the appellant only go to show that where a decree imposes a joint liability upon several persons execution taken out against any one of them is a step in aid of execution against the rest."

The question is whether the present decree is one that distinguishes portions of the subject-matter as payable or deliverable by each judgment-debtor, and a reference to the decree will show that defendants 1 and 2 are first made liable for the amount due both personally and by sale of their property and that the 3rd defendant is then made liable for the amount on their default. The liability of the surety is co-extensive with that of the principal debtors but is only deferred for a time. If the mortgage property had been destroyed and nothing could be got from defendants 1 and 2 the surety would have had to pay the whole amount. In the mortgage deed it is distinctly stated that all three are jointly liable for the principal and interest together with expenses as also costs if the creditor has to sue. The suit was for the repayment of money and I cannot see that there is any portion of the subject-matter of that suit, *which is to recover Rs.* 1,157 *due on a mortgage*, which is payable or deliverable by one and not by the other and I must

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hold that the only effect of the decree is that the surety's liability is postponed until after recourse has been had to the property of the principal debtors. It is true that the Chetty's first application was for sale of the property, and could not have been made against the surety, but this is only a detail in the execution of the decree, which is for money for which all are liable.

I hold therefore that the decree was not barred against the surety when the Chetty applied for execution against him.

Even if it were otherwise there is some authority for holding that if the Court issued execution even erroneously the payments made are not voluntary and that the error of the Court cannot be taken advantage of to refuse contribution (13 W.R., 298, and I.L.R. 8 Cal., 51).

It seems to me that Article 181 actually applies to the present case and not Article 182. It has been held that the former Article 179 (now 182) only applies where there is a decree which is at once executable and not otherwise and that Article 178 (now 181) is the proper one where the application cannot be made at once. (I.L.R. 24 All., page 300 and page 542). In this case the Chetty could not apply against the surety at any rate till the mortgage property was sold and that was only confirmed on 7th December 1908. He would then have three years within which to apply against the surety. In any event the application was not time-barred.

As regards the other argument that Maung Kin's suit must be brought within three years of the dates of payments into Court it is said that about Rs. 660 would be payable on this basis instead of Rs. 842.

No doubt Article 81 applies and the only question is whether the surety has "paid the creditor" when his money is paid into Court or when the decree-holder draws it out. It is admitted that the two cases relied on by the Lower Court are authorities for the latter but it is urged that they are wrongly decided. As a matter of fact both are cases of contribution, and the special Article 81 did not apply. They do however lay down the principle that the date of drawing out from Court governs limitation and not the date of realization by the Court.

It is urged on behalf of the appellants that immediately payment is made into Court the money passes out of the ownership of the judgment-debtor and can be attached by

other decree-holders, or rather that they can claim rateable distribution if they have satisfied the conditions of section 73, Civil Procedure Code. It is also urged that the Lower Court should not have used the analogy of Article 182, and the cases under it, when Article 81 clearly lays down a limitation of three years from the payment to the surety.

What the Lower Court followed were the rulings of a preponderance of the High Courts under Article 182 that an application to withdraw money from Court is a "step in aid of execution," and therefore creates a fresh starting point for the next application, but this it is urged does not justify holding that "payment to the creditor" under Article 81 is made only when an application to withdraw is filed or payment out of Court made. The Chetty in this case it may be noted applied on 16th August 1918 to withdraw an accumulation of monthly instalments and received payment on 20th September 1918. This will certainly keep alive the decree as against Maung Kin if necessary, but will it affect Maung Kin's right of suit against the appellants?

I do not see what connection there is between the two, and it seems to me that the only point is whether the two cases of 4 Cal., 529, and 20 Mad., 23, are rightly decided and should govern this case. They were both of them suits for contribution and Article 81 did not apply, and the case quoted by the respondent's Advocate, namely I.L.R. 39 Mad., 288, does not help as it only says that the right to sue arises when payment is actually made. The question here is what constitutes payment to the surety.

In the case of *Fuckorudden Mahomed Ahsan* v. *Mohima Chunder Chowdhery* (3) it was held that under Article 100 of the Act of 1871 corresponding to the present Article 99 the cause of action arose when the sale-proceeds were drawn out of Court by the decree-holder and in the case of *Pattabhiramyya Naidu* v. *Ramayya Naidu* (4) the learned Judges said that they were disposed to follow this decision, assuming that the case came under Article 61. There was no argument on the point in either of these cases, and therefore nothing to show the grounds on which the decisions were based.

(3) I.L.R. 4 Cal., 529.

(4) I.L.R. 20 Mad., 23.

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Article 81 makes limitation begin to run from the time when the surety pays the creditor and the principal debtor remains liable to be sued for three years only after this payment has been made. In this case the Chetty allowed nearly four years' instalments to accumulate before he withdrew the money, and it has been held that there is no bar of limitation for an application to withdraw money standing to a party's credit in Court, so that even fifteen years after the money could be withdrawn (see *Apurba* v. *Chundermony*, 10 C.W.N., 354). If so, and if the withdrawal starts limitation running, it is clear that a principal debtor's liability can be indefinitely extended by neglect of the decree-holder to take his money out of Court. This was surely not intended, and I think it is clear that the payment must be regarded from the point of view of the surety's parting with his money and crediting it to the decree-holder's account. It was definitely placed to his credit in Court in this case just as if it had been paid in to his credit at his bank, and the Court could no more refuse to give it to him on his application than his bank could.

In the case of *Torab Ali* v. *Nibruttin* (5) it was held under Article 61 that the money was paid and the cause of action arose when the decretal amount was paid into Court, and if that constitutes payment under Article 61 I do not see why it does not equally constitute payment under Article 81. As the creditor in this case had got a decree the payments were made through the Court but it seems to me that they were payments to the creditors all the same. The surety could certainly sue the principal debtor at once without waiting till the Chetty chose to withdraw the money, and this seems to conclude the matter because, if the period of limitation once begins to run, it must continue without interruption (section 9) and will have run out in three years.

I must therefore respectfully differ from the findings to the contrary, and hold that in this case payment to the surety was made when the money was credited in Court.

The suit was brought on 20th February 1919 and the Plaintiff sued only for the amounts withdrawn, including Rs. 18-6-0 received in Court on 12th October 1918. He has specified the particular sums and, although he has paid stamps to cover a

(5) I.L.R. 13 Cal., 155.

larger amount than he will now get, I do not think I can allow him in this suit to include further payments in, for which he has not sued.

The payments in which he can recover begin on 4th March 1916 and amount to Rs. 575-12-0. The Rs. 18-6-0 cannot be included as this was for balances not drawn of payments made in 1914 and 1915.

The decree of the Lower Court will be modified and there will be a decree for Rs. 575-12-0 with costs on that amount.

Before B. H. Heald, Esq., M.A., I.C.S.

Criminal Revision No. 836 of 1920, dated 28th September.

NGA THET SHE AND ONE v. KING-EMPEROR.

Mr. N. M. Mukerjee—for Applicant.

Criminal Procedure—435—438.

Upper Burma Criminal Justice Regulation Schedule, section XII.

Held,—that section XII of the schedule to the Upper Burma Criminal Justice Regulation does not limit a District Magistrate's ordinary powers in revision under the Criminal Procedure Code but extends his powers under section 438 by allowing him to deal with the cases of second and third class Magistrates as he thinks fit instead of reporting them to the High Court for orders.

Petitioners were sent up by the Police for trial under section 325 of the Indian Penal Code in respect of serious injuries received by one Po Ka during a *fracas* which resulted from gambling at Puzanetkin Village in the Myingyan District.

The Magistrate discharged the petitioners but noted at the end of his judgment that many of the witnesses mentioned by Po Ka in his deposition, which was recorded in hospital when it was thought that he was likely to die, had not been examined.

The District Magistrate, having called for the case in revision, said that there appeared from the proceedings and the police papers to be grounds for further enquiry and ordered that enquiry to be held by the Senior Magistrate.

Petitioners ask me to set aside that order in revision and I have read the records and heard their learned Advocate.

One of the grounds argued is that a District Magistrate in Upper Burma has no power to revise the orders of first class Magistrates. In view of the express of provisions

NGA THET SHE v. KING-EMPEROR.

sections 435 to 438 of the Code of Criminal Procedure, this argument would not be worth notice, but for the fact that it is constantly cropping up in cases in this Court. It is of course based on the provisions of section XII of the Schedule to the Upper Burma Criminal Justice Regulation which says that a District Magistrate in revising the order of a second or third class Magistrate, may, subject to certain limitations, "pass such order as he thinks fit." That provision obviously does not limit the District Magistrate's ordinary powers in revision under the Code but on the contrary extends his powers under section 438 by allowing him to deal with the cases of second and third class Magistrates as he thinks fit instead of reporting them to this court for orders.

So far as the merits of the present case are concerned, it is perfectly clear from the Magistrate's own note that there was scope for further enquiry, and I see no reason to interfere with the District Magistrate's discretion in the matter.

The application is dismissed.

Criminal Revision No. 662 of 1920, dated the 7th September.

Before B. H. Heald, Esq., I.C.S.

NGA SAN DUN *v.* KING-EMPEROR.

Criminal Procedure 406, 423 (*c*) (*d*).

Held,—that in an appeal under section 406 of the Code of Criminal Procedure the District Magistrate has power under section 423 (*c*) and (*d*) of the Code to alter or reverse the order under appeal and to make any consequential or incidental order that may be just and proper.

I.L.R. 23 Cal., 8.

The police reported petitioner to the Subdivisional Magistrate, Amarapura, for action under section 107 of the Code of Criminal Procedure.

On that report the Magistrate decided to take action against petitioner under section 110 instead of section 107 of the Code, and after taking evidence directed petitioner to enter into a bond in Rs. 200 with two sureties to be of good behaviour for one year.

Petitioner appealed to the District Magistrate who set aside the order for security for good behaviour, and directed the Magistrate to make further enquiry against petitioner under section 107 of the Code.

The Magistrate, instead of taking proceedings against petitioner under section 107, noted in the diary of the record of the proceedings under section 110 that he had been referred to a ruling which debarred the District Magistrate from ordering further enquiry in proceedings under section 110 of the Code, and gave petitioner time to apply to this Court for revision of the District Magistrate's order.

I have heard petitioner and referred to the case mentioned by the Magistrate, namely the case of *Dayanath Taluqdar* v. *K.-E.* (1), and I find that what the learned Judges said in that case was "It appears to us that the District Magistrate had no power under the law to order further enquiry *in the terms in which he did*." In that case an order for security for good behaviour had been made against the petitioner, and on appeal the District Magistrate set aside that order and directed that there should be a further enquiry, and at the same time required increased security from the petitioners.

It seems to me clear that in an appeal under section 406 the District Magistrate has power under section 423 *(c)* and *(d)* of the Code to alter or reverse the order under appeal and to make any consequential or incidental order that may be just and proper.

If the District Magistrate considered that the order for security for good behaviour was not warranted by the evidence or the circumstances of the case but was of opinion that the case was one in which an order for security to keep the peace might be justified, I see no reason to believe that he was not competent to set aside the order for security for good behaviour and at the same time to order proceedings to be taken under section 107. That procedure would be analogous to that prescribed in section 423 *(b)* which empowers an Appellate Court in an appeal from a conviction to reverse the finding and sentence and to order the accused to be retried, and would not in my opinion be open to any objection.

Further apart from the provisions of section 423 the District Magistrate had power to initiate proceedings against petitioner under section 107 of the Code, and in view of the provisions of Section XV of the Schedule to the Upper Burma Criminal

(1) I.L.R. 23 Calcutta, page 8.

NGA SAN DUN v. KING-EMPEROR.

Justice Regulations, which says that no order shall be reversed or altered on appeal or revision on account of any irregularity of procedure unless the irregularity has occasioned a failure of justice, I should not interfere, even if I thought that the District Magistrate's procedure was irregular, since I fail to see that that procedure has occasioned any failure of justice.

I therefore see no reason to interfere and I dismiss the application.

Before R. C. J. Swinhoe, Esquire.

Civil 2nd Appeal No. 162 of 1920, 12th October.

MA EIN HLAING AND THREE OTHERS v. MA SHWE KIN.

Mr. D. Dutt—for Appellants.
Mr. L. Pillay—for Respondent.

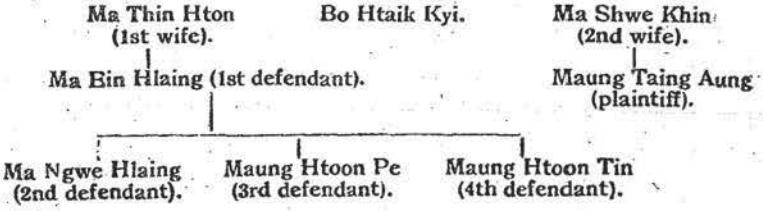
Buddhist Law—Inheritance.

A Burman Buddhist married a second wife after the death of his first wife, and died leaving a child by his first wife, and his second wife, with her son by him. The surviving widow's claim was time-barred, and she also relinquished it. In a suit by the son of the second marriage for a share of the *hnapazôn* property of the first marriage brought to the second, which was in the possession of the child of the first marriage.

Held,—dissenting from the ruling in Mi Chan Mya *v.* Mi Ngwe Yon, II U.B.R., 1914-16, p. 74—that the child of a second marriage is, on the death of his father, entitled to a one-eighth share in the *hnapazôn* property of the first marriage, and that this share is not recoverable through his mother, but is independent of her, and can be sued for in her life-time being taken direct from the three-quarter share of the child of the first marriage.

II U.B.R., 1914-16, p. 74—dissented from; 10 L.B.R., p. 10—followed.
U Gaung's Digest, sections 212 and 229.
Attasankhepa Dhammathat, section 220. Tha Gywe's "Conflict of Authority in Buddhist Law," Volume II, pages 86 and 96.
May Oung's "Treatise on Burman Buddhist Law," Part III, page 257.
10 B.L.T., p. 41. I U.B.R., 1910-13, p. 178.

The relationships of the parties in this appeal are as follows:—



Bo Htaik Kyi first married Ma Thin Hton and first defendant-appellant is their daughter, the remaining defendants

being first defendant's children. Ma Thin Hton died and Bo Htaik Kyi then married Ma Shwe Khin and plaintiff-respondent is their son. His father Bo Htaik Kyi is dead but his mother is still alive, and, as he is a minor, he sues through her as his next friend. In the plaint it is stated that she too has a share in the property in suit but she relinquishes it. The suit was for partition of certain lands said to be the *hnapazôn* property of Bo Htaik Gyi and Ma Thin Hton and in the defendant's possession of which plaintiff claimed that he was entitled to a one-fourth share. He also claimed Rs. 178-12-0 being a one-fourth share of Rs. 715, the amount for which other lands left by Bo Htaik Gyi had been either mortgaged by or redeemed from first defendant.

Defendants-appellants' written statement is not clear, but there is no denial that the property is the *hnapazôn* of Bo Htaik Gyi and his first wife.

They said the lands in plans (∞) and (ə) were received on mortgage for Rs. 215 and that other lands were mortgaged by plaintiff. They also said that the estate ought to be divided into eighths, and that a suit for partition should not be brought but no reason for this is given. The issues were :—

(1) Were the lands as per plans (∞) and (ə) *bobabaing* lands of Nga Htaik Kyi or were they mortgaged by others?

(2) Were the sums Rs. 100 and Rs. 115 mentioned in paragraph 4 of the plaint paid as additional advance on the lands as per plans (∞) and (ə)?

(3) Should plaintiff sue for the Rs. 200 and Rs. 300 mentioned in paragraph 4 of the plaint?

(4) Should the estate be divided into four or eight shares?

(5) Should the lands as per plans (∞) and (ə) be partitioned?

There was examination of the parties before issues were fixed and only Ma Ein Hlaing was examined as a witness on behalf of the plaintiff. She gave particulars of the lands in her possession and those mortgaged by and redeemed from her and said that plaintiff once asked for his inheritance but she did not give it because he was young.

The Judge decided that the suit for partition of Rs. 200 and 300 mortgage money received by Ma Ein Hlaing must be

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dismissed on the authority of *Nga Ya Baw* v. *Nga Bya* (1) and that, as to the remaining money and the lands, after deducting further sums paid, the plaintiff will get one-fourth of Rs. 78 and of the lands, on the authority of the *Menukye Dhammathat*. The reference given however is not traceable.

An appeal was made by the present appellants, and the District Court held that plaintiff could sue in the life-time of his mother as his claim was through his deceased father, not through his mother, and that it was not time-barred as he is still a minor. The appeal was dismissed, as it was said that there was no objection raised to the share being one-fourth and not one-eighth. Unfortunately the District Judge did not quote any rulings or *Dhammathats* and disposed of the case very summarily.

It is not unnaturally objected now that the Lower Appellate Court's judgment was not according to law and it is also stated that the decision that plaintiff can claim in his mother's life-time is wrong. The grounds of appeal to the District Court were that the claim of Ma Shwe Khin was time-barred so she was claiming through her son, but that no partition could be allowed between the children while the step-mother is alive. As the mother's claim is time-barred her child's claim is also time-barred. The Lower Court erred in granting a one-fourth share, and not considering that it was time-barred and was against the *Dhammathats* and that the plaintiff had instituted a suit for another person.

The obvious meaning of these grounds is that the son has no share apart from his mother but can only claim through her, so that his suit is not maintainable because she has lost her right to sue owing to limitation, also that he cannot sue while his mother is alive and that the granting of a one-fourth share is against the *Dhammathats*. I do not agree therefore that the grounds of appeal do not include an objection to the granting of a one-fourth share, as the District Judge has said, and the written statement in the case pointed out that the division ought to be into eighths. As a matter of fact it did not clearly raise the objection that no partition was allowable in Ma Shwe Khin's life-time, neither did Ma Ein

(1) I U.B.R., 1910-13, p. 178.

Hlaing in her evidence, but the point was taken on first appeal. The position is therefore clear, both plaintiff and first defendant are children of Bo Htaik Gyi by different wives, and the property in dispute belongs to the earlier marriage. The question therefore resolves itself into this—must plaintiff's claim be through his mother or has he got a distinct and separate claim from his mother's claim? If the latter, it is clear that it has nothing to do with whether his mother is alive or not—he claims direct, on his father's death, from his half-sister and her children in possession of the property. The surviving widow does not make a claim, so the case is only for the share, if any, of the plaintiff, and not for any time-barred share of the widow.

There is a direct conflict of authority in Upper and Lower Burma on the point in issue. In the case of *Mi Chan Mya* v. *Mi Ngwe* (2) it was held that the children of a first marriage were, on the death of their father who had married again after the death of their mother, entitled to three-fourths of the *lettet-pwa* of the first marriage taken to the second marriage and the surviving widow entitled to one-fourth, the children of the second marriage getting nothing till their mother died, when they got her share. In that case the property was in the possession of the surviving widow, who had (as in the present case) a minor son, and a suit was therefore instituted by the child of the first marriage. The claim however was as a *keittima* adopted child of that marriage and the greater part of Mr. McColl's judgment is taken up with a discussion as to the proof of this adoption and whether it was *keittima* or *apadditha*, and whether the adoptive tie had been subsequently severed or not. The latter portion of the judgment, however, deals with the last ground of appeal which was that the giving to the child of the first marriage of three-fourths of the property taken to the second marriage was contrary to Buddhist law "as there is a son of the second marriage." The learned Judge after observing the contradictory nature of the texts collected in section 229 of U Gaung's *Digest*, Volume I, and also referring to section 220 of the *Attasankhepa Dhammathat* said that he was unable to suppose that the *Dhammathats* which gave three-fourths

(2) II U.B.R., 1914-16, p. 74.

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to the children of the first marriage and one-fourth to the surviving widow had overlooked the fact that there might be children of the second marriage; as, in the case of the *Manuyin* and the *Dayajja* such children are definitely mentioned, without disturbing the three-fourths and one-fourth division. As regards section 220 of the *Attasankhepa Dhammathat* noted above, which distinctly lays down that, when there are children of the second marriage, the division must be into eighths, of which such children get one-eighth taken from the share of the children of the first marriage, not from that of the widow, the learned Judge remarks "The *Attasankhepa Dhammathat* was compiled by the late Kinwun Mingyi, U Gaung, the compiler of the *Digest*. He was learned in Buddhist Law and had experience of its application, and his opinion is entitled to very great weight. Unfortunately this particular work of his is dogmatic. No authorities are cited; throughout the work there is evidence of attempt to reconcile contradictory texts of the older *Dhammathats* without any hint of the method of reconciliation and the tendency is to elaborate intricate rules of division of property which are never followed in practice, *e.g.* the rule given in section 161."

The conclusion come to therefore was that "the children of the second marriage get nothing because their mother is still living, but on her death they got her share." As regards the *lettetpwa* of the second marriage it was agreed that the texts are almost unanimous, and that the children of the first marriage are entitled to one-eighth which was accordingly given.

The same point arose for decision in the recent case in Lower Burma *Ma Lay* v. *Tun Shwe* (3) and was decided by Sir Daniel Twomey, Chief Judge, in the opposite way to *Ma Chan Mya's* case. Unfortunately the latter case cannot have been brought to the notice of the Court as the judgment contains the following remarks: "It appears that neither the Chief Court nor the Judicial Commissioners have yet definitely decided the question whether, in a case like the present, the offspring of the second marriage are entitled to a share in the joint property acquired during the father's first marriage."

(3) 10 L.B.R., p. 10.

The consequence is that no reference is made to *Ma Chan Mya's* case and it can only be supposed by reference to the arguments used by the learned Chief Judge that, if he had noticed it, he would have disagreed with the conclusion arrived at, as in fact the case of *Ma Chit Lu Ma* (4) was dissented from.

The facts in *Ma Lay's* case are curiously similar to those in the present appeal, even to the fact that the surviving widow's own share was time-barred and that a next friend sued on behalf of the minor son, Tun Shwe, to get a share from Ma Lay, the daughter of the first marriage, of the property brought to the second marriage. The addition of Ma Lay's step-brother and the widow herself as defendants makes no difference to the question of Tun Shwe's right to claim during his mother's life-time, nor to the share which he should get. The decision in the case was that, as there is a child of the second marriage, the division is into eighths, of which the surviving widow gets two shares and the children of the first and second marriages get five shares and one share respectively; in other words "the widow should in any case get her one-fourth share, and the one-eighth share of her children should come out of the three-fourths share which the children of the former marriage would have received if the widow were childless." That is a one-eighth share is taken from the share of the children of the first marriage and given to those of the second, so that the latter's claim is quite independent of the widow's and would have to be given in her life-time and whether her claim is time-barred or not. In coming to this decision the Chief Judge dissented from the ruling in *Mi Chit Lu Ma* v. *Mi Win Ma U* (5) and pointed out that the *Dayajja* has two contradictory texts, one giving the step-mother only a share, and the other giving a separate share also to her children (which is apparently not noticed in the Upper Burma Ruling), and that the *Manuyin*, which is the solitary *Dhammathat* that declares uncompromisingly against any share being given to the children of the second marriage, goes on to say "nor shall any of the property acquired during the second marriage be given to the children of the first marriage." Not only has this latter rule not been followed by the Courts, but

(4) 10 B.L.T., 41. (5) 10 B.L.T. 41.

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it is contradicted by the same *Dhammathat* which lays down "on the death of the mother, the father marries again and dies, leaving issue by the second marriage. The estate shall be divided, and the second wife shall get five shares, her children by the marriage two shares, and her step-children one share."

This can only refer to property acquired during the second marriage of which it is immediately afterwards declared that the step-children shall get none. Thus the value of the two *Dhammathats* on which the ruling in *Mi Chan Mya's* case was based must be considerably discounted.

On the other hand the *Attasankhepa Dhammathat* is supported by the *Kungya*, *Yazathat*, *Vinicchaya* and *Pakasani* in giving a separate and distinct share to the children of the second marriage.

It will be seen that in Ma Chan Mya's case the learned Judge held that the presence of children of the second marriage makes no difference to the division, as they got nothing, and, if this is so, it is hard to understand why the texts that are collected under section 212 of the *Digest* should be so careful to state that the second marriage has been without issue. They nearly all begin with such a phrase as "After the death of the mother the father marries again but dies without issue" or "A widower or a widow marries again but dies without issue by the second marriage." The division is into fourths. But many of these same *Dhammathats* give the mode of partition in section 229 of the *Digest* that is when there *is* issue of the second marriage, and then they divide the estate into eighths of which the children of the second marriage get one share of the property brought to that marriage. If such children have no share and merely inherit their mother's share when she dies, it would only be necessary to give the partition as between a step-mother and step-children and to add that the division is the same as regards property brought to the second marriage even when the step-mother has children of her own. Instead of this the *Digest* sets apart Chapter X in order to collect the texts dealing with "Partition among children of a former marriage, their step-parents, and children of the second marriage" and most of the texts in section 229 of that Chapter deal with property of the first marriage brought to the second. Of course the author of the *Digest* is also the

author of the *Attasankhepa*, and the arrangement of the *Digest* is his own, but it is shown that the fact of there being a child by the second marriage is very widely recognised as making a distinct difference in the partition.

The learned author of the "*Conflict of authority in Buddhist Law*" deals with the matter in Volume II at page 86 *et seq.* He considers the reconciliation of the conflicting texts made by section 220 of the *Attasankhepha Dhammathat* to be successful, and the distinct method of partition where there are children of the second marriage to be intelligible. He does not agree with the finding in *Mi Chan Mya's* case and says; "it is hardly conceivable that the children of the second marriage who are given a share in the property acquired during that marriage (*auk oksa*) in addition to their mother's share and in her life-time are not entitled to share with their half-brothers in the property acquired during their father's first marriage (which is *atet oksa*) because their mother is alive."

The strange thing is that there is no dispute about the children of the first marriage getting one-eighth share of the *letletpwa* of the second marriage, and in *Mi Chan Mya's* case it is admitted that the texts are almost unanimous in favour of this. As this is so, it seems to me that the children of the second marriage have just as strong a claim to a similar share in the property acquired during the first marriage, and no reason is shown in the *Dhammathats* why the children of each marriage should not mutually have a one-eighth share in the property of the other marriage. In the *Conflict*, Volume II, page 96, this is accepted without any demur by the learned author. The reason for the division into eight parts as laid down in the *Menukye*, Chapter X, section 10, when children by more than one marriage have to be provided for is explained by Mr. May Oung in his *Treatise on Burman Buddhist Law*, Part III, page 257, when dealing with property acquired during the second marriage, as follows:

"When the case of a son by the second marriage had to be provided for he was given one-fourth out of the *pubbaka's* ordinary one-sixth, and one-fourth of his parent's ordinary five-sixths, making two out of eight shares for him and arriving at the proportion of 1, 5 and 2 (section 10)." Why

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should not the same reasoning hold good as regards the children when the property is acquired during the first marriage and provision is being made for a child by the second marriage?

It is true that Mr. May Oung's division is based on his argument that the proper share of a step-child as against his step-parent only should be one-sixth and not one-eighth, and also that this is not the basis of the division adopted in the case of a *Ma Lay* v. *Tun Shwe*, but the result is the same, namely that a son by one marriage gets one-eighth of the property acquired during the other marriage as a distinct share

In both cases provision is made for the fact that there is a son by the second marriage; in the first case by taking one-fourth from the *pubbaka* and one-fourth from the parent, if Mr. May Oung is right, and in the other case by leaving alone the parent's share (which is only one quarter) and taking an eighth from the three-quarter share of the child of the first marriage.

Mr. May Oung does not comment on the ruling in *Mi Chan Mya's* case as to a son having to wait till his mother is dead, but he notices the case, and he appeared as Advocate for the appellants in the Lower Burma case of *Ma Lay* v. *Tun Shwe* where, as the judgment shows, he urged that the children of the second marriage would not get any share, and any how would have to wait till their mother died. Yet, oddly enough, he was able only to produce as his authority the case of *Ma Chit Lu Ma* v. *Mi Win Ma* (10 B.L.T., 41) and did not cite the Upper Burma Ruling, which directly supported him. In his treatise too the Lower Burma Ruling is not alluded to, as probably it was not then printed.

With great deference to the opinion of my learned predecessor it seems to me therefore that the ruling in *Mi Chan Mya's* case is based on too slender authority and that, as against it, there is a considerable body of the *Dhammathats* including the *Attasankhepa* which insist that a different division must be made when there is issue of the second marriage and this seems to me in accordance with reason. I must therefore agree with the law as laid down in *Ma Lay's* case and hold that the plaintiff-respondent, Maung Taing Aung, is entitled to a one-eighth share in the *hnapazôn* property of the

first marriage, now in defendant-appellant's possession, and that this share is not recoverable through his mother, but can be sued for during her life-time.

The result is that plaintiff's share is one-eighth and not one-fourth as allowed, as the objection was taken in the District Court and again here. There has been no appeal as to the findings of the fact of the first Court. Therefore the lands as per plans (∞) and (ə) are divisable as being *bobabaing* property and not received on mortgage, and plaintiff-respondent's share is one-eighth also the sums of Rs. 200 and Rs. 300 must be excluded and a one-eighth share will be given of Rs. 80 being Rs. 215 (not Rs. 213 as stated in the judgment of the first Court) less Rs. 135, sums stated to have been further advanced.

The appeal has been partially successful but not on the main ground that the suit was not maintainable in the mother's life-time, and I consider it will be fair for each party to pay its own costs in this Court. In the Lower Courts the costs will stand as they are, as defendant-appellants appeared to agree that an one-eighth share was payable but refused to give it as the mother was alive. Had the share been offered it might have been accepted and the litigation rendered unnecessary.

G.B.C.P.O.—No. 27, J.C.U.B., 5-10-1921—750.

Circular Memorandum No. 1 of 1917.

FROM

THE REGISTRAR,
COURT OF THE JUDICIAL COMMISSIONER,
UPPER BURMA

TO

ALL JUDGES AND MAGISTRATES
IN UPPER BURMA,

Dated Mandalay, the 21st March 1917.

A perusal of the appended extract from the *Statesman* of the 1st December 1916, and of Mr. Brewester's note on it dated the 4th December 1916, is invited. Mr. Brewester is the expert adviser to the Director, Criminal Intelligence, on matters connected with forgery, photography, hand-writing, etc.

There can be no doubt but that finger print impressions can be copied by the transfer process described. A finger impression expert can, as before, testify to the identity of two or more finger impressions, but he will have to be cautious in testifying that any particular impression was transferred directly from the finger to the paper under examination.

By order,

ED. MILLAR,
Registrar.

Circular Memorandum No. 2 of 1917.

FROM

THE REGISTRAR,
COURT OF THE JUDICIAL COMMISSIONER,
UPPER BURMA,

To

ALL MAGISTRATES IN UPPER BURMA.

Dated Mandalay, the 21st March 1917.

The following is published for the information and guidance of all Magistrates in Upper Burma :—

Extract from the remarks made by the Sessions Judge, Toungoo Division, in Criminal Revision No. 223 of 1916 of his Court on the 9th August 1916, on a review of the proceedings in Criminal Regular No. 86 of 1916, of the Township Magistrate, Yedashe, Toungoo District.

* * * * *

" I notice in this case, as in most I have seen, the express provisions of section 103 (2), Criminal Procedure Code, are ignored by the Excise officers. I am afraid that the Police usually make the same mistake. The Code says that a search list shall be prepared, but that no person attending the search shall be required to attend the court as a witness unless specially summoned by it. Yet the Police and Excise Department go on sending up as witnesses the *lugyis* who attend searches. Magistrates are also much to blame for this state of things. They should require the search list to be produced, have it shown to accused and then number it as a documentary exhibit. The list shows where articles have been found. If it is properly prepared *probably in a large number of instances nothing more than the list with the sworn evidence of the officer making the search* will be required. Instead of which, from a number of judgments I have perused I gather that there is an impression amongst some Magistrates that *lugyis* must be examined. I suggest to the District Magistrate the advisability of issuing departmental orders on the subject."

* * * * *

By order,

ED. MILLAR,
Registrar.

Extract from the "Statesman," dated Calcutta, the 1st December 1916.

Are we to have no illusions left? Who among us, as our reverend mentors would say, has ever doubted that with the advent of the finger print impression the problem of identification had been finally and satisfactorily solved? If any such there has been he was quite right! The problem has not been solved. The wily criminal has once more sprinkled salt upon the tail of the law, and thumb impressions can be forged as easily as signatures!

It is sadly appropriate that, just as the thumb impression took its rise in India, having been discovered and applied by Sir Edward Henry when Inspector-General of Police in Bengal, so the forged thumb impression industry should also owe its origin to India—or rather Afghanistan. For we are informed on good authority that the wily Kabuli has been in the habit of forging thumb prints for years. In an unguarded moment, however, one of the fraternity seems to have revealed the secret to Babu Panchkouri Chatterjee of Howrah, and that gentleman has now demonstrated before the local Bar Library and a Finger Print Expert from the Government Bureau in Calcutta, that thumb impressions can be forged in five minutes with an exactitude which deceives even the elect.

Our informant is Babu Nilananda Chatterjee, M.A., B.L., Assistant Secretary of the Pleaders' Association of Howrah, and we subjoin his letter dealing with the matter.

Babu Panchkouri Chatterjee of Howrah has done a public service by openly demonstrating before the Bar Library and before a Finger Print Expert from the Government Bureau at Calcutta how by a simple process finger impressions can be easily transferred from a given original. Indeed Babu Panchkouri prepared such an identical copy of the Finger Print Expert's finger impressions in his own presence within five minutes' time that he had to admit, while examined before the Howrah Small Cause Court, that the original and the copy were identical. The process is well known to Kabulis who were in the habit of copying finger impressions and forging documents, and Babu Panchkouri says he owes his knowledge to the Kabulis.

Apparently we shall once more be driven to hieroglyphs in self-defence.

Director,—

As regards the cutting from the *Statesman* above, I happened to be in Calcutta when this appeared in the local editions and immediately saw Babu Nilananda Chatterjee of the Howrah Bar. This gentleman gave me all possible assistance. Endeavours were made to interview Babu Panchkouri Chatterjee, the man who demonstrated the possibility of transferring finger prints from one paper to another but he was not at home, being away at Hooghly in connection with some business. I hope to see him when I next visit Calcutta, possibly during this month.

I find by experiment that it is possible to transfer a finger impression from one paper to another in such a manner as to deceive even a finger print expert. The process employed is a very simple one, costing little or nothing for materials, and only needing a short time in which to do the work especially if the impression to be used as a matrix is fresh. First a thin strong paper is smeared with a glutinous substance, such as Gum Arabic. This paper is then placed on the finger impression to be reproduced, pressure being applied to force the gum to take up as much as possible of the ink of the original impression. So far as my experiments have gone it seems to require a good deal of practice to obtain just the right consistency of the gummy substance, because if used too wet or too dry a satisfactory impression is not obtained or the gum adheres to the two papers to such an extent that it becomes exceedingly difficult to separate one paper from the other. Having, however, obtained a satisfactory negative, this is placed on a fresh paper in the position it is desired it should occupy, some slight pressure being applied. The next step is to remove the negative and all traces of gum. This is done by applying wafer to the paper of the negative and rubbing gently with the finger until the paper is rubbed away. The negative now becomes a positive when it adheres to the fresh paper, and it is entirely cleaned by the continued, but gentle, application of cold water. The final result is a perfectly clear and exact duplicate of the original, though of course the ink of the transfer is not anything like so dense as the original.

It is obvious that the ordinary methods of classification and identification will not avail to detect a "transfer" from a genuine impression taken direct from the finger, for the reason that the "pattern" will in each case be identical. My enquiries and experiments are not yet complete, but so far as I can see at present it would be advisable in future to treat with caution any single finger print affixed to a document, the authenticity of which cannot be established beyond doubt by independent witnesses, and especially so when the ink of such an impression is of a grey or greyish colour. In a genuine impression the ridges are clear and "sharp," but in a "transfer" this is not so, the lines appearing to be "fuzzy" and not so "sharp" as in an original impression. It is difficult to explain the condition of each line in a "transfer," but one who has had experience of the difference, say, between a hand engraved line and the same line reproduced by means of photozincography would, I think, be able to appreciate it. In some cases too, depending on the nature of the paper used to take the final "transfer," the fibres of the paper may be disturbed. Traces of gum may also be discernible. A low power microscope or a short focus Coddington lens is, I think, necessary in such cases and the suspected impression should be examined by good oblique light.

I will submit a further note after my next visit to Calcutta.

F. BREWESTER.

The 4th December 1916.

Circular Memorandum No. 3 of 1917

FROM

THE REGISTRAR,
COURT OF THE JUDICIAL COMMISSIONER,
UPPER BURMA,

To

ALL JUDGES IN UPPER BURMA.

Dated Mandalay, the 21st March 1917.

Attention is invited to the remarks appended below of their Lordships of the Privy Council in connection with Order XIII, rule 4, of the Code of Civil Procedure, 1908.

There was no Judicial Commissioner at the time their Lordships issued their instructions.

By order,
ED. MILLAR,
Registrar.

Remarks made by their Lordships of the Privy Council in the appeal of Sadik Hussain Khan v. *Hashim Ali Khan* (*I.L.R.* 38 *All.*, 627) *at page* 663.

"Finally, their Lordships feel bound to criticise adversly a practice followed in these two cases, which is as illegal as it is slovenly and embarrassing. By the 141st section of "The Civil Procedure, Code, 1877," repeated in "The Civil Procedure Code, 1882," and practically re-enacted in Order XIII, rule 4, of the Rules and orders passed under the Code of Civil Procedure of 1908, it is provided that a presiding Judge shall endorse with his own hand a statement that it (*i.e.*, a document proved or admitted in evidence) was proved against or admitted by the person against whom it was used. That course was in many instances not followed at the hearing of these two cases, with the result that embarrassing and preplexing controversies arose on the hearing of these appeals as to whether or not certain documents, prints of which were bound up in the record, had been given in evidence. There is no possible excuse for the neglect in this manner, of the duty imposed by the Statutes, since so long ago as the 3rd March 1884, a circular was addressed by the then Registrar of the Privy Council to the Registrar of the High Court of Calcutta calling attention to the requirements of the then existing law and the necessity of observing them. A copy of this circular was sent not only to the High Courts of Madras, Bombay and Allahabad, but, in addition, to the Judicial Commissioner of Oudh and other Judicial Commissioners. Their Lordships, with a view of insisting on the observance of the wholesome provisions of these Statutes, will, in order to prevent injustice, be obliged in future on the hearing of Indian appeals to refuse to read or permit to be used any document not endorsed in the manner required."

Circular Memorandum No. 4 of 1917.

FROM

THE REGISTRAR,
COURT OF THE JUDICIAL COMMISSIONER,
UPPER BURMA,

To

ALL MAGISTRATES IN UPPER BURMA.

Dated Mandalay, the 27th March 1917.

The attention of all Magistrates is invited to the need for paying the most careful heed to the way in which charges are joined together, and to the conditions under which persons can be tried together in one trial. Mistakes are so frequently made about this important subject, and so much time is wasted through such mistakes, that the following instructions are issued. It must be remembered that misjoinder is fatal to the validity of the trial, and the Appellate Court has no option, but to set aside the conviction and order a retrial.

The sections of the Criminal Procedure Code applicable are 233—239. The subject is also dealt with in paragraphs 228—234, Courts Manual.

(1) Section 233 provides that for each distinct offence there must be a separate charge.

It is quite common to find a charge drawn up as follows: "That you on the 6th June voluntarily caused hurt to Po Ka and Ma Me." As each of these acts of causing hurt constituted a distinct offence, the charge is bad, even although the two offences occurred in the course of the same transaction.

Separate offences must not be lumped together in a single charge. Another common example of a similar error is where an accused person extorts money from a body of villagers and is tried for one offence in a single charge for these separate acts of extortion. For each act a separate charge should be framed and the trial should be confined to three such acts out of the total collection.

(2) A person can only be tried at one trial for more offences than one, when—

(*a*) the offences are of the same kind;
(*b*) and are committed within a period of twelve months;
(*c*) and are punishable under the same section of the law applicable.

Only three such offences can be tried together.

(3) Section 235. The important point in this section is the expression "same transaction." The illustrations to the section

help towards understanding its meaning. In *Nga Ta Pu* v. *King-Emperor*, *L.B.R.*, *II*, 21, it was held that an interval of time did not necessarily make two events parts of a different transaction and that theft and the disposal of stolen property could *sometimes* be properly considered the same transaction. On the other hand, it has been held that if A steals property and then is met on the road by some policemen and resists arrest, the theft and resistance to arrest form two separate transactions. The test has been said to be whether the events are so related to one another in point of purpose or (*b*) as to cause and effect, or (*c*) as principal and subsidiary acts as to constitute one continuous action. In the two instances given above, theft and the disposal of stolen property are related as principal and sudsidiary acts, but theft and resisting the police are not, as at the time of the theft, it was not in the contemplation of the thief to resist the police.

(4) Section 239 deals with the subject of the joint trials of persons. Persons can only be jointly tried when—

(*a*) they are accused of the same offence, or
(*b*) of different offences committed in the same transaction, or
(*c*) where A is accused of committing the offence and B of abetting it or attempting to commit it.

Where two parties are accused of rioting, they must be tried separately. A thief and receiver of stolen property may sometimes be tried together. But where a person throws clods on the railway line and another person rescues him from police custody, these two persons must be tried separately. A very common mistake is to try persons found fishing in a leased fishery together, when *each of them is fishing on his own account*. Each of these persons is committing a separate offence and not the same offence and must be tried separately. In *Po Mya* v. *King-Emperor* (*Volume* 7, 272) the Chief Court has held that to enable more persons than one to be charged and tried together in one trial the offences must all form part of the same transaction. Thus although A and B jointly commit two thefts on the same day, unless these thefts form parts of the same transaction, separate trials for each theft must be held. A and B can be tried together for the first theft, and then they must be tried together *in a separate trial* for the second theft.

It would be well for junior Magistrates to bring to the attention of Inspecting officers anydifficulties they feel about the subject and for inspecting officers to see that Magistrates understand these instructions.

By order,

ED. MILLAR,
Registrar.

Circular Memorandum No. 5 of 1917.

FROM

THE REGISTRAR,
COURT OF THE JUDICIAL COMMISSIONER,
UPPER BURMA,

To

ALL JUDGES IN UPPER BURMA.

Dated Mandalay, the 30th March 1917.

The attention of the Judicial Commissioner has been drawn to the fact that a diversity of practice exists with regard to the classification of suits relating to declaratory decrees in column 9 of Civil Register No. I. He directs that such suits shall be entered in that column as Class 4.

By order,
ED. MILLAR,
Registrar.

Circular Memorandum No. 6 of 1917.

FROM

THE REGISTRAR,
COURT OF THE JUDICIAL COMMISSIONER,
UPPER BURMA,

To

ALL MAGISTRATES IN UPPER BURMA.

Dated Mandalay, the 18th May 1917.

It has been brought to the notice of the Judicial Commissioner, Upper Burma, that in a number of cases Magistrates passed sentences on accused persons without waiting for the report of the Finger Print Bureau on the Prints sent for search. In some cases very light sentences were passed and shortly after judgment it was ascertained that the criminal was an old offender.

The Judicial Commissioner desires to impress on all Magistrates the advisability to delay passing sentences on accused persons whose finger prints have been sent for search until a reasonable time has been allowed for the reply to be received.

By order,

ED. MILLAR,
Registrar.

Circular Memorandum No. 7 of 1917.

FROM

THE REGISTRAR,
COURT OF THE JUDICIAL COMMISSIONER,
UPPER BURMA,

To

ALL JUDGES OF CIVIL COURTS
IN UPPER BURMA.

Dated Mandalay, the 6th June 1917.

The attention of all Judges is directed to the provisions of O. XXI, r. 40, of the Code of Civil Procedure. The procedure laid down in clause (1) would, if followed out, save District Courts much time at present spent in considering Insolvency petitions. Judges should explain to debtors who appear before them after notice has been issued to show cause against being committed to the civil jail, or who are brought before them under arrest, that if they are too poor to pay the debt, the Court has power, subject to clause 2, to make an order disallowing the application for their arrest or directing their release from arrest. If poverty is pleaded, the Court should hold an enquiry under clause 2, after taking action under clause 3, and pass orders, if the Court thinks fit, under clause 1.

By order,

ED. MILLAR,
Registrar.

Circular Memorandum No. 8 of 1917.

FROM

THE REGISTRAR,
COURT OF THE JUDICIAL COMMISSIONER,
UPPER BURMA,

To

ALL JUDGES IN UPPER BURMA.

Dated Mandalay, the 14th June 1917.

Under instructions from the Local Government, the Judicial Commissioner, Upper Burma, directs that when a suit is instituted in a Court against the Burma Railways Company, Limited, the summons on the Company shall be served through the Small Cause Court, Rangoon, but a copy of the summons shall be sent direct by post by the issuing Court to the Agent, Burma Railways, Rangoon.

If any other Railway Company or Administration is sued, the place in which its Head Office is situated should be ascertained from the list appended hereto and a copy of the summons should be sent there addressed to the Manager or Agent.

If the summons is sent by registered post, service in the usual way may be dispensed with.

By order,

ED. MILLAR,
Registrar.

List showing the Court within whose jurisdiction the headquarter offices of Railways party to the Indian Railway Conference Association are situated.

Name of Railway.	Station at which head-quarters situated.	Name of Court or Courts within whose jurisdiction the headquarters are situated.
Assam-Bengal ..	Chittangong	Chittagong Court that is under the High Court of Calcutta.
Dibru Sadiya ..	Dibrugarh	Dibrugarh Court in the district of Lakhimpur.
Barsi Light ..	Kurduwadi	Civil and criminal jurisdiction of courts at Madha, District Sholapur, Bombay Presidency.
Bengal and North Western.	Gorakhpur	Magistrate and Judges, Gorakhpur, High Court, Allahabad.
Bengal Dooras ..	Domohani	Jalpaiguri Court.
Bengal-Nagpur ..	Calcutta.	Small Cause Court, Calcutta (Civil).
		District Judge's Court, Alipur (14-Parganas).
		Munsiff's Court, Clipur (24-Parganas).
		Small Cause Court, Sealdah (24-Parganas).
		Munsiff's Court Sealdah (24-Parganas).
		Magistrate's Court, at Alipur (Judicial).
		Magistrate's Court, Howrah (Judicial).
		The Chief Mechanical Engineer's Office which is situated at Khargpur is within the jurisdiction of the Civil and Criminal Courts at Midnapore.
Bengal Provincial	Magra ..	Hooghly Court.
Bhavnagar State ..	Bhavnagar-Para.	Bhavnagar State Courts enjoy the jurisdiction. Bhavnagar is a Native State, Class I, in Kathiawar.
Bombay, Baroda and Central India.	Bombay ..	High Court of Judicature, Esplanade Road, Bombay.
		Police or Criminal Court, Cruikshank Road, Bombay.
		Court of Small Causes, Lamington Road, Bombay
Dholpur Bari ..	Dholpur..	Dholpur Durbar.
Eastern Bengal ..	Calcutta..	Original and Appellate, Civil and Criminal jurisdiction of the Hon'ble High Court of Judicature, Fort William, Bengal, and also with the Original Criminal juridiction of the Calcutta Police Court.
East Indian ..	Calcutta .	Court of Small Causes, Calcutta.
Gondal-Porbandar State.	Gondal ..	Gondal Estate.
Great Indian Peninsula.	Bombay..	Bombay High Court.
Gwalior Light ..	Gwalior..	Gwalior State.
H. H. the Nizam's Guaranteed State.	Secundera-bad.	Court of the District Civil Judge, Secunderabad, Civil matters.
		Court of the Superintendent, Residency Bazaar, Hyderabad, Civil matters.
		Court of First Class Magistrate for Railways, Hyderabad, Criminal matters.
		Court of the First Assistant Resident, Hyderabad Appellate Court, High Court.
		Court of the Hon'ble the Resident, Appellate Court, High Court.
Jamnagar ..	Jamnagar	Nawanagar State limits.
Jodhpur-Bikaner ..	Jodhpur	Chief Court, Marwar State, Jodhpur.
Jorhat ..	Jorhat	The Jorhat Court (District Sibsagra).

List showing the Court within whose jurisdiction the headquarter offices of Railways party to the Indian Railway Conference Association are situated—continued.

Name of Railway.	Station at which headquarters situated.	Name of Court or Courts within whose jurisdiction the headquarters are situated.
Junagad State ..	Junagad	Junagad State. 2. For purposes of proper administration and management of the affairs of the Junagad Railway, the Junagad State has ceded to the Government of India the criminal jurisdiction and certain civil jurisdiction (saving sovereignty rights) over the lands lying within His Highness' territory traversed by the railway on the understanding that the jurisdiction so ceded is to be exercised so long as the land assigned may be required for railway purposes and restored when lands are no longer required for the same. 3. As regards civil suits, Junagad State has agreed that all suits of a civil nature brought against tne Junagad State Railway respecting the loss of or damage to goods or injury to persons within railway limits and cases of a civil nature arising out of the application of the Railway Act over the said limits shall be heard and decided in due course in the Kathiawar Political Agency Courts, provided always that the Railway Manager shall represent the railway in such suits and not the proprietary State of Junagad and that any decrees that may be passed shall be executed against the railway property and not against the proprietary State of Junagad and provided also that all other civil jurisdiction within the limits of the said Junagad Railway shall continue and be exercised by the Junagad State. 4. The headquarters of the Kathiawar Political Agency Court referred to above is at Jet sar Court Civil Station, Sorath Pran, Kathiawar.
Madras and Southern Maharatta.	Madras	High Court of Judicature at Madras.
Messrs. Killick Nixon & Co., Managing Agents, the Champaner Shivarajpur and the Guzarat Railways.	Bombay	The Registered Office and Managing Agents of the Guzarat Railways Company are in Bombay within the jurisdiction of the Bombay High Court. The executive headquarters are at Godhra within the jurisdiction of the District Court of the Panch Mahals.
Messrs. McLeod & Co., Managing Agents, the Burdwan Kutwa Bunkura Damodar river and Jessore Jhenidah.	Calcutta	High Court of Calcutta.

List showing the Court within whose jurisdiction the headquarter offices of Railways party to the Indian Railway Conference Association are situated—concluded.

Name of Railway.	Station at which headquarters situated.	Name of Court or Courts within whose jurisdiction the headquarters are situated.
Morvi ..	Morvi ..	Morvi State.
Messrs. Martin & Co., Managing Agents.	..	Courts having jurisdiction over headquarters office. / Courts having jurisdiction over Agency Department.
rah Sasaram ..	..	Judge's Court, Shahabad, Arrah. / High Court, Calcutta.
arset-Basirhat ..	..	High Court, Calcutta. / Do.
Buktiarpur, Bihar	..	Do. / Do.
Howrah-Amta ..	..	Do. / Do.
Howrah-Sheakhala	..	Do. / Do.
Shahdara (Delhi) Saharanpur.	..	Judge's Court, Delhi / Do.
Mysore Durbar Railways, *viz.*, Kolar District.	..	Name of office: Agent .. — Name of Court: District Magistrate's Court. / District and Sessions Judge's Court. — Place: Civil and Military Station, Bangalore.
Mysore-Arsekere .. Bangalore-Chik-Ballapur.	..	Name of office: Traffic Manager, Loco and Carriage Superintendent, Audit Office. — Name of Court: The Chief Court of Mysore. / The District and Sessions Judge's Court. / District Magistrate's Court. / City Magistrate's Court. / Sub-Judge's Court. / Munsiff's Court. — Place: Bangalore City.
North-Western ..	Lahore ..	Court of Deputy Commissioner, Lahore.
Oudh and Rohilkhand.	Lucknow	Court of Judicial Commissioner, Oudh, Lucknow.
Rohilkhand and Kumaon.	Izatnagar	Under the jurisdiction of the Bareilly Courts.
South Indian ..	Trichinopoly.	District Court of Trichinopoly. / Subordinate Judge of Trichinopoly. / District Munsiff of Trichinopoly. / Court of Small Causes, Trichinopoly.
Udaipur-Chitorgarh	Udaipur..	The Resident in Mewar, Udaipur, deals with cases for Europeans and the Udaipur Chitorgarh Railway Magistrate for Indians.

Circular Memorandum No. 9 of 1917.

FROM

THE REGISTRAR,

COURT OF THE JUDICIAL COMMISSIONER,

UPPER BURMA,

To

ALL JUDGES IN UPPER BURMA.

Dated Mandalay, the 14*th June* 1917.

Several cases have come up on appeal to the High Court, in which *uncertified* copies of maps and other entries in Land Records Registers have been filed, although in some instances full fees for certified copies have been paid. Uncertified copies are inadmissible in evidence. Judges are requested kindly to see that copies are always certified and not to admit uncertified copies on the record. The method prescribed for certifying copies is laid down in paragraph 343, Burma Land Records Manual, and the fees in paragraph 350.

By order,

ED. MILLAR,

Registrar.

Not translated into Burmese.]

Circular Memorandum No. 10 of 1917.

FROM

THE REGISTRAR,
COURT OF THE JUDICIAL COMMISSIONER,
UPPER BURMA,

To

ALL DISTRICT JUDGES IN UPPER BURMA.

Dated Mandalay, the 28th July 1917.

I am directed to lay down for your guidance the following procedure in connection with the administration of the estates of American citizens who die in Burma.

Under section 54 of Act III of 1913 it is incumbent on the District Judge, on the death of any American citizen leaving assets within the limits of his jurisdiction, to report the circumstances at once to the Administrator-General in Rangoon, stating the following particulars so far as they are known to him:—

(*a*) the amount and nature of the assests;
(*b*) whether or not the deceased left a will, and if so, in whose custody it is;
(*c*) the names and addresses of the surviving next-of-kin of the deceased;

and on the lapse of one month from the date of death;

(*d*) whether or not any one has applied for probate of the will of the deceased of Letters or Administration.

The District Judge must retain the property under his charge until the Administrator-General has obtained Letters of Administration or probate of the will, if any.

The District Judge may, if he thinks fit, sell any assets which are subject to speedy and natural decay and credit the proceeds of the sale to the estate.

If the deceased has not left in British India any known heirs or testamentary executors, the District Judge, if in possession of the property of the deceased, should at once inform the nearest consular officer of the United States of America of the circumstance.

By order,

ED. MILLAR,

Registrar.

Circular Memorandum No. 11 of 1917.

FROM

THE REGISTRAR,
COURT OF THE JUDICIAL COMMISSIONER,
UPPER BURMA,

TO

ALL DISTRICT MAGISTRATES IN UPPER BURMA.

Dated Mandalay, the 28th July 1917.

In cases instituted on complaint in which the complainant is not required to be examined on oath under section 200, Criminal Procedure Code, Magistrates should insist upon sufficient particulars being given in the complaint as to what the act complained of really was, the date on which, and the time, place and manner in which it was committed, so as to enable them to exercise their judgment as to whether there is or is not sufficient ground for proceeding against the accused.

By order,

ED. MILLAR,
Registrar.

Circular Memorandum No. 14 of 1917.

FROM

THE REGISTRAR,
COURT OF THE JUDICIAL COMMISSIONER
UPPER BURMA,

TO

ALL DISTRICT JUDGES IN UPPER BURMA.

Dated Mandalay, the 22nd August 1917.

The Judicial Commissioner, Upper Burma, has noticed that copies of decrees and judgments of Lower Courts filed with appeals before this Court are often very imperfectly prepared. In many the dates of the judgments or decrees are not shown and the endorsement required to be made by the copyist on the back of the certified copy is often found to have been altered and scratched, especially as to dates, without the alterations being duly attested by the Authorized Officer. This indicates that Authorized Officers do not exercise sufficient care in seeing that copies are correctly and duly prepared in accordance with the Copying Rules.

The attention of District Judges is drawn to the above defects and is it hoped that they will warn Authorized Officers subordinate to them to exercise more care in the discharge of their duties.

By order,

ED. MILLAR,

Registrar.

Circular Memorandum No. 15 of 1917.

FROM

THE REGISTRAR,
COURT OF THE JUDICIAL COMMISSIONER,
UPPER BURMA,

TO

ALL MAGISTRATES IN UPPER BURMA.

Dated Mandalay, the 7th September 1917.

The attention of the Judicial Commissioner has been drawn to the fact that the Medical History Sheet of lunatics prescribed in Judicial Department Notification No. 63, dated the 10th May 1913, is often perfunctorily and unsatisfactorily filled up. The Medical Officer in charge of the lunatic is consequently placed at a great disadvantage in dealing with the case owing to want of adequate information of the known habits and history of the lunatic. The responsibility for the preparation of Form A rests with the Magistrates committing the lunatic. They are requested to see that, as far as possible, full details of the lunatic's previous mental history are ascertained and recorded on Form A before sending the lunatic for observation to the Medical Officer.

By order,

ED. MILLAR,
Registrar.

Circular Memorandum No. 18 of 1917.

FROM

THE REGISTRAR,

COURT OF THE JUDICIAL COMMISSIONER,

UPPER BURMA,

To

ALL JUDGES IN UPPER BURMA.

Dated Mandalay, the 26th November 1917.

Attention is invited to the rules published in Notification No. 7, dated the 2nd November 1917, of this Court for the maintenance and custody of live-stock and other moveable property under attachment and for the fees payable for such maintenance and custody. District Judges are requested to see that the rules are explained to and understood by presiding officers and the bailiffs and clerks of all Courts in their jurisdiction.

O. XXI, r. 43, Code of Civil Procedure, requires that moveable property attached shall be kept in the custody of the attaching officer or of one of his subordinates. Recent enquiries show that this provision of law is not observed by any Court in Upper Burma. Rule 14 does not authorise the Court to keep the attached property in the custody of the debtor or of any person other than the balliff or a peon who may, if necessary, be specially engaged for the purpose. The property attached may be left with the Judgment-Debtor in order that such expenses of attachment as tending and feeding charges, the hire of premises, etc., may be avoided; but it is necessary that in every case a person should be employed and paid for, in the first instance by the Decree Holder as explained in the rules for the custody of the property.

By order,

ED. MILLAR,

Registrar.

Circular Memorandum No. 19 of 1917.

FROM

THE REGISTRAR,
COURT OF THE JUDICIAL COMMISSIONER,
UPPER BURMA,

To

ALL DIVISIONAL AND DISTRICT JUDGES
IN UPPER BURMA.

Dated Mandalay, the 5th December 1917.

1. Attention is invited to Judicial Department Notification No. 150, dated the 7th November 1917, in which the following addition is made to Rule 6 of the Rules for the Service and Execution of Processes in Burma, published in this Department Notification No. 174, dated the 18th November 1912 :—

"The restriction contained in this rule may be relaxed in particular cases at the discretion of the Senior Judge."

2. In all cases where in fact the Rule is not at present observed application to relax the restriction should be made at once through the Divisional Judge.

By order,

ED. MILLAR,
Registrar.

Circular Memorandum No. 4 of 1918.

FROM

THE REGISTRAR,

COURT OF THE JUDICIAL COMMISSIONER,

UPPER BURMA,

To

ALL MAGISTRATES IN UPPER BURMA.

Dated Mandalay, the 6th June 1918.

It is possible that applications may be received from dependants of deceased lascars for compensation under the War Risks Compensation Scheme and the following instructions are therefore issued for dealing with them.

The application should contain the particulars shown in the annexed "Form A."

The Magistrate should with the least possible delay procure evidence of the truth of the statements made in the application.

The application when completed should be forwarded to the Principal Port Officer, Rangoon. It is important that claims of this nature should be disposed of promptly.

By order,

ED. MILLAR,

Registrar.

FORM A.

War Risk—Seamen's Compensation.

DEATH.

Particulars of Claim by Dependants of a Seaman killed or dying from injuries received by reason of Mines, Torpedoes or other Hostile Operations.

Name of vessel on which deceased seaman employed when killed or injured—

Name and address of owner of vessel—

Full name of deceased seaman—

Rating—

Age—

Nationality—

Home address of deceased seaman—

Date of death or injury—

Cause of death or injury—

Name of claimant.	Date of birth.	Relationship to deceased seaman.
Children		

Claimant's address—

How far claimant dependent on deceased seaman—

Amount allowed claimant by deceased seaman—

Whether deceased seaman left any advance or allotment notes in favour of claimant; and, if so, for how much—

Particulars of any pension, gratuity or allowance to which the claimants are entitled under section 1 of the Superannuation Act, 1887, and any Order or Warrant made thereunder, or the Greenwich Hospital Acts, 1685 to 1898—

DECLARATION.

I do solemnly and sincerely declare that the above particulars are correct.

*Signature of Applicant*_____

*Address*_____

I have this day of 191 investigated the case and am satisfied of the truth of the statements made.

*Signature of a Magistrate or Commissioner for Oaths*_____

*Address*_____

GENERAL REMARKS.

NOTE 1.—In the case of widows the birth and marriage certificates should be attached and in the case of children, birth certificates. In other cases certificates proving the relationship (if any) of the claimant to the deceased should be attached.

NOTE 2.—The Magistrate should institute careful enquiry into the questions of dependence, the proof of the original marriage and the occurrence of remarriage.

NOTE 3.—The Magistrate should give every assistance to the claimants for compensation under the scheme when such claims come before him and record on their applications the amount of expenses, if any, incurred by them in substantiating their claims (*e.g.* the expenses incurred in filing the petition) for sanction of the Local Government.

Not translated into Burmese.]

Circular Memorandum No. 5 of 1918.

FROM

THE REGISTRAR,
COURT OF THE JUDICIAL COMMISSIONER,
UPPER BURMA,

To

ALL JUDGES OF DISTRICT COURTS
IN UPPER BURMA.

Dated Mandalay, the 3rd August 1918.

From proceedings which have come from time to time before the Judicial Commissioner it appears that Courts exercising jurisdiction under the Provincial Insolvency Act, 1907, are imperfectly acquainted with the provisions of that Act and the following instructions are therefore issued for their guidance.

Upon a petition by a debtor praying that he may be adjudicated insolvent, no question arises in the first instance as to whether he is able to pay his debts, whether he has been guilty of fraud, whether he has omitted from his schedule assets or debts, or any question of a like nature.

Under section 4 (*f*) the mere presentation of an insolvency petition by a debtor is an act of insolvency, so that, in the case of a petition presented by the debtor, if he satisfies the Court that his debts amount to Rs. 500, or that he has been arrested or imprisoned in execution of a money decree, or that there is a subsisting order of attachment against his property, he must be granted an adjudication order unless a composition is effected under section 16.

The Court in the first instance must scrutinize the application and be satisfied that the provisions of section 11 (1) or section 11 (2) of the Act have been complied with according as the petition is by the debtor or by the creditor.

If they have been complied with the Court proceeds under section 12—

(1) to admit the petition,

(2) to fix a date for hearing the petition.

(3) to give notice as required by clauses 2 and 3.

Section 13 gives the Court certain powers for the protection of the interests of the creditors as soon as the petition is admitted and until adjudication.

On the date fixed under rule 12 the Court is to require proof-

(1) of the right to present the petition,

(2) of the service of notice,

(3) of the act of insolvency

and under section 15 shall dismiss the petition if not satisfied wit this proof, or if the debtor satisfies the Court that he is able t pay his debts or that for other sufficient cause no order should b made. It is clear that a debtor will only satisfy a Court that he i able to pay his debts or that for any other reason no order shoul be made, on a petition by a creditor. Otherwise, in the absence o any settlement under section 16 the Court must make an order o adjudication.

The right to present a petition is defined in section 6 (3) where the debtor is petitioner and in section 6 (4) where the creditor is petitioner.

Section 4 defines acts of insolvency. The mere presentation of a petition by a debtor to be adjudged an insolvent is included among cts of insolvency. Section 16 is mandatory and a court has no option to refuse an order of adjudication because on a petition by a debtor it has reason to suppose the debtor has concealed property or is able to pay his debts or has committed fraud.

The examination of the debtor before adjudication is provided for by section 14 (2), (3) and (4). This examination should be full and intelligent. On a petition by the debtor the object is not to ascertain whether he is entitled to apply to be adjudged insolvent but to obtain a full disclosure of his property and dealings up to the time of his bankruptcy.

Under section 16 unsecured creditors lose any remedy they may have had by suit or other legal proceeding, upon an order of adjudication, except as provided by the Act. It is therefore the duty of the Court either itself or through a Receiver to realize all moneys available for payment to such creditors with as little delay as possible.

Sections 43 and 44 of the Act give the Court ample power to punish an insolvent for dishonesty or extravagance by imprisonment and by the suspension or refusal of an order of discharge.

By order,

ED. MILLAR,

Registrar.

Circular Memorandum No. 6 of 1918.

FROM

THE REGISTRAR,
COURT OF THE JUDICIAL COMMISSIONER,
UPPER BURMA,

To

ALL CIVIL COURTS IN UPPER BURMA.

Dated Mandalay, the 3rd August 1918.

The attention of all Courts is invited to the Usurious Loans Act, 1918, Act X of 1918.

By the provisions of this Act very wide powers are given to all Courts to relieve debtors from the hardships occasioned by usurious transactions. These powers must be exercised with discretion. Particular attention is invited to section 3 (2) of the Act by which "Excessive" interest is explained, and the circumstances to be considered when deciding whether a transaction is substantially unfair are set out.

The Court should not act arbitrarily or without discretion. Regard must be had to the rates of interest prevailing in the locality, the means of the debtor, his ability to furnish security and the like.

Probably the Act will be found to be most commonly applicable, where there have been transactions extending over a considerable period where the interest has been added to capital and a fresh bond taken, or where, as is frequently the case when loans are repayable in kind, failure to discharge the immediate obligation is treated with an exorbitant penalty.

While the Act should be unhesitatingly applied in all cases of real hardship Judges must be careful not to attempt to use it to reduce rates of interest, which, while they may be high in comparison with rates elsewhere, are in fact the ordinary local rates of interest by which capital is induced to make itself available.

By order,

ED. MILLAR,
Registrar.

Circular Memorandum No. 7 of 1918.

FROM

THE REGISTRAR,
COURT OF THE JUDICIAL COMMISSIONER,
UPPER BURMA,

To

ALL MAGISTRATES IN UPPER BURMA.

Dated Mandalay, the 29th August 1918.

In continuation of this Court's Circular Memorandum No. 15, dated the 7th September 1917, attention is invited to the revised form of medical history sheet for lunatics, published with Judicial Department Notification No. 31, dated the 4th April 1918. Magistrates are requested to use the revised form referred to in all cases in future.

By order,

C. B. AUBREY,
Offg. Registrar

Circular Memorandum No. 8 of 1918.

FROM

THE REGISTRAR,
COURT OF THE JUDICIAL COMMISSIONER,
UPPER BURMA,

To

ALL SESSIONS JUDGES AND MAGISTRATES
IN UPPER BURMA.

Dated Mandalay, the 12th October 1918.

It has been brought to the notice of the Judicial Commissioner that Courts when passing sentences in their original jurisdiction, or upholding convictions and sentences on appeal, occasionally remark that they are obliged to pass or confirm what appears to them a heavy sentence, as the law leaves them no alternative. In some cases it is suggested in the orders of the Court that the case should be referred to the Local Government for consideration under section 401 of the Code of Criminal Procedure, but these suggestions are not invariably communicated to the Local Government.

Where a recommendation to clemency is made in the course of a judgment or appellate order in a criminal case, such recommendation should invariably be brought directly to the notice of the Local Government.

By order,

C. B. AUBREY,
Offg. Registrar.

Circular Memorandum No. 9 of 1918.

FROM

THE REGISTRAR,
COURT OF THE JUDICIAL COMMISSIONER,
UPPER BURMA,

To

ALL SESSIONS JUDGES AND MAGISTRATES
IN UPPER BURMA.

Dated Mandalay, the 11th November 1918.

The following instructions which have been issued by the Chief Court, Lower Burma, are commended to the notice of all magistrates in Upper Burma.

In addition to the powers referred to in paragraph 2 magistrates in the Bhamo, Myitkyina, Ruby Mines and Upper Chindwin Districts can under section 6 of the Whipping Act pass a sentence of whipping in lieu of other punishment on any person who in these districts commits an offence punishable under the Indian Penal Code with three years' imprisonment or upwards.

To ensure the provisions of the Reformatory Schools Act and of section 562, Code of Criminal Procedure, being made use of, District Magistrates should take steps to cause all magistrates who can suitably be empowered to exercise the powers referred to therein to be invested with them.

"The attention of all magistrates is again drawn to the importance of giving careful consideration to cases of young offenders and of not awarding sentences of imprisonment or fine unless when it is clear that there is no possible alternative or that a fine, if imposed, will be paid by the parents or guardians of the offender. As has been repeatedly pointed out, the imposition of short terms of imprisonment on young offenders for first offences or petty offences is open to grave objections. Equally strong objections apply to the imposition of a fine in cases where the fine cannot be paid.

A short term of imprisonment is ordinarily useless for the purpose of reformation, and involves the risk of contamination through contact with more matured and hardened offenders. These remarks do not of course apply to sentences of imprisonment till the rising of the Court, which may often be appropriate. The instructions on the subject are embodied in paragraphs 307 and 308

of the Courts Manual.[1] As, however, cases are constantly recurring in which these instructions are disregarded, it appears desirable to again recapitulate the alternatives to sentences of fine and imprisonment.

2. Under section 5 of the Whipping Act, boys under 16 may be sentenced to whipping for the abetment, commission of or attempt to commit any offence (1) under the Penal Code not punishable with death, or (2) under any other law punishable with imprisonment, which has been specially notified in the *Gazette of India*. Boys over 16 can be sentenced to whipping under sections 3 and 4 of the Whipping Act.

Boys under 15 can be committed to a reformatory in suitable cases, and the principles for guidance are to be found in paragraphs 316, 317, 318 and 319 of the Courts Manual.[2]

Under section 31 of the Reformatory Schools Act boys and girls under 15 can be discharged with an admonition or given over to a parent or relative on an undertaking of responsibility for the offender's good behaviour for a period not exceeding one year.

In many cases a first offender can also be released on probation of good conduct under section 562, Criminal Procedure Code.

3. It is important in applying these alternatives that the correct procedure should be observed and they should be adopted only by magistrates empowered to use them.

4. Where a magistrate not empowered considers that the provision of the Whipping Act, Reformatory Schools Act or of section 562, Criminal Procedure Code, can be suitably applied, he should invariably submit the proceedings to the superior magistrate indicated in section 349, Criminal Procedure Code, section 9 or section 31, Reformatory Schools Act, or the proviso to section 562, Criminal Procedure Code, as the case may be.

5. Sessions Judges and District Magistrates should pay special attention in the scrutiny of their periodic lists of completed criminal cases, to the detection of instances in which the instructions have not been observed, with a view to correcting the errors observed and to advising or admonishing subordinate magistrates who are in default."

By order,

C. B. AUBREY,

Offg. Registrar.

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1 Corresponding paragraphs in the Upper Burma Courts Manual are 378, 387 and 399A.

2. Corresponding paragraphs in the Upper Burma Courts Manual are 394, 395, 396 and 397.

Circular Memoran dum No. 10 of 1918.

FROM

THE REGISTRAR,
COURT OF THE JUDICIAL COMMISSIONER,
UPPER BURMA,

To

ALL MAGISTRATES AND SESSIONS JUDGES
IN UPPER BURMA.

Dated Mandalay, the 12th December 1918.

The attention of Magistrates and Sessions Judges is invited to the provisions of Local Government's Judicial Department Circular No. 23 of 1918, dated the 30th October 1918. The procedure prescribed in this Circular is in supersession of that contained Judicial Department Circular No. 35 of 1916.

Special attention is invited to the changes effected in paragraphs 2, 3 and 5 to 7.

The report required by paragraph 6 should be noted in the tabular Statement of Reports and Returns at the end of the entry "I—Yearly (*a*) Criminal," published in paragraph 968 of the Courts Manual.

This Court's Circular Memoranda Nos. 6 of 1912 and 17 of 1917 are hereby superseded.

By order,

ED. MILLAR,
Registrar.

Addenda to Circular Memorandum No. 8, dated the 12th October 1918.

Add the words "through the Judicial Commissioner" at the end of the 2nd paragraph.

By order,

ED. MILLAR,

Registrar.

G.B.C.P.O.—No. 17, J.C.U.B, 21-10-1922—750

Circular Memorandum No. 1 of 1919.

FROM

THE REGISTRAR,
COURT OF THE JUDICIAL COMMISSIONER,
UPPER BURMA,

To

ALL MAGISTRATES IN UPPER BURMA.

Dated Mandalay, the 30th January 1919.

In supersession of the *Rules for the payment of the expenses of complainants and witnesses attending any Criminal Court in Burma* published in this Court's Circular Memorandum No. 11, dated the 21st August 1916, the annexed amended Rules are reproduced for information and guidance of Courts in Upper Burma.

2. In order to obviate any difficulty that may arise in the interpretation of the phrase " sufficient reason " contained in the proviso to Rule IV, the Judicial Commissioner directs that payment of witnesses' expenses should not ordinarily be made in advance unless the distance to be travelled to the Court cannot be covered in one day and unless the witness is so poor that he cannot attend Court without hardship unless his expenses are paid in advance.

3. The amendment contained in Judicial Department Notification No. 127, dated the 25th November 1918, will be duly incorporated in the Upper Burma Courts Manual at pages 367 to 351, under paragraph 995 and the Guard-book of Upper Burma Judicial Forms Part I (Criminal), under " Instructions to Criminal Register No. III."

By order,

ED. MILLAR,

Registrar.

Judicial Department Notification No 91, dated Rangoon, the 29th June 1916.

Under the provisions of section 544 of the Code of Criminal Procedure, 1898, and in supersession of the notifications cited in the margin, the Lieutenant-Governor, with the previous sanction of the Governor-General in Council, is pleased to make the following rules for the payment of the expenses of complainants and witnesses attending any Criminal Court in Burma for the purposes of any enquiry, trial, or other proceeding before such Courts under the said Code.

Judicial Department Notification No. 182, dated the 12th May 1892.

Judicial Department Notification No. 131, dated the 10th April 1894.

Rules for the payment of the expenses of complainants and witnesses attending any Criminal Court in Burma for the purpose of any enquiry, trial, or other proceeding before such Court under the said Code.

I.—The Criminal Courts may at their discretion pay, according to the scale set forth in Rule III, the expenses of complainants and witnesses either for the prosecution or for the defence—

(1) in all cases which are cognizable by the police;

(2) in all cases entered in column 5 of the Schedule II as not bailable.

(3) in all cases in which witnesses are compelled to attend the Court under sections 94, 103, 208, 217, 257 and 540 of the Code of Criminal Procedure; and

(4) in all cases where the prosecution is instituted or carried on by, or under the orders or with the sanction of, Government or any Judge, Magistrate, or public officer, or in which the presiding officer thinks the prosecution to be directly in furtherance of the interests of public justice.

II.—Expenses of complainants and witnesses shall be payable, according to the scale set forth in Rule III, on account of their journeys to and from the Court and for the days during which they have been absent from their homes for the purposes of the trial, proceedings, etc.:

Provided that—

(1) a Government servant whose salary exceeds Rs. 10 per mensem giving evidence in his official capacity—

(*a*) When giving evidence at a place more than five miles from his headquarters shall not receive anything under these rules, but shall be given a certificate of attendance;

(*b*) When giving evidence at a place not more than five miles from his headquarters shall, in cases where the Court consider it necessary, receive under these rules actual travelling expenses, but shall not receive subsistence, special or expert allowances.

(2) A Government servant whose salary does not exceed Rs. 10 per mensem giving evidence in his official capacity shall receive his expenses from the Court.

(3) A Government servant giving evidence in his private capacity shall receive actual travelling expenses under these rules, but shall not receive subsistence, special or expert allowances.

(4) In cases in which the Magistrate acquits the accused under section 245 or section 247 of the Code of Criminal Procedure, and is of opinion that the complaint was frivolous or vexatious, the expenses of the complainant shall not be paid.

[NOTE 1.—Whenever the expenses of a Government servant summoned as a witness in his official capacity have to be deposited in advance, the term "expenses" shall be interpreted to mean the travelling and halting allowances admissible under the Civil Service Regulations.

NOTE 2.—Any fees or expenses which may be deposited in cases falling within proviso 1 (*a*) shall be credited to Government under the head "XVI-A—Miscellaneous fees and fines."]*

III.—The scale of expenses payable shall be as follows:—

(1) *Ordinary labouring class of natives.*—The actual railway or steam-boat fare to and from the Court by the lowest class; or, where the journey could not have been performed by rail or steam-boat, actual travelling expenses up to a limit of Rs. 2 a day by boat and of four annas a mile by road; and an allowance for each day's absence from home of six annas to those who are residents of places other than the place where the Court is held, and of four annas to those who are residents of the place where the Court is held.

(2) *Petty village officers.*—Double the above rates of daily allowance; same rates as above for railway or steam-boat fare, or actual travelling expenses by boat or road up to the limit of Rs. 2 a day by boat and of four annas a mile by road.

(3) *Persons of higher ranks of life, such as clerks, trades people, village headmen and headmen of circles.*—Second class railway or steam-boat fare to and from the Court; or, where the journey could not have been performed by rail or steam-boat, actual travelling expenses up to a limit of Rs. 4 a day by boat and of six annas a mile by road; and an allowance not to exceed, except in special cases, Rs. 3 for each day's absence from home to European or Anglo-Indian, and Re. 1 to Burman and Indians.

(4) *Persons of superior rank.*—The actual sum spent in travelling to and from the Court, with an allowance according to circumstances, not to exceed, except in very special cases, Rs. 5 for each day's absence from home to European or Anglo-Indian, and Rs. 2 to Burmese and Indian gentlemen.

(5) *Witnesses following any profession, such as medicine or law.*—A special allowance according to circumstances. In determining the amount payable under this rule, the Court may, in the case of any person summoned to give evidence as an expert, allow reasonable remuneration for the time occupied both in giving evidence and in performing any work of an expert character necessary for the case.

[NOTE.—When the journey has to be performed partly by rail or steam-boat and partly by road or boat, the fare shall be paid in respect of the former and the mileage or boat-allowance in respect of the latter part of the journey.]

* Judicial Department Notification No. 97, dated the 12th July 1917.

IV.—Allowances shall be paid under the orders of the Court, and in the presence of the presiding officer, and ordinarily at the conclusion of the trial, enquiry, or other proceeding. The presiding officer of the Court shall check the statement of charges and will be responsible that unauthorized charges are not allowed.

" Provided that, for sufficient reason, the Court may direct that the said allowances shall be paid to the person summoned at the time of serving the summons." *

V.—In cases committed to the Court of Sessions, or to the High Court, the Magistrate who commits the case shall note in the list of witnesses the class which in his opinion, each belongs.

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* Judicial Department Notification No. 127, dated the 25th November 1918.

Circular Memorandum No. 2 of 1919.

FROM

THE REGISTRAR,
COURT OF THE JUDICIAL COMMISSIONER,
UPPER BURMA,

To

ALL MAGISTRATES IN UPPER BURMA.

Dated Mandalay, the 19th February 1919.

Attention is invited to the procedure laid down in Local Government's Judicial Department Circular No. 2 of 1919, dated the 7th January 1919, for the trial of members of the Indian Army and the Burma Military Police Force, who are accused of criminal offences. The provisions contained therein are in supersession of Judicial Department Circular No. 5 of 1888 and of all subsequent executive orders issued on the subject.

This Court's connected Circular Memoranda issued previously are hereby cancelled.

Necessary amendments will be effected in the Upper Burma Courts Manual in due course.

By order,

ED. MILLAR,
Registrar.

Circular Memorandum No. 3 of 1919.

FROM

THE REGISTRAR,
COURT OF THE JUDICIAL COMMISSIONER,
UPPER BURMA,

To

ALL MAGISTRATES AND SESSIONS JUDGES
IN UPPER BURMA.

Dated Mandalay, the 25th February 1919.

With reference to paragraph 9 of the resolution on the Reports on the Administration of Criminal Justice in Burma for the year 1917, regarding the inclusion of sentences of imprisonment till the rising of the Court in the category of imprisonments of 15 days and under in columns 28 and 29 of Statement V—Imperial (U.B. $\frac{\text{Judicial}}{\text{Criminal 18}}$), it is requested that the number of cases in which imprisonment till the rising of the Court is ordered should be given in the body of the Report on the Administration of Criminal Justice together with any remarks on such figures as may be necessary.

By order,

ED. MILLAR,
Registrar.

Circular Memorandum No. 4 of 1919.

From

THE REGISTRAR,
COURT OF THE JUDICIAL COMMISSIONER,
UPPER BURMA,

To

ALL JUDGES AND MAGISTRATES IN
UPPER BURMA.

Dated Mandalay, the 13th March 1919.

Special attention is invited to the fact that much inconvenience is caused by the practice of sending sums of money which are expressly meant for the Court of Small Causes, Rangoon, to the Registrar, Chief Court of Lower Burma. All remittances, such as moieties of salaries attached, judicial deposits, subsistence allowance of witnesses, commissioner's fees, etc., intended for the Small Cause Court should, in future, be made direct to the Judge of that Court and not to the Registrar, Chief Court of Lower Burma.

By order,

ED. MILLAR,
Registrar.

Circular Memorandum No. 5 of 1919.

FROM

THE REGISTRAR,
COURT OF THE JUDICIAL COMMISSIONER,
UPPER BURMA,

To

ALL JUDGES IN UPPER BURMA.

Dated Mandalay, the 25th March 1919.

The attention of all Judges is invited to the rules framed by the Local Government under section 13 of the Indian Soldiers (Litigation) Act, 1918, and published in Judicial Department Notification No. 12, dated the 5th February 1919. These rules are in supersession of those contained in Judicial Department Notification No. 170, dated the 19th November 1915.

Circular Memorandum No 7 of this Court, dated the 23rd December 1915, is hereby cancelled.

By order,

ED. MILLAR,
Registrar.

Not translated into Burmese.]

Circular Memorandum No. 6 of 1919.

FROM

THE REGISTRAR,
COURT OF THE JUDICIAL COMMISSIONER,
UPPER BURMA,

To

ALL SESSIONS JUDGES AND
DISTRICT MAGISTRATES IN UPPER BURMA.

Dated Mandalay, the 31st March 1919.

Cases frequently come before this Court in revision in which one of the grounds of the application is that although the accused has appealed against the conviction the judgment of the Appellate Court does not comply with the provisions of the law. It was pointed out in the case of Nga Po Han *v.* King-Emperor (U.B.R., 1910-13, 169) that section 424 read with section 367 of the Code of Criminal Procedure requires a judgment in appeal to state the points for determination, the decision thereon, and the reasons for the decision. It is obvious that such judgments as the following, "I have read the evidence and am satisfied that the accused was rightly convicted," do not comply with the provisions of the law, and it is necessary, when the Appellate Court's judgment does not show that the judge has considered the evidence, for this Court to go into the evidence to satisfy itself whether the conviction should be sustained or not.

It is possible that if Appellate Courts recognized more clearly the distinction between an order dismissing an appeal summarily under section 421 of the Code of Criminal Procedure, and a judgment dealing with an appeal which has been admitted, this mistake would not be made, and it seems desirable therefore that the diary should show distinctly in the case of every appeal which has not been summarily dismissed that it is admitted.

The parties to a criminal trial are entitled upon an appeal to have a statement of the case and the decision of the Appellate Court with its reasons recorded in such a manner as to show that the Appellate Court has considered the evidence and has come to an independent finding upon it, and it should not be necessary for parties to come to this Court because Appellate Courts have failed to do their duty.

By order,

ED. MILLAR,
Registrar

Circular Memorandum No. 7 of 1919.

FROM

THE REGISTRAR,
COURT OF THE JUDICIAL COMMISSIONER,
UPPER BURMA,

To

ALL SESSIONS JUDGES AND MAGISTRATES
IN UPPER BURMA.

Dated Mandalay, the 10th April 1919.

In continuance of Circular Memoranda Nos. 3, dated the 6th February 1908, and 8, dated the 19th July 1909, attention is again invited to the instructions contained in paragraphs 328 and 328*a* of the Upper Burma Courts Manual.

It has been reported that, owing to detentions for the purpose of giving medical evidence, difficulties are still experienced in getting Sub-Assistant Surgeons set free from a station immediately their services are required to meet urgent demands.

By order,

ED. MILLER,
Registrar.

Not translated into Burmese.]

Circular Memorandum No. 8 of 1919.

FROM

THE REGISTRAR,
COURT OF THE JUDICIAL COMMISSIONER,
UPPER BURMA,

To

ALL SESSIONS JUDGES AND DISTRICT
MAGISTRATES IN UPPER BURMA.

Dated Mandalay, the 13th June 1919.

A brief notice of the working of the orders contained in Rule 1 of Judicial Department Circular No. 10, dated the 5th March 1919, should be included in the Annual Report on the Administration of Criminal Justice in Upper Burma commencing with the Report for the year 1919.

By order,
ED. MILLAR,
Registrar.

Circular Memorandum No. 9 of 1919.

FROM

THE REGISTRAR,
COURT OF THE JUDICIAL COMMISSIONER,
UPPER BURMA,

To

ALL SESSIONS JUDGES AND MAGISTRATES
IN UPPER BURMA.

Dated Mandalay, the 17th June 1919.

It is undesirable that persons of respectability so long as they are only *under-trials* should be addressed as "Nga" and "Mi." It is accordingly directed, with the approval of the Local Government, that the terms "Maung" and "Ma" should in future be adopted in all criminal proceedings

By order,

ED. MILLAR,
Registrar.

Circular Memorandum No. 10 of 1919.

FROM

THE REGISTRAR,
COURT OF THE JUDICIAL COMMISSIONER,
UPPER BURMA,

To

ALL SESSIONS JUDGES AND MAGISTRATES
IN UPPER BURMA.

Dated Mandalay, the 25th June 1919.

The Officiating Judicial Commissioner, Upper Burma, has had his attention drawn to the fact that the rules regulating the action to be taken in cases in which Judges and Magistrates find it necessary to comment upon the conduct of the police as disclosed in enquiries and trials, require revision. Allegations of tutoring of witnesses, of the manufacture or suppression of evidence, and of extorting confessions of guilt by threats or inducements, are sometimes adopted as the line of defence in the criminal courts of this country and it is inevitable that Courts should express their opinion freely on such allegations. It is however essential, both for the maintenance of public confidence in the administration of justice, and also for the protection of the police force, that judicial comments on such allegations should be carefully weighed, should not go beyond the evidence available and should lead, when necessary, to adequate investigation.

2. The Officiating Judicial Commissioner, Upper Burma, desires to lay down certain general principles to be borne in mind by Magistrates and Judges who consider that the evidence before them calls for strictures upon the methods employed by the police:

(*a*) The misconduct to which attention is drawn in a judgment should be relevant to the case under trial.

(*b*) Strictures upon the conduct of the police should be based on a careful though brief enquiry made in the course of the trial, showing that there are at least *primâ facie* reasons to justify them.

(*c*) Such strictures should be expressed in restrained and temperate language.

3. The Officiating Judicial Commissioner now directs that the following procedure be observed in regard to allegations made against the police and the comments which Judges or Magistrates may make upon them :—

(*a*) It is directed that in all cases where strictures are passed by Magistrates upon the conduct of the police, as disclosed in cases

coming before them, whether in the judgment or a separate note, a copy of the judgment or note shall be sent at once by the Magistrate to the District Magistrate concerned. The District Magistrate will cause the allegations to be enquired into by a senior officer of police, or will direct a magisterial enquiry according as he may think fit, in accordance with the instructions contained in Police Department letter No. 10—7P.-6, dated the 4th March 1912.

(*b*) In Sessions trials where strictures are passed by a Cour of Session or the Court of Judicial Commissioner, Upper Burma if the facts are not sufficient to warrant the immediate institution of criminal proceedings and if the Court is of opinion that an enquiry of a special nature (other than a departmental or police investigation) is necessary, a copy of the note or judgment embodying this opinion shall at once be sent to the District Magistrate. The District Magistrate will then report the matter by the ordinary channel for the orders of the Local Government, which will issue instructions for a public enquiry to be held by a commission of officers, and will appoint the officers for that purpose. Such a commission will ordinarily consist of two officers not belonging to the Police Department one of whom has had judicial experience.

(*c*) In all other cases where strictures have been passed by a Court of Session or the Court of Judicial Commissioner, Upper Burma, *i.e.*, where criminal proceedings or a special enquiry are not considered necessary, a copy of the note or judgment embodying the strictures shall be sent to the District Magistrate who will either proceed as in clause (*a*) above or if he considers it desirable, move the Local Government to direct a special enquiry by Commission.

4. Judges and Magistrates will seldom have the opportunity to investigate thoroughly the allegations made against the police in the course of a trial. They will seldom have more than a *primâ facie* case showing good grounds for enquiry. They should accordingly in such cases abstainfrom recording, as if they had been fully proved, statements imputing to the police corrupt or other reprehensible practices which are to be the subject of future enquiry.

By order,

ED. MILLAR,

Registrar.

COURT OF THE JUDICIAL COMMISSIONER,
UPPER BURMA.

Corrigendum to Circular Memorandum No. 3 of 1919, dated the 25th February 1919.

For the word "cases" in the sixth line of the Circular Memorandum *substitute* the word "punishments."

By order,

ED. MILLAR,
Registrar.

Circular Memorandum No. 11 of 1919.

FROM

THE REGISTRAR,
COURT OF THE JUDICIAL COMMISSIONER,
UPPER BURMA,

TO

ALL MAGISTRATES IN UPPER BURMA.

Dated Mandalay, the 4th July 1919.

In passing sentences under the Gambling Act Magistrates should be careful to distinguish between persons, who are merely present at or take part in illegal gambling, and the actual promoters of the gambling.

Gambling is a fruitful cause of crime and the promoters of gambling on a scale that is at all extensive require to be severely dealt with.

Ordinarily a severe fine will be sufficient for a first offence under section 12, though there may be exceptional cases in which imprisonment is called for. Magistrates should, however, be very chary of awarding substantive sentences of imprisonment unless the offender has been previously convicted under the Gambling Act.

By order,

ED. MILLAR,
Registrar.

Circular Memorandum No. 12 of 1919.

FROM

THE REGISTRAR,
COURT OF THE JUDICIAL COMMISSIONER,
UPPER BURMA,

To

ALL JUDGES IN UPPER BURMA.

Dated Mandalay, the 21st July 1919.

In continuance of this Court's Circular Memorandum No. 5, dated the 25th March 1919, attention is invited to Judicial Department Notification No. 75, dated the 16th June 1919, in which Rule 1 of the rules framed by the Local Government under the Indian Soldiers (Litigation) Act, 1918, in Judicial Department Notification No. 12, dated the 5th February 1919, is amended.

By order,

ED. MILLAR,
Registrar.

Circular Memorandum No. 13 of 1919.

FROM

THE REGISTRAR,
COURT OF THE JUDICIAL COMMISSIONER,
UPPER BURMA,

To

ALL JUDGES AND MAGISTRATES
IN UPPER BURMA.

Dated Mandalay, the 30th July 1919.

The attention of all Judges and Magistrates is drawn to the following extracts from paragraph 177 of the (Rowlatt) Sedition Committee's Report, 1918 :—

"We have had our attention pointedly drawn to the length of trials and cross-examinations in particular. It is the duty of the Court to disallow of its own motion examination or cross-examination upon matters irrelevant or addressed directly or indirectly to a purely ulterior or collateral object and not to the question of the guilt or innocence of the accused, or calculated to elicit directly or indirectly the disclosure of matters protected from disclosure by section 125 of the Evidence Act, concerning sources of information as to the commission of offences.

"This duty is not inconsistent with the Indian Evidence Act, but directly arises out of it

* * * * *

"The same observations apply to the undoubted rule of law that the Court shall take as conclusive (save as excepted by section 153) the answer of a witness upon a question put as to credit only and shall not treat the mere making of the suggestion involved in the question as indicating any foundation for it."

2. From cases both civil and criminal coming before him the Officiating Judicial Commissioner notices that the abuse of cross-examination is a growing evil and is one of the chief causes of excessive durations shown by Courts in Upper Burma. It is the duty of Judges and Magistrates to see that irrelevant matter is not introduced into the case. The right performance of this most important duty pre-supposes a clear conception of the fundmental principle of the law of evidence as laid down in section 5 of the Evidence Act,—that evidence may be given of the existence or

non-existence of any fact in issue and of such other facts as are declared to be relevant in Chapter II of the Act and of no others. Questions relating to facts not in issue or which are obviously irrelevant should be at once disallowed and free use should be made of the provisions of section 136 which enable the court on its own motion to enquire as to the mode in which evidence offered is relevant before allowing it to be given.

3. Judges and Magistrates should bear in mind the rule of law laid down in section 153 of the Act that (subject to the exceptions contained in the section) when a witness has been asked and has answered any question which is relevant to the inquiry only in so far as it tends to shake his credit by injuring his character, no evidence shall be given (by further questioning the witness or otherwise) to contradict him. No hostile inference may be drawn from the mere fact that such a question is put.

4. Judges and Magistrates should make it a practice to decide questions as to the admissibility of evidence, oral or documentary, as they arise. Such questions should not ordinarily be reserved for decision until judgment is given.

5. The Officiating Judicial Commissioner invites the co-operation of all District, Divisional an Sessions Judges and District Magistrates in securing the right application of the above rules of evidence with a view to checking the improper or irrelevant examination or cross-examination of witnesses. In the course of inspection, and in disposing of cases in revision or on appeal, they should draw the attention of the Judge or Magistrate concerned to any instances of the neglect of these rules and the admission in consequence of irrelevant evidence in the trial of the case.

By order,

ED. MILLAR,
Registrar.

Circular Memorandum No. 14 of 1919.

FROM

THE REGISTRAR,
COURT OF THE JUDICIAL COMMISSIONER
UPPER BURMA,

To

ALL DIVISIONAL AND DISTRICT JUDGES
IN UPPER BURMA.

Dated Mandalay, the 19th August 1919.

It has been found that much inconvenience is felt in the disposal of civil cases pending in this Court in Appeal or Revision by the failure to submit in time the records of proceedings by the lower Courts. It is accordingly directed that the instructions published in paragraph 741 of the Upper Burma Courts Manual and in Circular Memorandum by No. 9 of 1909, dated the 13th September 1909, should be strictly observed in future or any delay in the submission of the records explained.

By order,

ED. MILLAR,
Registrar.

Circular Memorandum No. 15 of 1919.

FROM

THE REGISTRAR,
COURT OF THE JUDICIAL COMMISSIONER,
UPPER BURMA,

To

SESSIONS JUDGES AND MAGISTRATES
IN UPPER BURMA.

Dated Mandalay, the 26th August 1919.

With the sanction of the Local Government thef ollowing instructions are issued for guidance.

In many cases in which the law does not prescribe enhanced maximum punishment for a second conviction, it is nevertheless necessary to pass a severe sentence because the offender has been previously convicted of a similar offence or of some other offence indicating moral turpitude. (*Cf.* Printed Judgments, Lower Burma, page 93.) In such cases the record must show clearly that the previous convictions have been either admitted or proved.

An accused person should not be asked if he has been previously convicted, unless there are *primâ facie* grounds for believing that he has been so convicted.

The procedure should be similar to that prescribed in section 310 (*b*) and (*c*) of the Code of Criminal Procedure, that is to say, when the trial is concluded, and the Magistrate convicts the accused at once, or adjourns the trial for judgment and has not made up his mind to acquit the accused, he should proceed to try the previous convictions. Form No. U.B. $\frac{\text{Judicial}}{\text{Criminal 81}}$ should be used for this purpose.

These instructions will be embodied in the Upper Burma Courts Manual as paragraph 318B in due course.

By order,

ED. MILLAR,
Registrar.

Not translated into Burmese.]

Circular Memorandum No. 16 of 1919.

FROM
THE REGISTRAR,
COURT OF THE JUDICIAL COMMISSIONER,
UPPER BURMA,

To
ALL JUDGES IN UPPER BURMA.

Dated Mandalay, the 29th August 1919.

In adoption suits it is important that Appellate Courts should know the exact words used by witnesses when they speak of the alleged adoption. It is accordingly directed that in recording the statements of witnesses in these cases the Burmese expressions actually used by the witness should be entered in brackets after the English word "adopt," "adoption," "adopted son," etc.

By order,

ED. MILLAR,
Registrar.

Circular Memorandum No. 17 of 1919.

FROM

THE REGISTRAR,
COURT OF THE JUDICIAL COMMISSIONER,
UPPER BURMA,

To

ALL JUDGES AND MAGISTRATES
IN UPPER BURMA.

Dated Mandalay, the 23rd September 1919.

In supersession of the supplementary rules relating to the monthly check of the Bailiff's Registers with the Registers of Courts and the Treasury Register, published in this Court's Circular Memorandum No. 13, dated the 1st August 1910, the following amended rules are issued:—

The monthly check of the Bailiff's Registers with the Registers of all Courts at headquarters will also include a check with the Treasury Register (No. T. F. 108).

At out stations where there is more than one officer exercising judicial powers, the officer senior in rank should check once a month the Bailiff's Registers containing money entries of the other officer or officers with Court Registers, with T. F. No. 108 where it is kept, and with the cash-book. He should also see that Bailiff's Register No. V is fully and regularly entered up and check the exhibits in the Bailiff's hands with this register. At outstations where there is only one officer exercising judicial functions, he should make the same check once a month. Inspecting Officers should make the checks abovementioned.

By order,

ED. MILLAR,

Registrar.

Circular Memorandum No. 18 of 1919.

FROM

THE REGISTRAR,
COURT OF THE JUDICIAL COMMISSIONER,
UPPER BURMA,

To

ALL MAGISTRATES IN UPPER BURMA.

Dated Mandalay, the 22nd October 1919.

Attention is invited to Police Department Circular No. 34 of 1919, dated the 15th August 1919, wherein rules for the enforcement of the Preventive Law are published.

The existing instructions contained in paragraphs 129 and 130 of the Upper Burma Courts Manual will be amended accordingly in due course.

By order,

ED. MILLAR,
Registrar.

Circular Memorandum No. 19 of 1919.

FROM

THE REGISTRAR,
COURT OF THE JUDICIAL COMMISSIONER,
UPPER BURMA,

To

ALL JUDGES IN UPPER BURMA.

Dated Mandalay, the 24th October 1919

Orders of the Government of India issued in Home Department (Judicial) Notification No. 1201, dated the 3rd September 1919, are published for information and guidance:—

(1) that the provisions of section 29 of the Code of Civil Procedure, 1908, shall apply to the Courts in Mesopotamia specified in the Schedule hereto annexed; and

(2) that the service by such Courts of any summons issued by a Court in British India under the said Code shall be valid service.

SCHEDULE.

1. Court of Appeal, Baghdad.
2. Court of First Instance, Baghdad.
3. Court of First Instance Basrah.
4. Court of First Instance, Ba'qubah.
5. Court of First Instance, Mosul.

It is directed that any summons for service on a party residing in Mesopotamia should be forwarded to one of the Courts concerned, with the name, description and place of residence and if the issuing Court is subordinate to the District Court, through the District Judge.

Names of the Courts will be inserted in paragraph 605, Upper Burma Courts Manual, in due course.

By order,

ED. MILLAR,
Registrar.

G.E.C.P.O.—No. 17, J.C.U.B, 26-10-1922—750

Circular Memorandum No. 1 of 1920.

FROM

THE REGISTRAR,
COURT OF THE JUDICIAL COMMISSIONER,
UPPER BURMA,

To

ALL MAGISTRATES IN UPPER BURMA.

Dated Mandalay, the 10th February 1920.

When passing orders on applications for remands Magistrates are requested to note on the back of the Police Case Diary, Form $\frac{\text{Crime 13}}{\text{Police 4—4}}$ that a remand in the case has been granted up to the date fixed by them.

By order,

ED. MILLAR,
Registrar.

Circular Memorandum No. 2 of 1920.

FROM

THE REGISTRAR,
COURT OF THE JUDICIAL COMMISSIONER,
UPPER BURMA,

To

ALL SESSIONS JUDGES AND MAGISTRATES
IN UPPER BURMA.

Dated Mandalay, the 28th February 1920.

The following list of offences under Special and Local Acts which are cognizable within the meaning of section 4 (*f*), Code of Criminal Procedure, 1898, and should be classified as such, has been compiled for the information and guidance of criminal courts. It will be inserted in the Courts Manual and the Judicial Commissioner looks to Sessions Judges and District Magistrates for assistance in keeping the list up to date.

By order,

ED. MILLAR,
Registrar.

Cognizable offences under Special and Local Acts.

Acts.	Sections.
The Indian Arms Act, 1878 ..	19 and 20.
The Burma Military Police Act, 1887 ..	6
The Burma Excise Act, 1917 ..	30—34, inclusive, 37 and 38.
The Burma Ferries Act, 1898 ..	26
The Indian Post Office Act, 1898 ..	52 (including abetments and attempts).
The Indian Railways Act, 1890 ..	100, 101, 119—121 inclusive, 126—129 inclusive, and 130 (1).
The Indian Registration Act, 1908 ..	81 and 82.
The Burma Salt Act, 1917 ..	9, 10 and 13 read with section 9.
The Indian Telegraph Act, 1885 ..	25, 26, 27 and 29 (including attempts).
The Metal Tokens Act, 1889 ..	4
The Indian Official Secrets Act, 1889..	3 and 4.
The Births, Deaths, and Marriages Registration Act, 1886 ..	27
The Criminal Tribes Act, 1911 ..	21—25 inclusive.
The Indian Air Craft Act, 1911 ..	8 (including abetments and attempts).
The Burma Habitual Offenders Restriction Act, 1919	18 (1) (c).

Circular Memorandum No. 3 of 1920.

FROM

THE REGISTRAR,
COURT OF THE JUDICIAL COMMISSIONER,
UPPER BURMA,

To

ALL SESSIONS JUDGES AND DISTRICT
MAGISTRATES IN UPPER BURMA.

Dated Mandalay, the 22nd March 1920.

The Judicial Commissioner has found that the existing procedure followed by the lower courts in reporting proceedings under section 438, Code of Criminal Procedure, is not satisfactory and varies considerably.

With the approval of the Local Government the following instructions are accordingly issued for guidance :—

"All reports under section 438 should be by proceeding containing the following particulars :—

(i) a brief analysis of the case ;

(ii) the sentence or order of the Subordinate court, with the name of, and the powers exercised by, the Magistrate passing it ;

(iii) the particular portion of the finding, sentence or order which is considered incorrect, illegal, or improper, or the particular portion of the proceedings which is considered irregular ;

(iv) the grounds on which it is suggested that the High Court should exercise the powers conferred by section 439 ;

(v) a note showing how much of the sentence passed has been already undergone by the accused ; and if the sentence was one of fine or whipping whether the fine has been realized or the whipping inflicted ;

(vi) the recommendation of the Judge or Magistrate ;

(vii) a note whether the execution of the sentence has been suspended.

NOTE.—These particulars should not be numbered nor set out in paragraphs corresponding to the numbers (i) to (vii) above. The proceeding should be composed in the same way as a judgment.

A true copy of the report should be forwarded to the registrar with the records of the case reported upon and with the revisional proceedings of the Court or Magistrate making the report. No covering letter should be sent.

More than one case should not be reported upon in one proceeding.

The inferior court should, whenever it may seem desirable to do so, be called on to submit an explanation with regard to the point on which it is proposed to make the reference, and the explanation should be sent with the report."

The necessary amendments will be made in the Upper Burma Courts Manual in due course.

By order,

C. B. AUBREY,
Registrar.

Circular Memorandum No. 4 of 1920.

FROM

THE REGISTRAR,
COURT OF THE JUDICIAL COMMISSIONER,
UPPER BURMA.

TO

ALL JUDGES IN UPPER BURMA.

Dated Mandalay, the 7th June 1920.

The provisions of paragraph 608 of the Upper Burma Courts Manual are generally either misunderstood or disregarded. Statements made by parties who are examined by the Court under the provisions of Order X of the Code of Civil Procedure are not evidence; they are merely pleadings.

In addition to being examined under the provisions of that Order the parties should also as a matter of course be examined by the Court as witnesses unless they refuse to give evidence, or are absent, in which case the Court should record the fact of their refusal or absence in the case diary.

By order,

C. B. AUBREY,
Registrar.

Circular Memorandum No. 5 of 1920.

FROM

THE REGISTRAR,
COURT OF THE JUDICIAL COMMISSIONER,
UPPER BURMA,

TO

ALL MAGISTRATES IN UPPER BURMA.

Dated Mandalay, the 11th June 1920.

The attention of Magistrates is invited to the Burma Habitual Offenders Restriction Act, II of 1919, and the rules framed thereunder and published in Police Department Notification No. 280, dated the 17th November 1919 (*Burma Gazette* of November 22nd, 1919, Part I, page 918).

Magistrates empowered to try proceedings under section 110, Code of Criminal Procedure, 1898, have discretion to proceed either under section 110 of the Code or under section 3 (1) this Act, or under both. Section 3(1

The proceedings under section 3 (2) of the Act may be taken jointly with those under section 110, Code of Criminal Procedure, and may be entered in and form part of the same record. Section 3 (2

But an order under section 118, Code of Criminal Procedure, and an order under section 7 of the Act cannot be made against one and the same person, and a joint proceeding as above can result only in an order under one or the other of these sections, or in the discharge of the accused. Section 7, proviso (*a*).

It must be laid down in the order of restriction whether the person is required to restrict himself, in his movements or to report himself or both. Section 7, proviso (*b*).

A Magistrate who is empowered to take action against a convict under section 565, Code of Criminal Procedure, may, instead of passing an order under section 565 of the Code, make an order of restriction against the convict under section 9 (1) of the Act. Section 9(1

It must be borne in mind that an order under section 565 of the Code and an order under section 9 (1) of the Act cannot be made against the same person.

Before passing an order of restriction Magistrates must satisfy themselves that the person against whom the order is made has adequate means of earning his livelihood within the area of restriction. Section 10 (1).

Magistrates are empowered to revise their own orders with regard to the area of restriction at any time. Section 10 (2).

A District Magistrate may revise or cancel any order of restriction made by any Court or Magistrate having jurisdiction in his district. Sections 1 and 12.

The times and places of report must be set out in an order requiring a person to report himself. Rule 5.

By order,

C. B. AUBREY,
Registrar.

Circular Memorandum No. 6 of 1920

FROM

THE REGISTRAR,

COURT OF THE JUDICIAL COMMISSIONER,

UPPER BURMA,

To

ALL DIVISIONAL AND DISTRICT JUDGES

IN UPPER BURMA.

Dated Mandalay, the 19*th August* 1920.

The following Notification issued by the Government of India regarding the exemption from Court-fees of certain estates of persons subject to military law who have been killed or have died of wounds inflicted, or as the result of an accident occurring or of a disease contracted within three years before death while on active service in the war, is issued to all Divisional and District Judges in Upper Burma for information with the request that they will, on application, refund any fees already levied with effect from the 14th January 1915, under Articles 11, 12 and 12A of the First Schedule to the Court-fees Act, 1870, in cases which would have fallen within the terms of Financial Department Notification No. 120-F., dated 14th January 1915, if it had been in force:

GOVERNMENT OF INDIA, HOME DEPARTMENT (JUDICIAL)

NOTIFICATION.

Simla, the 17*th June* 1920.

No. 1085.—In exercise of the powers conferred by section 35 of the Court Fees Act, 1870 (VII of 1870), and in supersession of Notification of the Government of India in the Finance Department No. 120-F., dated the 14th January 1915, the Governor-General in Council is pleased to make, in the whole of British India, the remissions hereinafter set forth in the fees leviable under Articles 11, 12 and 12A of the First Schedule of the said Act, on the property of any person subject to military law either under the Army Act (44 and 45 Vict., Ch. 58) or under the Indian Army Act, 1911 (VIII of 1911) who is killed, or died of wounds inflicted, accident occurring or disease contracted within three years before death, while on active service in the present war, namely:—

(*a*) Where the amount or value of property in respect of which the grant of probate or letters of administration is made

or which is specified in the Certificate under the Succession Certificate Act, 1889, or in the Certificate under Bombay Regulation No. 8 of 1827, does not exceed Rs. 50,000, to remit the whole of the fees leviable in respect of that property.

(*b*) Where the said amount or value exceeds Rs. 50,000, to remit the whole of the said fees in respect of the first Rs. 50,000, and

(*c*) Where any property passes more than once in consequence of such deaths to remit in the case of second and subsequent successions, the whole of the said fees irrespective of the value or amount of such property.

By order,

C. B. AUBREY,

Registrar.

Circular Memorandum No. 7 of 1920.

FROM

THE REGISTRAR,

COURT OF THE JUDICIAL COMMISSIONER,

UPPER BURMA,

To

ALL MAGISTRATES IN UPPER BURMA.

Dated Mandalay, the 25th August 1920.

Cases are constantly coming before this Court in which sentences of imprisonment passed in default of payment of fine are illegal. The attention of Magistrates is therefore drawn to sections 64 to 69 inclusive of the Indian Penal Code and to the instructions contained in paragraphs 381 to 386, Upper Burma Courts Manual.

The question of reducing the powers of Magistrates who pass such illegal sentences will be considered in all future cases.

By order,

C. B. AUBREY,

Registrar.

Circular Memorandum No. 8 of 1920.

FROM

THE REGISTRAR,
COURT OF THE JUDICIAL COMMISSIONER,
UPPER BURMA.

To

ALL MAGISTRATES IN UPPER BURMA.

Dated Mandalay, the 25th August 1919.

A case has recently come to the notice of the Judicial Commissioner in which a Magistrate, who had convicted a sepoy of an offence under the Indian Penal Code, sentenced him to one month's rigorous imprisonment *in military custody.*

The Judicial Commissioner directs all Magistrates to refrain from passing sentences of imprisonment, whether simple or rigorous, in military custody.

By order,

C. B. AUBREY,
Registrar.

[*Not translated into Burmese.*]

Circular Memorandum No. 9 of 1920.

FROM

THE REGISTRAR,
COURT OF THE JUDICIAL COMMISSIONER,
UPPER BURMA,

To

ALL MAGISTRATES IN UPPER BURMA.

Dated Mandalay, the 6th October 1920.

The attention of Magistrates is drawn to the Workman's Breach of Contract Act, XIII of 1859, as amended by Act XII of 1920, published at page 41 *et seq.* of Part IIIA of the *Burma Gazette*, dated the 3rd April 1920.

Section 1 (1). The Act provides for the punishment of breaches of contract of artificers, workmen or labourers[1] who have received advances of money on account of work to be performed.

Section 1 (1). Action under the Act can only be taken on the complaint of the employer.

Section 1 (1), Section 4. The Act confines the utilization by employers of the provisions of the Act to cases where the advance of money does not exceed three hundred rupees, and the time for performance of the contract, where a time is fixed, does not exceed one year, and further the employer must move the Court within three months of the occurrence of the breach of the contract.

Section 2 (1), proviso (*a*). Section 2A. In all cases, whether a time is fixed or not the Magistrate may in his discretion refuse to put the Act into operation if he considers the terms of the contract are substantially unfair to the workman.

Section 1 (2). On receipt of a complaint under the Act, the Magistrate must proceed in accordance with the provisions contained in sections 200—203, Code of Criminal Procedure, 1898. He must examine the complainant on oath, and should dismiss the complaint summarily if the conditions specified above are not fulfilled, or if he considers that there are not sufficient grounds for proceeding against the respondent.

Section 2 (1). Where a breach of contract has been proved, the Magistrate may in his discretion order either repayment of the advance or performance of the contract and is no longer bound by the option of the complainant. He has also power to allow time for repayment and to order payment, by instalments, and, if the order is for

[1] For the meaning of the term "artificer, workman or labourer" *See*—
(i) 9 L.B.R., 21.
(ii) U.B.R. (1904-06), 1 W B.C.A., 1.
(iii) U.B.R. (1902-03), 1 W.B.C.A., 3.
(iv) 7 L.B.R., 82.

performance of the contract, to fix a time not exceeding one year therefor.

A Magistrate ordering an artificer, workman or labourer, under section 2 of the Act, to repay the money advanced, or any part thereof, or to perform, or get performed, the work according to the terms of the contract, cannot at the same time sentence him to imprisonment in default of compliance with the order under section 2 (2). Such a sentence cannot be passed until the failure is proved to have occurred.[2]

When an order under section 2, sub-section (1), has been passed it remains in force until it has been obeyed and the employer can at any time move the Court to inflict the penalty under section 2, sub-section (2), for non-compliance with the order.[3]

The Act enables imprisonment of either description to be ordered as a punishment for a breach of contract. Section 3.

Any order under section 2 (1) may be varied at the discretion of the Magistrate at any time, but not so as to extend the period fixed for performance of a contract beyond one year. Section 2 (3).

If after hearing the complainant and the evidence produced in support of the complaint, the Magistrate is of opinion that the complaint was false, frivolous or vexatious, he may under provisions analogous to section 250, Criminal Procedure Code, order the complainant to pay compensation to the respondent. Before such an order is passed the complainant must be called upon to show cause why the order should not be passed against him. Section 2B

Imprisonment awarded in default of compliance with an order to pay compensation must be simple. Section 2B (3).

Offences under sections 2 (1) and 2 (2) of the Act, cannot be tried summarily.[4] The cases should be registered as Miscellaneous not as regular cases.

The Secretary of State for India in Council or, the Government of India, or the Local Government of any Province of India is not a master or employer resident or carrying on business in any place to which the Act applies, within the meaning of section 1 of the Act.[5]

The Act applies only where there has been a contract for work with money given as wages in advance. It does not apply where money has been given as a loan, with a condition attached that the borrower is to work for the lender.[6]

Proceedings under section 2 (1) of the Act are criminal proceedings; and a prosecution under section 211 of the Indian Penal Code for instituting proceedings without just cause under section 1 of the Act will lie.[7]

The Act does not refer to contracts to be performed outside the limits of British India.[8]

By order,

C. B. AUBREY,
Registrar.

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[2] Bombay H.C. Cr. Rul., No. 24 of 26th April 1888 and No. 31 of 3rd May 1888. *See* also I.L.R. 5 Mad., 376; Bom. H.C.Cr. Rule 31 of 1888.
[3] Cr. Revision No. 122B of 1920. This ruling will be published shortly in the L.B.R.
[4] 2 L.B.R., 163. [5] 3 L.B.R., 33 [6] L.B.R., 187,
[7] 2 L.B.R., 306. [8] 10 L.B.R. 53.

C.B.C.P.O.—No. 17, J.C.U.B., 28-10-1922—750

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AWARD. *Held*,—that a suit for the specific performance of an—is not a suit for the specific performance of a contract.—*See* Provincial Small Cause Courts Act—Specific Relief Act ... 109

AWARD.—*Held*—that an—is final and cannot be questioned except upon such grounds, *e.g.*, corruption or an illegality apparent upon the face of the—as are set out in the second Schedule of the Code of Civil Procedure and there is no reason for departing from this principle where the Court itself has been appointed and has accepted the office of arbitrator.—*See* Arbitration—Award 36

AWARD OF ARBITRATORS.—Effect of—*See* Specific Relief ... 210

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BUDDHIST LAW.—DIVORCE.—Mere clandestine intercourse after a divorce is not sufficient to revive the marriage under Buddhist Law.

Maung Po Lat v. *Ma Ngwe Ma* 182

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BUDDHIST LAW: DIVORCE—*Held*—that in a suit for divorce between Burman Buddhist it is not necessary to claim partition of property—*Held also*—that in such a suit it is the kind of divorce granted which determines the rule to be followed at partition—
U.B.R., 1897-01, II, 34.
—— 1902-03, B.L. Div. 6.
—— 1904-06, B.L. Div. 1, 3, 6.
I U.B.R., 1910-13, p. 30.
II U.B.R., 1914-16, p. 32.
6 L.B.R., 18.
8 L.B.R., 1.
Maung Nga v. *Ma Pyu* 251

BUDDHIST LAW—GIFT.—*Held*—that gift made by grand-parents to grand-children like gifts made by parents to sons entering the priest-hood are merely contingent gifts and that the rules for such gifts are intended to operate merely as rules of inheritance and do not give the donee any claim as against the donor during the latter's lifetime.
S.J.L.B., 30.
8 L.B.R., 190.
Ma Me I v. *Maung Lauk Hnya and two others* ... 228

BUDDHIST LAW—INHERITANCE.—*Held*—that a "Pongyi" or "Rahan" cannot inherit property from his lay relatives after his ordination.
2, Chan Toon's Leading Cases 235.
II U.B.R., 1897—1901, page 54.
—— 1914-16, page 61.
Shwe Ton *v.* Tun Lin (Civil Reference No. 1 of 1916 of the Chief Court, Lower Burma) unpublished.
Maung Pwe and two others v. *U Inguya and another* ... 91

BUDDHIST LAW—INHERITANCE.—*Held*—that where there are no children of the marriage of their step-father with their mother and no children of the step-father by any other marriage, step-children are entitled as against their step-father to a one-fourth share of the jointly acquired property of the marriage of their mother with the step-father and also to one-fourth of property inherited by the step-father during his marriage with their mother.
Held also—that as against their step-father's widow the step-children of the deceased step-father by an earlier wife are entitled to the same share of the jointly acquired and inherited property of the marriage of their mother with their step-father to which they would have been entitled as against their step-father himself.
Held further—that as against their step-father's widow, the step-children are not entitled to any share in the jointly acquired property of the marriage of their step-father with the widow.
S.J.L.B. 18, 177, 110.
U.B.R., 1892-96, II, 93.
—— 1897-01, II, 66, 122, 126, 164, 185, 531.
—— 1904-06, II, B.L. In., 1.
II U.B.R., 1914-16, 74.
P.J.L.B., 299.
2 L.B.R., 174.
3 L.B.R., 219.
4 L.B.R., 110.
9 L.B.R., 176.
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BUDDHIST LAW—INHERITANCE.—The children of a divorced wife who live with their mother and do not maintain filial relations with the father are not entitled to share in his estate where there has been a division of property at the time of divorce—*See* Probate and Administration 93

BUDDHIST LAW—INHERITANCE—PRE-EMPTION. *Held*,—that co-heirs have a right of pre-emption in respect of the share of other co-heirs in undivided inherited property so long as the property remains undivided, but that after partition there is no right of pre-emption in respect of the separated shares.

I. L.B.R., 144.
VIII L.B.R., 466.
U.B.R., 1897-01, II, 161.
—— 1897-01, II, 155.
—— 1907-09, II, Buddhist Law—Pre-emption, 1.
S.J.L.B., 39, 14, 76.

Maung Pu Za and three others v. *Ma Nge Ma and others* ... 254

BUDDHIST LAW—INHERITANCE.—A Burman Buddhist married a second wife after the death of his first wife, and died leaving a child by his first wife and his second wife, with her son by him. The surviving widow's claim was time-barred and she also relinquished it. In a suit by the son of the second marriage for a share of the *hnapason* property of the first marriage brought to the second, which was in the possession of the child of the first marriage.

Held,—Dissenting from the ruling in Mi Chin Mya *vs.* Mi Ngwe Yon, II U.B.R., 1914-16, page 74—that the child of the second marriage is, on the death of his father, entitled to one-eighth share in the *hnapason* property of the first marriage and that his share is not recoverable through his mother, but is independent of her, and can be sued for in her life-time being taken direct from the three-quarter share of the child of the first marriage.

II U.B.R., 1914-16, page 74, dissented from X.L.B.R., page 10 followed.
U Gaung's Digest, sections 212 and 229.
Attasankhepa Dhammathat, section 220. Tha Gywe's "Conflict of authority in Buddhist Law," Volume II, pages 86 and 96.
May Oung's "Treatise on Burman Buddhist Law," Part III, page 257, 10 B.L.T., page 41.

Ma Ein Hlaing and three others v. *Ma Shwe Kin* ... 272

BUDDHIST LAW—MARRIAGE—Damages for breach of promise. *Held*,—that whether there is a betrothal or not the consent of the parties is necessary to a valid marriage, and that an action for damages for breach of promise of marriage cannot be maintained against the parents of a Burmese Buddhist in respect of a promise made by such parents to give their son in marriage.

VIII L.B.R., 347.
I.L.R., 21 Bom. 23.

Maung Po Thaw and one v. *Maung Tha Hlaing and one* ... 106

BUDDHIST LAW—MARRIAGE.—*Held*—that a Burmese Buddhist youth can make a valid promise of marriage at any time after he is physically competent for marriage and that he can be sued for damages for breach of such promise although he is under 18 years of age.

1 U.B.R., 1907-09, Contract 5
U.B.R., 1897-01, II, 197.

Maung Nyein v. *Ma Myin* ... 75

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BUDDHIST religious gifts are not excepted from the operation of section 123 of the Transfer of Property Act—*See* Transfer of Property 207

BURMAN BUDDHISTS—in a suit for divorce between—it is not necessary to claim partition of property—*See* Buddhist Law—Divorce 251

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CIVIL PROCEDURE.—13—Damages—Malice—*Held*—that before an action for damages for malicious prosecution can be sustained it is not necessary that the plaintiff should have been formally acquitted but something more than an inference from the general circumstances of the criminal case is necessary and it must be definitely proved either that there was malice, or that there was such a wilfully false statement to the police as would justify an inference of malice.

I.L.R., 6 Bom., 376.

Civil Second Appeal No. 28 of 1916 (not published).

Maung Po Lun v. *Ma Nyein Bon* 67

CIVIL PROCEDURE—20 (*b*).—*Held*—that where the place where a contract was made was not within the jurisdiction of a Court, the Court still has jurisdiction if the place where the contract was to be performed, or where in its performance, the money to which the suit related was expressly or implicity payable was within the jurisdiction of the Court.

I.L.R., 34 All., 49.

—— 31 Mad., 223.

Meghraj Ramniranjandas v. *Thakurdas* 38

CIVIL PROCEDURE—24.—*Held*,—that an order passed under the provisions of section 24 of the Civil Procedure Code read with section 15 of the Upper Burma Civil Courts Regulation was not a decree and that an order for costs passed as part of such an order was not appealable.

I.L.R., 16 Bom., 676.

—— 27 Mad., 341.

—— 34 Cal., 878.

Ma Tu and one v.—*Kumar Gangadhar Bagla, etc.* ... 61

CIVIL PROCEDURE—80.—No appeal lies from a decision on a preliminary issue in a suit where such decision does not determine any of the reliefs claimed in the plaint.

Nga Meik and one v. *Nga Gyi* 5

CIVIL PROCEDURE—100.—It is permissible for the High Court in a second appeal to examine the evidence in order to see whether there is any evidence on which the findings of the Lower Appellate Court could properly be based.—*See* Probate and Administration 23

CIVIL PROCEDURE—115 (*c*).—*Held*,—that a material irregularity or illegality is not in itself a sufficient ground for revision under—. There must have been at the same time a wrong or irregular exercise of jurisdiction.

B.L.T., XI, 48.

—— XII, 5.

2 L.B R., P. 333.

22 C.W.N., 627.

Ma E Ko v. *Ma Pwa Hmi and* 179

CIVIL COURTS—section 53 (2) (ii) of the Upper Burma Land and Revenue Regulation does not bar the jurisdiction of the

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ordinary—in respect of disputes between private persons regarding the ownership or possession of State land or any lien upon or other interest in such land or the rents, profits or produce thereof—*See* Upper Burma Land and Revenue Regulation ... 212

CIVIL PROCEDURE—O. III, r. 2.—Upper Burma Civil Courts Regulation, 25. *Held*,—that section 25 of the Upper Burma Civil Courts Regulation forbids a recognized agent doing such acts as examining and cross-examining a witness or addressing the Court on behalf of his client unless he has been licensed thereto by the Judicial Commissioner either generally or specially.

7 B.L.T., 206.
19 C.W.N., 64.

S. C. Banerjee v. *A. C. Mukerjee and one* 94

CIVIL PROCEDURE—O. V, r. 17. *Held*,—that rule 17, O. V, of the—is intended for cases in which the summons should be affixed in the way required by that rule after a proper attempt has been made to find the defendant.

U.B.R., 1892-96, II. 262.
I.L.R., 19 Cal., 201.

Maung Maung Than v. *L. K. S. M. Somasundran Chetty* ... 123

CIVIL PROCEDURE—O. VI, r. 17.—A plaint cannot be amended so as to convert a suit on a promissory note into a suit on a mortgage bond.

Ma Nyun v. *Maung Shwe Kaung and two others* ... 178

CIVIL PROCEDURE—O. 6.—Pleadings—*Held*—that the determination in a cause must be founded upon a case set up in the pleadings or involved in or consistent with the pleadings.

5 L.B.R., 76.
8 L.B.R., 334.

Haji Chit and five others v. *Haji Kyaw* 201

CIVIL PROCEDURE—O. IX, r. 5.—*Held*—that whereas in a suit against a debtor and his surety for money lent the mere omission of the plaintiff to pursue his suit against one of the defendants with the result that defendant's name is struck off and the suit dismissed against him under O. IX, r. 5, does not discharge the surety, provided the suit is still in time against the principal, where the plaintiff expressly waived his claim against the principal debtor and informed the Court that he would obtain decrees against the surety only, it was an act or omission the legal consequence of which was to discharge the principal debtor within the meaning of section 134 and therefore the plaintiff had no further right of suit against the principal debtor and could not recover from the surety.

I. L.B.R., 150.
I.L.R., 39 Bom., 52.
Burma Law Times, VI, 62.

Maung Po U and one v. *Maung Kyaw* 62

CIVIL PROCEDURE.—O. XXI, rr. 58, 63, section 115—*Held*—that where a remedy is provided by a formal suit to displace an order of a summary nature the High Court will not interfere on revision merely because there has been an error in the misappreciation of evidence or misconstruction of law unless the extrinsic conditions of the Lower Court's legal activity have been impunged.

I.L.R., 8 Mad., 493.
—— 18 All., 164.
—— 29 Cal., 543.
—— 10 All., 122.
8 L.B.R., 146.
I.L.R., 15 All., 405.
—— 18 Cal., 290.
—— 7 Bom., 341.
I. L.B.R., 180.
I. U.B.R., 1897—01, II, 311.

Maung San Ba v. *Maung Lun Bye* 13

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CIVIL PROCEDURE.—O. 21, r. 66 (4), section 73 (*b*).—Property under usufructuary mortgage is attachable in execution of a decree but the decree-holder has only the right to bring to sale his Judgment-debtor's right or equity of redemption. But unless the mortgagee consents the decree-holder has no right to bring the property to sale. All he can sell is the residual right of the mortgagor, that is the right to recover the property on payment of the mortgage money.

When a Court receives an application for execution against property which is admittedly or is alleged to be subject to mortgage, it should give notice to the mortgagee and ask him whether he consents to the sale of the property free of mortgage. If he consents and there is no dispute as to the fact of the mortgage or the amount of the mortgage money the Court may, under section 73 (*b*) of the Code of Civil Procedure, direct the sale of the property free of mortgage, giving the mortgagee the same interest in the proceeds of sale as he had in the property sold. In that case no mention of the mortgage should be made in the proclamation of sale.

U.B.R., 1897-01, II, 262.

—— 1892-96, II, 613

Ovanna Perumal Chetty v *Maung Myin and one* ... 139

CIVIL PROCEDURE.—O. XXI, rr. 100, 101—Section 47.—Where the interpretation sought to be put upon words of the Limitation Act is arrived at by implication and by reference the Court ought not to adopt a construction which has a restricting and penalising operation unless it is driven to do so by the irresistible force of language.

An application by a judgment-debtor alleging that land in excess of what is affected by the decree has been made over by the Court is governed by Article 181 and not by Article 165 of the Limitation Act—*see* Limitation 79

CIVIL PROCEDURE.—O. XXII, r. 6.—*Held*—that the provisions of O. XXII, r. 6 of the Civil Procedure Code cover not only the case where a judgment is delivered in ignorance of the fact that a party has died between the conclusion of the hearing and the delivery of the decision, but also provide for the delivery of judgment where the Court is aware of such death. The death of a party is not sufficient cause for allowing the withdrawal of a suit which has been completed in every respect except for such delivery of judgment.

I.L.R. 21 Bom., 314.

——33 Bom., 722.

Ma Kin Nyun v. *Ma Tin* 46

CIVIL PROCEDURE.—O. XXXIV, rr. 7 (*c*), 8.—Redemption of usufructuary mortgage after date fixed in preliminary decree. The District Court on appeal gave a decree for redemption of a usufructuary mortgage and fixed a date for payment of the money into Court under O. XXXIV, r. 7 (*c*). The money was paid into Court after the date specified in the decree and in execution proceedings the Court attached the land and made it over to the decree-holders. No extension of time had been asked for and no notice was given to the judgment-debtors. *Held*,—that although a decree-holder may not be precluded from redeeming at any time before a final decree is passed under O. XXXIV, r. 8, there is no provision for the execution of a preliminary decree, and a final decree cannot be dispensed with. The correct course in such a case is to apply for an extension of the time. If the Court proposes to accept a payment after due date, it could not pass a final decree

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without giving the judgment-debtor an opportunity of being heard.

U.B.R. 1897-01, II, 582.
I.L.R., 36 Cal., 122.

Maung Tun Maung and one v. *Ma Ywe and three* ... 183

CIVIL PROCEDURE.—O. 41, r. 23. *Held*—that a part from O. 41, r. 23, Civil Procedure Code, an Appellate Court has inherent power, when a suit has been decreed against the defendant *ex-parte*, not only to reverse a decree passed on evidence given by the plaintiff only, but also to direct a retrial of the case.

I.L.R. 23, Mad.—445.
—— 30, Mad. 54.
21 C.W.N. 877.
C.A. No. 120 of 1918 (unpublished).

Ma On Me v. *Ma Pya Gyi and three others* ... 198

CIVIL PROCEDURE CODE.—O. XLVII, r. 7. *Held*.—the right of appeal against an order granting an application for review is restricted by the terms of Rule 7, Order XLVII.

I.L.R., 41 Cal., 746.

Ramdat Kurme v. *Parasutan* 104

CO-ACCUSED.—The confession of a—is not the same thing as the testimony of an accomplice and stands on a different footing. It may be taken into consideration as lending support to other evidence in the case. But if there is no other evidence, it is not a proper basis for a conviction. It is not strengthened by the fact that it is supported by other confessions, whether these have been made in such circumstances as to preclude the theory that there has been connivance between the persons making the confessions or not—*See* EVIDENCE 3

CO-HEIRS—have a right of pre-emption in respect of the shares of other—in undivided inherited property so long as the property remains undivided but that after partition there is no right of pre-emption in respect of the separated shares—*See* Buddhist Law—Inheritance Pre-emption 154

COMMITMENT.—The question as to whether there is an absence of evidence to warrant a—is a point of law and not of fact—*See* Criminal Procedure 29

COMMITMENT.—If a Magistrate is in doubt as to the credibility of the witnesses and the evidence if believed, is sufficient to justify a—he should commit the case—*See* Criminal Procedure ... 29

COMMON CARRIER—responsibility of—not within the Contract Act—*See* Contract 120

COMPENSATION. *Held also*,—that where a claim has been submitted to arbitration and an award made, the claim for—is merged in the award and the payment of any money directed by the award appears to be a simple claim for money of a kind cognizable by a Court of Small Causes.—*See* Provincial Small Cause Courts Acts—Specific Relief Act 109

COMPLAINT. *Held*,—that there is no provision of law in the Indian Penal Code or in the Code of Criminal Procedure which restricts the right of a person not in possession to make a—to a Magistrate in respect of the offence of trespass even though that offence is alleged to have been committed against the third person, nor does the definition of Criminal Trespass contained in section 441 of the Indian Penal Code restrict the offence to cases in which the person in actual possession is insulted, intimidated or annoyed.

Held further,—that an order under section 522, Code of Criminal Procedure, need not be made at the time of conviction: it is sufficient if it is made without unreasonable delay:

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and that an offence attended by criminal force within the meaning of section 522, Criminal Procedure Code, includes an offence in the commission of which there has been a show of force.—*See* Penal Code, 441, 447; Criminal Procedure—522 ... 111

COMPLAINT.—*Held*,—that a person who has taken his—to the police and to the Court without unreasonable delay was protected from an action for defamation of character in respect of allegations contained in such.—*See*—Defamation—Action for ... 88

CONSENT.—*Held*,—that whether there is a betrothal or not the—of the parties is necessary to a valid marriage, and that an action for damages for breach of promise of marriage cannot be maintained against the parents of a Burmese Buddhist in respect of a promise made by such parents to give their son in marriage —*See* Buddhist Law—Marriage 106

CONTRACT—38.—Under section 38 of the Contract Act payment to one of joint promisees discharged the debt, and one of several payees can give a valid discharge. The presumption of equity raised in English Law that where there is more than one obligee they are tenants in common and not joint tenants of the debt is of doubtful application in India.

21 Cal., L.J., 570.
I.L.R., 38 Cal., 342.
—— 36 Mad., 544.
22 Q.B.D. (1889), 537.

Maung Nyan Mo v. *Ma Po and one* 42

CONTRACT—108—*Held*—that exception 1 to section 108 of the Contract Act applies to sales of goods made by an agent in defiance of his principal's instructions provided that the buyer acts in good faith and that the circumstances are not such as to raise a reasonable presumption that the agent has right to sell the goods.

I.L.R., 33 Mad., 783.
—— 24 Bom., 458.
—— 11 Bom., 704.
—— 27 Mad., 424.
12 Bengal, L.R., 42.
22 C.W.N., 1042.
37 P R., 107, 129.

Dulabdass and one v. *Ma Win* 217

CONTRACT.—*Held*,—that a suit for the specific performance of an award is not a suit for the specific performance of a—. —*See* Provincial Small Cause Courts Act—Specific Relief Act .. 109

CONTRACT, 23. *Held*—that a contract in the nature of a marriage brocage contract is opposed to public policy and should not be enforced.

I.L.R., 23 All., 495.
—— 13 Bom., 131.
—— 17 Mad., 9.

Maung Pyo v *Maung Po Gyi* 119

CONTRACT, 151, Carrier's Act.—*Held*,—that the responsibility of a common carrier is not within the Contract Act. A common carrier unless he is protected by a special contract or by statute, is liable as an insurer of goods, that is, he is responsible for every injury to the goods occasioned by any means whatever except only by the Acts of God and the King's enemies.

I.L.R., 18 Cal., 620.
27 Cal. L.J., 615.
1 C.W.N., 329.

Maung Po Taw v. *Haramdi Missay and two others* ... 180

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CONTRACT, 240.—Allegations of fraud must be specific and not general and the facts constituting the fraud or from which it is to be inferred must be clearly indicated.

Where two persons combine their money or skill in an undertaking with an agreement to share profits and losses such an agreement is in fact a partnership.

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

Manik Chand v. *Rai Bahadur Giridharilal* 69

COURT—*Held*,—that a party to a civil suit who makes a defamatory statement in—which is not covered by any of the exceptions to section 499, Indian Penal Code, is not protected from prosecution for an offence punishable under section 500, Indian Penal Code

Held also,—that even if there were a general privilege in respect of words uttered in—such privilege only refers to words spoken in the ordinary course of a proceeding before a—. —*See* Penal Code 101

COURT-FEES—7 (V) (*c*).—*Held*—that the provision of section 7 (V) (*c*) of the Court-Fees Act apply to the valuation of "religious" land and that its value must be deemed to be the amount at which the Court estimates it with reference to the value of similar "non-religious" lands in the neighbourhood.

Maung Mesk and one v. *U Kumara* 236

CREDITOR.—*Held*,—that there appears to be no reason why the Court's powers under section 48 of the Provincial Insolvency Act should not at any time be put in motion by a—and the Court is then bound to consider whether the debtor has made false entries in the inventories or lists, or committed any of the other acts set out in that section.—*See* Provincial Insolvency 97

CRIMINAL PROCEDURE—46 (3). Right of private defence—*See* Penal Code 176

CRIMINAL PROCEDURE—144, 145.—*Held*—that under section 144, Criminal Procedure Code, a Magistrate can proceed to pass an order when one of the rival parties is found to be in possession of the land but that except in cases of grave emergency section 145 is the proper section under which to act.

I.L.R., 26 Mad., 471

—— 32 Cal., 966.

11 C.W.N., 271.

Nga Po Hmi v. *Mi Shwe Tha* 17

CRIMINAL PROCEDURE—145, 435 (3).—*Held*—that orders passed under Chapter XII, Code of Criminal Procedure, are not subject to revision being expressly excluded from the operation of section 435 of the Code by clause 3 of that section.

But to deprive the Hight Court of the power of interference in revision the proceedings must be proceedings under Chapter XII of that Code in fact and not only in name.

I.L.R, 26 All., 144.

Nga Hpay and one v. *Nga Aung Baw and 2 others* ... 35

CRIMINAL PROCEDURE—145-435 (3).—Proceedings under section 145, Code of Criminal Procedure, do not constitute a trial and are not in the nature of a trial.

An order, therefore, refusing to hold an enquiry under that section on the ground that one of the respondents had been prosecuted and acquitted under section 447, Indian Penal Code, and that therefore section 403, Code of Criminal Procedure, applied, was not an order which could be sustained and it was set aside.

I.L.R., 31 All., 150.

—— 25 Bom., 179.

Nga Chit v. *Nga Ya and 3 others* 33

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CRIMINAL PROCEDURE—162.—*Held*—that the statements of witnesses recorded by the police in the course of an investigation cannot be used in any way whatever, in the course of the trial which results from that investigation, except in the one way laid down in section 162 of the Code of Criminal Procedure with the single exception referred to in clause 2.
Nga Ba Than and two others v. *KingEmperor* ... 81

CRIMINAL PROCEDURE—162, 476—*Held*—that there is no provision of law by which the statement of a witness made to the police can be used against him to impeach his credit when he is called for the defence.
The giving of false evidence is only an offence when it is intentional and the intention is usually to be gathered from the surrounding circumstances such as the importance or relevance of the evidence in question.
Nga Yon v. *King-Emperor* 84

CRIMINAL PROCEDURE—179, 181 (2). *Held*,—that when an alleged breach of trust took place in Rangoon, the accused could not be tried at Maymyo in consequence of his failure to remit money there as he had agreed to do. The resultant loss to complainant at Maymyo was not an ensuing consequence by reason of which the applicant was accused of the commission of the offence of criminal breach of trust and therefore section 179 of the Criminal Procedure Code does not apply.
I.L.R. 19 All., 111.
—— 34 All., 487.
—— 38 Mad., 639.
—— 41 Cal., 305.
Abdul Salam v. *Ramnewal Singh* 172

CRIMINAL PROCEDURE—210, 213, 215.—*Held*—that a Committing Magistrate has a discretion to consider the credibility of the evidence and if he entirely disbelieves it ought to discharge the accused—If he is in doubt as to the credibility of witnesses and the evidence if believed is sufficient to justify a commitment he should commit the case—*Held also*—that the question as to whether there is an absence of evidence to warrant the commitment is a point of law and not of fact.
I.L.R., 5 All., 161. 5 C.W.N., 411.
—— 21 All., 265. 14 I.A., 101.
—— 35 Bom., 163. 7 B.L.T., 26.
9 C.W.N., 829.
Nga Hmyin v. *K.E.* 29

CRIMINAL PROCEDURE—234.—*Held*,—that section 234 of the Code of Criminal Procedure only applies to the trial of a single person for separate offences of the same kind and not to cases in which more persons than one are tried jointly.
I.L.R., 33 Cal., 292.
Nga San Pa and one v. *K.E.* 187

CRIMINAL PROCEDURE—342, 364, 537.—*Held*—that the omission to examine accused persons under the provisions of sections 342 and 364 of the Criminal Procedure Code, is fatal to the validity of a trial. The provisions of section 342 are imperative and failure to comply with them is not a mere irregularity curable under section 537.
King-Emperor v. *Nga Po Mya and one* 18

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CRIMINAL PROCEDURE—350.—*Held*,—that section 350 of the—provides the only exception to the general principle that criminal cases must be decided by the magistrate who heard the evidence.
I.L.R., 23 Cal., 194.
Nga Paik v. *Nga Saw Hlaing* 118

CRIMINAL PROCEDURE—406, 423 (*c*) (*d*)—*Held*,—that in an appeal under section 406, the District Magistrate has power under section 423 (*c*) and (*d*) to alter or reverse the order under appeal and to make any consequential or incidental order that may be just and proper.
I.L.R., 33 Cal., 8.
Nga San Dun v. *King-Emperor* 270

CRIMINAL PROCEDURE—432, Gambling 8 and 9.—*Held*,—that an accused person cannot be put on his oath or examined as a witness in the case in which he is accused. The fact that there are several accused persons is immaterial if the accused is himself upon his trial with the other accused at the time when it is sought to make him a witness. *Held also*,—that if an incompetent witness is examined inadvertently his statement is not legal evidence and must entirely be ignored.
I.L.R., 23 Bom., 213.
Nga Ngwe Gyaw v. *K.E.* 115

CRIMINAL PROCEDURE—435, 438.—Upper Burma Criminal Justice Regulation—Schedule—Section XII—*Held*,—that Section XII of the Schedule to the Upper Burma Criminal Justice Regulation does not limit a District Magistrate's ordinary powers in revision under the Criminal Procedure Code but extends his powers under section 438 by allowing him to deal with the cases by second and third class Magistrates as he thinks fit instead of reporting them to the High Court for orders.
Nga That She and one v. *King-Emperor* 269

CRIMINAL PROCEDURE—437.—A court ordering further enquiry to be made against an accused person discharged should record its reasons sufficiently fully to give the accused notice of its grounds for its order.
IV, L.B.R., 233.
VIII, C.W.N., 457.
III, Cal., L.J., 45.
Nga Min Din v. *King-Emperor* 16

CRIMINAL PROCEDURE—439.—*Held*—that the power of reversing acquittals on revision at the instance of private parties is one that will only be used sparingly and where the interests of public justice demand it.
I.L.R., 42 Cal., 612.
I.L.R., 38 Cal., 786.
Nga Po Pyaw v. *Nga Po Nwe* 19

D

DAMAGES.—A Burmese Buddhist youth can be sued for—for breach of promise of marriage although he is under 18 years of age.—*See* Buddhist Law—Marriage 75

DAMAGES.—*Held*—that before an action for—for malicious prosecution can be sustained it is not necessary that the Plaintiff should have been formally acquitted but something more than an inference from the general circumstances of the criminal case is necessary and it must be definitely proved either that there was malice or that there was such a wilfully false statement to the police as would justify an inference of malice.—*See* Civil Procedure 67

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DAMAGES.—*Held*,—that whether there is a betrothal or not the consent of the parties is necessary to a valid marriage, and that an action for—for breach of promise of marriage cannot be maintained against the parents of a Burmese Buddhist in respect of a promise made by such parents to give their son in marriage.—*See* Buddhist Law—Marriage 106

DEATH.—That although the intention of the persons who inflicted the beating was not to cause—but to exorcise the spirit they must be taken to have known that they were likely to cause—*See* Penal Code 54

DEBTOR.—*Held*—that whereas in a suit against a—and his surety for money lent the mere omission of the plaintiff to pursue his suit against one of the defendants with the result that that defendant's name is struck off and the suit dismissed against him under O. IX, r. 5, does not discharge the surety, provided that the suit is still in time against the principal, where the plaintiff expressly waived his claim against the principal—and informed the Court that he would obtain decrees against the surety only, it was an act or omission the legal consequence of which was to discharge the principal—within the meaning of section 134 and therefore the plaintiff had no further right of suit against the principal—and could not recover from the surety—*See* Civil Procedure 62

DEBTOR.—*Held*,—that there appears to be no reason why the Court's powers under section 43 of the Provincial Insolvency Act should not at any time be put in motion by a creditor and the Court is then bound to consider whether the—has made false entries in the inventories or lists, or committed any of the other acts set out in that section.—*See* Provincial Insolvency 97

DEFAMATION.—Actions for—*Held*—that a person who has taken his complaint to the police and to the Court without unreasonable delay was protected from an action for defamation of character in respect of allegations contained in such complaint.

I.L.R., 28 Bom., 226.
—— 38 Cal., 880.
XX Cal., L.J., 518.

Maung Myo v. *Maung Kywet E* 88

DEFAMATORY.—*Held*,—that a party to a Civil Suit who makes a—statement in Court which is not covered by any of the exceptions to section 499, Indian Penal Code, is not protected from prosecution for an offence punishable under section 500, Indian Penal Code.—*See* Penal Code 101

DELAY.—*Held*—that a person who has taken his complaint to the police and to the Court without unreasonable—was protected from an action for defamation of character in respect of allegations contained in such complaint.—*See* Defamation—Action for— 88

DELIVERY.—*Held*—that the provisions of O. XXII, r. 6 of the Civil Procedure Code cover not only the case where a judgment is delivered in ignorance of the fact that a party has died between the conclusion of the hearing and the—of the decision, but also provide for the—of judgment where the Court is aware of such death. The death of a party is not sufficient cause for allowing the withdrawal of a suit which has been completed in every respect except for such—of judgment—*See* Civil Procedure 46

DISTRICT.—*Held*—that in a—in which the law does not prohibit or place any restriction upon the manufacture of *tari* it cannot be unlawfully manufactured and section 37 does not therefore

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apply to the possession of *tari* manufactured in such a district.—*See* Excise Act V of 1917, section 12 (*a*), 37 ... 86

DISTRICT MAGISTRATE.—An order made by a Magistrate to execute a bond under section 3 of the Opium Law Amendment Act is appealable to the—*See* Opium Law Amendment Act ... 117

DISTRICT MAGISTRATE—in an appeal under section 406, Criminal Procedure Code, the—has power under section 423 (*c*) and (*d*) to alter or reverse the order under appeal and to make any consequential or incidental order that may be just and proper—*See* Criminal Procedure 270

DIVORCE.—In a suit for—between Burman Buddhists it is not necessary to claim partition—in such a suit it is the kind of—granted which determines the rule to be followed at partition—*See* Buddhist Law: Divorce 251

DIVORCE.—*Held*,—that a Muhammadan husband who gives his wife the right to —him does not by so doing divest himself of the right to—her. A Muhammadan wife who is divorced is entitled to maintenance during the period of her "iddat." —*See* Muhammadan Law— Divorce ... 99

DIVORCE.—Mere clandestine intercourse after a—is not sufficient to revive the marriage under Buddhist Law—*See* Buddhist Law—Divorce 182

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EASEMENT.—Pointed out that an— of necessity cannot arise in any other way than on severance of tenements. Facts necessary to prove a right-of-way by—

2 L.B.R., 134.
4 L.B.R., 246.

Maung Shwe Daing and one v. *Ma Thet Su* ... 65

ENDORSEE.—*Held*,—that section 8 of the Negotiable Instruments Act prevents any person suing on a negotiable instrument, who is not named therein as the payee, or has not become entitled as—or assignee.—*See* Negotiable Instruments ... 200

EVIDENCE.—There is no provision of law by which the statement of a witness made to the Police can be used against him to impeach his credit when he is called for the defence. The giving of false—is only an offence when it is intentional and the intention is usually to be gathered from the surrounding circumstances such as the importance or relevance of the—in question.—*See* Criminal Procedure 84

EVIDENCE.—30, 114.—*Held*,—That the confession of a co-accused person is not the same thing as the testimony of an accomplice and stands on a different footing. It may be taken into consideration as lending support to other evidence in the case. But if there is no other evidence, it is not a proper basis for a conviction. It is not strengthened by the fact that it is supported by other confessions, whether these have been made in such circumstances as to preclude the theory that there has been connivance between the persons making the confessions or not.

I.L.R., 29 All., 434.
—— 38 Bom., 164.
—— 15 Bom., 66.
—— 33 Mad., 46.
—— 8 All., 306.
I.L.R. 4 Cal., 483.
—— 10 Bom., 231
—— 22 All. 445.
—— 28 Cal., 689.
—— 25 Bom., 168.

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I.L.R. 17 All., 86. 23 W.R., 24.
19 W.R.G., 57. 1 L.B.R., 238.
21 W.R., 71. S.J.L.B., 636.
Nga San Nyein and nine others v. *King-Emperor* ... 3

EVIDENCE.—Section 350 of the Code of Criminal Procedure provides the only exception to the general principle that criminal cases must be decided by the magistrate who heard the—*See* Criminal Procedure 118

EVIL SPIRIT.—Exorcising—*See* Penal Code, 300 54

EXCISE ACT V OF 1917, sections 12 (*a*), 37.—*Held*—that in a district in which the law does not prohibit or place any restriction upon the manufacture of *tari* it cannot be unlawfully manufactured and section 37 does not therefore apply to the possession of *tari* manufactured in such a district.
King-Emperor v. *Nga Po Kyan* 86

EXCISE 41 (*c*), 63 (1) (*a*).—The Collector on a report from the District Superintendent of Police sanctioned the prosecution of an excise licensee under section 41 (*c*) of the Excise Act but did not pass orders authorising any particular Excise Officer to make a report or complaint.
A report was then made to a Magistrate by a Sub-Inspector of Police.
Held,—that this was not a compliance with the provisions of section 63 (1) (*a*) of the Excise Act.
Kaung Ki v. *King Emperor* 197

EXECUTION—Documents completed in the Burmese fashion without being signed are "executed"—*See* Upper Burma Registration Regulation 258

EXECUTION.—*Held*—that stay of—in respect of part of a decree is sufficient to warrant exclusion of time under this section. —*See* Limitation—15 73

EX-PARTE.—*Held*,—that apart from O. 41, r. 23, Civil Procedure Code, an Appellate Court has inherent power, when a suit has been decreed against the defendant—, not only to reverse a decree passed on the evidence given by the plaintiff only, but also to direct a retrial of the case. *See* Civil Procedure. 198

F

FORESTS, rr. 22, 98. *Held*,—that the holder of a license to extract a certain fixed quantity of teak is responsible if under cover of the license something illegal is done and it is immaterial whether that illegal act is done by the licenses or by some one employed by him, provided that the person employed is acting within the scope of his employment.
9 L.B.R., 112.
Nga Shwe Baw v. *King Emperor* 114

FRAUD.—Allegations of—must be specific and not general and the facts constituting the—or from which it is to be inferred must be clearly indicated.—*See* Contract 69

FRENCHMAN. Union between a—and a Burmese lady under Burmese Law not a marriage as understood in Christendom —*See* Succession Act 128

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GIFTS.—Buddhist religious—are not excepted from the operation of section 123 of the Transfer of Property Act—*See* Transfer of Property 207

GIFT.—Where delivery of property is essential to the validity of the—there must be clear evidence of a change of possession —*See* Probate and Administration 23

H

HIGH COURT.—It is permissible for the —in a second appeal to examine the evidence in order to see whether there is any evidence on which the findings of the Lower Appellate Court could properly be based—*See* Probate and Administration. 83

HILL.—*Held*—that the Kachin—Tribes Regulation applies to Kachins in the hill-tracts defined and does not affect the jurisdiction of the ordinary Civil Courts as provided for by the Code of Civil Procedure—*See* Kachin Hill Tribes Regulation 49

HOUSE—A lodging—need not be let in lodgings, it is still a lodging—if it is occupied to any extent in common by members of more than one family—*See* Municipal ... 52

HUSBAND.—*Held*,—that although the wife was in actual physical possession of the house and invited the accused there, the —did not cease to be in possession by reason of his temporary absence; and that as the intention was to commit an offence, which constituted an infringement of the rights of the —the conviction was correct. *See* Penal Code ... 194

I

IMPRISONMENT.—A Court of Appeal or (in Upper Burma) on revision cannot alter a sentence of—to one of whipping under section 3 of the Whipping Act when any portion of such—has been served—*See* Whipping 32

INVESTIGATION.—*Held*—that the statements of witnesses recorded by the police in the course of an—cannot be used in any way whatever, in the course of the trial which results from that —, except in the one way laid down in section 162 of the Code of Criminal Procedure with the single exception referred to in clause 2.—*See* Criminal Procedure 81

J

JUDGMENT.—*Held*—that the provisions of O. XXII, r. 6 of the Civil Procedure Code cover not only the case where a —is delivered in ignorance of the fact that a party has died between the conclusion of the hearing and the delivery of the decision, but also provide for the delivery of—where the Court is aware of such death. The death of a party is not sufficient cause for allowing the withdrawal of a suit which has been completed in every respect except for such delivery of—*See* Civil Procedure 46

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JURISDICTION—A material irregularity or illegality is not in itself a sufficient ground for revision under section 115, clause (*c*), of the Civil Procedure Code. There must have been at the same time a wrong or irregular exercise of—*See* Civil Procedure 179

JURISDICTION.—*Held*—that where the place where a contract was made was not within the—of a Court, the Court still has—if the place where the contract was to be performed, or where in its performance, the money to which the suit related was expressly or impliedly payable, was within the—of the court —*See* Civil Procedure 38

K

KACHIN HILL TRIBES REGULATION—1 (3), 3, 11.—*Held*—that the Kachin Hill Tribes Regulation applies to Kachins in the hill-tracts defined and does not affect the jurisdiction of the ordinary Civil Courts as provided for by the Code of Civil Procedure.

Pauksi How & Co. v. *Sinwa Naung* 49

L

LIMITATION—15.—*Held*—that stay of execution in respect of part of a decree is sufficient to warrant exclusion of time under this section.

I.L.R., 26, Mad., 780.
20 Indian Cases, 439.

Nachiappa Chetty v. *Maung Pe* 73

LIMITATION.—165, 181.—Where the interpretation sought to be put upon the words of the Limitation Act is arrived at by implication and by reference the Court ought not to adopt a construction which has a restricting and penalising operation unless it is driven to do so by the irresistible force of language. An application by a judgment-debtor alleging that land in excess of what is affected by the decree has been made over by the Court is governed by Article 181 and not by Article 165 of the Limitation Act.

I.L.R., 25 All., 343.
——21 Mad., 494.
——38 All., 339.

Maung The and one v. *Ma Pyu and two* ... 79

LIMITATION—Article 174, First Schedule—Section 18—Civil Procedure—O.XXI, r. 2.—Where a decree-holder promised to certify an adjustment made out of Court but failed to do so and the judgment-debtor made an application after the 90 days allowed by Article 174 of the First Schedule to the Limitation Act,—*Held*—that section 18 of the Limitation Act applies only to cases where a person had been kept from the

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knowledge of his right to make the application and not to cases in which he had been kept by fraud from the exercise of his right.
U.B.R., I, 1910, 13, 191.
16 C.W.N., p. 923, at p. 927.
Maung On Myit v. *Maung Shwe Pi* 169

LIMITATION ACT.—First Schedule—Article 182. Explanation 1, Article 81. —*Held*—that a decree against two mortgagors for payment of money and sale of property in default and against a third person as surety for the mortgage who has joined in the covenant to repay the amount is a joint decree and an application for execution against the mortgagors takes effect against the surety by virtue of Explanation 1 to Article 182 of the Limitation Act.
Held also,—that where money is paid into Court to the credit of suit there has been payment to the creditor and in a suit by the surety against the principal debtor time runs from the date of such payment in under Article 81 of the Limitation Act, and not from the time when the creditor draws it out.
I.L.R., 31 Bom., 50.
—— 23 Bom., 478.
—— 4 Cal., 529.
—— 20 Mad., 23.
—— 13 Cal, 155.
Yinke Supaya and one v. *Maung Kin* 261

LODGING.—A—house need not be let in lodgings, it is still a—house if it is occupied to any extent in common by members of more than one family—*See* Municipal 52

M

MAINTENANCE.—*Held*,—that a Muhammadan husband who gives his wife the right to divorce him does not by so doing divest himself of the right to divorce her. A Muhammadan wife who is divorced is entitled to—during the period of her 'iddat.'—*See* Muhammadan Law—Divorce 99

MALICE.—*Held*—that before an action for damages for malicious prosecution can be sustained it is not necessary that the Plaintiff should have been formally acquitted but something more than an inference from the general circumtances of the criminal case is necessary and it must be definitely proved either that there was—or that there was such a wilfully false statement to the police as would justify an inference of—.—*See* Civil Procedure 67

MARRIAGE—BUDDHIST LAW.—*Held*—that a Burmese Buddhist youth can make a valid promise of marriage at any time after he is physically competent for marriage and that he can be sued for damages for breach of such promise although he is under 18 years of age —*See* Buddhist Law—Marriage ... 75

MARRIAGE.—*Held*—that whether there is a betrothal or not the consent of the parties is necessary to a valid —, and that an action for damages for breach of promise of marriage cannot be maintained against the parents of a Burmese Buddhist in respect of a promise made by such parents to give their son in marriage—*See* Buddhist Law—Marriage 106

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MARRIAGE.—Mere clandestine intercourse after a divorce is not sufficient to revive the—under Buddhist Law—*See* Buddhist Law—Divorce 182

MARRIAGE.—Union between a Frenchman and a Burmese lady under the Burmese Law not a—as understood in Christendom—*See* Succession Act 128

MORTGAGEE.—Usufructuary.—A—in Burma has a right to the crops growing on the land at the time of redemption provided that such crops were sown or planted by the—or his tenant without notice of the intended redemption—*See* Transfer of Property 141

MORTGAGE BOND.—A plaint cannot be amended so as to convert a suit on a promissory note into a suit on a—*See* Civil Procedure 171

MORTGAGE.—Usufructuary—redemption of—after date fixed in preliminary decree—*See* Civil Procedure 183

MUNICIPAL 2 (6).—A lodging house need not be let in lodgings, it is still a lodging house if it is occupied to any extent in common by members of more than one family.

Shaik Amanath Mistry v. *K.E.* 52

MUHAMMADAN LAW—DIVORCE. *Held*,—that a Muhammadan husband who gives his wife the right to divorce him does not by so doing divest himself of the right to divorce her. A Muhammadan wife who is divorced is entitled to maintenance during the period of her 'iddat.'

22 C.W.N., 924 at p. 926.

32 Indian Cases, 707.

Nga Kyaw v. *Mi Hla* 99

MUNICIPAL—180 (1).—*Held*,—that there is nothing in Chapter VI of the Burma Municipal Act, which empowers a Town committee to pass a general resolution directing how sulliage or surface water is to be disposed of. An infraction of the directions embodied in such a resolution is not therefore punishable under—of the—Act

Sohan Singh v. *K. E.* 188

N

NEGOTIABLE INSTRUMENTS—8—Specific Relief—42. Plaintiff sued the widow of his deceased son for a declaration of title to certain promissory notes drawn in favour of his son and to an injunction restraining the widow, who was in possession, from invading his rights thereto. His allegation was that the monies lent were his and lent on his behalf by his son—*Held*,—that as plaintiff was not the holder of the notes within the meaning of section 8 of the Negotiable Instruments Act and had no right of suit thereon he was not entitled to the declaration sought.

Ma Nyi Ma v. *Maung Yan Shin* 204

NEGOTIABLE INSTRUMENTS—8.—*Held*,—that section 8 of the Negotiable Instruments Act prevents any person suing on a negotiable instrument, who is not named therein as the payee, or has not become entitled as endorsee or assignee.

Maung Saw v. *Ingraswamy by his assignee E. V. Muhomed Ebrahim* 200

NON-COMMISSIONED OFFICER.—The pay of a—is exempt from attachment by a Civil Court—*See* Army Act 20

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OATH.—An accused person cannot be put on his—or examined as a witness in the case in which he is accused.—*See* Criminal Procedure 115

OPIUM LAW AMENDMENT ACT, 3.—An order made by a magistrate to execute a bond under section 3 of the Burma—is appealable to the District Magistrate.

U.B.R., 1897-01, I, 227.

Law Kaw v. *King Emperor* 117

ORDINATION.—*Held*—that a "Pongyi" or "Rahan" cannot inherit property from his lay relatives after his—.—*See* Buddhist Law—Inheritance 91

P

PARTNERSHIP.—When two persons combine their money or skill in an undertaking with an agreement to share profits and losses such an agreement is in fact a—.—*See* Contract 69

PARTNERSHIP.—There is no justification either in Buddhist Law or the published rulings for holding that in every case which a husband and wife borrowed money it must be presumed until the contrary is proved, that there is a partnership between the two and that the money is borrowed for the purpose of that partnership.

I.L.R., 39, Bom., 261.

—— 40, Mad., 727.

U.B.R., 1892-96, II, 204.

Maung Taw v. *Moosajee Ahmed & Co.* 189

PAYEE.—*Held*,—that section 8 of the Negotiable Instruments Act, prevents any person suing on a negotiable instrument, who is not named therein as the—, or has not become entitled as endorsee or assignee. *See* Negotiable Instruments ... 200

PENAL CODE—99; CRIMINAL PROCEDURE—46 (3).—Right of private defence. An Excise Inspector pursued an armed smuggler and on coming up with him ordered him to stop and fired his revolver twice to frighten him whereupon the smuggler drew a sword and cut the Inspector on the thigh. *Held*,—that the smuggler had reasonable ground for believing that the Inspector intended to cause death or grievous hurt and did not exceed the right of private defence; but that when subsequently he was in the grip of the Inspector and an Excise peon came up and tried to disarm him, he had no right of private defence, as he was no longer under a reasonable apprehension of death or grievous hurt.

Nga Nan Da v. *King Emperor* 176

PENAL CODE—173.—*Held*,—that refusal to accept a summons when tendered does not amount to intentionally preventing service of summons since under both the Civil and Criminal Code of Procedure service can be effected by tender.

I.L.R., 5, Mad. 199

G. Zapantis & Co. v. *King Emperor* 202

PENAL CODE—193.—*Held*,—that there is no provision of law by which the statement of a witness made to the police can be used against him to impeach his credit when he is called for the defence. The giving of false evidence is only an offence

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whether it is intentional and the intention is usually to be gathered from the surrounding circumstances such as the importance or relevance of the evidence in question.—*See* Criminal Procedure 82

PENAL CODE—203.—*Held*,—that section 203 of the Indian Penal Code applies only to information volunteered by the informant and not to a false statement made in the course of an examination by a police-officer.

King Emperor v. *Nga Po Lwin* 204

PENAL CODE—302—Plea of guilty. *Held*,—that before a plea of guilty can be accepted and a sentence of death passed, the record should show clearly that the person who is charged understands and admits such facts as would bring his offence within the definition of murder and that he does not plead any of the exceptions set out in the Indian Penal Code.

Bom. L.R. VIII, p. 240.

Nga Han v. *King-Emperor* 137

PENAL CODE—302, 304A, 304 (2).—Where a woman was beaten to death in the *bonâ fide* belief that she was possessed of an evil spirit. *Held*,—that as she did not consent to the method of treatment adopted section 304A, Indian Penal Code, did not apply.

That though the intentions of the person who inflicted the beating was not to cause death but to exercise the spirit they must be taken to have known that they were likely to cause death.

That severe punishment is called for in such cases, the view that they are due to ignorance alone and that ignorance cannot be cured by punishment not being the only consideration affecting the question of punishment.

U.B.R.L., 1910—13, 87.

——1902-03, I, Penal Code, 1.

Nga Po Tha and two v. *King Emperor* 54

PENAL CODE—441, 447. CRIMINAL PROCEDURE—522. *Held*,—that there is no provision of law in the Indian Penal Code or the Code of Criminal Procedure which restricts the right of a person not in possession to make a complaint to a Magistrate in respect of the offence of trespass even though that offence is alleged to have been committed against a third person, nor does the definition of Criminal Trespass contained in section 441 of the Indian Penal Code restrict the offence to cases in which the person in actual possession is insulted, intimidated or annoyed.

Held further,—that an order under section 522, Code of Criminal Procedure, need not be made at the time of conviction: it is sufficient if it is made without unreasonable delay; and that an offence attended by criminal force within the meaning of section 522, Criminal Procedure Code, includes an offence in the commission of which there has been a show of force.

U.B.R., 1897-01, I, 352.

8 U.B.R., 425.

49 P.R. Crl., 15.

11 C.W.N., 467.

Nga Po Tok v. *King Emperor* (*Nga Lu Ka*) 111

PENAL CODE—447, 448.—Criminal Trespass. The complainant suspected his wife of an intrigue and set a trap to catch the delinquent. The accused was caught in the house at night and there was no doubt that he went with the intention of committing an offence on the invitation of the complainant's wife. The accused was convicted of criminal trespass.

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Held,—that although the wife was in actual physical possession of the house and invited the accused there, the husband did not cease to be in possession by reason of his temporary absence; and that as the intention was to commit an offence, which constituted an infringement of the rights of the husband the conviction was correct.
8 L.B.R., 425.
U.B.R., 1897—1901, I, 354.
I.L.B.R., 355.
I.L.R., 23 All. 83.
VI Bur. Law Report, App. 60.
Chatter Singh Damai v. *King Emperor* 194

PENAL CODE—499, EXCEPTION 9,—*Held*,—that a party to a Civil Suit who makes a defamatory statement in Court which is not covered by any of the exceptions to section 499, Indian Penal Code, is not protected from prosecution for an offence punishable under section 500, Indian Penal Code.
Held also,—that even if there were a general privilege in respect of words uttered in Court such privilege only refers to words spoken in the ordinary course of a proceeding before a Court.
I.L.R., 25 All., 685.
—— 17 Bom., 127.
—— 14 Cal., 433.
—— 15 Mad., 414.
—— 36 Mad., 216.
—— 11 Bengal L.R., 3.
Meer Burks v. *Maung Hla Pe* 101

PLEADINGS.—*Held*,—that as the question of the validity of the sale did not arise in the—plaintiff was not entitled to succeed on a case which he had not set up. *See* Sale—validity of— 192

PLEADINGS—the detemination in a cause must be founded upon a cause set up in the—or involved in or consistent with the—*See* Civil Procedure 201

POLICE OFFICER.—Section 203 of the Indian Penal Code applies only to information volunteered by the informant and not to a false statement made in the course of an examination by a—*See* Penal Code 204

"PONGYI."—*Held*,—that a—or "Rahan" cannot inherit porperty from his lay relatives after his ordination.—*See* Buddhist Law—Inheritance 91

POSSESSION.—*Held*,—that although the wife was in actual physical —of the house and invited the accused there, the husband did not cease to be in—by reason of his temporary absence; and that as the intention was to commit an offence, which constituted an infringement of the rights of the husband the conviction was correct. *See* Penal Code 194

POSSESSION.—*Held*,—that in a district in which the law does not prohibit or place any restriction upon the manufacture of *tari* it cannot be unlawfully manufactured and section 37 does not therefore apply to the—of *tari* manufactured in such a district—*See* Excise Act V of 1917, sections 12 (*a*), 37 86

POSSESSION AS TITLE. *Held*,—that if a person dispossessed of property does not avail himself of the remedy allowed by section 9 of the Specific Relief Act he must prove a title which, where it

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is based on possession only, must be possession for at least twelve years.
I.L.R., 26 Cal., 579.
U.B.R., 1893-96, II, 375.
——1904-06, II, Ev. 7.
Nga Tha Zan v. *Sundar Singh* 125

POWER—*Held*,—that apart from O. 41, r. 23, Civil Procedure Code, an Appellate Court has inherent—, when a suit has been decreed *ex-parte*, not only to reverse a decree passed on evidence given by the plaintiff only, but also to direct a retrial of the case—*See* Civil Procedure 198

PRIVATE DEFENCE—Right of—Criminal Procedure—46 (3)—*See* Penal Code 176

PRIVILEGE. *Held also*,—that even if there were a general—in respect of words uttered in Court such—only refers to words spoken in the ordinary course of a proceeding before a Court—*See* Penal Code 101

PROBATE AND ADMINISTRATION—45, 46, 94—INDIAN SUCCESSION 229, 230, 273—On the death of the executor or administrator of a deceased person the heir of the executor or administrator does not succeed to his rights as executor or administrator and the deceased person's estate is unrepresented until new letters of administration are granted.
12 B.L.R. 423.
25 W.R. 489.
Ma Pe Po v. *Maung Lat Gyi* 208

PROBATE AND ADMINISTRATION—98—Civil Procedure—100. Buddhist Law—Inheritance—*Held*—that if the Administrator of an estate denies the claim of a person to an interest in the estate, that person is entitled to take legal measures to enforce his claim. *Ma Hmyin* v. *Ma On Gaing* U B.R., 1902-03, II, Probate and Administration, 1, explained.
Also—that it is permissible for the High Court in a second appeal to examine the evidence in order to see whether there is any evidence on which the findings of the Lower Appellate Court could properly be based.
Also,—that where delivery of property is essential to the validity of the gift, there must be clear evidence of a change of possession.
Also,—that the children of a divorced wife who live with their mother and do not maintain filial relations with the father, are not entitled to share in his estate where there has been a division of property at the time of divorce.
U.B.R., 1897—01, II, 59, 116. I.A., VIII, 75.
I.A., XVII, 127. I.A., XIV, 101.
I.L.R., 34 Cal., 207. P.J.L.B, 504.
S.J.L.B., 296. IV, L.B.R., 272.
U.B.R., 1902-03, II, Pro. and Ad., 1. VI, L.B.R., 167.
Ma Tok and 3 others v. *Ma Chit* 83

PROMISE—BREACH OF—.—*Held*,—that a Burmese Buddhist youth can make a valid—of marriage at any time after he is physically competent for marriage and that he can be sued for damages for breach of such—although he is under 18 years of age.—*See* Buddhist Law—Marriage 75

PROMISSORY NOTE—A plaint cannot be amended so as to convert a suit on a—into a suit on a mortgage bond—*See* Civil Procedure 174

PROPERTY—Partition of—in a suit for divorce between Burman Buddhist it is not necessary to claim partition of—. In such a

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suit it is the kind of divorce granted which determines the rule to be followed at partition—*See* Buddhist Law—Divorce ... 251

PROVINCIAL INSOLVENCY—43, 44. *Held*,—that there appears to be no reason why the Court's powers under section 43 of the Provincial Insolvency Act should not at any time be put in motion by a creditor and the Court is then bound to consider whether the debtor has made false entries in the inventories or lists, or committed any of the other wrongful acts set out in that section.

10 B.L.T., 25.

Ko Bein Wa v. *District Court as receiver and one* ... 97

PROVINCIAL SMALL CAUSE COURTS ACT, II SCHEDULE, CLAUSE 15.—Specific Relief Act, section 30. *Held*,—that a suit for specific performance of an award is not a suit for the specific performance of a contract.

Held also,—that where a claim has been submitted to arbitration and an award made, the claim for compensation is merged in the award and the payment of any money directed by the award appears to be a simple claim for money of a kind cognizable by a Court of Small Causes.

I.L.R., 16 Bom., 267.

——13 Mad., 344.

16 Indian Cases, 868.

Maung Tok v. *Ma Shwe Mi* 109

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"RAHAN"—*Held*,—that a "Pongyi" or—cannot inherit property from his lay relatives after his ordination.—*See* Buddhist Law—Inheritance 91

"RELIGIOUS" LAND—Valuation of—must be deemed to be the amount at which the Court estimates it with reference to the value of similar "non-religious" lands in the neighbourhood—*See* Court-fees 236

REPORT.—The Collector on a—from the District Superintendent of Police sanctioned the prosecution of an excise licensee under section 41 (*c*) of the Excise Act but did not pass orders authorising any particular Excise Officer to make a—or complaint.

A—was then made to a Magistrate by a Sub-Inspector of Police.

Held,—that this was not a compliance with the provisions of section 63 (1) (*a*) of the Excise Act.—*See* Excise ... 197

REVIEW. *Held*,—that the right of appeal against an order granting an application for—is restricted by the terms of Rule 7, Order XLVII.—*See* Civil Procedure Code. O, XLVII, r.7 ... 104

REVISION.—Orders passed under Chapter XII, Code of Criminal Procedure, are not subject to—being expressly excluded from the operation of section 435 of that Code by Clause 3 of that section.

But to deprive the High Court of the power of interference in—the proceedings must be proceedings under Chapter XII of that Code in fact and not only in name—*See* Criminal Procedure 35

RIGHT OF PRIVATE DEFENCE—*See* Penal Code 176

RIGHT-OF-WAY.—Facts necessary to prove a—by easement.—*See* Easement 65

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SALE.—Validity of—. Plaintiff sued for redemption of certain land relying on a mortgage effected by him.

The defence was that plaintiff had converted the mortgage into a sale. The trial Court, taking this view of the facts, dismissed the suit.

The First Appellate Court found the sale proved, but held that it was invalid, by reason of the consent of the coheirs not having been obtained and granted a mortgage decree.

Held,—that as the question of the validity of the sale did not arise in the pleadings, the plaintiff was not entitled to succeed on a case which he had not set up.

Ma Ye Baw and one v. *Mauwg Shwe Hman and one* ... 192

SOLDIER. The pay of a—is exempt from attachment by a Civil Court—*See* Army Act 20

SPECIFIC RELIEF—9.—Person dispossessed of property—title based on possession only—must be possession for at least twelve years. *See* Possession as title 112

SPECIFIC RELIEF—21.—Award by Arbitrators—effect of—the existence of an award made by arbitrators in consequence of a reference to arbitration by mutual agreement bars the decision of the subject matter thereof in a civil suit until the award has been set aside by the decree of a competent court.

U.B.R. 1897—01, II, 542.
I.L.R. 33 Bom. 401.
8 L.B.R. 157.
C.A. No. 440 of 1914 (unpublished).

Ma Hla Ye and two others v. *Maung Tun Maung* ... 210

STATE LAND—Section 53(2) (ii) of the Upper Burma Land and Regulation does not bar the jurisdiction of the ordinary Civil Courts in respect of disputes between private persons regarding the ownership or possession of—or any lien upon or other interest in such land or the rents, profits or produce there of—*See* Upper Burma Land and Revenue Regulation ... 212

STATEMENT.—There is no provision of law by which the—of a witness can be used against him to impeach his credit when he is called for the defence—*See* Criminal Procedure ... 84

STATEMENTS.—*Held*,—that the—of witnesses recorded by the police in the course of an investigation cannot be used in any way whatever, in the course of the trial which results from that investigation, except in the one way laid down in section 162 of the Code of Criminal Procedure with the single exception referred to in clause 2 —*See* Criminal Procedure 81

SUCCESSION ACT—27. *Held*,—that marriage under the Burmese Law being polygamous a union between a Frenchman and a Burmese lady which was a lawful marriage under that law was not a marriage as understood in Christendom.

Held also,—that the offspring of such a marriage were not legitimate and cannot inherit under the law administered in Courts in British India and such law being in the case of a suit between East Indian Christians the law contained in the Succession Act.

Held also,—that the terms wife and lineal descendant used in the Succession Act refer only to the lawful wife and to legitimate children. 198

1 U.B.R., 1910-13, III.
1890, 15 P.D., 76.
I.L.R, 30 Bom., 500.
8 L.B.R., 393.
U.B.R., 1892-96, II, 529.

Sophia Blin v. *Maria David* ... ...

SUMMONS—refusal to accept a—when tendered does not amount to intentionally preventing service of—*See* Penal Code 202

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SUMMONS—Rule 17, O. V, of the Civil Procedure Code is intended for cases in which the—should be affixed in the way required by the rule after a proper attempt has been made to find the defendant—*See* Civil Procedure. 122

SURETY.—*Held*,—that, whereas in a suit against a debtor and his—for money lent the mere omission of the plaintiff to pursue his suit against one of the defendants with the result that that defendant's name is struck off and the suit dismissed against him under O. IX, r. 5, does not discharge the—provided the suit be still in time against the principal where the plaintiff expressly waived his claim against the principal debtor and informed the Court that he would obtain decrees against the—only, it was an act or omission the legal consequence of which was to discharge the principal debtor within the meaning of section 134 and therefore the plaintiff had no further right of suit against the principal debtor and could not recover from the—*See* Civil Procedure 62

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Tari.—*Held*,—that in a district in which the law does not prohibit or place any restriction upon the manufacture of—it cannot be unlawfully manufactured and section 37 does not therefore apply to the possession of—manufactured in such a district.—*See* Excise Act V of 1917, section 12 (*a*), 37 86

TENEMENTS.—Pointed out that an easement of necessity cannot arise in any other way than on severance of—Facts necessary to prove a right-of-way by easement.—*See* Easement 65

TOWNS ACT—7, 9 (2).—It is not part of the ordinary duty of a ward headman to provide coolies to take an official's letters out to him when he is on tour and in the absence of proof of any emergency a requisition calling on a ward headman to perform that duty is not warranted by the provisions of section 7 of the Towns Act.

U.B.R., 1892-96, I, 321.
4 L.B.R., 150.

King Emperor v. *Nga Po Sin* 234

TRANSFER OF PROPERTY—51, 108. *Held*,—that a usufructuary mortgagee in Burma has a right to the crops growing on the land at the time of redemption provided that such crops were sown or planted by the mortgagee or his tenant without notice of the intended redemption.

I.L.R., 2 Bom., 670.
——13 Mad., 15.
I.L.R., 8 All., 502.
22 I. Cases, 515.
3 L.B.R., p. 129.
1 U.B.R., 1910-13, p. 14
1 L.B.R., p. 186.

Maung Gaw Ya v. *Maung Talok and one* 141

TRANSFER OF PROPERTY—123.—*Held*,—that Buddhist religious gifts are not excepted from the operation of section 123 of the Transfer of Property Act.

9 L.B.R., 258.

U Ne Mein v. *Ma Hnin On* 207

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TRESPASS. *Held*,—that there is no provision of law in the Indian Penal Code or in the Code of Criminal Procedure which restricts the right of a person not in possession to make a complaint to a Magistrate in respect of the offence of—even though that offence is alleged to have been committed against a third person, nor does the definition of Criminal—contained in section 411 of the Indian Penal Code restrict the offence to cases in which the person in actual physical possession is insulted, intimidated or annoyed.

Held further,—that an order under section 522, Code of Criminal Procedure, need not be made at the time of conviction: it is sufficient if it is made without unreasonable delay; and that an offence attended by criminal force within the meaning of section 522, Criminal Procedure Code, includes an offence in the commission of which there has been a show of force.—*See* Penal Code—441, 447; Criminal Procedure—532 111

TRIAL.—Proceedings under section 145, Code of Criminal Procedure, do not constitute a—and are not in the nature of a—*See* Criminal Procedure 53

TRIBES.—*Held*—that the Kachin Hill—Regulation applies to Kachins in the hill tracts defined and does not affect the jurisdiction of the ordinary Civil Courts as provided for by the Code of Civil Procedure—*See* Kachin Hill Tribes Regulation ... 49

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UPPER BURMA CIVIL COURTS REGULATION—15.—*Held*,—that an order passed under the provisions of section 24 of the Code of Civil Procedure read with section 15 of the Upper Burma Civil Courts Regulation was not a decree and that an order for costs passed as part of such an order was not appealable—*See* Civil Procedure 61

UPPER BURMA CRIMINAL JUSTICE REGULATION—Schedule—Section XII of the—does not limit a District Magistrate's ordinary powers in revision under the Criminal Procedure Code but extends his powers under section 438 by allowing him to deal with the case of second and third class Magistrates as he thinks fit instead of reporting them to the High Court for orders—*See* Criminal Procedure ... 269

UPPER BURMA LAND AND REVENUE REGULATION—53 (2) (ii)—*Held*—that section 53 (2) (ii) of the Upper Burma Land and Revenue Regulation does not bar the jurisdiction of the ordinary Civil Courts in respect of disputes between private persons regarding the ownership or possession of State land or any lien upon or other interest in such land or the rents, profits or produce thereof.

7 L.B.R., 10.
8 L.B.R., 227.
U.B.R., 1892-96, II, 327, 634.
—— 1897-01, II, 207, 209, 211, 443.
—— 1902-03, II, Civil Procedure, 1.
—— 1904-06, II, Land and Revenue, 1, 5.
II U.B.R. 1914-16, 151.
U.B. Land and Revenue Manual, 1911, p. 83.

The B.O.C. Ltd. v. *Baijnath Singh and one* ... 211

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UPPER BURMA REGISTRATION REGULATION—4—Execution—*Held*,—that documents completed in the Burmese fashion without being signed are "executed" within the meaning of section 4 of the Upper Burma Registration Regulation.
U.B.R., 1892-96, I, 303.
——1907-09, II, Ex. 5.
Ma Sat Pu v. *Ma Sin* 258

USUFRUCTUARY MORTGAGE after date fixed in preliminary decree —redemption of—*See* Civil Procedure 183

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VALIDITY.—*Held*,—that as the question of the—of the sale did not arise in the pleadings, plaintiff was not entitled to succeed on a case which he had not set up. *See* Sale—Validity of— ... 192

VILLAGE ACT—9. *Held*,—that an accused convicted of an assault by a village headman is liable subsequently to be tried by a magistrate for the causing of hurt upon the same facts.
Mi Chit v. *Mi Nyun* 135

VILLAGE HEADMAN. An accused convicted of an assault by a—is liable subsequently to be tried by a magistrate for the causing of hurt upon the same facts—*See* Village Act ... 135

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WARD HEADMAN.—It is not part of the ordinary duty of a—to provide coolies to take an official's letters out to him when he is on tour and in the absence of proof of any emergency a requisition calling on a—to perform that duty is not warranted by the provisions of section 7 of the Towns Act—*See* Towns Act 234

WHIPPING—3—*Held*,—that a Court of Appeal or (in Upper Burma) on revision cannot alter a sentence of imprisonment to one of whipping under—where any portion of such imprisonment has been served.
VIII L.B.R., 466.
King Emperor v *Nga Tun Sein* 32

WIFE.—*Held*,—that although the—was in actual physical possession of the house and invited the accused there, the husband did not cease to be in possession by reason of his temporary absence; and that as the intention was to commit an offence, which constituted an infringement of the rights of the husband, the conviction was correct. *See* Penal Code 194

WIFE AND LINEAL DESCENDANT. The terms—used in the Succession Act refer only to the lawful wife and legitimate children—*See* Succession Act 128

WITHDRAWAL—The death of a party is not sufficient cause for allowing the—of a suit which has been completed in every respect except for delivery of judgment—*See* Civil Procedure ... 46

WITNESS. An accused person cannot be put on his oath or examined as a—in the case in which he is accused. If an incompetent—is examined inadvertently his statement is not legal evidence and must entirely be ignored—*See* Criminal Procedure 115

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