THE
ALL INDIA REPORTER

1930

RANGOON SECTION

CONTAINING

FULL REPORTS OF ALL REPORTABLE JUDGMENTS OF THE **RANGOON HIGH COURT** REPORTED IN

(1) I. L. R. 8 RANGOON (2) 31 CRIMINAL LAW JOURNAL
(3) 121 to 128 INDIAN CASES (4) 1930 CRIMINAL CASES
(5) 13 & 14 ALL INDIA CRIMINAL REPORTS

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TO

THE LEGAL PROFESSION

IN GRATEFUL RECOGNITION OF

THEIR WARM APPRECIATION AND SUPPORT

RANGOON HIGH COURT

1930

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Puisne Judges:

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(PARALLEL REFERENCES)

Hints for the use of the following Tables

Table No. I.—This Table shows serially the pages of INDIAN LAW REPORTS for the year 1930 with corresponding references of the ALL INDIA REPORTER.

Table No. II.—This Table shows serially the pages of other REPORTS and JOURNALS for the year 1930 with corresponding references of the ALL INDIA REPORTER.

Table No. III.—This Table is the converse of the **First** and **Second Tables.** It shows serially the pages of the ALL INDIA REPORTER for 1930 with corresponding references of all the JOURNALS including the INDIAN LAW REPORTS.

TABLE No. I

Showing seriatim the pages of INDIAN LAW REPORTS, RANGOON SERIES, for the year 1930, with corresponding references of the ALL INDIA REPORTER.

N. B.—Column No 1 denotes pages of I. L. R. 8 RANGOON.
Column No. 2 denotes corresponding references of the ALL INDIA REPORTER.

I. L. R 8 Rangoon=All India Reporter

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TABLE No. III

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RANGOON HIGH COURT

A. I. R. 1930 Rangoon 1

Special Bench

HEALD, OFFG. C. J., CHARI AND ORMISTON, JJ.

Guddai Mutayalu, In the matter of.

Civil Ref. No. 7 of 1929, Decided on 19th August 1929, made by Commissioner for Workmen's Compensation.

(a) **Workmen's Compensation Act (1923), S. 30 (d)—Except as provided by S. 30 no authority is conferred on any Government officer to direct Commissioner to reverse his decision.**

Section 30 allows appeals to the High Court from certain orders, in particular, from an order disallowing a claim of a person alleging himself to be a dependant. Except, however, as provided by this section no appeal lies from his orders and there is no authority conferred, by the Act, or by rules framed thereunder on, the Financial Commissioner or any other officer of Government to direct the Commissioner to reverse any decision at which he may have arrived and if a Financial Commissioner purports to direct the Commissioner to reopen the proceedings, his action is ultra vires. [P 3 C 1]

(b) **Workmen's Compensation Act (1923), S. 8 (4)—Commissioner has power to order redeposit of compensation.**

Subject to the observance of the provisions of R. 8, the Commissioner has power to order the redeposit of the compensation. [P 4 C 1]

(c) **Workmen's Compensation Act (1923), S. 8—Act does not forbid compensation being paid otherwise than through Commissioner.**

The Act does not forbid compensation being paid otherwise than through the Commissioner. The whole scheme of S. 8 under sub-S. (1), whereof compensation "shall" be paid to the Commissioner, seems to be designed for the protection of the employer against claims in respect of accidents where his liability is admitted or established. [P 4 C 1]

Saw Po Chit—for Employer.

Ormiston, J.—This is a reference under S. 27, Workmen's Compensation Act 1923, (Act 8 of 1923), by a Commissioner for Workmen's Compensation appointed under that Act. On 1st February 1927, an accident occurred in a mill belonging to Ah Nyan at Zinmathwe, Thaton District, which resulted in the death on the same day of a workman employed therein named Guddai Ramannah or Yammaya. The accident was reported to the Commissioner on 25th March 1927, whereupon notice was issued to the mill owner to deposit the amount of the compensation specified in S. 4 (1)-A of the Act. The mill owner, on 9th May 1927, pursuant to S. 8 (1), deposited the sum of Rs. 807-8-6, furnishing at the same time, as provided in R. 6 of the Workmen's Compensation Rules 1924, a statement in Form-A annexed to those rules therein describing the workman as Yamaya of Zinmathwe village, which must have been at the time his correct address. R. 7 requires the Commissioner to cause to be displayed in a prominent position outside his office an accurate list of the deposits received by him under S. 8 (1), together with the names and addresses of depositors and of the workmen in respect of whose deaths the deposits have been made.

The Commissioner ordered this to be done, and on 11th May 1927, it was done, the list displayed containing the name of Yammaya of Zinmatnwe village. S. 8 (4) directs the Commissioner, on the deposit of any money under sub-S. (1), if he thinks it necessary, to cause notice to be published or to be served on each dependant in such manner as he thinks fit, calling upon the dependants to appear before him on such date as he may fix for determining the amount of compen-

sation. If he is satisfied, after any enquiry which he may deem necessary, that no dependant exists, he shall repay the balance of the money to the employer by whom it was paid. On 6th June 1927, no one having appeared to claim compensation, the Commissioner directed a notice to be published calling upon the dependants to appear before him on 2nd July 1927, for determining the distribution of the compensation. The notice was to be published at the mill, at the headman's house, and also at a conspicuous place in the village where the mill was situate, by beat of gong after reading out the contents of the notice. Copies were ordered to be posted also at the District Court and at the Deputy Commissioner's Court-house. The notices were so published, and no one having appeared on the day fixed, they were so published a second time. The notices described the workman as Yammaya of Zinmathwe. No one appeared on 24th August 1927, which was the adjourned date.

The Commissioner was satisfied that no dependant existed, basing his decision in part on S. 10 (1) of the Act, to which I will presently refer. Apart from that subsection, he had ample materials on which he could have arrived at his conclusion. He was not obliged to serve the notice on any particular dependant, and he could have had no means of knowing who the dependants were, neither the Act nor the rules providing that he should be supplied with a list of them, or with any address of the workman other than the village where he was working at the time of the accident. The Commissioner having recorded his satisfaction that no dependant existed directed the return of the deposit to the mill owner, which was done on 16th September 1927.

On 28th September 1927, the Commissioner received a claim from Guddai Mutayalu, the widow of the workman residing in the Ganjam District of the Madras Presidency, which was supplemented by a further claim received on 1st October 1927. The claims were filed, a copy of the second claim having been sent by the claimant to the mill owner for information and favourable disposal. The mill owner made to the widow an ex gratia payment, which she acknowledged.

On 21st June 1928, the Officer-in-Charge, Labour Statistics Bureau, Rangoon, as a result of an inspection of the proceedings in the case wrote to the Financial Commissioner (transferred subjects) criticising the action of the Commissioner, and suggesting that he should be enlightened as to the correct procedure. He received a reply dated 9th August 1928, from the Financial Commissioner, endorsing the criticisms of the Officer-in-Charge, Labour Statistics Bureau, and adding further criticisms. The reply concluded by requesting that the attention of the Commissioner be drawn to the alleged errors in procedure and that he be asked to take steps or rectify them. The claimant, he wrote, should be given an opportunity of proving her claim, for which purpose it was suggested that the District Magistrate, Ganjam be asked to investigate it.

The correspondence was forwarded to the Commissioner, who after causing the claim to be investigated as suggested, and satisfying himself that it was a true claim, on 26th March 1929, required the mill owner to redeposit the amount of compensation. The mill owner objected on the ground that the Commissioner having by his order held that no claim was admissible, because none was made within six months of the date of the death, the Financial Commissioner had no power to reverse the order and direct the proceedings to be reopened. The Commissioner appears to have been inclined to agree with this view, and, in consequence, he made the present reference. It should be stated that the Commissioner who made the order directing the return of the Compensation, the Commissioner who reopened the proceedings on receipt of the Financial Commissioner's letter, and the Commissioner who made the reference, were successive holders of the office.

The questions referred are:

(1) Was the Commissioner correct in accepting the reversal of his order by the Financial Commissioner and reopening the case without reference to the High Court ?

(2) If he was correct, has he the power to direct a new deposit of the sum returned to (presumably "by" is meant) him ?

Another question is suggested and may be thus formulated:

(3) If the answer to questions (1) and (2) are answered in the affirmative, should the ex gratia payment of Rs. 300 be deducted from the amount of compensation payable to the claimant?

The answer to the first question is simple. The Act gives the Financial Commissioner no power to issue any such order. S. 30 allows appeals to the High Court from certain orders, in particular, from an order disallowing a claim of a person alleging himself to be a dependant. Except, however, as provided by this section, no appeal lies from his orders, and there is no authority conferred by the Act, or by rules framed thereunder on the Financial Commissioner or any other officer of Government to direct the Commissioner to reverse any decision at which he may have arrived. If and in so far as the Financial Commissioner did purport to direct the Commissioner to reopen the proceedings, his action was ultra vires. It is open, of course to anyone to make suggestions to the Commissioner, but if such suggestions are made by a superior officer of Government, it is desirable that they be not made in such a form as to be capable of interpretation as orders.

The second question, in the form in which it is put, having regard to the answer to the first question, does not exactly arise. It suggests, however, the question whether the Commissioner, having satisfied himself in the manner prescribed by the Act and the rules made thereunder that there were no dependants of the deceased workman, and having, in consequence, refunded to the employer the compensation deposited by him, has the power to reopen the matter on the application of a workman and to require the redeposit of the compensation. I have already stated that, in my opinion, the Commissioner had complied with the provisions of the Act and the rules, and had materials before him on which he could be satisfied that the workman had no dependants. He was, therefore, amply justified in refunding the deposit to the mill owner. S. 10 (1) enacts in the case of the death of a workman resulting from an accident, that no proceedings for the recovery of compensation shall be maintainable before a Commissioner, unless the claim for compensation with respect to the accident has been instituted within six months from the date of the accident but there is a proviso that the Commissioner may admit and decide any claim to compensation in any case, notwithstanding that the claim has not been instituted within six months from the date of the death, if he is satisfied that the failure to institute the claim was due to sufficient cause. At the date of the order of 24th August 1927, no claim had been instituted before the Commissioner by any dependant, and being satisfied that there was no dependant, all that he had to do was to record that fact and, under the provisions of S. 8 (4) to order the return of the deposit. Subsequent to the order, on 28th September 1927, he received a claim from an alleged dependant, which was amended by a claim received three days later. It was, under the terms of the proviso, open to him to admit and decide the claim, if he was satisfied that there was sufficient reason for not instituting it within six months from the death. Once the claim is instituted it lies open to the Commissioner, whether on his own motion, or on the suggestion of the Financial Commissioner (Transferred Subjects), or of any one else, to satisfy himself whether or not the applicant had brought herself within the terms of the proviso. The Commissioner, however, has never had his attention directed to this aspect of the case, and it is still open to him to make the necessary enquiries with a view to ascertaining whether there was sufficient cause for the delay, and if he is satisfied that there was such cause, to admit the claim.

If the claim is admitted, he has to decide it. The mill owner has already admitted liability for the consequence of the accident by depositing the compensation. It is suggested that the Commissioner, having under S. 8 (4), directed its refund, is functus officio and that he has no power under the Act to direct its redeposit. I do not consider that there is any substance in this argument. Section 8 (1) provides that compensation "payable" in respect of a workman whose injury has resulted in death shall be deposited with the Commissioner. The employer may dispute his liability. In that event, under S. 19 (1) the question of his liability has to be decided by the Commissioner. If the Commissioner decides against him, there is an obliga-

tion on the part of the employer to pay the compensation to the Commissioner, which may be enforced by the issue of an order under R. 8 of the Workmen's Compensation Rules, on the application of a dependant, but until the decision there is no such obligation. I fail to understand why an employer who has admitted liability should be in any better position than an employer who has not admitted liability. The circumstances that he has already made the deposit and that it has been returned to him under what must ex hypothesi be considered to be a mistake of fact, seem to me to be immaterial. I am of the opinion that subject to the observance of the provisions of R. 8, the Commissioner has power to order the redeposit of the compensation. I should point out, although the question does not strictly fall within the scope of this reference, that under R. 6, the employer is entitled to be a party to the distribution proceedings, and that it is open to him, if so advised, to contest the status of the alleged dependant.

The last question, in the form in which I think it should be stated, is whether the ex gratia payment of Rs. 300 should be deducted from the amount of compensation payable to the claimant. I am assuming for the purpose of the answer that it will be either admitted or established that the Rs. 300 was paid by the employer to the widow and was so paid as compensation for the accident. If there is any dispute on the point it should be enquired into and settled by the Commissioner. The Act does not forbid compensation being paid otherwise than through the Commissioner. The whole scheme of S. 8 under sub-S. (1) whereof compensation "shall" be paid to the Commissioner, seems to be designed for the protection of the employer againt claims in respect of accidents where his liability is admitted or established. If he does so pay the compensation, he is protected against the claims of all dependants, whether or not they have applied to be parties to the distribution. If he makes the distribution himself he lays himself open to attack by persons who may afterwards turn up and claim to be dependants. But if he pays the correct amount to the only person who is a dependant, it is not, I think, open to that person to claim the amount over again, and if he makes to him a payment of less than the correct amount, he should, I think, be only required to pay the difference. It would probably be a protection to the employer in the present instance against the claims of other persons who may hereafter put forward belated claims if (in the event of the widow's claim to compensation being admitted and decided in her favour) the employer were to pay the whole of the compensation to the Commissioner under S. 8 (1). Section 8 (4) does not oblige the Commissioner to cause notice to be published and in the present instance, he might well dispense with republication. In that event he would refund Rs. 300 to the employer and pay the balance to the widow.

Heald, Offg. C. J.—I concur.

Chari, J.—I concur.

V.S./R.K. *Reference answered.*

A. I. R. 1930 Rangoon 4
Special Bench

HEALD, OFFG. C. J. AND CHARI AND BROWN, JJ.

Commissioner of Income-tax—Referee.

v.

E. M. Chettyar Firm—Respondent.

Civil Ref. No. 4 of 1929, Decided on 2nd August 1929, by the Commissioner of Income-tax, Burma.

(a) Income-tax Act (1922), S. 66 — High Court has no jurisdiction to consider any question of fact—Only—questions of law are to be referred.

Under S. 66, Income-tax Act, only questions of law can be referred to the Court. The High Court has no jurisdiction to consider any question of fact and the finding of the Assistant Commissioner or the Commissioner on questions of facts is final. However, the question whether there was any evidence on which an Assistant Commissioner or the Commissioner could come to a finding of fact is a question of law. If there was any evidence upon which it was reasonably possible for the Commissioner to come to the conclusion at which he arrived, the High Court will not consider whether on that evidence that finding was correct, because the High Court is not a Court of appeal in respect of the findings of fact arrived at by the Commissioner. Even where the finding of fact is an inference from other facts the question whether such an inference has been properly drawn is not a question of law. An inference of fact drawn from other facts admitted or proved is itself a finding of fact: *American Thread Co.* v. *Joyce*, 6 *Tax Cases* 1; *Queen* v. *Special Commissioner of Income-tax* 3 *Tax Cases* 289, *Rel. on.* [P 6 C 1]

(b) Civil P. C., O. 41, R. 27—Appellant in income-tax proceedings has no higher right in adducing fresh evidence in appeal.

An appellant in income-tax proceedings has no higher right in adducing fresh evidence in appeal than he would have in a civil case under O. 41, R. 27, Civil P. C. [P 7 C 1]

(c) Income-tax Act, (1922), S. 31—Assistant Commissioner can make an estimate of income—Reasons and basis of assessment must be given.

Where the Assistant Commissioner is satisfied that the account books produced before him are not the complete accounts and the assessee does not produce his accounts to enable the Assistant Commissioner to arrive at a correct estimate of the income, the only course open to the Assistant Commissioner is to make an estimate of the income to the best of his judgment, but this does not mean that the Assistant Commissioner acts under S. 23 (4) of the Act. But he is entitled to make an assessment to the best of his judgment. He must of course give the reasons and the basis of his assessment for the purpose of enabling the Commissioner to see whether the estimate was made according to the best of the Assistant Commissioner's judgment or was wholly arbitrary. [P 7 C 2]

(d) Income-tax Act (1922), S. 31—Proviso does not require notice of enhanced assessment or disclosure of materials forming basis of enhancement.

The proviso to S. 31 contemplates merely a notice by the Assistant Commissioner that he proposes to enhance the income. It is not necessary under that proviso to give notice that the Assistant Commissioner proposes to enhance the assessment to any particular figure or to disclose the materials on which the enhancement is about to be made. [P 8 C 1]

Gaunt—for the Crown.

Darwood and *Foucar*—for Assessee.

Judgment.—This is a reference by the Commissioner of Income-tax of Burma. The facts of the case are fully and clearly set out in the reference and it is unnecessary to give them in detail. Briefly stated they are that the E. M. Chettyar firm, which was carrying on business in Moulmein, was assessed for the year 1925-26 by the Income-tax Officer on an income of Rs. 1,00,386 of which Rs. 78,413 was income from the Moulmein business. The assessee had returned a loss of Rs. 7,508. The Chettyar firm appealed against the assessment under S. 30 of the Act; and the Assistant Commissioner, during the hearing of the appeal became suspicious of the accounts. He thereupon directed the Income-tax Officer to make a further enquiry. The result of the enquiry was submitted to him and for the purpose of testing the accounts on which the assessment was based he issued a notice to the Chettyar firm to produce four sets of accounts. Of these accounts, one set was produced before him; one set was said to have been lost at the Rangoon wharf when it was being brought over from Madras and the two other sets were alleged to be the accounts of R. M. P. R. which is said to be a separate business carved out of the E. M. firm by an arrangement with the widow of a deceased partner and to have been created for the purpose of being allotted to the share of a son whom, it was intended, the widow should adopt to her deceased husband.

At a later hearing the Assistant Commissioner was told that the agent of E. M. firm hoped to recover the accounts lost at the wharf and he also agreed to produce the R. M. P. R. accounts which were kept at Puduvayal and not in Burma. Later the Assistant Commissioner sent to the advocates of the Chettyar firm a note wherein he asked them to explain certain points. The explanation was either not forthcoming or was not satisfactory to the Assistant Commissioner, who on 3rd January 1928 issued a notice to the Chettyar firm to show cause why the assessment should not be enhanced. This he was bound to do under the proviso to S. 31 of the Act. He later enhanced the assessment under the head of Burma business from Rupees 78,413 to two lakhs of rupees. In his appellate judgment the Assistant Commissioner stated that to the best of his information and belief the net taxable income of the E. M. concern at Moulmein was not less than two lakhs. The Chettyar firm then took up the matter in appeal to the Commissioner of Income-tax, who dismissed the appeal. The Commissioner was then asked to refer to this Court following questions said to arise out of the case:

1. Whether there was evidence on which the Assistant Commissioner and the Commissioner could find that the books of account on which the assessment of the Income-tax Officer was based were not the full and complete accounts of the petitioners' business for the year.

2. Whether in these assessment proceedings the Income-tax authorities were entitled to insist on the production in Burma of the petitioners' accounts which were maintained in Puduvayal.

3. Whether the Commissioner erred in law in refusing to admit the R. M. P. R.

accounts at the hearing of the appeal before him.

4. Whether the enhancement of the petitioners' income under the head "Burma business" made by the Assistant Commissioner was such an enhancement as is contemplated by S. 31, Income-tax Act, 1922, and in accordance with the provisions of that section.

5. Whether even assuming that the petitioners wilfully failed to produce the accounts the Assistant Commissioner acted illegally enhancing the assessment in respect of their Burma business to two lakhs of rupees without disclosing to them the materials he had before him in support of such assessment, so as to give them an opportunity to rebut or disprove such materials.

The second question has not been pressed before us in view of our judgment in another case in which a similar point arose, where we decided that it was competent for the Commissioner to call for the production of books which were maintained outside British India.

We shall now consider the other questions seriatim.

Question 1 seems to be a question of fact disguised as a question of law. It has been repeatedly held that under S. 66, Income-tax Act, only questions of law can be referred to the Court. We have no jurisdiction to consider any question of fact and the finding of the Assistant Commissioner or the Commissioner on questions of fact is final. It has, however, been held that the question whether there was any evidence on which an Assistant Commissioner or the Commissioner could come to a finding of fact is a question of law. If there was any evidence upon which it was reasonnably possible for the Commissioner to come to the conclusion at which he arrived, the High Court will not consider whether on that evidence that finding was correct, because the High Court is not a Court of appeal in respect of the findings of fact arrived at by the Commissioner: see the *American Thread Co.* v. *Joyce* (1) and the cases discussed therein. Even where, as in this case, the finding of fact is an inference from other facts the question whether such an inference has been properly drawn is not a question of law. An inference of fact drawn from other facts admitted or proved is itself a finding of fact. Thus in *Queen* v. *Special Commissioner of Income-tax* (2), the Master of Rolls in considering the question whether the Commissioners were entitled on the ground of the assessee not producing his books coupled with certain other facts to draw the inference that certain items in a schedule furnished by the assessee were wrong said:

> "It is a question of the true inference which they had to draw as a matter of evidence upon the facts which they had in evidence before them. But to draw an inference of facts from evidence before you is not a question of law at all. The inference is a question of fact just as much as the direct evidence of fact, and it would be an appeal against facts, which we are not entitled to entertain, and consequently there can be no mandamus. To say that these gentlemen did not assume to hear and determine the case is idle. They did. But the question is whether they did it by the exercise of something which was beyond their jurisdiction. I say, if that is a question of fact, the mere question of whether they appreciated the evidence rightly or not and whether they drew a right inference of fact, is not the subject matter of a mandamus at all. There would be an appeal if there was an appeal, but there is none."

In this case, the Assistant Commissioner, from the fact of non-production of certain books which the Chettyar firm was ordered to produce coupled with other facts mentioned in his order, came to the conclusions that the books of account on which the assessment was based were not the full and complete accounts of the petitioner's business for the year of assessment. This is a finding of fact and there was ample evidence from which the Assistant Commissioner could draw the inference that the books produced were not the full and complete accounts of the business. Whether on the evidence we would come to the same conclusion or not is a question which does not arise.

It has been urged before us that as there was a partition among the members of the E.M. family there was justification or at all events excuse for the E. M. firm not producing the R. M. P. R. accounts, but the question whether this alleged partition took place and whether it afforded any excuse for the non-production of the books before the Assistant Commissioner are questions of fact. They are pieces of the evidence on a consideration of the whole of which the Assistant Commissioner arrived at his finding

(1) 6 Tax Cases, 1.

(2) 3 Tax Cases 289.

of fact. We therefore answer question 1 in the affirmative and hold that there was evidence on which the Assistant Commissioner could come to the conclusion at which he arrived.

Question 3.—After the Assistant Commissioner had enhanced the assessment, and when the matter was taken up in appeal to the Commissioner, the Chettyar firm offered to produce the R. M. P. R. accounts. These ought to have been produced before the Assistant Commissioner and it was entirely in the discretion of the Commissioner whether or not he would admit further evidence at that stage. The Commissioner rightly remarks that an appellant in income-tax proceedings has no higher right, in adducing fresh evidence in appeal than he would have in a civil case under O. 41, R. 27, Civil P. C. The Chettyar firm had had ample opportunity of producing the R.M. P.R. accounts before the Assistant Commissioner and therefore we answer this question in the negative and hold that the Commissioner did not err in law in refusing to admit those accounts at the hearing of the appeal.

As regards question 4, it was suggested before us that the Assistant Commissioner had arrogated to himself the power of assessing to the best of his judgment which is given only to the Income-tax Officer under S. 23 (4) of the Act. From the reference submitted by the Commissioner the argument on this question before him seems to have been that S. 31 does not give the Assistant Commissioner power to ignore the materials accepted and acted upon by the Income-tax Officer and to make a summary assessment and that it does not give the Assistant Commissioner power to assess on income which according to him was not included in and not covered by the assessment appealed against.

As regards the second of the two arguments above stated we are in agreement with the Commissioner ; if the argument were sound, it would mean that the Assistant Commissioner could not enhance the assessment, in any case. The Assistant Commissioner did not in fact assess any new source of income or the income of a new business. He merely enhanced the income of the Moulmein business to two lakhs of rupees.

As regards the first part of the argument, it is true that where the Assistant Commissioner is satisfied that the account books produced before him are not the complete accounts and the assessee does not produce his accounts to enable the Assistant Commissioner to arrive at a correct estimate of the income, the only course open to the Assistant Commissioner is to make an estimate of the income to the best of his judgment, but this does not mean that the Assistant Commissioner Acts under S. 23 (4) of the Act. But in a case like the present he is entitled to make an assessment to the best of his judgment. He must of course give the reasons and the basis of his assessment for the purpose of enabling the Commissioner to see whether the estimate was made according to the best of the Assistant Commissioner's judgment or was wholly arbitrary. In his appellate order the Assistant Commissioner says :

> "To the best of my information and belief the net taxable income of the appellant-concern's business at Moulmein during the accounting year was not less than two lakhs of rupees. It is highly improbable that any assessee and least of all an astute Chettyar money-lender, would go to the length of maintaining a double set of accounts and concealing part of his income unless the stakes were worth the hazard. Under S. 31 (3) (a), therefore I enhance the assessment under the head "Burma business" from Rs. 78,413 to Rs. 2,00,000."

It will thus be seen that, though the Assistant Commissioner states that the assessment is to the best of his information and belief, he does not mention the facts and figures on which his assessment was based. In matters of assessment where such wide powers are vested in the Income-tax officials, it is highly desirable that they should avoid even a semblance of arbitrary action. Our answer to question 4 therefore is that if the enhancement of the Assistant Commissioner is based on materials from which he could reasonably conclude, though only as a rough estimate, that two lakhs of rupees was the income of the Moulmein business then the enhancement was legal ; if, on the other hand, the enhancement was wholly arbitrary and based upon no materials, it was, illegal. In view of this answer the proper course for the Commissioner to adopt will be to call upon the Assistant Commissioner to give the grounds on which he based his assessment and the Comissioner as an appellate tribunal can then consider whether the enhancement was justified on these materials. If in his

opinion there were materials on which the Assistant Commissioner could arrive at the enhanced figure there is an end of the matter, since there is no further appeal and we cannot enter into questions of fact, namely, as to the sufficiency of those materials for the conclusion arrived at.

Question 5.—On this question the argument before us took an apparent different turn from that before the Commissioner. It was argued, first, that the Assistant Commissioner was bound in law to disclose the materials on which he came to the conclusion that two lakhs of rupees was the income of the Burma business in order to enable the Chettyar firm to meet the case. The proviso to S. 31 contemplates merely a notice by the Assistant Commissioner that he proposes to enhance the income. It is not necessary under that proviso to give notice that the Assistant Commissioner proposes to enhance the assessment to any particular figure or to disclose the materials on which the enhancement is about to be made. As we have stated in the answer to the last question, it is desirable that the Assistant Commissioner, in his order enhancing the assessment, should mention the basis of the enhanced assessment but this is merely for the purpose of satisfying the appellate tribunal that the assessment was not arbitrary. It was open to the Chettyar firm when notice was issued under the proviso to S. 31 to show cause against the enhancement and to convince the Assistant Commissioner that if he did enhance the income it should not be above a certain figure. Our answer to question 5 is therefore that the Assistant Commissioner did not act illegally in enhancing the assessment without previously disclosing the materials on which he based the enhanced assessment.

Each party will bear his own costs in respect of this reference.

V.S./R.K. *Reference answered.*

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* A. I. R. 1930 Rangoon 8

HEALD, OFFG. C. J. AND MYA BU, J.

Crescent Insurance Co. Ltd. — Appellant.

v.

Maung Po Htaik—Respondent.

First Appeal No. 19 of 1929, Decided on 10th September 1929.

* **Arbitration—Judge cannot put himself in position of arbitrator without consent of parties.**

The Judge has no power without the consent of the parties to put himself into the position of an arbitrator, so as to decide otherwise than on the evidence. [P 10 C 1]

J. R. Chowdhury—for Appellant.

P. B. Sen—for Respondent.

Judgment.—On 27th May 1926 respondent took out an insurance against loss or damage by fire in respect of the stock of cloth, cotton piece goods, and silk goods in his stall at the Zigon municipal bazaar with the appellant company for 4000. It was a condition of the policy that on the happening of any such loss or damage respondent should forthwith give notice thereof to the company and should within fifteen days after the loss or damage or such further time as the Court might in writing allow, deliver to the company a claim containing as particular an account as might be reasonably practicable of all the properties damaged or destroyed, and that if the claim should be rejected and a suit should not be begun within three months after such rejection, all benefit under the policy should be forfeited. It was also of course a condition that if the claim was fraudulent the benefit should be forfeited. In the early hours of the morning of 10th April 1927, there was a fire in the bazaar and the stock in respondent's stall was destroyed. Later the same morning respondent sent to the company a telegram (which is on the record but has not been marked as an Exhibit) saying that the bazaar and his shop had been burnt. On receipt of that telegram the company's representative Alibhoy went to Zigon and saw respondent, and after that interview sent him the necessary claim forms. The claim (Ex. D) which was dated 25th April 1927 was presented to Alibhoy who acknowledged receipt of it on 28th April.

Apparently about 17th April Rowland, who is Inspector to the Burma Fire Insurance Association, went on the company's behalf and inspected the scene of the fire. He says that he told respondent to send in his claim with documents showing what stock he had in his shop. Respondent told him that all his books and receipts and such like papers had been destroyed. Rowland sent in two reports dated 22nd April (Ex. 1) and 26th April (Ex. 2). In the earlier of these

two reports he said that the respondent was suspected of arson and suggested that the services of the Criminal Investigation Department should be obtained and that the claim should be repudiated, if respondent were convicted. It appeared from that report that the police and the Deputy Commissioner had already recorded the statements of certain witnesses against respondent. In the later report, he said that there was evidence that the value of respondent's stock at the time of the fire was not more than 700. It may be noted that in his evidence Rowland said that he understood that respondent had been prosecuted for arson and had been discharged. After Rowland made his report there was correspondence between the parties but the letters or most of them have not been proved, and it does not appear how they came to have been admitted into the record. As, however, no objection to their admission has been raised in the appeal we shall take it that they were admitted by consent.

On 11th July 1927 respondent gave one Ba Thein, who was a son-in-law of Maung Gyi, to whom respondent owed a considerable sum of money and was manager of Manng Gyi's business, a power-of-attorney (Ex. 2) empowering him to represent respondent in the matter of this claim, and on the same day both respondent and Ba Thein gave notice of Ba Thein's appointment to the Company's agent vide: the two letters of that date which are on the record but have not been marked as exhibits. On 26th July 1927 Ba Thein as respondent's attorney sent to the company a reminder about respondent's claim. This letter also is on the record but has not been marked as an exhibit. On 28th July 1927, the company asked respondent to submit his books and vouchers; similar remarks apply to the letter of this date.

On 2nd August 1927 Ba Thein wrote to the company pointing out that they had already been informed that the books and vouchers had been burnt with the stock and threatening legal proceedings if the claim was not met. That letter also is on the record but has not been marked as an exhibit. On 9th August 1927 the company wrote to Ba Thein a (letter which similarly is on the record but is not marked) in which they said again that they could not entertain the claim without the support of account books and vouchers. On 12th September respondent sent to the company a lawyer's letter demanding payment. That letter similarly has not been marked as an exhibit, and it does not appear how it comes to be on the record. On 14th Septemper the company replied with a lawyer's letter (Ex. F) in which they refused to pay on grounds that the claim was not complete, and that the case was not a genuine case of fire.

On 2nd October respondent replied with a lawyer's letter in which he said that the delay in making the claim was due to dilatoriness on their part, that respondent had already told them that he could not produce his account books or vouchers because they had been burnt along with the stock, but that he had offered to produce other evidence of the contents of his stall, and that the allegation that the claim was fraudulent was false. On 10th December 1927 respondent sent the company another lawyer's letter (not marked as an exhibit) demanding either payment or arbitration. On 12th December the company replied that they stood by their letter of 14th September, that is to say, that they refused to pay. On 13th December, the suit was filed in forma pauperis.

The company pleaded that the claim was not made in time, that the suit was not filed in time, and that at the time of the fire respondent's stock was not worth more than 700. The learned Judge on the original side found that time was not of the essence of the contract in respect of the making of the claim and that in any case the company had waived any objection which there might have been on that score. He found further that the suit was in fact filed in time. On the value of respondent's stock he said that he was doubtful on the evidence whether respondent's stall actually held as much as 4000 worth of goods, that the claim was probably exaggerated, that such exaggeration did not amount to fraud, and that there was no evidence to support the company's contention that the value of the stock was only 700. In these circumstances he said that he placed himself in the position of an arbitrator, and that he thought that he would be doing substantial justice if he assessed the amount at 3000.

For these reasons he gave respondent a decree for 3,000.

The company appeals on grounds that there was no waiver of the objection, that the claim was not made in time, that the suit was not filed in time, and that the learned Judge having found that the actual value of the stock was not proved was not entitled to regard himself as an arbitrator so as to make an arbitratary assessment. There are no merits in the first of two of these grounds of appeal, because the objection on the score of the late presentation of the claim, if there was any force in it, of which we are satisfied, was undoubtedly waived, and the suit was filed within three months of the 14th September, which was the date of the company's rejection of the claim. As for ground 3, it is clear that the learned Judge had no power without the consent of the parties to put himself into the position of an arbitrator, so as to decide otherwise than on the evidence. It remains therefore for us to consider what finding the evidence warranted. It is clear that at the time when the insurance was effected the company was satisfied that the respondent's stock was worth at least 4000 and in the absence of proof of fraud or other circumstances showing that it was reduced, there is some slight presumption that it remained at about that figure. Respondent swore that just before the fire his stock was worth about 5000. He said that about four months before the fire he bought 1500 worth of goods from one Bhansi Lal, but he was unable to produce Bhansi Lal as a witness because he was certified to be ill and was unable to attend Court. He said that he bought over 2000 worth of goods from one Tun U and Tun U said that during the six months before the fire, he had bought goods for respondent to the value of about 1700. Tun U also said that he thought that respondent had about 4000 worth of goods in his stall at the time of the fire. Respondent said that he also bought about 1300 worth of goods from a Chinese trader A Taw, and A Taw said that he had purchased goods for respondent within two or three months before the fire, but he could not say what those goods were worth. Respondent said further he bought over 1000 worth of goods from Maung Gyi to whose son-in-law and manager Ba Thein he gave the power-of-attorney and he called Saw Win an assistant in Maung Gyi's business who said that on 1st July 1926 respondent bought Rs. 649-6-6 worth of goods from them, and that on 7th October 1926 he bought 1633-11 worth of goods from them. He also said that about three or four months before the fire respondent had stock to the value of 4000 or 5000.

All this evidence must of course be accepted with caution but it is entirely unrebutted, and it does at least show that respondent's stock had been replenished, since the insurance was taken out. In view of the initial presumption that the value of the stock was at least 4000 when the insurance was effected and the complete absence of any evidence that it was less at the time of the fire, we are of opinion that the learned Judge's assessment of its value at the time of the fire at 3000 was not excessive.

We accordingly dismiss the appeal with costs. Respondent has filed a cross-objection in forma pauperis, claiming that the value of his stock should have been assessed at 4000 and not 3000. We have considered his claim and we are not satisfied that we should be justified on the evidence in enhancing the award. We therefore dismiss the cross-objection without order for costs, and we direct that respondent do pay the court-fees which would have been paid on his cross-objection if he had not been permitted to file it as a pauper, and that a copy of the decree containing this order be sent to the Collector.

P.N./R.K. *Appeal dismissed.*

A. I. R. 1930 Rangoon 10
Special Bench

RUTLEDGE, C. J. AND BROWN, J.

M. R. Ry. Somasundaram Chettyar — Applicant.

v.

Commr. of Income-tax — Opposite Party.

Civil Misc. Appln. No. 70 of 1928, Decided on 22nd May 1929.

Income-tax Act (1922), S. 22 (4) — S. 22 (4) empowers Income-tax Officer to require agent to produce account books kept in places outside British India for his inspection.

Section 22 (4) empowers the Income-tax Officer to serve on any person, upon whom a notice has been served under sub-S. (2), a notice requiring him to produce, or cause to

be produced, such accounts or documents as the Income-tax Officer may require. The only limitation to the powers of the Income-tax Officer in this respect are that he cannot require the production of any accounts relating to a period more than three years prior to the previous year. [P 11 C 2]

In a suit the person on whom notice was served was the Rangoon agent of the non-resident firm. It was the non-resident firm which was being assessed. The Income-tax Officer was of opinion that the books of accounts kept in places outside British India were required to help him to assess the firm to tax.

Held: that the Income-tax Officer had the power to call for the account books in question: *A. I. R.* 1928 *Bom.* 448 and *A. I. R.* 1928 *Bom.* 465, *Ref.* [P 12 C 1]

Foucar—for Applicant.

Gaunt—for the Crown.

Judgment.—The P. K. N. Chettyar firm, the principals of which are resident in Pudukota State outside British India carry on business in Rangoon through their agent. The agent submitted a return of income for the year 1925-26 to the Income-tax Office, and on 4th March 1926 the Income-tax Officer issued a notice on him under the povisions of S. 22 (4), Income-tax Act, to produce books of account in the Jaffna and Alleppy branches of the firm. This notice was issued because inspection of the Rangoon books of account showed that the firm was carrying on business in rice in Rangoon and Akyab by purchasing and exporting rice to Jaffna and that it also had business in Alleppey. The books of account not having been produced, the Income-tax Officer made an assessment on the firm under the provision of of S. 23 (4), and the question we have now to decide is as to the legality of this assessment.

By an order of this Court the Commissioner of Income-tax has been directed to state the case and refer to this Court the question whether, in the circumstances of this case, it is open to the Income-tax Officer to require the production of the books of the Jaffna and Alleppey branches of the assessee; and, if not, whether the failure to comply with such a requisition is a default within the meaning of S. 23 (4) of the Act renders the assessee liable to assessment under that subsection. The Commissioner has now stated the case and referred the question to this Court for orders.

The Rangoon agent has presumably been assessed under the provisions of S. 42, Income-tax Act, and our attention has been drawn to two recent decisions of the High Court of Bombay as to the meaning of the word "agent" in that section. In the case of the *Commissioner of Income-tax, Bombay* v. *Bombay Trust Corporation, Ltd.* (1) and *Commissioner of Income-tax* v. *Remington Typewriter Co., Ltd.* (2), it was held that Ss. 40, 42 and 43, Income-tax Act, 1922 are to be read jointly and not disjunctively, and that in order to make an agent liable under S. 42 it is necessary that he should be in receipt of income on behalf of the non-resident person for whom he is agent. We understand the contention to be that an agent is not liable save for moneys actually received by him in British India, and that therefore books of account from outside British India cannot be necessary for the purposes of assessing income.

We do not consider it necessary to express any opinion on the question raised in the Bombay cases as we are unable to see how it follows as a corollary to the decision in those cases that the agent was not bound to produce the books of account in question in the present case. We do not understand it to be contended that the agent in this case is in receipt of no income on behalf of the non-resident firm. S. 22 (4) is very wide in its terms. It empowers the Income-tax Officer to serve on any person upon whom a notice has been served under sub-S. (2), a notice requiring him to produce, or cause to be produced, such accounts or documents as the Income-tax Officer may require. The only limitation to the powers of the Income-tax Officer in this respect are that he cannot require the production of any accounts relating to a period more than three years prior to the previous year. In the present case the person on whom notice is served is the Rangoon agent of the non-resident firm, but it is the non-resident firm which was being assessed, and it can hardly be contended that it is outside the power of that firm to produce the account books. The Income-tax Officer was of opinion that the books were required to help him to assess the firm to tax, and the section gives the Income-tax Officer full discretion in the matter.

(1) A. I. R. 192- Bom. 448=52 Bom. 702.
(2) A. I. R. 1928 Bom. 465=52 Bom. 726.

It is impossible for us to hold that the books could not be required and could not give any valuable information as to the amount to which the non resident firm should be assessed. We can find no authority in the Act for varying the plain meaning of the wording of S. 22 (4), or for limiting the power given to the Income-tax Officer by that clause. We are therefore of opinion that the Income-tax Officer had the power to call for the account books in question. We answer the first part of the question referred in the affirmative. The second part of the question referred does not therefore arise.

The Chettyar firm will pay the costs of this reference, advocate's fee five gold mohurs.

V.S./R.K. *Reference answered.*

A. I. R. 1930 Rangoon 12

BROWN, J.

U. Shwe Thaung—Appellant.

v.

U. Kyaw Dun—Respondent.

Civil Misc. Appeal No. 33 of 1929, Decided on 26th July 1929.

(a) Contract Act, S. 29—Terms of contract fixing price reduced to writing—Plaint stating, price should have been lesser sum —Prayer for getting money by which, it was alleged, sum mentioned in contract exceeded intended sum. No suit lies on plaint as framed, though suit could have been brought under S. 20, Contract Act, to avoid contract and suit under S. 31, Specific Relief Act, is necessary to get terms in written document altered — Specific Relief Act, S. 31.

Terms of the contract for purchase of certain land fixing price at a certain sum were reduced to writing. Purchaser paid the amount mentioned. A suit was brought by the purchaser. The plaint stated that the price should not have been as stated in the contract but ought to have been much less sum and contained a prayer for payment of money by which it was alleged the sum mentioned in the contract exceeded the intended sum.

Held: that on the plaint as framed no suit lay though a suit could have been brought to avoid the contract under S. 20, Contract Act, on the ground that the parties to the agreement were under a mistake in the matter of price. [P 12 C 2]

Held further: that as it was sought to alter terms in the written document, a suit under S. 31, Specific Relief Act, to get the instrument rectified was necessary. [P 12 C 2]

(b) Specific Relief Act, S. 31—Concluded contract must be proved and the instrument must have represented it inaccurately.

Where a person seeks to rectify a written document containing the terms of the contract, it is always necessary for him to show that there was an actual concluded contract before the execution of the document which is sought to be rectified and that such contract is inaccurately represented in the instrument: 16 *Bom.* 561, *Foll.* [P 12 C 2, P 13 C 1]

P. K. Basu—for Appellant.

Thein Maung—for Respondent.

Judgment.—The respondent U. Kyaw Dun sued the appellant U Shwe Thaung for the refund of Rs. 924. The suit was dismissed by the trial Court after the examination of the plaintiff and without the taking of any other evidence. The plaintiff appealed to the District Court and that Court set aside the decree of the trial Court, and remanded the case for retrial. Against this decree of the District Court, the present appeal is filed. The plaint in this case is a somewhat curious one. It sets forth that there is a contract between the parties whereby the defendant agreed to sell to plaintiff a certain piece of land. The terms of the contract were reduced to writing and according to the written agreement the purchase price was Rs. 4,998. This money had been duly paid. The plaint states that the price should not have been Rs. 4,998 but a lesser sum and prayer in the plaint is merely for the payment of the amount Rs. 924 by which the plaintiff says the sum mentioned in the contract exceeds intended sum.

It seems to me quite clear that on the plaint as framed no suit lay. The plaintiff was entitled to bring a suit to avoid the contract under S. 20, Contract Act, on the ground that the parties to the agreement were under a mistake in the matter of price. That is not what he has done. He is not seeking to avoid the contract. But he is seeking to alter the terms as contained in the written document. He could only succeed in this by suing under the provisions of S. 31, Specific Relief Act, to have the instrument rectified. And the question is whether there is sufficient ground now for allowing him to amend his plaint. As pointed out in the case of *Abdul Rahman Alla Rakhia* v. *Bombay and Persia Steam Navigation Co.* (1) when a plaintiff seeks to rectify a written document, containing the terms of the contract, it is always necessary for him to

(1) [1892] 16 Bom. 561.

show that there was an actual concluded contract, before the execution of the document which is sought to be rectified and that such contract is inaccurately represented in the instrument.

From a perusal of the plaint and the statement of the plaintiff when he was examined, I find it difficult to discover any allegation that there was an actual concluded contract antecedent to the executing of the instrument in this case. The original contract according to the plaint was that the plot of land alongside plot 287 was to be sold for Rs. 3,000. But this contract was subsequently modified. The plaint goes to state:

"Plaintiff therefore purchased a piece of land . . . . . at the original rate mentioned in para. 3. Plaintiff also purchased another piece of land . . . . . at the rate mentioned in para. 3. Plaintiff was also given free a piece of land . . . . . ."

That these statements are not correct is clear. There was certainly no concluded purchase of these pieces of land and there is no definite allegation of a definite agreement to sell by the defendant and agreement to buy by the plaintiff on definite terms. It is not alleged that the parties had agreed to give so much per acre. The price according to the plaintiff was to be worked out proportionately at the rate fixed according to the width of the land at the front and the back. This would appear to assume that the depths of the pieces of land are all the same. The plaintiff further admits "the front portion of the land is much more valuable." That being so the southernmost block agreed to be sold which is a triangular piece with a frontage of 25 feet and no width at the back would clearly be more valuable than half a plot of 25 feet depth, front and back. I cannot see therefore what exactly the definite contract alleged to have been entered into by the parties was. It certainly was not a contract to sell for Rs. 4074. And the original agreement for the purchase of the original one plot was admittedly only destroyed when the document sought to be avoided was executed. There was certainly an agreement to refer to the revenue surveyor and if there were any concluded agreement it would appear to be the agreement about the acceptance of the revenue surveyor's figure. It may be that when they came to sign the actual agreement both parties were under a mistaken impression as to the manner in which the revenue surveyor had calculated, and that the contract was therefore voidable.

But as I have said, that is not the plaintiff's case, nor could he possibly claim the relief for which he asks, on making out such a case. The plaint as framed shows no cause of action, and in view of the vagueness of its terms I am not satisfied that there is sufficient reason for allowing the plaintiff to amend it, at this stage. That being so, I consider that the suit was rightly dismissed by the trial Court. I set aside the decree of the District Court, and restore that of the trial Court dismissing the suit of the plaintiff-respondent. The plaintiff respondent will pay the costs of the defendant-appellant in all three Courts.

P.N./R.K. *Decree set aside.*

A. I. R. 1930 Rangoon 13

RUTLEDGE, C. J., AND BROWN, J.

Khoo Sein Ban—Appellant.

v.

Official Assignee and *another* — Respondents.

First Appeal No. 263 of 1928, Decided on 26th April 1929.

Administration — Powers of administrator — Administrator cannot saddle estate with heavy expenses merely because he is incompetent to carry out ordinary duties of administrator.

If a person takes out letters of administration and assumes to himself the responsibility of his position, the estate cannot be justly saddled with heavy expenses merely because he is incompetent to carry out the ordinary duties of the administrator.

A widow took out letters of adminstration to her husband's estate and executed a document in favour of a person who was a friend of her family and not a broker authorising him to sell the property and further agreed to pay him brokerage as soon as the estate had cash in hand.

Held: that the agreement was one which the administratrix was not justified in entering on behalf of the estate, and the estate could not be bound by it. [P 15 C 2]

Held further: that as the agreement was to pay the brokerage when the estate had cash in hand, there was no personal guarantee for the payment: *A. I. R.* 1928 *Bom.* 270, *Dist.*; *Weiss* v. *Dill*, 40 *Ch.* 10 *Ref.* [P 16 C 1]

Paget—for Appellant.

N. N. Burjorjee and *Clarke*—for Respondents.

Judgment. — Respondent 2 in this appeal Ten Guat Tean is the widow of the late Lim Chin Tsong and

took out letters of administration to his estate. Respondent 1 is the Official Assignee, who is now administering the estate in insolvency. At the time of Lim Chin Tsong's death he was heavily indebted to the China and Southern Bank Ltd. His total indebtedness to the Bank amounted to some 50 or 60 lakhs of rupees. After his death, the Bank started negotiations with his administratrix for settlement of its debts. Lim Chin Tsong was a director of the Bank and the Bank was very anxious to treat his heirs as favourably as possible.

The plaintiff-appellant Khoo Sein Ban was a friend of Lim Chin Tsong and his family and Mrs. Lim Chin Tsong consulted him as well as others with regard to the administration of the estate. In the suit out of which this appeal has arisen, the plaintiff-appellant claims against his estate for a sum of 72,639. He says that he was authorised by the administratrix to negotiate for the sale of all the properties of the estate which were under mortgage to the Bank, and that she agreed to pay him the usual brokerge of 1 per cent on all town properties and 2 per cent on all suburban properties. He negotiated with the Bank accordingly and finally arranged that the Bank should buy all the properties under mortgage to them, at a valuation of about 41 lakh of rupees, which sum was to be settled against the debt due by the estate to the Bank. He claims that he was entitled to brokerage on the same. The trial Court has dismissed his claim. The learned Judge held firstly that the plaintiff appellant had really done nothing to earn the commission, and secondly that the administratrix was not justified in saddling the estate with such heavy charges. The learned Judge further held that the claim against Mrs. Lim Chin Tsong personally was fraudulent and collusive, and that to countenance it would be against public policy. Khoo Sein Ban has appealed against this decision.

It is claimed on his behalf that he is entitled to recover the money from the estate, and in the alternative that, if it is held that the estate was not liable, he is entitled to a personal decree against the administratrix. Khoo Sein Ban says that he was first asked to help the widow in January 1924, and he entered into negotiations with the Bank. On 7th March Mrs. Lim Chin Tsong executed a document Ex. A, on which the appellant relies. This document reads as follows:

"I hereby authorize Mr. Khoo Sein Ban to negotiate for the sale of all our moveable and immovable properties which are in the hands of the China and Southern Bank Ltd, Rangoon, and I agree to pay usual brokerage of 1 per cent on all town properties and 2 per cent on all suburban properties as soon as the estate has cash balance in hands."

Respondent admits execution of this document. She has not, however, given evidence in the case, and it is contended on behalf of the Official Assignee that as against him the execution has not been proved. In the view, however, that we take of the case, on other grounds, it is not necessary to decide this point. It is quite clear that before the sale of the properties to the Bank, the Bank had been negotiating with the lawyers of the administratrix as to the settlement of the debt and on 12th February, the Bank suggested that it should be put into possession of the properties. Objections to this suggestion were raised on behalf of the administratrix and negotiations on this point came to nothing. It was some time in March, according to Khoo Sein Ban, that he entered into an arrangement with the Bank on behalf of the administratrix for the sale of the properties. In this he is corroborated by the witness H. Fukushima. Eventually the deed of sale was drawn up, and executed. The properties were sold for 41 lakhs of rupees. The plaintiff-appellant claims, and apparently claims correctly, that the Bank accepted his valuation of the properties, but it does not appear that he incurred any serious trouble or expense in making the valuation. The Bank was always clearly ready to treat the estate as favourably as possible and it no doubt further had in mind the possibility of insolvency proceedings being instituted and the necessity of having the valuation fixed at a sufficiently high rate to avoid all danger of having the transfer set aside. The plaintiff appellant is not a professional broker, nor is he a professional valuer, and in undertaking the negotiations he did not do so in any professional capacity.

We have been referred on behalf of the plaintiff-appellant to the case of

Vasani Moolji v. *Karsondas Tejpal* (1). In that case a broker had been employed to find a party willing to advance up to 4 lakhs of rupees on equitable mortgage, and it was held that on bringing the parties together he had done all the things necessary for him to earn his commission. But the circumstances of the present case are entirely different. The plaintiff-appellant was not a broker at all. He was merely a friend of the family. He was not employed to bring the parties together and did not in fact do so. The parties had been negotiating together long before he was employed at all. The document Ex. A authorizes him generally to negotiate the sale of the properties but certainly does not in term contemplate their sale to the Bank to whom they were already mortgaged for considerably more than their value. The estate may have profited by the valuation being above the market value, but it is not shown that this was the result of any special exertion on the part of the plaintiff-appellant. The suggestion that the difficulty in the way of an amicable settlement might be solved by a sale comes from him, but beyond that he did little or nothing in bringing about the settlement with the Bank.

In paragraph 761 of Vol. 14, Halsbury's Laws of England, the following passage occurs :

"As a general rule the personal representative ought not to employ an agent to perform the duties which by accepting the office, he has taken upon himself. But he may do so in special cases, as where there are weekly rents to collect, a large number of book debts to get in or from the nature of the accounts, an accountant is required, in such cases he is allowed the expense of the employment. He may pay a stock broker's fee for identifying him at the Bank on the occasion of a transfer of stock and may charge for a power-of-attorney where he cannot without inconvenience and expense attend at the bank in person to effect the transfer. He is also entitled to employ and charge for the services of a solicitor but not for doing work which he himself could do, as for instance writing an ordinary letter."

In the case of *Weiss* v. *Dill* (2), the Master of the Rolls (Sir John Leach) enunciated the following principle :

"Generally speaking executors are not allowed to employ an agent to perform those duties which by accepting the office of executors they have taken upon themselves, but there may be very special circumstances in which it may be thought fit to allow them such expenses as they may have incurred by the employment of agents."

It is contended on behalf of the plaintiff-appellant that the administratrix in this case was an illiterate woman, and that it was therefore reasonable for her to incur expenses which might otherwise have been held unjustifiable. In taking out letters of administration she has assumed to herself the responsibility of her position and it is clear that the estate cannot justly be saddled with heavy expenses merely because she was incompetent to carry out the ordinary duties of the administratrix. The claim on behalf of the plaintiff-appellant is that under the agreement he made with the administratrix he was entitled to the large sum of Rs. 72 639 for doing what cost him nothing in money and very little indeed in labour and in doing what he almost admits he would have been prepared to do gratuitously as a friend of the family. If that is what the agreement amount to, then we are clearly of opinion that the agreement was not in the interests of the estate and that the promise to pay him out of the estate was entirely unreasonable.

It has been suggested that the Official Assignee administering an estate does in fact frequently employ brokers. That may be so, but when he employs brokers he employs professional brokers who are remunerated for their special skill in matters in which they deal. In the present case as we have remarked, the plaintiff-appellant is not a professional broker, at all, and what he did, might equally well have been done by any other friend of the family. If the effect of the agreement Ex. A is what the plaintiff appellant claims for it, then we are of opinion that the agreement is one which the administratrix was not justified in entering into, on behalf of the estate, and that the estate cannot be bound by that agreement. If the effect of the agreement is that the plaintiff-appellant would be entitled to remuneration in proportion to the services he really did to the estate, then we are of opinion that he has entirely failed to prove that he has earned the remuneration he has claimed under the agreement. We are in entire agreement with the trial Judge that the plaintiff-appellant has failed to prove his claim against the estate.

(1) A. I. R. 1928 Bom. 270=52 Bom. 627.
(2) 40 Ch. 10.

As regards the claim against the widow, respondent 2, it is not at all clear from the plaint that the plaintiff-appellant really wished to press his claim. Even if he did, we are not satisfied that he has established it. The agreement by the administratrix was to pay brokerage as soon as the estate had cash in hand. Having regard to the circumstances in which the agreement was drawn up and to its terms it is quite clear that her promise was to pay out of the estate and not out of her own properties. From the agreement, as it stands, therefore the plaintiff-appellant has no cause of action against Mrs. Lim Chin Tsong, nor we think in the circumstances is he entitled to claim against her any damages for breach of agreement. There is quite clearly no personal guarantee by her of the payment. The general condition of the estate was at least well known to the plaintiff appellant as to the administratrix, when this agreement was drawn up and it is probable that the plaintiff-appellant himself drew up the agreement. He was in a better position than the administratrix herself to know whether he would be able to enforce any claim he made under the agreement against the estate. There has not been on her part any breach of the agreement and if there were any misrepresentation at the time the agreement was drawn up, the misrepresentation must have come from the plaintiff-appellant, and not from the defendant. It was to our mind clearly never the intention of the parties that Mrs. Lim Chin Tsong should be held personally liable to pay this brokerage and we do not consider that he has established any claim against her. For these reasons we hold that the case has rightly been decided by the trial Court and we dismiss the appeal with costs.

P.N./R.K. *Appeal dismissed.*

A. I. R. 1930 Rangoon 16

RUTLEDGE, C. J. AND BROWN, J.

Ah Kwe—Appellant.

v.

Municipal Committee of Thaton—Respondent.

First Appeal No. 195 of 1928, Decided on 27th March 1929, from judgment of Dist. Judge, Thaton, in Civil Regular No. 13 of 1926.

Contract Act, S. 73—Purchase by *N* of license for pawnshop auctioned by municipality—Terms of sale reduced to document which recited that *N* was licensed for three years subject to certain conditions but contained no guarantee as to validity of license—Grant subsequently set aside by Commissioner under powers given him by Burma Municipal Act—License again auctioned and again bought by *N* for much higher sum—*N* suing committee in damages for breach of contract basing his claim on difference between two bids—There being no breach of contract committee held not liable in damages.

The municipality sold by auction a license for the pawnshop and *N* purchased it. The terms of the contract of sale were reduced to a document which recited that *N* was licensed to carry on business as a pawnbroker for three years subject to certain conditions but contained no guarantee as to the validity of the license. The grant of the license was, on appeal by a disappointed bidder, set aside by the Commissioner under the powers given him by the Burma Municipal Act on the ground that 14 days' notice as required by the byelaws was not given. The committee resold the license by auction and it was again purchased by *N* for a much higher sum. *N* brought a suit against committee in damages for breach of contract basing his claim on the difference between the two bids.

Held: that the municipality were not in a position to guarantee what the action of the Commissioner would be, nor could it be presumed that they ever intended to give any guarantee in the matter and that there was no breach of contract on their part and so they were not liable in damages. [P 17 C 1, 2]

A. B. Banerji—for Appellant.

A. Eggar—for Respondent.

Judgment.—On 23rd December 1925, the Thaton Municipality issued notices with regard to the issue of a license for the pawnshop at Thaton for the three years, 1st April 1926 to the 31st March 1929. Tenders were to be submitted before 19th January 1926. Tenders were to be opened at 3 p. m., before the said date, and if the President were not satisfied, the license would be sold by auction. On 19th January the tenders received were opened by the Municipal Committee. The names on the two highest tenders appeared to be fictitious, and the committee thereupon decided to auction the license. The license was auctioned forthwith, and bought on the same day by the present plaintiff-appellant, Ah Kwe. A disappointed bidder then appealed to the Commissioner, who subsequently set aside the grant of the license by the committee on the ground that the byelaws on the matter required that 14 days' notice should be given of

a sale by auction, and 14 days' notice had not been given. The Municipal Committee then resold the license by auction. Ah Kwe was again the highest bidder, but on this occasion he had to offer Rs. 14,550 per year as license fees. On the previous occasion the bid of his, which was accepted, was for Rs. 9,200 only.

Ah Kwe has now brought a suit against the Thaton Municipality for damages for breach of contract. He has been given a decree by the District Court for Rs. 5, 350. Against this decree Ah Kwe has appealed on the ground that the damages awarded are inadequate, and the Municipality have filed a cross-objection to the appeal that the suit should have been dismissed, or, in the alternative, that the damages awarded are excessive. The damages claimed were based on the difference between the two bids. The suit was in the first instance dismissed by trial Court on the ground that it was not maintainable. This order of the trial Court was set aside by this Court on appeal, and the case remanded for decision on the merits. The first point for decision now is whether the appellant, Ah Kwe, has established any cause of action. The terms of the contract which it is alleged that the Municipal Committee have broken have been reduced to the form of a document, Ex. 4. That document first of all recites that Ah Kwe is licensed by the Municipal Committee of Thaton to carry on business as a pawnbroker for three years, subject to the conditions stated, and that the license may be cancelled by the committee for breach of any one or more or the conditions.

The conditions set forth are as to the terms of payment by Ah Kwe, and various rules which he has to observe. There is no promise at all by the committee in this document as to their future conduct. By the document they give their permission to the licensee to sell in the pawnshop. They also say that that permission will remain good for three years, provided that the conditions set forth are observed. But there is no guarantee at all that the licensee will be secured in the quiet enjoyment of the license. The present suit has been filed under the provisions of S. 73, Contract Act, for damages for breach of contract. Such a suit would only lie if the municipality had in fact broken their contract. It does not seem to us that there has been any breach on their part. In the document, Ex. 4, the municipality gave their premission to the licensee, and they never contracted to give anything more. The municipality have never withdrawn this permission. The permission they gave has been set aside by the Commissioner acting under the powers given him by the Burma Municipal Act. It is not suggested on behalf of Ah Kwe that the action of the Commissioner in the matter was not perfectly legal. There is certainly no express guarantee as to the validity of their license in the document, Ex. 4. Nor does it seem to us reasonable to import into the contract any implied guarantee of this nature. That the actions of the committee were subject to the control of the Commissioner is a matter of law and procedure of which it must be presumed that Ah Kwe was aware.

It was quite clear that the municipality were not in a position to guarantee what the action of the Commissioner would be, and it is quite impossible to presume that they ever intended to give any guarantee in the matter. There is thus no part of their contract which they have failed to perform, and they were not, therefore, liable in damages to Ah Kwe. It is suggested on behalf of Ah Kwe that the municipality induced him to believe that they had issued the notices required by law before the original auction sale was held. There seems to us to be very little ground for holding that there ever was such inducement. But, even if there were, that at most would entitle Ah Kwe to claim damages from the municipality for any loss to which he was put by bidding at the auction sale. He clearly suffered no such loss. Subsequent events have shown that had the first sale to him been upheld he would have made a very large profit indeed out of the municipality. But had he not bid again at the second sale he would now be in exactly the same position as if he had never bid at all. In our opinion Ah Kwe established no case for damages against the municipality, and his suit should have been dismissed. We dismiss the appeal, allow the cross objection, and set aside the decree of the trial Court, and pass a decree dismissing

the suit of the plaintiff-appellant, Ah Kwe, with costs in both Courts.

P.N./R.K. *Suit dismissed.*

A. I. R. 1930 Rangoon 18

CHARI, J.

(*Maung*) *Aung Nyein* and *another*—Applicants.

v.

(*Maung*) *Gale* and *another*—Respondents.

Civil Revn. No. 145 of 1929, Decided o 7th May 1929, from order of Dist. Judge, Prome, in Civil Appeal No. 120P of 1928.

Co-operative Societies Act (2 of 1882), S. 42—Order under S. 42 is final—Order of imprisonment for disobedience of summons to appear and deliver documents—Civil Court executing order—No revision lies to High Court against order of civil Court—No security ordered before imprisonment—Order still is one under S. 42 (3).

The order of the liquidator under S. 42 is final. Thus if the liquidator passes order of imprisonment for disobeying the summons and order to deliver certain documents the civil Court in execution of the order cannot go behind it and investigate its legality and if the order is thus enforced there is no error of jurisdiction on the part of the civil Court and revision to High Court does not lie. Even if the persons summoned are not ordered to give security before they are directed to be imprisoned, the order of imprisonment does not cease to be an order under S. 42 (3): *A. I. R.* 1929 *Rang.* 113 and 40 *All.* 89, *Rel. on.* [P 18 C 2, P 19 C 2]

Hla Tun Pru—for Applicants.

Maung Kyaw—for Respondents.

Judgment.—This is a second appeal against an order of the District Judge of Prome passed in appeal in a matter which came up from the Township Court of Thegon in the following circumstances: The Padigun Urban Co-operative Credit Society, Ltd., is under liquidation and Maung Gale and Maung Kyan were appointed liquidators. As such they summoned the appellants in this appeal to produce certain documents, which are set out in the copy of the order sent by them to the Township Court. That order shows that two persons Maung Myo and Maung Aung Nyein, the Chairman of the society in liquidation and the Manager of the same society, were summoned to appear and deliver to the liquidators the books apparently of the society itself of certain years and one promissory note executed by U Myo for a loan which he took. These persons refused to obey the summons and thereupon the liquidators under S. 42 (3), Co-operative Societies Act read with S. 32, Civil P. C., directed the two persons Maung Myo and Maung Aung Nyein to suffer simple imprisonment for a term of one month.

It will be noticed that the persons against whom action was taken were the Chairman and Manager of the Society under liquidation, whose duty it was to help the liquidators instead of obstructing them. The Township Court of Thegon was then moved to execute this order and, in Civil Execution No. 286 of 1928, after issue of a notice to Maung Myo and Maung Aung Nyein, it directed their arrest and imprisonment for one month in the civil jail. The matter was taken in appeal to the District Court of Prome and it dismissed the appeal.

Maung Myo and Maung Aung Nyein now file this second appeal. The learned advocate for the appellants admits that no second appeal lies. As not being a matter in execution of a decree, S. 47, Civil P. C., is inapplicable, he wants me to treat the case as one in revision against the orders of the Township Court and the District Court.

It has been held in more than one case, by my brother Ormiston in *U Po Nyan* v. *Mg. Kyan* (1), by myself in a case decided last week or the week before and by the Allahabad High Court in the case of *Mathura Prasad* v. *Sheobalak Ram* (2), that an order of the liquidator under S. 42, Co-operative Societies Act is final and that a Court whose aid is sought for the execution of that order cannot go behind it and investigate its legality; and under S. 42 (4) such orders are open to appeal to the Court of the District Judge provided an appeal is given by the rules framed under the Act. The rules framed under the Act do not provide for any such appeal with the result that an order by a liquidator is absolutely final and there is no check imposed either by way of appeal or revision against any orders passed by the liquidators.

The anomalous state of the law was noticed by Ormiston, J. and attention was drawn to it by him in his judgment. It is unnecessary for me to add anything to what he has already said on the

(1) A. I. R. 1929 Rang. 113.

(2) [1918] 40 All. 89=42 I.C. 968=15 A. L. J. 863.

point. The law being what it is and the civil Court being precluded from questioning the order of the liquidator, in the case then before him Ormiston, J. held that as the civil Court was bound to execute the order and had no option to do otherwise, it could not be said that there was any error in the exercise of jurisdiction which would entitle the party aggrieved to come up in revision to this Court. That reasoning would be applicable to the case now before me. But the learned advocate for the appellant seeks to draw a distinction on the ground that the order now before me is an order directing the imprisonment of the appellants under S. 42 (3), whereas the orders sought to be executed in the other cases were orders passed under sub-S. 2 to determine those persons' liability as regards contribution. This point by itself does not distinguish the present case from the previous one. But another argument is adduced that the order passed by the liquidators was passed without jurisdiction; and that the Township Court of Thegon should have refused to execute that order on that ground and that in not refusing to do so it has failed to exercise the jurisdiction vested in it. This necessitates a consideration of the wording of sub-S. 3, S. 42, of the Act. The liquidators appointed under S. 42, are given powers necessary for carrying out the purposes of that section—to summon and enforce the attendance of witnesses and compel the production of documents by the same means and as far as may be in the same manner as is provided in the case of a civil Court under the Code of Civil Procedure.

It was first alleged that no summons was issued and that S. 32 became applicable only when a summons had been issued and there had been disobedience of the summons. But the copy of the order sent to the Township Court of Thegon shows that a summons must have been issued. At all events there is nothing to the contrary on the record. The principal point urged on the part of the appellants is that under S. 32, Civil P. C., under which the liquidators purported to act, the liquidators should have ordered the appellants to furnish security for their appearance and in default committed them to civil prison. The complaint of the liquidators in the case is not that the appellants refused to appear before them but that they refused to produce the documents and account books in their possession which they were bound to produce.

Order 16, R. 10 and the following rules also provide a procedure where the witnesses fail to appear or produce documents when they are summoned to do so and where the property of the witnesses could be attached for the purpose of making them obey the orders of the Court. There is nothing on the records before me to show that the appellants were not ordered to give security before they were directed to be imprisoned. But assuming that this is the case there is no want of jurisdiction in the liquidators in the sense that the order passed was entirely without jurisdiction which could be ignored by any Court of law whose duty it is to enforce that order. It is merely an irregularity or at most an illegality, since the liquidators had power to use the means given to them by the Code for the purpose of enforcing the production the documents. It cannot possibly be said that such an order, simply because it does not follow strictly the provisions prescribed by the Civil Procedure Code, is not an order under S. 42 (3). The argument to that effect urged on me by the learned advocate for the appellants is fallacious. The order necessarily is an order under that section. Though it may be an irregular order, it cannot possibly be said that it is an order passed without jurisdiction.

As I have already pointed out, the Township Court has no option but to enforce the order and there is therefore no error of jurisdiction on the part of the Township Court or on the part of the District Court of Prome. The anomalous state of the law and the hardship to which one may find oneself put, are worthy of consideration by the Legislature or the Local Government. A Court of law cannot take these matters into consideration and must administer the law as it finds it. The application is therefore dismised with costs—two gold mohurs. The order suspending imprisonment is cancelled.

P.N./R.K. *Revision dismissed.*

A. I. R. 1930 Rangoon 20

CHARI, J.

H. N. Oppenheimer—Appellant.

v.

M. E. Moola & Sons Ltd.—Respondents.

Civil Misc. No. 78 of 1927. Decided on 5th December 1928.

Companies Act, S. 229—Company in compulsory liquidation—Secured creditor claiming principal and interest from unsecured property—His claim should be confined as unsecured creditor after deducting amount realized by secured property—Presidency Towns Insolvency Act, Sch. 2, Rr. 20 and 23.

A secured creditor, though he can claim interest up to the date of payment when he seeks to recover what is due to him from the proceeds of the sale of the secured property must confine his claim when he seeks to prove against the other property as an unsecured creditor to the principal and interest which have accrued up to the date of adjudication, or liquidation as the case may be, deducting therefrom the amount realized by the sale of the property. *In re, London, Windsor and Greenwich Hotels Co.*, (1892) 1 *Ch.* 639, *Rel. on.*; 41 *All.* 481 and *A. I. R.* 1924 *Rang.* 352, *Dist.* and *A. I. R.* 1922 *Lah.* 281, *Ref.* [P 21 C 2]

Hay—for Appellant.

Leach—for Respondents.

Judgment.—The question involved in this case is an interesting one, and there are no direct authorities on the point. Messrs. Moola & Sons, Ltd., is a company in liquidation and it is an admitted fact that it is an insolvent company. In these circumstances, according to S. 251, Companies Act, the same rules shall prevail and be observed with regard to the respective rights of secured and unsecured creditors and in respect of other matters as are for the time being in force under the law of insolvency with respect to the estate of persons adjudged insolvent. There are two applicants before me, both of whom are secured creditors. Each of them had a mortgage of immovable property and they realized their security by sale of the property. The property was sold for a good deal less than the amount due to them, and they are now claiming to prove for the balance against the other assets of the insolvent company.

The Official Liquidator disallowed their claim to prove for interest after the winding up order, that is, 21st June 1927. The way he calculated their claim was: he calculated the principal amount and the interest due up to the date of the winding up order, which corresponds to the date of adjudication in insolvency and from the total of that amount he deducted the amount realized. He then allowed the creditors to prove for the balance only. The claimants being aggrieved asked the Official Liquidator to refer his order to me, and it had accordingly been referred for my decision.

The law on this subject goes back to very early cases in English Law. Mr. P. D. Patel contends that he is a secured creditor; that under S. 17, proviso, his powers to realize or otherwise deal with the security are not in any way affected; that he could have realized the full amount of the principal due to him and the interest up to the date of realization from the secured property; and that he is, therefore, entitled to deduct the interest, which has accrued due after liquidation, from the amount realized, first, then apply the balance to the principal and interest due up to the date of liquidation, and prove for the balance.

It will be noticed in the first place that the proviso merely preserves to the creditor his power to realize or otherwise deal with the property. It has no bearing on the question as to what he could claim against the other assets of the company. S. 23, Sch. 2, Presidency Towns Insolvency Act, enacts that interest at a specified rate can be claimed up to the date of adjudication; and that thereafter interest on debts ceases to run. That section applies only to unsecured debts; but, after realization, when proving for the deficit, a secured creditor is in the same position as an unsecured creditor. In the English Acts the provisions were the same. There also it was provided that interest shall cease from the date of the vesting order, and the rights of the secured creditors were also preserved by the rules.

The question arose in the case of *In re, Savin* (1). The Vice-Chancellor. Sir James Bacon, in an elaborate judgment accepted the very contention which Mr. Patel is now pressing on me, namely, that a mortgagee having the full right to realize his debt from the secured property could claim interest up to the date of realization, deduct it, and prove for the balance. The Vice-Chancellor also explained certain other cases, which seem to lay down a contrary rule. The matter was taken up in appeal and Lord

(1) [1872] 7 Ch. 760=42 L. J. Bk. 14=20 W. R. 1027=27 L. T. 466.

Justice James and Lord Justice Mellish reversed the decision of the Vice-Chancellor. They held that the rule in bankruptcy was that interest subsequent to bankruptcy cannot be proved. They did not think it worth while to consider whether it was a just or an unjust rule; but the rule being what it was, they held that in the case of a secured creditor, though his right to realize the full amount from the secured property was not impaired by the mortgagor's bankruptcy, when he came to prove for the balance, he could only claim interest up to the date of bankruptcy.

In the case of *In re, London, Windsor and Greenwhich Hotels Co.* (2), the facts were exactly similar to those of this case. There also a company in liquidation was an insolvent compnny, and a secured creditor, who had exhausted his security without getting full satisfaction for his debt, sought to prove for the deficiency against the general assets of the company. Stirling, J., held on a review of the authorities and the rules, that the secured creditor must limit his proof to what was due for the principal and interest at the commencement of the winding up order after deducting therefrom the proceeds of the sale realized from the security and the costs. Mr. P. D. Patel draws my attention to two cases, the first being: *Jugal Kishore* v. *Bankim Chandra* (3). It was there held that a mortgagee was entitled as a secured creditor to receive out of the proceeds of the sale of the mortgaged property his principal, interest and costs the interest being calculated up to the date of payment: a proposition which is indisputable and is not disputed. That ruling has no bearing on the question which I have to decide.

Similarly, *In the matter of Bulabat Sagermull* (4), the question for consideration before the learned Chief Justice, who was then sitting as an insolvency Judge, was the interest to be given to a secured creditor when he seeks to bring the property to sale. The question now before me was not considered by the learned Chief Justice in that case. In *Ram Chand* v. *Bank of Upper India, Ltd.* (5), reference is made to an earlier case in the Punjab, where, apparently, the point now before me was decided in the way I am now deciding. The remarks of the learned Judges, however, as regards this point were, so far as that case was concerned, merely obiter dicta.

(2) [1892] 1 Ch. 639.
(3) [1919] 41 All. 481=51 I. C. 192=17 A.L.J. 480.
(4) A. I. R. 1924 Rang. 352=2 Rang. 197.

I am, therefore, of opinion that a secured creditor, though he can claim interest up to the date of payment when he seeks to recover what is due to him from the proceeds of the sale of the secured property, must confine his claim when he seeks to prove against the other property as an unsecured creditor to the principal and interest which have accrued up to the date of adjudication, or liquidation, as the case may be, deducting therefrom the amount realized by the sale of the property. I, therefore, confirm the Official Liquidator's decision. The Official Liquidator is entitled to advocate's costs five gold mohurs in each of the two applications, and these costs can be taken by him from the assets in his hand.

P.N./R.K. *Decision confirmed.*

(5) A. I. R. 1922 Lah. 281=3 Lah. 59.

* A. I. R. 1930 Rangoon 21

Heald and Otter, JJ.

U Sein Po and *others*—Appellants.

v.

U Phyu and *others*—Respondents.

First Appeal No. 84 of 1928, Decided on 14th May 1929, against judgment of Dist. Court Prome, in Civil Regular No. 11 of 1926.

(a) Companies Act, S. 4 (2) — Association formed for doing rice business of more than 20 persons if not registered is illegal—Members of such illegal association are entitled to the return of their subscription money after conversion of property of association into cash—Contract Act S. 23.

An association formed for carrying on rice business and consisting of more than 20 persons must get itself registered and if it does not, it is an illegal association. If members of such illegal association bring a suit for declaring the respective shares of their association and directing that they be repaid their shares after reconverting the buildings and other property of the association into which the subscription money is changed, into cash and after payment of debts and liabilities, their suit is maintainable and they are entitled to the return of their subscription money after conversion of the property into money as prayed: *English case law considered.* [P 27 C 1]

(b) Limitation Act, Art. 120—Association of more than 20 persons not registered—Suit by members for return of subscription

money after conversion of property of association into which money is changed is governed by Art. 120 and not by Limitation Act, Art. 62.

Where an association consists of more than 20 persons but is not registered and the members bring a suit for the return of subscription money paid to the promoter after conversion of the property of the association into cash into which the said money is changed such suit is governed by Art. 120 and not by Art. 62 for such money is not received by the promoter for the use of the members. [P 27 C 1,2]

* **(c) Limitation Act, Art. 62—Art. 62 applies only when money paid is forthwith payable.**

Article 62 applies to suits falling under the category well known in English Law as "suits for money had and received." Such suits arise where money paid into the hands of the defendant is payable forthwith to the plaintiff: 40 *Mad.* 291, *Foll.* [P 25 C 2]

* **(d) Companies Act, S. 4 (2) — Association illegal by omission to register—Subsequent registration cures previous omission to register but not subsequent reduction in number.**

Where an association is illegal by reason of the fact that though it consists of more than 20 members it is not registered, its character of illegality cannot be cured by subsequent reduction in number. It retains that character until registration or dissolution. Subsequent registration cures the previous omission to register. [P 25 C 1,2]

Paget—for Appellants.

Thein Maung—for Respondents.

Otter, J.—This is an appeal against a judgment of the Additional District Judge of Prome, in an action by three members of an association formed for carrying on a rice business, claiming a decree: (i) declaring the respective shares of the subscribers to that association and (ii) directing that the plaintiffs be repaid their shares after reconverting the property of the association into cash and after payment of all debts and liabilities; and praying also for the appointment of a receiver. The learned Judge of the lower Court granted the decree asked for, directed that the assets shown in Annexure A to his judgment should be sold, and ordered that the debts shown in Annexure B to his judgment should be paid out of the sale proceeds. He further ordered that the plaintiffs should receive their shares pro rata out of the balance arrived at.

The short facts are that all the parties to this appeal, with the exception of respondent 20, were members of the association I have referred to. The appellant occupied the position of promoter of the association, and its members subscribed varying sums amounting in all to some Rs. 55,000. Twenty-seven persons subscribed to the association, and their subscription money were paid during the year 1922. In April and May 1922 certain lands and a godown were purchased, and later, a fully equipped ricemill was built upon the land.

A lease of the property was granted to the appellant on 10th December 1924, and this expired on 10th December 1925. A further lease for three years is said to have been granted by certain of the subscribers but without the consent of the remainder.

It is unnecessary to deal in detail with the history of this association, for it was agreed that the only questions for consideration by this Court are questions of law. The substantial contention put forward on behalf of the appellant is that the respondents have no cause of action upon the ground that as the association was formed of more than twenty persons, money paid by way of subscription to the association is not recoverable. It is conceded by the respondents that the association was at its formation an illegal association by reason of sub-S. (2), S. 4, Companies Act, for, as we have seen, it consisted of twenty-seven members.

The material portion of the section in question is as follows:

> "No company, association or partnership consisting of more than twenty persons shall be formed for the purpose of carrying on any business that has for its object the acquisition of gain by the company, association or partnership, unless it is registered.

The association was never registered, and as has been indicated, a certain amount of business was done. It may be observed here, that owing to transfers of shares, the number of subscribers subsequently became reduced to a figure below twenty. It will be necessary to refer to this point at a later stage. The argument of Mr. Paget who appears for the appellant, shortly, was that, although money paid for an illegal purpose is prima facie recoverable from the payee, yet when once the purpose for which the money was paid has been carried out no action will lie for its recovery. In other words, he says that as the association in the present case, though admittedly illegal in its formation, has in fact carried out a part of the business for which it was formed, this

Court cannot interfere on behalf of members of the association who ask for the return of money paid by them to the association.

Mr. Thein Maung for the respondents argued that the fact that the association, though illegal in its inception, has done business and that money of the subscribers has been employed for the purpose of the business makes no difference, and that as a matter of law the judgment of the lower Court was correct. Mr. Paget referred to a number of authorities, and it will be necessary to examine certain of these. Three cases he relied upon may be referred to at once, viz., *Cousins* v. *Smith* (1), *Sykes* v. *Beadon* (2), *Kearley* v. *Thomson* (3). It is sufficient to say that in the first of these cases it was decided that a Court of equity would not assist a combination of firms formed for an illegal purpose by making an order for discovery. It is hardly necessary to point out that the purpose of the association in the present case was not illegal. The second was a similar case, and the effect of the judgment of Jessel, M. R. was that no Court of law or equity will lend its assistance towards carrying on an illegal contract, and that therefore such a contract cannot be enforced by one party against the other. Thus the action was for the enforcement of an illegal contract; whereas the respondents in the present case do not rely upon an illegal contract at all.

In the third case the facts were that money was received by the defendants as consideration for their non-appearance at a public examination of a bankrupt and for not opposing his order of discharge. The defendants did not appear at the public examination, and before an application for discharge had been made plaintiff sought to recover his money. Here again the action was upon an illegal contract, and thus this case is not on all fours with the present suit. The old case of *Knowles* v. *Haughton* (4) is also relied upon, and the headnote is as follows :

"The profits of a partnership in underwriting, illegal by statute cannot be the subject of account in equity."

It seems to me that this case does not assist the appellant, for the purpose of the partnership in that case was illegal. In *Harvey* v. *Collett* (5), the plaintiff, on the ground that he had bought shares in a company upon the face of statements which were fraudulent, claimed cancellation of an agreement said to have been made between one of the directors and the other directors. The Court (for reasons to which it is unnecessary to refer) held that he was entitled only to the amount he had paid for the shares or their value. This case, therefore, at least does not appear to assist the appellant.

Butt v. *Monteaux* (6) was also quoted by Mr. Paget, and we would observe that passages in the judgment are also relied upon by Mr. Thein Maung for the respondent. The facts were similar to those in the present case. The plaintiff claimed an account of moneys received by certain defendants who held the position of directors of a company, upon the ground that the purposes of the company were other than those disclosed in the prospectus. It was said that the company was illegal for want of registration and that an account ought to be refused. As this case seems to afford considerable assistance in deciding the present suit, it will be convenient here to set out certain passages from the judgment of the Vice-Chancellor. At p. 396, English Reports, he said :

"Supposing the company had been one which could and ought to have been registered, I confess I should have felt very little difficulty on the point mainly urged, namely, that a company, constituted like this of persons who have advanced their money, would be precluded from filing its bill, and having its money replaced and secured, because the promoters, whose duty it was to register, had neglected to register. I apprehend the whole scope and frame of the Act is clearly to protect the public against all kinds of fraudulent schemes, which parties were in the habit of issuing forth, in order to circulate them in the share-market. Everything in the Act is levelled against promoters . . . . . And, if a case of that kind occurred, it would be very difficult to persuade me that the members of such an association, although they could not do more, or stir a step further without registration, were not sufficiently qualified to be called a company, to have back their money, not merely on the ground of the speculation being a bubble . . . . but to have back their money and the land and other things acquired with that money, and to have an account from the promoters whose duty it was to register, on

(1) 13 Ves. 542=9 R. R. 217.
(2) [1879] 11 Ch. D. 170=48 L. J. Ch. 522=27 W. R. 464=40 L. T. 243.
(3) [1890] 24 Q.B.D. 742=59 L.J.Q. B.288=54 J.P. 804=38 W.R. 614=63 L.T. 150.
(4) 11 Ves. 167.
(5) 13 Sim. 331.
(6) 1 K. & J. 97.

the footing as between them and the promoters of its being in truth a company, and upon the principle that a man could not aver any wrong or omission of his own as an answer to a bill seeking such relief."

It is true that in that case the Court held that the company could not be treated as a company capable of being registered as an English Company, but the expression of opinion by the Court appears to throw considerable light on the rights of the respondents. *In re, South Wales Atlantic Steamship Co.* (7), was a suit on an agreement made by an unregistered company. It can therefore be distinguished from the present case. *In re, Padstaw Total Loss and Collision Assurance Association* (8), was a case where an order to wind up an unregistered association of more than twenty persons was asked for. This was refused upon the ground that the Court cannot recognize such an association as having a legal existence. I need only point out that the present case is not and could not be an application to wind up an association but is a regular suit inter alia for the return of subscriptions paid.

Barclay v. *Pearson* (9) was a case where money was paid to a defendant for an illegal purpose, and it was held:

"that so far as money in the hands of the defendant was impressed with any trust, it was one which had arisen out of an illegal transaction, and the Court would not render any assistance in its administration, "and semble" that notwithstanding the illegality of the competition the competitors had a legal right . . . . to the return of their contributions, at all events, provided that they gave notice of their claim before the money had been distributed by the defendant."

The latter part of the headnote was relied upon by Mr. Paget, and it is a similar case to *Kearley* v. *Thomson* (3), already referred to. There the money was to be applied by the defendant for an illegal purpose In the present case, as has already been pointed out, the purpose was not illegal. Thus it will be seen that a careful examination of the cases relied upon on behalf of the appellant discloses no real support for the contention relied on his behalf.

On behalf of the respondent Mr. Thein Maung referred to an important passage in the Edn. 9 of "Lindley on Partnership" at p. 145, which would appear to be directly in point. It should be observed that in the preceding passage the learned authors referred to and commented upon the two cases I have just mentioned above, and they go on to say:

"Although, therefore, the subscribers to an illegal company have not the right to an account of the dealings and transactions of the company and of the profits made thereby, they have a right to have their subscriptions returned; and even though the moneys subscribed have been laid out in the purchase of land and other things for the purpose of the company, the subscribers are entitled to have that land and those things reconverted into money, and to have it applied as far as it will go in payment of the debts and liabilities of the concern, and then in repayment of the subscriptions. In such cases no illegal contract is sought to be enforced; on the contrary the continuance of what is illegal is sought to be prevented."

As authority for this proposition the cases, inter alia, of *Shephard* v. *Oxenford* (10) and *Butt* v. *Monteaux* (6) already referred to, are cited. In *Shephard* v. *Oxenford* (10), the plaintiff filed a bill against an illegal association for an account of all the moneys received and paid by the directors and the debts and liabilities of the association, and for sale . . . . and for a division of the properties of the association among the shareholders. The Court did not think it necessary to do more than preserve the property and only granted an injunction against the defendant and appointed a receiver. No demurrer upon the ground that the association was illegal was put in, but later, a demurrer was entered apparently upon this ground and was subsequently overruled. It is clear from the report of this case, however, that although the plaintiff did not obtain the return of his money, no suggestion that he was not so entitled in law would have been entertained by the Court. The expression of opinion occurring in the case of *Butt* v. *Monteaux* (6), appears to be directly in point.

One further case was referred to viz., *Greenberg* v. *Cooperstein* (11). The material portion of the head-note is as follows:

"Held: (1) That the association was rendered illegal by the Companies (Consolidated) Act 1908, S. 1. sub-S. 2, as being an unregistered association of more than 20 persons carrying on a business having for its object the acquisition of gain; (2) That, notwithstanding this, the Court was not debarred from affording relief to the members asking for the return of money

(7) [1875] 2 Ch. D. 763.
(8) [1882] 20 Ch. D. 137=51 L. J. Ch. 344=30 W. R. 326=45 L. T. 774.
(9) [1893] 2 Ch. 154=62 L. J. Ch. 636=42 W. R. 74=68 L. T. 709.
(10) 1 K. & J. 489.
(11) [1926] Ch. D. 657.

paid into the hands of agents for application for an illegal purpose by granting an account."

At the close of his judgment Tomlin, J. (as he then was) said:

"I am happy to think that the law is not so feeble that it cannot protect the subscribers by ordering an account; but in saying this, I am expressing no opinion as to what will take place after the account has been taken 'and by what means if any the defendants may discharge themselves of the money they have received. I prefer to leave this entirely for discussion hereafter."

The decision in the case therefore does not assist either party to this appeal, but Mr. Paget was inclined to suggest that the learned Judge from his concluding words quoted above was doubtful whether he would order a return of moneys paid to the shareholders. This is by no means clear, and as the case appears to have been settled out of Court, it is impossible to say what course was taken when the action was finally decided.

Reviewing the authorities as a whole it would appear that there is no decided case exactly on all fours with the present suit. The passage appearing in *Butt* v. *Monteaux* (6), above referred to, however, appears to be sufficient authority in favour of the respondents. It is perfectly clear that what they ask is not an enforcement of an illegal contract, nor do they sue upon such a contract. If their prayer be given effect to, the result will be that an illegal association is brought to an end.

I have no real doubt therefore that the suit as framed is maintainable, and that the decision of the lower Court on that point is correct. Two further points must be referred to. It was said by Mr. Thein Maung that as the number of subscribers is now reduced to a number less than 20, the association is no longer illegal, and that in any event the respondents are entitled to the order they ask. In view of my decision upon the main question in the suit, it is not necessary to decide this matter. I am of opinion, however that although it may be said that subsequent registration of an illegal association would cure the previous omission to register, I can see no reason for holding that a subsequent reduction in numbers would have the same effect. What is aimed at by the statute is the formation of an illegal association, and it seems to me (though no authority was quoted by either party upon the point) that an association once illegal in form must retain its illegal character until registration or dissolution.

The only other question raised by Mr. Paget was the question of limitation. According to him the present suit must fail upon the ground that as the suit was instituted in April 1926 (viz., more than three years after the payment of the subscriptions) it is out of time. It was argued that as this is a suit for money paid by the respondents to the appellant for the use of the former, Art. 62, Lim. Act must apply. This point appears to be a new point raised for the first time in this Court. Moreover, it is not covered by the memorandum of appeal. I am of opinion, however, that it is without substance. Art. 62, Lim. Act applies to suits falling under the category well known in English law as "suits for money had and received." Such suits arise where money paid into the hands of the defendant is payable forthwith to the plaintiff: see as to this *J. Subba Rao* v. *Rama Rao* (12).

In the present case, the money was paid for a certain purpose, viz., to be expended in the purchase of a rice-mill for the benefit of the members of the association and other purposes, and after reconversion the subscribers will clearly not be entitled to the return of the whole of their subscriptions. The suit, though not in form, in substance therefore must be for an account and it is only after such an account has been taken that the amounts due to the respective subscribers can be ascertained. It has been well settled that Art. 120, Lim. Act, applies to such suits, and as this article provides for a limitation of six years from the time when the right to sue accrues, the action is well within time.

The only questions arising before this Court are the questions of law I have dealt with, and for the reasons given above I am of opinion that the decision of the lower Court is correct and must be upheld. The appeal is therefore dismissed, and in the circumstances the appellant must pay the respondents' cost both here and below.

Heald, J.—On 28th December 1921, a number of persons decided to form a

(12) [1916] 40 Mad. 291=30 M. L. J. 341=3 M. L. W. 192=32 I. C. 899=(1916) 1 M. W. N. 188.

partnership to do a rice milling business. The capital of the partnership was to be Rs. 50,000 divided into 500 shares of Rs. 100 each. Rs. 25 was to be paid in respect of each share forthwith and the balance within ten days of notice to pay. Sixteen of those present, including a number of the parties to the present suit at once applied for shares amounting to 401 out of the 500 shares. A meeting of the partners was held on 7th January 1922. at which it was recorded that 15 persons had paid up Rs. 25 for each share in respect of 358 shares, and the appellant Sein Po was appointed manager of the partnership business.

On 14th January 1922, it was recorded that four other persons had paid Rs. 25 for each share in respect of 52 more shares and the manager Sein Po and another of the shareholders were authorized to buy the equipment of the mill. On 7th March 1922, it was recorded that five other persons had joined the partnership, taken 17 further shares, and a resolution was passed that the partnership should be registered as a company under the name of the "Mingala Bazaar Rice Milling Company." Certain partners were authorized to buy the land and timber of the mill, and the manager, Sein Po, was authorized to buy the engine and to engage engine driver. The partnership was in fact never registered as a company, and therefore was an illegal association. On 2nd July 1922, shareholders were asked to take further shares and it was decided to issue notices for payment of the balance due in respect of shares already taken.

On 2nd October 1922 it was recorded that a certain of the original subscribers had taken further shares and some new subscribers also seem to have taken shares. The partnership is said to have consisted of 27 partners until February 1926, when one Tha Hla purchased the shares of Po Han and Kyi Byu. Kyaw Zan Hla, who was already a shareholder, purchased the shares of Le Le and Po Chit, Maung Pyu, who was already a shareholder, purchased the shares of Aung Nyun. Yan Byan purchased the shares of Maung Pyo and Pan I, who was already a shareholder, purchased the shares of Po Tha and Tha Hnin. These transfers are said to have reduced the number of shareholders to 19, and they were doubtless effected with a view to the filing of the suit, which was instituted in April 1926. The partnership bought land, built and equipped a rice mill with the usual appurtenant outbuildings, and on 10th December 1924 gave Sein Po, a year's lease of the premises. Sein Po, according to the plaintiffs, failed either to pay the rent in full or to give up possession of the premises, but instead, with the concurrence of two of the shareholders, gave a lease of the mill to one Po Lon for three years. That lease has now expired and the premises have presumably reverted to the possession of the shareholders.

While the premises were still in the possession of Po Lon, three of the shareholders Maung Pyu, Po Kin and Po Hla filed the present suit to recover from Sein Po, whom they described as the "promoter" of the partnership, and who, as they alleged, was manager of the business from the time when the partnership was instituted to the time when the partnership premises were leased to him, the shares which they contributed to the partnership, or so much as they might be entitled to recover in respect of those shares after converting the assets of the partnership into money and paying the debts incurred by the partnership. Sein Po in his written statement said that he was Managing Director of the partnesship throughout its existence, and did not deny that he was the "promoter." He admitted the formation of the partnership and its acquisition of the premises alleged and he also admitted the receipt of Rs. 10,000 from Po Lon as rent of the premises. He pleaded, however, that by reason of the provisions of S. 4 (2), Companies Act, the plaintiffs were not entitled to recover the money which they had put into the partnership and were not entitled to recover possession of the premises from him.

The lower Court found that the plaintiffs were entitled to recover the amounts, which they had paid, to the extent that their money or property representing that money was still in the possession of Sein Po, or of the partnership, subject to the payment of debts incurred by Sein Po on behalf of the partnership, and it recorded findings as to the assets which were available, the liabilities which were outstanding and the amount paid by the partners as their shares of the capital. It directed that

the assets should be sold, that the liabilities should be paid out of the sale proceeds, and that the plaintiffs should receive their shares pro rata out of the balance. | It also directed that the costs should be borne by the defendants. Only Sein Po appeals and the grounds of his appeal are that the suit was not maintainable by reason of the provisions of S. 4 (2), Companies Act, that the plaint did not disclose a cause of action and that the suit was bad for misjoinder of parties and causes of action. At the hearing in this Court a point of limitation which was not taken either in the trial Court or in the grounds of appeal was raised.

We have heard the learned advocates on both sides and I have had the advantage of reading my learned brother's judgment. I have no hesitation in agreeing with him that, subject to the law of limitation, plaintiffs are entitled to recover out of the assets of the partnership which remain after paying the liabilities, such amount as represents pro rata their shares of the money which they contributed to the partnership. I agree with him also that the reduction of the number of shareholders, which was effected shortly before the suit was filed, and was clearly effected for the purposes of the suit, did not avoid the objection that the partnership was illegal. At all times material to the suit it was illegal, and in my opinion we are bound to deal with it on the footing that it was an illegal association.

The question of limitation seems to me to be more difficult, but it was pointed out by a Full Bench of the High Court of Madras in the case of *Rama Seshayya* v. *Tripurasundari Cotton Press, Venkata Gurupadha* (13) that there is in Sch. 1, Lim. Act.

> "No article which which provides simpliciter for a debt due, such a debt as would have been the subject of the old common law action for a debt"

and that "all we can do is to fall back on the omnibus Art, 120," and as I am satisfied that Art. 62 cannot be applied because the money when it was received by Sein Po or his representative U Myaing, was not received by him for the plaintiff's use but was recieved for other specific purposes, and became payable to the plaintiffs, to the extent which it is payable, only by reason of the happening of subsequent events, namely, the failure to register the parntership as a company. I agree that Art. 120 applies and that the suit was not barred by limitation. I accordingly concur in my learned brother's judgment dismissing the appeal with costs in this Court and his order that the appellant Sein Po should bear all the costs in the trial Court.

P.N./R.K. *Appeal dismissed.*

(13) A.I.R. 1926 Mad. 615=49 Mad. 468 (F.B.).

A. I. R. 1930 Rangoon 27

RUTLEDGE, C. J. AND BROWN, J.

Ma Sein—Appellant.

v.

P. L. S. K. Firm and *another*—Respondents.

First Appeal No. 230 of 1928, Decided on 8th April 1929.

(a) Specific Relief Act, S. 42 (proviso)—Suit by creditor against *N* and *K* for declaration that deed of release by *N* in favour of *K* is void as against him and that he is entitled to proceed in execution against property—Suit is maintainable without seeking to get document delivered up and cancelled—Specific Relief Act, S. 39.

A creditor of *N* sued him and *K* for a declaration that a deed of release by *N* in favour of *K* was void and ineffective as against him and that he was entitled to proceed in execution or otherwise against the property. It was contended that the plaintiff might have sought the relief of having the document delivered up and cancelled and that, therefore the suit was not maintainable.

Held: that it was not necessary for the plaintiff for obtaining his legal right that he should have made any such prayer and that the suit was not barred by S. 42 (proviso): 26 *All.* 606, *Appl.* [P 29 C 1]

(b) Transfer of Property Act, S.53—Transferrer heavily indebted—Transfer to sister is not necessarily void for valuable consideration.

The fact that a debtor transfers, at the time when he is heavily indebted, the whole of his property to his sister is not by itself a sufficient reason for avoiding the trarsfer if in fact the transfer is made bona fide and for valuable consideration. [P 29 C 2]

Kyaw Din—for Appellant.

Chari—for Respondents.

Judgment.—Respondent 1 P. L. S. K. Chettyar firm sued the appellant, Ma Sein, and respondent 2, Maung Saw Maung on behalf of themselves and other Chettyar firms, who were the creditors of Maung Saw Maung, for a declaration that the deed of release by Maung Saw Maung in favour of Ma Sein was void and ineffective as against the creditors and that the creditors were entitled to proceed in execution or otherwise against

the property. The trial Court gave the plaintiffs a decree in terms of the prayer in the plaint. Ma Sein appeals against this decree on two grounds. Ground 1 is that the trial Judge ought to have held that the suit for a mere declaration was not maintainable without a request for the consequential relief of setting aside the deed of transfer. Ground 2 is that on the merits the plaintifff have not established their case.

As regards ground 1, the court-fees in the trial Court were paid as on a suit for declaration, that is to say, to the value of Rs 10 only. The appellant has paid a similar court-fee in this appeal and it is not contended that the court-fee paid is insufficient. What is contended is that the Chettyars could have sued to have the deed of transfer delivered up and cancelled and that, as they did not do so, the suit being a suit under S. 42, Specific Relief Act, was not maintainable. Had the Chettyar firm first attached the property and had the attachment been removed under the provisions of R. 58 and the following rules of O. 21, Civil P. C., there can be no question but that a suit would lie under the provisions of R. 63. There has, however, been no removal of attachment in the present case and it is argued, that that being so, the Chettyar firm were bound to ask for the cancellation of the document. In accordance with the provisions of S. 42, Specific Relief Act, the right to bring a suit under that section is subject to the proviso that:

"no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so."

It is contended that under this proviso the plaintiffs might have sought the relief of having the document delivered up and cancelled. It does not seem to us in any way necessary for the obtaining by the plaintiffs of their legal rights that they should have made any such prayer. On the transfer being declared void, the only further action that the plaintiffs could take would be to attach and sell the property in execution of their decree. That clearly could not be done by the trial Court in the suit under appeal. The plaintiffs are not in possession of the property but they have no right to possession and certainly could not ask for consequential relief of that nature.

In the case of *Ganga Ghulam* v. *Tapeshri Prasad* (1), the plaintiff had filed a suit asking for a declaration that a certain house was not liable to sale in execution of a decree obtained by defendant 1. Defendant 2 had executed a mortgage deed with regard to that house in favour of defendant 1. The plaintiff's claim was that he was the owner of the house and that defendant 2 had no right to mortgage it. It was contended that the plaintiff might have suid for cancellation of the mortgage deed and to have the decree based on the mortgage deed set aside, and that, therefore, the suit was not maintainable under the proviso to S.42, Specific Relief Act. It was held that there was no obligation on the plaintiff, even under the proviso to S. 42, to have sued to set aside either the mortgage or the decree. All that the plaintiff wanted, and all that the law compelled him to ask for, was to have the cloud on his title, which was caused by his property being proclaimed for sale, removed, and to achieve that it was not necessary to ask for any further relief.

The present case is the converse of *Ganga Ghulam's* case (1). But it seems to us that the same considerations apply. It has been held that a creditor in defence to a suit by a transferee of a judgment-debtor, claiming the property that belonged to the judgment-debtor as his, can plead in defence that the transfer was a fraudulent one and was intended to defeat or delay the transferrer's creditors, and that it is not necessary for the creditor in such a case to have the transfer formally set aside. The creditor is entitled to ask the Court, in whatever form the matter may be brought before the Court, to hold that so far as he is concerned the transfer is void. Under S. 39, Specific Relief Act, any person against whom a written instrument is void or voidable, who has reasonable apprehension that such instrument, if left outstanding, may cause him serious injury, may sue to have it adjudged void or voidable, and the Court may, in its discretion, so adjudge it, and order it to be delivered up and cancelled.

The contention on behalf of the appellant is that the present suit should have been brought under this section. It seems to us, however, open to consider-

(1) [1904] 26 All. 606=(1904) A.W.N. 133.

able doubt whether the Chettyar firm could have brought a suit under S. 39, Specific Relief Act. They have no apprehension that the instrument, if left outstanding, would cause them serious injury. If they obtain the declaration they ask for in this case, they will then be able to proceed to attach the property and the instrument would clearly not be able to cause them any injury. It is not necessary in the present case for the plaintiff to ask to have the document cancelled and it does not seem to us that their plaint establishes any good cause for such relief. That being so, we are of opinion that the suit in its present form was not barred by the proviso to S. 42, Specific Relief Act. We would note that this objection was not taken in the trial Court but was raised for the first time in this appeal. We now come to the consideration of the appeal on the merits of the case. The appellant Ma Sein is the sister of the respondent, Maung Saw Maung. Maung Saw Maung and Ma Sein are admittedly two out of six coheirs of an estate consisting of about 300 acres of paddy land and some other property. The document of the transfer which it is sought to set aside is called a deed of release and is dated 21st September 1926. This document recites that Maung Saw Maung makes over all his rights in the estate to his sister in consideration of a cash payment of Rs. 1,600 and of Ma Sein undertaking to pay on his behalf Rs. 5,834 to another of his coheirs, Po Hmyin and Rs. 2,000 to a creditor of Maung Saw Maung and further to discharge a debt due to herself by Maung Saw Maung of Rs. 2,000. Admittedly Maung Saw Maung had no other property of value. Admittedly he was indebted to the respondent Chettyar and other Chettyar firms to the extent of several thousands of rupees, and admittedly he was so indebted at the time of the execution of the document in question. The effect of the transfer, if it is upheld, will undoubtedly, therefore, be to defeat or delay the claims of his creditors. It is claimed on behalf of the respondent Chettyar that the whole of the estate is worth something like Rs. 1,20,000 and that Saw Maung's share is, therefore, worth Rs. 20,000. As the consideration set forth in the deed amounts only to Rs. 11,834 it is suggested that on the face of the deed itself the consideration is grossly inadequate. It does not seem to us, however, to be established that the property is worth so much as the Chettyar contends. The property consists of something like 300 acres of paddy land and two houses and there is no real evidence to show exactly what they are worth.

The circumstances of the transfer are extremely suspicious, the transfer being to a sister of the debtor and its effect being to remove the whole of the debtor's property out of the clutches of his creditors, the transfer having been made at a time when the transferrer was heavily indebted. But this by itself would not be sufficient reason for avoiding the transfer, if in fact, the transfer had been made bona fide for valuable consideration. (Then their Lordships considered the evidence as to the payment of consideration and found that the transfer was made for grossly inadequate consideration as there was no satisfactory evidence regarding payment of consideration other than Rs. 4,000 and concluded as follows). We do not think, therefore, that sufficient case has been made out for interfering with the order passed by the trial Judge and we dismiss the appeal with costs.

P.N./R.K. *Appeal dismissed.*

A. I. R. 1930 Rangoon 29

BAGULEY, J.

U. Ahdeiksa—Appellant.

v.

Ma San Me and *another*—Respondents.

Special Second Appeal No. 59 of 1929, Decided on 22nd July 1929.

(a) Evidence Act, S. 116—Scope.

S. 116 does not state that every license is revokable at the whim of the licensor. [P 31 C 1]

(b) Buddhist Law (Burmese)—Ecclesiastical Law—Once kyaung is built and offered to pongyi, it becomes extra commercium.

A kyaung cannot be regarded like an ordinary piece of immovable property which can be occupied by a layman, bought, sold or otherwise treated like an ordinary commercial property. Once a kyaung has been built and offered to a pongyi it becomes extra commercium. [P 31 C 1]

(c) Buddhist Law (Burmese)—Ecclesiastical Law—Layman cannot evict presiding pongi in ordinary state of affairs.

When a pongyi is installed in a kyaung and he is shown to have remained in that kyaung for a period of many years, the layman who claims the right to turn him out has got to prove that right very strictly. A kyaungtaga, when he places a pongyi in charge of a kyaung and refers to him as the presiding pongyi of that kyaung, in the vast majority of cases

would have dedicated the kayaung to that pongyi, and any kyaungtaga, who asserts the contrary has got to prove it, and has got to prove that the pongyi was merely his watchman or caretaker. [P 32 C 1]

A. C. Mukerjee—for Appellant.

Day—for Respondents.

Judgment.—This is an appeal by the defendant. The plaintiffs are mother and son; they sued for recovery of possession of a kyaung and its compound in which the defendant is now established. Ma San Me is the daughter of the original founders of the kyaung, and it is alleged that the original kyaung built by her parents was pulled down and rebuilt by herself and her husband who is now dead. The second plaintiff is their only son. The plaint states that when the kyaung was built the plaintiffs asked one pongyi U Zayanta to live in and look after it. When he became old he returned the kyaung to Ma San Me, and she and her husband took back the kyaung and handed it over to another pongyi, U Maga, after U Zayanta had died, and that U Maga lived in the kyaung and looked after it for three years, after which he also returned the kyaung, and, finally, in 1282 the present defendant-appellant asked permission to live in the kyaung and look after it. and he was permitted to do so. The plaintiffs say that as he is now not living in accordance with the Vinaya they wish to recover possession of the kyaung.

It will be noted that the plaint suggests a rather striking state of affairs, namely, that the plaintiffs have a kyaung, which is their absolute outright property and occupied by a series of pongyis as caretakers. According to the plaint there was never any dedication of the kyaung either poggalika or sanghika; and in an annexure to the plaint, the plaintiffs specifically state that the transactions would not come under the Buddhist Ecclesiastical law at all because the possession of the pongyis was never more than permissive. The defence is that, originally U Zayanta had the kyaung dedicated to him in the ordinary way, and that after the death of U Zayanta and U Maga, the kyaung was dedicated to the defendant. The written statement then goes on to argue that the case should be tried by the Ecclesiastical authorities and to state that there have been other disputes between the other parties.

The trial Court framed six issues after examining the parties. It found that when the defendant came to occupy the kyaung it was in the possession of Ma San Me and her husband now deceased; that they got possession of the kyaung by the previous pongyi returning it to them; that the defendant had the kyaung offered to him in a regular way, the roof being sanghika and the under portion poggalika, and that the defendant was not liable to give up possession to the plaintiffs. On appeal to the District Court, the learned District Judge viewed the matter from a totally different angle. He found that as the defendant on his own showing came into occupation by the invitation of the plaintiffs that was an admission in itself that the plaintiffs were the owners of the kyaung. He further found that the defendant failed to prove the dedication of the kyaung to himself; that the burden of proving this dedication lay upon him, and as he had failed to prove dedication to himself the suit must be decreed.

The defendant pongyi now comes in second appeal to this Court. The appeal was argued at considerable length, and at one time it appeared to me that it would be necessary to come to a decision on the as yet undecided point of whether the original donor of a poggalika gift has any right remaining to him in the property given: vide May Oung's Buddhist Law, page 177; but on further consideration it appears to me that the point does not really arise.

Mr. Day for the respondents argued that the appeal should be dismissed on a short point under S. 116, Evidence Act. He claimed that the appellant having come into occupation of the kyaung by license of the plaintiffs, could not be permitted to deny that the plaintiffs had a title to the kyaung at the time that they gave it to him. This argument appears to me to be fallacious. The property now in suit is not ordinary property: it is of an ecclesiastical nature and, therefore, pro tanto Buddhist Ecclesiastical Law must be taken into consideration with regard to it. The defendant may have come into occupation of the kyaung by license of the plaintiffs, but that does not imply that he must therefore return the kyaung to them whenever they ask for it. S. 116, Evidence Act, merely states that the licensee is not permitted

to deny that the person who gave him the license had a title to such possession at that time that that license was given. It does not state that every license is revocable at the whim of the licensor; and the fact that the provisions of the Evidence Act might prevent the appellant from denying the respondents' title to possession of the kyaung at the time that he entered into possesion under their license would not prevent him from asserting that the respondents have no power now to turn him out.

As I have stated, the plaint asserts a most extraordinary state of affairs, namely, that the kyaung was built by laymen and had a series of pongyis put in as watchmen in succession. The suit was managed entirely by plaintiff 2, and he endeavoured to prevent his mother from appearing in Court. However, the trial Judge insisted on her appearance, and when she was put into the witness-box she stated that the kyaung was built as an offering to the sanghas. She also stated that the defendant had been in the suit kyaung for about 18 years, as opposed to the eight years mentioned in the plaint. The plaintiff Tun Aung states that the defendants was made a rahan at the instance of his (plaintiff's) father; and, therefore, assuming that the defendant entered the kyaung at the instance of the plaintiffs, we have the following state of affairs: The plaintiffs represent the original founder and builder of the kyaung. At their invitation the defendant came into occupation of it, and he has been in occupation of it, for some period varying between eight years, as stated in the plaint, and 18 years as stated by plaintiff 1 herself on oath. In any case the defendant has been in possession for a very long time indeed. He is a pongyi whose entry into the priesthood was made at the instance of the husband of plaintiff 1 who was the father of plaintiff 2. Ordinarily speaking, a pongyi placed in a kyaung by the representatives of a founder of the kyaung would be regarded as having been properly installed and would not be liable to be evicted at the whim and pleasure of those who placed him in the kyaung. A kyaung cannot be regarded like an ordinary piece of immovable property which can be occupied by a layman, bought, sold, or otherwise treated like an ordinary commercial property. Once a kyaung has been built and offered to a pongyi it becomes extra commercium; and I hold that the lower appellate Court has erred in regarding it as an ordinary piece of immovable property. If occupation of ordinary immovable property is to be regarded as prima facie evidence of ownership to such an extent that any person who wishes to recover possession from a man in possession has got to prove his right to do so, still more would it be incumbent on any layman who wish to turn a pongyi out of a kyaung in which he was living to prove that he was entitled to do so. The plaintiff Tun Aung, as I have said, speaks to this somewhat strange position of the defendant being put in as a caretaker liable to be evicted at any time, He says, however, in cross-examination with regard to the defendant, pongyi was staying in a kyaung to the east. He was not a presiding pongyi there. He became presiding pongyi—I should call him our tenant—when he came to stay in this kyaung. It will be seen therefore that the second plaintiff, the one who is strongly against the defendant, admits that the defendant became a presiding pongyi when he entered this kyaung. This would certainly show that a very heavy burden lay upon the plaintiffs. A layman cannot evict a presiding pongyi in an oridinary state of affairs.

The first witness called by the plaintiff is U Kumara. He states definitely, "I do not know on what understanding the defendant came to stay in this kyaung." The next witness for the plaintiffs is Lu Min. He says that defendant pongyi went to Ma San Me and asked to be allowed to stay in the kyaung in suit and look after it and Ma San Me agreed, This witness is a most casual witness, living in another village, indebted to the plaintiffs, and he admits that he does not know if anything further was said when the defendant came to stay in the kyaung, and he does not know what celebration was done on that occasion. The next witness for the plaintiffs is Aung Ya. He refers to a conversation between Ma San Me and the defendant, but he does not know whether it was as a result of that conversation that the defendant entered the kyaung, and he admits that he does not know what actually occurred when

the defendant come to stay in the kyaung. The next witness for the plaintiffs is Maung So Mya. He gives the history of the kyaung, and winds up by saying "defendant pongyi came to stay here after U Maga but I do not know how." This is the whole of the plaintiffs' case. It seems to me quite impossible to hold on this evidence that the plaintiffs have shown their right to turn the defendant out of the kyaung. As I have said before, this case cannot be regarded as though it referred to a house or an ordinary piece of immovable property. When a pongyi is installed in a kyaung and he is shown to have remained in that kyaung for a period of many years, and layman who claims the right to turn him out had got to prove that right very strictly. A kyaungtaga, when he places a pongyi in charge of a kyaung and refers to him as the presiding pongyi of that kyaung, in the vast majority of cases would have dedicated the kyaung to that pongyi, and any kyaungtaga who asserts the contrary has got to prove it, and has got to prove that the pongyi was merely his watchman or caretaker. This, as I have shown, the plaintiffs in the present suit have entirely failed to do, and the defendant pongyi is entitled to the benefits that follow from his possession of the kyaung in the same way that any other occupier of immovable property is entitled to the presumptions that will accrue to him because of his occupation, and this the more because kyaungs are normally occupied by pongyis and not by laymen once they have been made over to the priesthood in one form or another.

This case was argued at length on the point of Buddhist law with regard to the reversion of sanghika gifts. On examination of the evidence, however, as I have shown, it does not appear to me that this point would arise, and I therefore, have not thought it necessary to deal with the many cases and authorities cited in argument. For these reasons I set aside the judgment and decree of the lower appellate Court, and restore that of the trial Court dismissing the suit. The respondents will bear the appellant's costs throughout.

P.N./R.K. *Suit dismissed.*

A. I. R. 1930 Rangoon 32

DAS, J.

In the matter of G. H. Ghanchee and sons.

Insolvency Case No. 25 of 1929, Decided on 4th September 1929.

(a) Presidency Towns Insolvency Act, S. 36 — Offcial Assignee cannot examine person to whom insolvent transfers his property.

Section 36 was not intended for the purpose of enabling the Official Assignee to cross-examine person to whom the insolvent appears to have transferred his property and to get from him the proof of his case. [P 32 C 2]

(b) Presidency Towns Insolvency Act, S. 36 (as amended by Act 19 of 1927)—Person admitting insolvent's title alone can be asked to deliver the property.

Under S. 36 (4) (5) it is only on the admission of the persons alleged to be in possession of property belonging to the insolvent that the Court can order them to give up the properties. [P 32 C 2]

N. N. Burjorjee—for Official Assignee.
N. N. Sen—for Claimant.

Judgment.—This is an application by the Official Assignee for the examination of M. D. Oomer under S. 36, Presidency Towns Insolvency Act. It appears that the insolvent transferred certain properties to this person and the Official Assignee challenges this transfer. Before making this application, the Official Assignee demanded these properties from this person and this person denied the rights of the Official Assignee. The Official Assignee now applies to this Court for the examination of M. D. Oomer under S. 36, Presidency Towns Insolvency Act. I do not think that S. 36 was intended for this purpose. S. 36 has now been amended by Act 19 of 1927 and sub-Ss. 4 and 5 now read as follows: "If on his examination any person admits, etc." That makes a lot of difference in the construction of S. 36. S. 36 was only intended for the purpose of enabling the Official Assignee to get hold of properties belonging to the insolvent in the possession of third persons. It is only on the admission of these persons that the Court could order them to give up the properties. S. 36 was not intended for the purpose of enabling the Official Assignee to cross-examine a claimant and get from him the proof of his case. The order of the Registrar is confirmed and this application is dismissed. There is no order as to costs.

P.N./R.K. *Application dismissed.*

* A. I. R. 1930 Rangoon 33

HEALD, OFFG. C. J., AND MAUNG BA, J.

Chettyar P. K. N. P. R. Firm— Applicants.

v.

Commr. of Income-tax, Burma—Respondent.

Civil Misc. Appln. No. 10 of 1929, Decided on 16th July 1929.

*** (a) Income-tax Act (1922), S. 23 (4)—Assessment to the best of his judgment means not arbitrary, vague and fanciful but legal and regular assessment—Failure of the Income-tax Officer to use discretion properly—Commissioner must exercise proper discretion under Income-tax Act, S. 33.**

Section 23 (4) says that the Income-tax Officer shall make the assessment "to the best of his judgment." This means that he must make it according to the rules of reason and justice and not according to private opinion; according to law and not humour; and that the assessment is to be not arbitrary, vague and fanciful but legal and regular. [P 34 C 2]

Where the assessee has admittedly filed complete accounts and there is no suggestion that the accounts are false or fraudulent and where there are available the actual assessments for the previous years which may be presumed to have been regularly and properly made, an assessment which should have been made to the best of the Income-tax Officer's judgment but which does not even purport to be based upon the material which were admittedly available or on any material at all beyond the Income-tax Officer's whim or humour, can hardly be regarded as an assessment in respect of which the discretion given to the Income-tax Officer by S. 23 (4) has been properly exercised, and is an assessment in respect of which the Commissioner ought to have exercised the discretion given to him by S. 33. [P 34 C 2, P 35 C 1]

*** (b) Income-tax Act (1922), S. 66 (3)—Commissioner's failure of duty under S. 33 does not give jurisdiction to call for reference under S. 66 (3)—Income-tax Act, S. 33.**

The failure of the Commissioner in his duty under S. 33 will not give the High Court jurisdiction to require the case to be referred under S. 66 (3) since that subsection relates back to sub-S. (2) and sub-S. (2) deals only with order under S. 31 or S. 32 and not with order under S. 33. [P 35 C 1]

*** (c) Income-tax Act (1922), S. 27—Sufficiency of cause involves question of law—Income-tax Act, S. 66 (3).**

The question of the sufficiency of cause is different from the question of the sufficiency of evidence, since the determination of the sufficiency of cause involves the question whether the judicial discretion has been exercised in a sound and reasonable manner or has been exercised capriciously, arbitrarily or in a judicially unsound manner and, therefore, does involve a question of law. [P 35 C 1]

E. Hay and *Venkatarama*—for Applicants.

C. Gaunt—for Respondent.

1930 R/5 & 6

Judgment.—Applicants, who are the P. K. N. P. R. Chettyar Firm, returned an income of Rs. 34,000 for assessment of income-tax for the year 1927-28, but in their return they did not give all the details required by S. 22 (2), Income-tax Act, their agent alleging that he was not in a position to give such details. They were given notice under S. 22 (4) to produce their accounts and they produced what they alleged to be the complete set of their account books. They did not produce what are known as "Baki" books and their agent swore that they did not keep such books. The Income-tax Officer came to the conclusion that they did keep such books, and on the footing of their default in respect of their return under S. 22 (2) and also in respect of their account books under S. 22 (4) proceeded to make an assessment under S. 23 (4) and assessed applicants on an income of Rs. 1,25,000.

Applicants filed an application under S. 27 asking that the assessment should be cancelled and that a fresh assessment should be made. They said that their failure to give the required details in their return under S. 22 (2) was due to the fact that that return had to be made at a time when in the usual course of their business their accounts for the year 1926-27 had not been closed, that they followed the usual practice of Chettyar Firms in such cases by producing all their books before the Income-tax Officer, and that in fact they did not keep "Baki" books. They claimed that in the circumstances they had not made any default under S. 22 (2) or S. 23 (2) or S. 22 (4) and that the assessment made by the Income-tax Officer under S. 23 (4) should be cancelled and a fresh assessment should be made under the provisions of S. 23.

The Income-tax Officer said that, whatever the practice of appellants' business might be, they could not evade the obligation of filing a statement showing details of the receipts and expenditure on which they based their return under S. 22 (2) and that he was still convinced that they did in fact maintain "Baki" books. He, therefore, rejected their application under S. 27.

Appellants appealed to the Assistant Commissioner under S. 30 (1) against the Income-tax Officer's refusal to make

a fresh assessment under S. 27 alleging that they had produced all their books and that in the circumstances of the case their failure to file a statement of receipts and expenditure for 1926-27, did not amount to default under S. 22 (2) of the Act. They said that the Income-tax Officer had disregarded the facts that they had produced all their books and that in the two previous years they had been assessed on an income of Rs. 50,000 or Rs. 60,000 that these facts should be taken into consideration, that the assessment should have been based on their books which in fact showed their actual income for 1926-27 and that the Income-tax Officer's action in assessing them on an income of Rs. 1,25,000 was entirely arbitrary.

The Assistant Commissioner found that applicants did not in fact keep "Baki" books and that they had actually produced all their account books, but he said that they were in default in that they had failed to file a statement of their receipts and expenditure for 1926-27 and that, therefore, the Income-tax Officer was entitled to make an assessment to the best of his judgment under S. 23 (4) and was justified in refusing to cancel the assessment under S. 27. Applicants then applied to the Commissioner to refer certain questions to this Court under S. 66 (2) and they also asked him to review the order of the Assistant Commissioner under S. 33.

The Commissioner agreed with the Income-tax Officer and the Assistant Commissioner that applicants had not in fact complied with the provisions of S. 22 (2) and he said that by reason of that default no question of law arose as to the power of the Income-tax Officer to make an assessment under the provisions of S. 23 (2). He said further that because no appeal lies against such an assessment the only questions which were before the Assistant Commissioner on an application under S. 27 were the questions mentioned in that section, namely whether the applicants were prevented by sufficient cause from complying with the terms of those notices, and that, so far as the Assistant Commissioner was concerned, the question whether or not the Income-tax Officer had in fact used his best judgment or had made the assessment arbitrarily did not arise. He, therefore, refused either to make a reference to this Court or to review the Assistant Commissioner's order. Applicants now ask us to direct the Commissioner to refer the case to this Court under the provisions of S. 66 (3).

The scheme of the Act is apparently that if in fact an assessee fails to make a return in the terms of the form prescribed under S. 22, Cl. (2) or if he fails to produce such accounts or documents as the Income-tax Officer may require under S. 22 (4) or if he fails to produce evidence under S. 23 (2) then unless he can show that he was prevented by sufficient cause from making the return or that he did not receive the notices under S. 22 (4) or S. 23 (2) or that he had not a reasonable opportunity to comply or was prevented by sufficient cause from complying with those notices, he is liable to be assessed under S. 23 (4) "to the best of the Income-tax Officer's judgment." that there shall be no appeal against such an assessment and that the only remedy against an arbitrary assessment that is against what is in effect a fine of unlimited amount, shall be the discretion of the Commissioner to review the assessment under S. 23.

But when S. 23 (4) says that the Income-tax Officer "shall make the assessment to the best of his judgment" it means that he must make it :

> "according to the rules of reason and justice, not according to private opinion, according to law and not humour,"

and that the assessment is to be "not arbitrary, vague and fanciful, but legal and regular."

In a case where the assessee has admittedly filed complete accounts and there is no suggestion that these accounts are false or fraudulent and where there are available the actual assessments for previous years, which may be presumed to have been regularly and properly made, an assessment which should have been made "to the best of the Income-tax Officer's judgment" but which does not even purport to be based on the materials which were admittedly available or on any materials at all beyond the Income-tax Officer's mere whim or humour can hardly be regarded as an assessment in respect of which the discretion given to the In-

come-tax Officer by S. 23 (4) has been properly exercised, and is in our opinion an assessment in respect of which the Commissioner ought to have exercised the discretion given to him by S. 33.

But our opinion that the Commissioner has failed in his duty under S. 33 will not give us jurisdiction to require the case to be referred under S. 66, sub-S. (3), of the Act, since that subsection relates back to sub-S. (2) and sub-S. (2) deals only with orders made under S. 31 or S. 32 and not with orders made under S. 33.

What we have to decide is whether or not a question of law arises out of the Assistant Commissioner's order under S. 31, that order being made an order made in an appeal against an order under S. 27.

Section 27 says that if the assessee "satisfies" the Income-tax Officer that he was "prevented by sufficient cause from making the return required by S. 22 or from complying with the terms of notices issued under S. 22 (4) or S. 23 (2) the Income-tax Officer shall cancel the assessment. The word "satisfies" and "prevented from sufficient cause," are similarly used in R. 9, O. 9, Sch. 1 to the Civil P. C., and in S. 5, Lim. Act, the corresponding words in R. 19 or O. 41 being "it is proved" and "prevented by a sufficient cause." All these provisions of law have been interpreted as importing a discretion, and since the words "satisfies the Court" simply mean "proves" it would appear that the discretion lies in the power to determine whether or not the cause shown is "sufficient." The question of sufficiency of cause seems thus to have been regarded differently from the question of sufficiency of evidence, since it has always been held that the determination of sufficiency of cause involves the question whether the judicial discretion has been exercised in a sound and reasonable manner or has been exercised capriciously, arbitrarily or in a judicially unsound manner so as to involve a question of law.

The Income-tax Officer undoubtedly had such a discretion under S. 27, and the Assistant Income-tax Officer had a similar discretion in an appeal from an order under that section.

We hold, therefore, that a question of law, namely, whether or not the discretion given by S. 27 was properly exercised arises out of the Assistant Commissioner's order under S. 31, and, therefore, under S. 66 (3) we require the Commissioner to state the case and to refer it to this Court. The costs in respect of this application will abide the final order for costs which will be made on the reference.

M.N./R.K. *Order accordingly.*

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Special Bench

HEALD, OFFG. C. J. CHARI AND ORMISTON, JJ.

Chettyar S. P. K. A. A. M. Firm—Applicant.

v.

Commr. of Income-tax — Opposite Party.

Civil Misc. Appln. No. 135 of 1928 Decided on 29th August 1929.

Income-tax Act (1922), S. 23 (4)—Assessment under S. 23 (4) must be based on reasonable judgment—Assessment should not be purely arbitrary.

Where an assessee withholds the materials for a regular assessment, the assessment, to the best of the Income-tax Officer's judgment, must necessarily be to some extent arbitrary, but it must also be reasonable and the materials or reasons on which it is founded must be so stated that the Commissioner may be in a position to ascertain whether or not it is reasonable. [P 36 2, P 37 C1]

Where the assessment under S. 23 (4) is entirely arbitrary and does not purport to be founded on any materials or reasons beyond the Income-tax Officer's private opinion, the assessment is illegal. [P 37 C 1]

Leach—for Applicant.
Gaunt—for the Crown.

Heald, Offg. C. J.—The S. P. K. A. A. M. Chettyar firm of Rangoon was called on to make a return of its income for the year 1926-27 for the purposes of its assessment to income-tax for the year 1927-28. It returned its income at Rs. 28,818-6-6. On investigation the Income-tax Officer found that certain items of interest shown in the books of the M. M. firm of Wakema and the K. S. M. firm of Kayan as paid to the S. P. K. A. A. M. firm did not appear in that firm's accounts and that there had been several transactions between those firms and the S. P. K. A. A. M. firm which did not appear in the latter firm's accounts. The only explanation given for the S. P. K. A. A. M. firm was that the transactions were dealings not of

the firm but of certain of its partners personally. The Income-tax Officer was not satisfied with this explanation because the transactions appeared in the books of the other firms as dealings with the S. P. K. A. A. M. firm and because there was in those books and in the documents recording the transaction nothing to indicate or suggest that the transactions were not dealings with that firm. He, however, gave the firm's agent time to get particulars from the partners with whom those dealings were alleged to have taken place and to produce the accounts relating to those transactions. The agent failed to give any further particulars or to produce any further accounts, and as he asserted that the firm had no accounts other than those which he had produced, the Income-tax Officer came to the conclusion that the accounts which were produced did not contain all the transactions of the firm and that a portion of the accounts was being withheld. He therefore proceeded to make what purported to be an assessment under S. 23 (4) of the Act, and assessed the firm on a Rangoon income of Rs. 3,25,000.

No appeal lies against such an assessment but the assessee is entitled to apply under S. 27 of the Act to have the assessment cancelled on the ground that he was prevented by sufficient cause from making a proper return and the firm filed an application under that section which was dismissed.

The firm then filed an appeal against the order dismissing its application but that appeal was dismissed.

There is no question that these two orders were rightly made, because the sole question which arose on the application and the appeal was whether or not the firm was prevented by sufficient cause from making a proper return, and it is clear that the firm failed to prove that there was any sufficient cause for its default.

The firm then applied to the Commissioner of Income-tax to refer to this Court certain questions of law under S. 66 (2) of the Act. The Commissioner refused, but he was required by a Bench of this Court to state and refer the case under S. 66 (3) of the Act. He had accordingly stated and referred the case.

The Income-tax authorities' findings of fact are not open to review by this Court unless there is no evidence to support them, and in this case there is abundant evidence to support the Income-tax Officer's finding that the firm was in default. It follows that the Income-tax Officer was entitled to make the assessment to the best of his judgment under the provisions of S. 23 (4) of the Act.

The only question which arises in the case is as to the power of this Court to hold that what purports to be an assessment to the best of the Income-tax Officer's judgment was not in fact such an assessment, and was therefore not a legal assessment.

It was said by a Bench of this Court in the case arising out of the *P. K. N. P. R. Chettyar Firm* v. *Commr. of Income-tax* (1) that:

"when S. 23 (4) says that the Income-tax Officer shall make the assessment to the best of his judgment."

it means:

"that he must make it according to the rules of reason and justice, not according to private opinion; according to law and not humour; and that the assessment is to be not arbitrary, vague and fanciful but legal and regular."

It was also said that, since there is no appeal against an assessment under S. 23 (4), the only remedy against an arbitrary assessment, that is against what is in effect a fine of unlimited amount, is the discretion of the Commissioner to review the assessment under S. 33. With these remarks I agree, and it is clear that if the Commissioner is to be in a position to review such an assessment, the Income-tax Officer must state in his order the materials or reasons on which his judgment is founded.

In the present case the Income-tax Officer gave no reasons and no indication of the basis of his assessment of the firm's Rangoon income at Rs. 3,25,000. All that he said was that he determines the firm's income for the year at Rs. 3,25,000. So far as appears from his order that determination was entirely arbitrary and was based purely on private opinion. I realise of course that where an assessee withholds the materials for a regular assessment, the assessment to the best of the Income-tax Officer's judgment must necessarily be to some extent arbitrary, but it must also be reasonable and the materials or reasons on which it is founded must be

(1) A. I. R. 1930 Rang. 33.

so stated that the Commissioner may be in a position to ascertain whether or not it is reasonable. In this case no reasons or materials have been stated and the effect of the order seems to be that the firm has been fined a very large amount.

I would hold that because the assessment in question was entirely arbitrary and did not purport to be founded on any materials or reasons beyond the Income-tax Officer's private opinion, it was an illegal assessment and I would direct the Commissioner of Income-tax to pay the S. P. K. A. A. M. Firm's costs in these proceedings and in Civil Miscellaneous Application No. 135 of 1928 of this Court, advocate's fee in each case to be ten gold mohurs.

Chari, J.—I concur.

Ormiston, J.—I concur.

V.S./R.K. *Reference answered in favour of assessee.*

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HEALD AND OTTER, JJ.

Chettyar V. E. A. Firm—Applicants.

v.

Commissioner of Income-tax—Opposite Party.

Civil Misc. Appln. No. 96 of 1928, Decided on 25th March 1929.

** **(a) Income-tax Act (11 of 1922), Ss. 33 and 66 (1)—Review order by Commissioner under S. 33—Commissioner refusing to state case on application by assessee — High Court has no power requiring him to do it—Nor can it do so under S. 45, Specific Relief Act—Specific Relief Act, S. 45.**

Where the Commissioner takes up a case in review and passes order under that section and where the assessee applies to the Commissioner under S. 66 (1) to state a case for the opinion of the High Court but he refuses to do so, the High Court has no power under the Act to require the Commissioner to state and refer the case. The Court is also not entitled to have recourse to S. 45, Specific Relief Act, for purpose of requiring the Commissioner to do so: *A. I. R.* 1923 *P. C.* 138, *Expl.*; *A. I. R.* 1926 *Mad.* 1051 (*F. B.*), *Diss. from*; 4 *Pat.* 224, *Expl.* [P 37 C 2; P 38 C 2]

(b) Interpretation of Statutes—Intention of Legislature—Powers of Court.

Where the legislature has in a special Act laid down particular conditions for the exercise of a power by the Court, the Court is not justified in disregarding those conditions and holding by reference to a general Act that it has powers beyond those given by the special Act. [P 38 C 2]

Foucar—for Applicants.

Heald, J.—The applicants, who are the V. E. A. Chettyar firm, made a return of their income for purposes of income-tax for 1927-28 and produced their books of account before the Income-tax Officer. That officer discovered certain omissions and other suspicious features in the accounts, and after enquiry held that applicants had not complied with the requirements of S. 22 (4), Income-tax Act. He accordingly proceeded to make an assessment under S. 23 (4) of the Act, that is an assessment "to the best of his judgment," and assessed applicants on Rs. 1,50,000. No appeal lies against such an assessment, but applicants were entitled to apply for cancellation of the assessment under S. 27 of the Act, and did so apply. The Income-tax Officer refused to cancel the assessment and applicants appealed to the Assistant Commissioner against the order refusing cancellation. The Assistant Commissioner set aside the assessment under S. 23 (4) of the Act and directed that a fresh assessment be made in accordance with law. The Income-tax Officer then made a fresh assessment of Rs. 36,642 instead of Rs. 1,50,000. Applicants were satisfied with that assessment and took no further steps. The Commissioner, however, took up the case in review under S. 33 of the Act and restored the assessment to Rs. 1,50,000. Applicants then applied to the Commissioner to state the case under S. 66 (1) or S. 66 (2) of the Act, but the Commissioner refused to do so.

Applicants now ask us for an order S. 66 (3) of the Act or under S. 45, Specific Relief Act, requiring the Commissioner to state the case and refer it to this Court. It is clear that the case does not fall within the purview of S. 66 (2) because the order on which the case arises is not an order under S. 31 or 32 of the Act, but is the order of the Commissioner made under S. 33 of the Act. There is therefore no question of our making an order under S. 66 (3) of the Act, and the preliminary question which arises is whether we have power to make an order under S. 45, Specific Relief Act.

For the application of that section it is necessary that the doing of the act ordered should be under any law for the time being in force, clearly incumbent on the person ordered to do the act, and it is therefore necessary to consider whether the stating of a case in circumstances such as those of the present case

is clearly incumbent on the Commissioner of Income-tax. Applicants rely on the judgment of their Lordships of the Privy Council in *Alcocks Ashdown & Co. v. Chief Revenue Authority* (1), and on a decision of a Full Bench of the High Court of Madras in *Abdul Kadir & Co., In re* (2).

In the Privy Council case the question arose under the provision of S. 51, Income-tax Act of 1918, which provided that if in the course of any assessment under the Act or any proceeding connected therewith, other than a proceeding under Chap. 7, a question has arisen with reference to the interpretation of any of the provisions of the Act or of any rule thereunder the Chief Revenue authority "may," either on its own motion or on reference from any revenue officer subordinate to it, draw up a statement of the case and refer it with its own opinion thereon to the High Court, and "shall so refer" any such question on the application of the assessee, unless it is satisfied that the application is frivolous or that a reference is unnecessary. Their Lordships pointed out that under the latter part of that section if the assessee applies for a case the authority must state it, unless he can say that it is frivolous or unnecessary, and that it will be a misfeasance and a breach of the statutory duty if he does not do it. As for the earlier part they said that although the word "may" does not mean "shall," nevertheless there may be circumstances which couple with the power a duty to exercise it, and they held that supposing there was a serious point of law to be considered there did lie a duty upon the chief revenue authority to state a case for the opinion of the Court and that if he did not appreciate that there was such a serious point it is in the power of the Court to control him and to order him to state a case. It is to be noted, however, that there was in S. 51 no provision, similar to that of the present S. 66 (3) which gives the High Court express power to require the Commissioner of Income-tax to state a case and refer it and the intention of the legislature in amending the Act was doubtless to state expressly the conditions for the exercise of the power of the Court to require the Commissioner to state and refer a case.

The Madras case was decided under the present Act and was similar to the present case in that an order under S. 33 of the Act had been made by the Commissioner. In that case the learned Judges said that as to orders in review passed by the Commissioner under S. 33 there is nothing to operate upon except S. 66 (1) and the assessee has no remedy unless we hold that the Court has power to order the Commissioner to state a case embodying any point of law that may arise in the course of proceedings under S. 33. They went on to say that unless the Court had such power the result would be that the Commissioner by calling up the records under S. 33 would be in a position to burke any further enquiry whatever, that they did not think that that could have been intended, and that accordingly they hold that the principle of *Alcock's* case must be applied to orders under S. 33.

If that decision is correct, it settles the preliminary question which arises in the present case, but with all respect I suggest that it is not correct. Where the legislature has in a special Act laid down particular conditions for the exercise of a power by the Court, I do not think that we are justified in disregarding those conditions and holding by reference to a general Act that we have powers beyond those given in the special Act. I entirely agree that the Act is defective and needs amendment, but I do not think that for that reason we are justified in going beyond its express terms and holding that we have powers which the Act itself does not confer. I would therefore hold that in the circumstances of the present case we have no power under the Income-tax Act to require the Commissioner to state and refer the case, and that we are not entitled to have recourse to S. 45, Specific Relief Act, for that purpose. I would accordingly dismiss the application but in the circumstances I would make no order for costs.

Otter, J.—The short history of this case is that on 24th June 1927 the applicant firm having been served with a notice under S. 22 (2), Income-tax Act of 1922, returned an income of Rs. 16,826-8-0 from its business for the year 1927-28. On 30th June 1927 notice under Ss. 22

(1) A.I.R. 1923 P.C. 138=47 Bom. 742=50 I. A. 227 (P.C.).

(2) A.I.R. 1926 Mad. 1051=49 Mad. 725 (F.B.).

(4) and 23 (2) of the Act was served on the firm, and in response the agent appeared and produced certain account books of the firm. Upon examination, the books appeared to disclose large payments to two Chettyar firms. Upon enquiry as to the names and addresses of the persons to whom these payments were made, and although adjournments were granted to enable the information to be obtained, the Income-tax Officer was informed by the agent that he could not furnish the names and addresses required. Furthermore the Income-tax Officer had received information that two advances had been made by the firm, viz., Rs. 5,000 on a mortgage deed and another of Rs. 3,000 upon a pro-note. No entry in the books regarding either of these transactions appears in the books produced. For these reasons the Income-tax Officer came to the conclusion that the applicant firm were keeping two sets of account books, and that therefore they had not complied with the notice dated 30th June 1927 and he proceeded to assess the applicant firm under S. 23 (4) of the Act at Rs. 1,50,000. On an application under S. 27 of the Act the Income-tax Officer refused to cancel his assessment, and on appeal to the Assistant Commissioner the latter by an order of 10th March 1927 cancelled the assessment and ordered a fresh assessment to be made. Thereupon the Income-tax Officer re-assessed the applicant firm at Rs. 36,642.

On 12th June 1928 the Commissioner of Income-tax, Burma, called upon the applicant firm under S. 33 of the Act to show cause why the order of 10th March 1927 should not be set aside and the original assessment restored. By an order dated 7th July 1928 the Commissioner of Income-tax (after hearing the applicant firm) set aside the order of 10th March 1927 and restored the original assessment of Rs. 1,50,000. The applicant firm applied to the Commissioner of Income-tax to state a case for the opinion of this Court under S. 66 (2) or S. 66 (1) of the Act. This the Commissioner refused to do, and this Court is now asked to direct the Commissioner under S. 66 (3) of the Act, or under S. 45, Specific Relief Act read with S. 66 (1), Income-tax Act, to state a case for the consideration of this Court.

The first question arising is whether assuming a question of law arises, this Court has power to make the order asked for. It is now admitted that the application cannot be made under S. (2) of the Act, for this provision applies only to orders passed under Ss. 31 and 32 of the Act. It is said, however, that we can act under S. 45, Specific Relief Act read with S. 66 (1), Income-tax Act. It must be borne in mind that S. 66 of the present Income-tax Act takes the place of S. 51 of the Act of 1918, the latter section having been repealed by the present Act. S. 51 of the old Act was a general section which empowered the Chief Reuenue Authority "in the course of any assesssment . . . . or any proceedings" . . . . (other than a proceeding under Chap. 7 of that Act):

"to state a case upon a question with reference to the interpretation of any of the provisions of the Act . . . . and shall so refer any such question on the application of an assessee unless it is satisfied that it is frivolous or vexatious."

Section 66 of the present Act is different. By sub-S. (1) it is provided that if in the course of any assessment under the Act . . . . a questiou of law arises, the Commissioner may either on his own motion or on reference from an Income-tax authority draw up a statement of the case to refer it to the High Court.

Sub-Section 2 provides that:

"within one month . . . . the assessee . . . . may require the Commissioner to refer any question of law arising out of such order . . . . to refer it . . . . to the High Court."

Sub-Section 3 gives an assessee the right upon a refusal by the Commissioner under sub-S. 2 to apply to the High Court and this Court may require the Commissioner to state a case. Thus so far as S. 66 as it stands alone is concerned an assessee can only get a case stated where an order was passed under S. 31 or S. 32 of the Act.

It is said, however, that by virtue of S. 45, Specific Relief Act read with sub-S. 1, S. 66, Income-tax Act, we have power to order the Commissioner to state a case in respect of an order under S. 33 of the Act and a number of cases were cited before us.

Alcock, Ashdown & Co., Ltd. v. *Chief Revenue Authority of Bombay* (1), was a case decided by the Privy Council under the old S. 51 and upon the wording of that section it was held to be

the duty of the revenue authority to state a case where a serious question of law arises, the reason being that though the subsection was not mandatory upon the revenue authority there may be circumstances which would couple with the power given by the statute a duty to exercise it.

Trikamji Diwan Das v. *Commr. of Income-tax, Bihar & Orissa* (3) arose under the present Act. A Bench of the Patna High Court had directed the Commissioner to state a case under S. 66 (1) of the Act on the application of an assessee. The matter came before the Chief Justice and another Judge of that Court and the Chief Justice in his judgment expressed grave doubt whether the Commissioner could have been so directed and pointed out that in the Bombay case of *Alcock, Ashdown & Co., Ltd.* (1) it was necessary to invoke S. 45, Specific Relief Act. But as the matter was before the Court it was dealt with and the assessee's application was dismissed upon the facts. I would observe that neither of these cases is an authority for the proposition argued before us. The first was decided under old S. 51, and the remark by the Chief Justice in the second was obiter. *In re Abdul Kadir & Co.* (2) was also cited. There (in a case arising under S. 33) and relying on *Alcock, Ashdown & Co. Ltd.* (1) a Full Bench of the Madras High Court held that it could not have been intended by the legislature to allow a Commissioner who takes action under S. 33 to escape any further enquiry. It was not argued, so far as the report discloses, that as the wording of S. 66 (1) makes no mention of an assessee the *Alcock Ashdown* case (1) should be distinguished. An obiter dictum of the Calcutta High Court was relied on to the effect that in a case and upon a properly constituted application, under S. 45, Specific Relief act, the High Court might possibly pass an order such as is asked for in the present case: see *Sarat Kumar Roy* v. *Commr. of Income-tax, Bengal* (4). Two other cases were cited where applications under S. 66 (1) of the Act were refused. In neither of these was S. 45, Specific Relief Act relied on: *Sin Seng Hin* v. *Commr. of Income-tax, Burma* (5) and *Ratanchand Khimchand Motishaw* v. *Commr. of Income-tax, Bombay* (6). In considering whether S. 45, Specific Relief Act, can assist the applicant it is necessary to consider the provisions of that section. Sub-S. (b) of that section is as follows:

> "that such doing or forbearing is, under any law for the time being in force, clearly incumbent on such person or Court in his or its public character, or on such corporation in its corporate character."

Under S. 51 of the old Act (as the Privy Council held) it was incumbent upon the revenue authority in a proper case to state a case for the opinion of the High Court upon the application of an assessee. But, as the late Chief Justice of this Court said in *Sin Seng Hin's* case (5):

> "there is no provision permitting an assessee to move the High Court in respect of an order under S. 33 of the present Act."

It is perfectly true that the case of *Abdul Kadir & Co.*, (2) is in favour of applicant's contention, and moreover that as that Court thought cases of apparent hardship might arise. The learned Judges of the Madras High Court seem to have been under the impression that somewhere or other there is now a provision giving an assessee the right to ask for a case other than under S. 66 (2) of the Act. The learned Chief Justice (at p. 727) says:

> "that Court is asked to draw the inference that the power of the High Court was meant to be confined to cases under those sections (i. e., Ss. 31—32), and was by implication taken away in the case of orders under S. 33."

He does not go on to say however by virtue of what law, the right of an assessee to get such a case stated, exists.

This is not one of those cases where a statute has enacted something for a particular case only, that was already and more widely the law. In such cases it would be useless to argue that an intention to alter the general law is to be inferred from the partial or limited enactment. Here S. 51 of the Act which contained the whole law on the subject was repealed and after the decision in *Alcock, Ashdown & Co., Ltd.* (1) by the Judicial Committee the legislature enacts in plain terms what the law is. There is now no other law. The position would be different if an assessee were mentioned in sub-S. 1,

(3) A. I. R. 1925 Pat. 352=4 Pat 224.
(4) 2 Income-tax Cases 279.
(5) 2 Income-tax Cases. 39.
(6) 2 Income-tax Cases 225.

S. 66. Then it might be said that "some law would be in force" within the meaning of S. 45 (b), Specific Relief Act, and the applicant might pray in aid that enactment to obtain a case. For these reasons I think that in the present case this Court has no jurisdiction to entertain the application. It is unnecessary therefore to consider the merits of the application which must be dismissed but without costs.

P.N./R.K. *Application dismissed.*

A. I. R. 1930 Rangoon 41

BROWN, J.

Ko Tha Lin Bwin and *another*—Appellants.

v.

Ko Hla Kye and *another*—Respondents.

Second Appeal No. 74 of 1929, Decided on 12th November 1929.

Limitation Act, S. 5—Appeal lying against ex parte decree—Time taken to set aside decree and prepare appeal against order rejecting application to set aside cannot be excluded in computing period for appeal.

Where an appeal lies against the ex parte decree, the time taken by the party in applying for setting aside the ex parte decree and in preparing an appeal against the order refusing to set it aside cannot be excluded in computing the period of limitation for appeal against the main ex parte decree : 1 *L. B. R.* 313 ; *A. I. R.* 1916 *P. C.* 96 and 21 *P. R.* 1904, *Dist.*; 23 *Cal.* 325, *Ref.* [P 42 C 1]

J. C. Ray—for Appellants.

R. C. Banerji—for Respondents.

Judgment.—The respondents brought a suit in the Sub-Divisional Court of Myaungmya for a mortgage decree and a decree was passed in their favour of 5th June 1928. The appellants filed an appeal against this decree in the District Court on the 8th January 1929. The appeal was rejected by the District Court as time barred.

It is perfectly clear that on the face of it the appeal was hopelessly time-barred. The present appellants have nevertheless appealed against the decision of the District Court on the ground that after the passing of the decree appealed from they took steps to have the decree set aside as an ex parte decree. It is claimed that the time taken occupied by them in the proceedings for setting aside the ex parte decree should be excluded from the period to be counted for the purpose of limitation.

The provisions of S. 14, Lim. Act, cannot be held to apply, but the contention is that the appeal should have been admitted under the provision of S. 5, Lim. Act. It has been held in certain cases that the period occupied in applying for a review of judgment can be excluded from the period of limitation when an appeal is filed against the decree that was previously sought to be reviewed. It was held, however, that in the case of *Maung Po Lu* v. *Maung Kyin* (1) that there was no rigid rule under which such an allowance of time should be made as a matter of course and in this case we have not the question of review to consider, nor is this a case in which the appellant has asked the Court to exclude only the time bona fide taken by him in attacking the decree in the trial Court. He first of all came up to the District Court in appeal against the order of the trial Court, refusing to set aside the decree and when that appeal was unsuccessful he filed the appeal against the original decree. The proceedings for setting aside the decree in the trial Court occupied one day only and it would not therefore help the appellant in the least if he were entitled to exclude this time only.

In the case of *Nrityamoni Dasi* v. *Lakhan Chandra Sen* (2) it was held that the rights of certain plaintiffs had remained in suspense whilst they were previously bona fide litigating for their rights in a Court of justice and could be excluded from the period of limitation provided for the bringing of a subsequent suit. That case does not seem to help us much here. There can be no question here of the suspense of the appellant's rights. Their right of appeal againt the decree was never in suspense. It was always open to them to appeal whatever steps they may have been taking to set aside the original decree. If they had actually succeeded in having the original decree set aside on the ground of its being paseed ex parte, the question of the suspense of the right of appeal might have arisen, but it has not in fact as yet arisen.

In the case of *Maharaj Narain* v. *Mt. Banoji* (3), an appellant was allowed to exclude time bona fide taken by him in attempting to have an ex parte decree set aside, but there was no suggestion in

(1) [1905] 1 L. B. R. 313.
(2) A. I. R. 1916 P. C. 96=43 Cal. 660 (P.C.).
(3) [1904] 21 P. R. 1904=145 P. L. R. 1904.

that case of his being allowed to exclude not only the time taken by him in the trial Court but also the time taken by him in appealing against the trial Court's orders, nor do I know of any authority for such a view of the law.

In the case of *Ardha Chandra Rai* v. *Matangini Dassi* (4) a decree had been passed against the petitioner. The petitioner applied to have the decree set aside, but after taking evidence the Judge rejected the application. The petitioner then appealed to the High Court from the order refusing to entertain his application to reopen the case and his appeal failed. He then appealed to the High Court against the original decree, and it was claimed on his behalf that he should be allowed to exclude from consideration for the purpose of limitation the period during which he was prosecuting his application to set aside the decree. This claim was not upheld. The circumstances of that case seem to be similar to the circumstances of the present case. It is true that in the Calcutta case the application to set aside the decree as an ex parte one was heard on the merits, whereas in this case the trial Judge rejected the application without considering the merits at all. I am to-day, however, passing orders in revision setting aside this order of the trial Judge, and directing that the application to set aside the order as ex parte shall be considered on its merits. In the circumstances I can see no reason for holding that the appellant was prevented by sufficient cause from filing his appeal in the District Court within the time allowed by the Limitation Act. When the trial Court refused to reopen the case, the appellant had a double remedy open to him. He could appeal against the actual decree and he could appeal against the order refusing to set it aside. Both appeals lay to the District Court, and there was nothing whatever to prevent his prosecuting the two appeals at the same time. I do not consider that sufficient cause has been shown for interfering with the finding of the District Court that the appellants are not entitled to the benefit of S. 5, Lim. Act.

This appeal must therefore be dismissed with costs.

V.B./R.K. —— *Appeal dismissed.*

(4) [1896] 23 Cal. 325.

A. I. R. 1930 Rangoon 42

CHARI AND BROWN, JJ.

Leong Hone Waing—Appellant.

v.

Leon Ah Foon & others—Respondents.

First Appeal No. 245 of 1928, Decided on 13th June 1929.

(a) Succession Act (39 of 1925), S. 61—Mere preference of one heir managing estate to another is not undue influence.

Mere disinheriting one heir and preference of other, who was actively concerned with the management of the estate of the deceased testator is not enough to establish a case of undue influence as regards the execution of a will: 38 *Cal.* 355 (*P. C.*), *Ref.* [P 44 C 1]

(b) Evidence Act, Ss. 11 (2), 14 and 21 (2)—Declaration of religion in formal documents is relevant admission when religion of deceased person is fact in issue.

Where the religion of a deceased person is a fact in issue, any solemn declaration made by him as to his religion is relevant and if such a declaration is made in a formal document for example in his will, it is relevant as an admission under the provisions of S. 11 (2), 14 and 21 (2) and is entitled to very great weight in deciding the question: 34 *All.* 341, *Expl.* and *Dist.*; 9 *L. B. R.* 179, *Ref.* [P 45 C 1]

(c) Succession Act (1925), S. 58—Scope.

The provision regarding succession contained in part 4 applies to the estates of confucians.

Moore & *N.N. Burjorjee*—for Appellant.

Sutherland, *N. M. Cowasjee* and *Kyaw Zan*—for Respondents.

Judgment.— The appellant Maung Maung alias Leong Hone Waing filed a suit in the District Court of Amherst for the administration of the estate of his grandfather Leong Chye deceased. The first two defendants are Leong Ah Foon and Leong Ah Choy, the only surviving sons of the deceased. The other defendants are the representatives of the other two sons of the deceased. Maung Maung claims to have been adopted as the son of Leong Ah Waing, a son of Leong Chye, who died many years ago. Shortly before his death, Leong Chye executed a will and also executed two deeds of gift, whereby he transferred a large portion of his property to defendant 2 Leong Ah Choy, and in the will he made Leong Ah Choy his sole heir. His other son, Leong Ah Foon, obtained nothing under the will, and the grandchildren and other heirs are given legacies of Rs, 1,000 each. In the plaint it is claimed that at the time of the execution of the will and of the deeds of gift Leong Chye, by reason of mental incapacity and old age, was under the dominance of Leong Choy, and that the execution of the deed was

obtained by undue influence on the part of Ah Choy. The will was duly admitted to probate after Leong Chye's death and the present suit was not filed until July 1927, that is over eight years after his death. It is claimed on behalf of the plaintiff that even if Leong Chye did make the will and was not induced to do so by undue influence, nevertheles the will is invalid, because under the Chinese Customary Law he is not competent to make it. Ah Choy entirely denies that there was any undue influence in connexion with the making of the will. He contends that his father was a Confucian by religion and that therefore under the Succession Act he had fully capacity to make the will. It has further been argued on his behalf that, even if the Court should hold that Leong Chye was a Buddhist, nevertheless a Chinese Buddhist is able to make a will and his powers in that respect are unrestricted. A number of issues were framed and evidence was recorded at some length. The trial Judge found as a fact that the will was a genuine will and that neither the will nor the deeds are liable to be set aside on the ground of undue influence. He further found that Leong Chye was a Confucian and not Buddhist at his death. He therefore dismissed the suit. It is against this order of dismissal that the present appeal is filed.

The question of the power to make a will is dealt with in part 4, Succession Act. S. 58 excepts from the operation of this part succession to the property of any Hindu, Buddhist, Sikh or Jaina, but lays down that save as so provided or by any other law for the time being in force, the provisions of this part shall constitute the law of British India applicable to all cases of testamentary succession. It is not suggested that the deceased was a Hindu, Sikh or Jaina; nor is there any other law in force with regard to the estates of Confucians. Unless therefore it can be shown that the deceased was a Buddhist, the provisions of this part of the Act will apply to the estate of Leong Chye. If then the finding of the trial Judge on the two main questions of fact are correct, the suit was rightly dismissed.

The first question, that of undue influence, raises no difficulty. The matter has been argued at considerable length before us but in our opinion the plaintiff has entirely failed to prove that there was any undue influence exercised over Leong Chye when he made the will or the two gifts. Leong Chye died on 21st May 1919. The will and the first deed of gift are dated 2nd April 1919. The second deed of gift is dated 7th May. Leong Chye was admittedly an old man when he died, probably about 78 years of age. But there is practically no evidence to show that his mental capacity was in any way impaired, except that of the plaintiff Maung Maung and of his first witness Hone Kyan. Hone Kyan is the son of Ah Foon, the eldest son of Leong Chye, and is therefore a highly interested witness. Further owing to the unsatisfactory nature of his answers to certain questions relating to his visit to Moulmein shortly before Leong Chye's death, the trial Judge, who examined him, considered him to be an untrustworthy witness. Both these witnesses depose to Leong Chye's mind being affected before his death. But their evidence on this point is entirely unsupported by any independent evidence of any kind. On the other side we have the evidence of U Shwe Thwin and Dr. Kanga. U Shwe Thwin is a well-known advocate of this Court, who has practised in the Courts of Moulmein since the year 1878. He has recently borrowed money from Ah Choy, but we can see no reason whatsoever for not accepting him as a trustworthy and reliable witness. He and the other partners of his firm had been Leong Chye's legal advisers for many years. He says that he was called in by Leong Chye to draw all three disputed deeds. About the will and the first deed of gift, Exs. D and E, he received instructions within a week of their execution. Leong Chye himself gave him the instructions, and the witness states:

> "There is no truth in the suggestion that Leong Chye was not in a sound state of mind when he executed the three abovementioned documents. Leong Chye was quite in his right senses when he gave me instructions in connexion with Exs. D, E and F and also when he executed them. As far as I know Ah Choy did not use any influence over Leong Chye to get him to execute these three documents."

Exhibit F is the second deed of gift, for which also U Shwe Thwin says Leong Chye gave him instructions. His evidence is supported by that of Dr.

Kanga who is a medical practitioner who has been practising in Moulmein for 25 years. He treated Leong Chye in his last illness up to 14th April. He witnessed the execution of all three deeds and says that the state of Leong Chye's mind at the time was perfectly sound and that if he had the slightest doubt as to the condition of Leong Chye's mind he should certainly not have put his signature on those documents.

The will, it is sought to upset, entirely disinherits the eldest son and gives the whole estate to Ah Choy and many years before Leong Chye's death Ah Choy had been managing his business. It has been suggested that these facts alone are sufficient to throw the burden on Ah Choy to shew that there was no undue influence. We are unable to agree with this contention. The principles approved by their Lordships of the Privy Council in the case of *Bur Singh* v. *Uttam Singh* (1) show that considerably more than this is required to establish a prima facie case of undue influence. But even if the contention were correct and the burden were shifted on to Ah Choy to show that Leong Chye had executed the documents of his own free will and without any undue influence on the part of Ah Chye, we should have no hesitation in holding that Ah Choy has discharged that burden. We are in entire agreement with the trial Judge that neither the deeds of gift nor the will can be set aside on these grounds.

The second question which was decided by the trial Court in favour of Ah Choy presents greater difficulty. In his will dated 2nd April 1919 the following recital occurs:

"I am the son of Leong Ah Shi, alias Foong Hong and his wife Chin Shi, who were both followers of Confucius in the Sanning District of the province of Canton, and I was brought up in the faith of my parents. I have always strictly conformed to my duty as regards ancestral rites and forms of worship and I hereby declare that I am a follower of Confucius."

Two earlier wills of Leong Chye have been proved, one dated in the year 1910 and the other dated in the year 1914. Under both of these wills Ah Choy is made the sole heir, and both of them contain a declaration as to the religion of the testator similar to the declaration in the last will. It has been argued before us that these statements in the two wills are not admissible in evidence for the purpose of proving the deceased's religion. We have been referred to certain rulings to the effect that recitals in deeds cannot themselves be relied upon for the purpose of proving the assertions of fact which they contain. We do not think, however, that the cases cited are of any assistance in dealing with the present case. What we have to decide is not whether a recital in a deed as to any specific fact can ordinarily be admitted in evidence, but whether the statement of a dead man recorded in the form of document as to his religion is admissible for the purpose of proving what that religion is.

The fact in issue in the present case is the religion of the deceased. It is asserted by the appellant that he was a Buddhist within the meaning of the Succession Act, and this is denied by the respondent. Buddhism is not a religion which requires any specific ceremony or public profession of faith for its adherents, and the question as to whether a man is a Buddhist or not can only be decided by considering his professions and his conduct during his lifetime. If it is shown that his profession of faith and his conduct are such as to justify an inference that he is a Buddhist, then the case of his status is made out, and in deciding on this point it seems to us quite impossible to disregard a solemn profession of faith made in formal documents. It is contended that the statements in question are not such statements as would be admissible under S. 32, Evidence Act. That is quite correct. But in our opinion the statements in question are admissible, because the statements themselves are relevant facts independently of S. 32. S. 14, Evidence Act lays down that facts showing the existence of any state of mind—such as intention, knowledge, good faith, negligence, rashness, ill-will or good-will towards any particular person, or showing the existence of any state of body or bodily feeling—are relevant, when the existence of any such state of mind, or body, or bodily feeling, is in issue or relevant. In Para. 580, Vol. 1, Taylor on Evidence, the following passage occurs:—

"Whenever the bodily or mental feelings of an individual are material to be proved, the

(1) [1910] 38 Cal. 355=9 I. C. 33=38 I. A. 13 (P C.).

usual expressions of such feelings, made at the time in question, are also original evidence. If they were the natural language of the affection, whether of body or mind, they furnish satisfactory evidence, and often the only proof of its existence. And the question whether they were real, or feigned, is for the jury to determine."

It is quite obvious that the mental feelings of the deceased are highly relevant to the question of his religion, and the expressions of these feelings in a formal manner are to our mind valuable evidence as to their existence. The Evidence Act is founded on the law of Evidence in England, and in our opinion, if under no other section, the statements in question would be relevant under S. 11 (2) of the Act. It is true that in the case of *Bela Ram* v. *Mahabir Singh* (2) it was laid down in general terms that if the terms of a deposition made by a person since deceased do not fall within the provisions of S. 32, Evidence Act, 1872, the provisions of S. 11 of the Act will not avail to make such deposition evidence. With this general statement of the law as applicable to ordinary circumstances we are in entire agreement. In that case the evidence sought to be admitted was evidence of statements of certain persons as to the date of death not very long after the death of the person, that is to say, they were statements not as to the condition of mental or bodily feelings of the person made at the time in question but as to outside facts which they could perceive by their senses. But in the present case the statements that are sought to be proved are statements as to the actual state of mind of the person making them, and as we have indicated, the only proof that could be given as to whether a man is a Buddhist consists of evidence of his public profession either by conduct or word of mouth. For these reasons we consider that any solemn declaration made by the deceased as to his religion would be relevant, and in this case the declaration was accompanied in each instance by the making of a will and therefore would be relevant as an admission under the provisions of S. 21 (2), Evidence Act. We are of opinion that the statements in the will in question are not only relevant and admissible in evidence but that they are entitled to very great weight indeed in the decision of the question before us. In the case of *Kyin Wet Ma Gyok* (3) the question for decision was whether a certain Chinaman was a Buddhist. Extracts from certain works on Chinese religion were cited, from which it appears that a Chinaman can be and very often is a Confucian Taoist and Buddhist at the same time. But it is certainly not laid down in that ruling nor could it be possibly maintained that every Chinaman is a Buddhist and where in this case we have a Chinaman who has made a formal profession of his religion as that of Confucius, there must be clear evidence before us to prove that he was a Buddhist as well before we can accept his status as a Buddhist. In the case in question it is suggested that on enquiring whether a particular Chinaman is a Buddhist or not, one of the questions might well be whether he worships Kuan Yin. Kuan Yin is a Goddss or Bodhisat, who plays a very prominent part in Chinese Buddhism, and receives probably more general reverence than any other Buddhist Gods or Saint in China.

A considerable amount of evidence has been adduced in this case on the question whether the deceased Leong Chye did or did not worship Kuan Yin. Leong Chye was a Chinaman born in China, who came to Burma, only after he was grown up. He was educated in China, and it is proved by the evidence of the witness Ah She Shoke and the statement of the plaintiff's witnes Chin Shi (1) that Leong Chye and his people in China were Confucian. Chin Shi (1) adds in re-examination that Leong Chye and his people in China worshipped Kuan I and Kuan Yin, but there is no satisfactory evidence that he really professed Buddhism in any way when he was in China. In Moulmein he married a Chinese wife who was admittedly a Buddhist. It is admitted that in the house in which they lived for many years there was in one part a Chinese God and in another part a Burmese Nyaung ye O Zin. The plaintiff has attempted to prove that the Chinese altar contained in it an image of Kuan Yin. But in this, in our opinion, he has failed. The principal witnesses on this point are Maung Maung and Hone Kyan who

(2) [1912] 34 All. 341=14 I. C. 116=9 A.L.J. 351.

(3) [1918] 9 L. B. R. 179=47 I. C. 148=12 Bur. L. T. 21.

were highly interested and whose evidence we have entirely discredited on the question of Leong Chye's state of mind before his death. Their evidence receives some corroboration from that of Ah Foon and the two Chin Shis, but there is no independent evidence in their favour on the point at all. Ah Choy says there was no image of Kuan Yin in the house at all, and he is supported by his witness Ah Shi Shoke who has no interest in the case. We do not consider that on this point the plaintiff has established that Leong Chye worshipped Kuan Yin in his house. It was admitted that Leong Chye was accustomed to worship at two Chinese temples in Moulmein, one a Cantonese temple and the other a Sinhein temple. The Cantonese temple includes, amongst other images, an image of Kuan Yin. and there is evidence that the deceased had at times, worshipped in that temple before Kuan Yin. It appears that the witnesses who give evidence on this point are testifying to what he did on public festival days, and we have it in evidence from the plaintiff's own witnesses that it is the custom of all Chinese people to worship before all the images on such days, whatever their own religion may be. In the Sinhein temple there is an altar of Kuan Yin with an inscription :

"In the year of Kee Hoy of Kong Swee presented by Leong Yaik Lee."

It is suggested that this image must have been presented by Leong Chye himself. According to Ah Choy "Leong Yaik Lee" is the firm name of Leong Chye's business. There is no direct evidence as to how or when this altar was presented. It is probable that the money for this altar was provided by Leong Chye, but we do not think that this carries us very far. Leong Chye himself had a number of Buddhist employees and the mere fact that many years before his death he was willing on their behalf to make a donation for the purpose of providing a Buddhist altar does not prove that he himself professed the Buddhist faith. We do not consider that the evidence that has been adduced in this case really establishes that Leong Chye worshipped Kuan Yin at all, or if he did worship Kuan Yin he only joined in such acts of worship as were common to all the other Chinese Communities who attended this temple whatever their religion.

The other principal points relied on to prove that Leong Chye was a Buddhist are connected with (1) the inscription on a tazaung in Moulmein, (2) the giving of land by going through a libation ceremony for the purpose of building a pongyi kyaung, (3) the shinbyuing of his three grandsons by Ah Choy. and (4) the issue of certain invitations on the death of Leong Chye's wife and on his own death. As regards the tazaung the present inscription reads :

"Leong Chye and Daw Hlaing's son Maung Ah Choy and his wife Ma Maw Nwi do make this offering,"

and the date is given as the year 1257. Admittedly Ah Choy was not married till about 1900, that would be about the year 1262, and it has been suggested that originally the inscription must have shown Leong Chye and Daw Hlaing alone as the donors. It is amply proved that many years before his death Leong Chye quarrelled with his eldest son Ah Foon, and it may be that Maung Ah Choy and his wife Ma Maw Nwi were then substituted in place of Ah Foon's name. We do not see how we can presume that at any time this tazaung was the gift of Leong Chye and Daw Hlaing. But even if they did make this gift, that in itself would be of very meagre value to show that Leong Chye was professing Buddhism. As we have said Daw Hlaing was admittedly a Buddhist. It is claimed that Leong Chye was also a Buddhist, but it is not claimed that he was a Burman Buddhist, or that he ever attended Burman Buddhist Pagodas, and the gift by him to the Burman Buddhists would, therefore, by itself indicate anything more than that he was tolerant of and kindly disposed to the religion of his wife. The same remarks would apply to the gifts of the land . the building of the Pagoda. The evidence is to the effect that the builder of the Pagoda first of all purchased the land from Ah Foon for only Rs. 200 less than the actual value, and that on Leong Chye's hearing of it he himself paid the balance of the purchase price. It is further in evidence that he made over the land by going through a cere-

mony of libation of water. The pouring of water is a long established custom in parts of India, signifying the transfer of ownership of land, and we do not think that the fact that Leong Chye agreed to pour out water on this particular occasion really indicates that he was a Buddhist. The next item, on which the plaintiff relies, is the shinbyuing of his grandsons by Ah Choy, and might be valuable evidence, if the question before us were the religion of Ah Choy. But that is not the question we have to decide. As Ah Choy's mother was admittedly a Buddhist, it would not be of any great help in this case if it were established that Ah Choy was a Buddhist.

Of Exs. A and B, Ex. A and invitation to Daw Hlaing's funeral ceremony were printed in Burmese. It is said that various religions ceremonies took place at the ceremony. As Daw Hlaing herself was a Buddhist, it would be natural for such ceremonies to take place. Ex. B purports to be an invitation sent out by Leong Chye's children to Leong Chye's funeral, and the invitation specifically mentions that certain Buddhist religious ceremonies will take place. Ah Choy says he knows nothing of this, But even if he did, it would not have been of great help to us in establishing the religion of Leong Chye. It would not be unnatural for Daw Hlaing's children to show reverence to her religion on their father's death. There seems to be no doubt that whatever Buddhist ceremonies may have been performed, there was a large Chinese gathering in which Chinese ceremonies did take place.

That is practically all the evidence that has been adduced to show that Leong Chye was a Buddhist, and it seems to us to be inadequate for the purpose. There is no definition of the word "Buddhist" in the Succession Act, and the word is wide enough to cover Chinese Budbhists as well as Burman Buddhists. But before it can be claimed that any person is excluded from the provisions of part 6 of that Act as being a Buddhist, it must clearly be proved that he was professing Buddhism during his lifetime. In China the three religions of Buddhism, Taoism, Confucianism are largely observed, and in many cases the same person appears to profess all three religions. But in their origins the religions are not related, and amongst the educated class of Chinese Confucianism appears to be the chief religion. It may be that many Confucians are tolerant towards certain aspects of the two other religions which have so long played such a large part in China. Something more than a mere tolerance would be required to prove that a Chinaman who was formally professing himself to be a Confucian was also a Buddhist, and that evidence seems to us to be lacking in the present case. We are of opinion that the learned District Judge is right in holding that it has not been proved that the deceased Leong Chye was a Buddhist on his death.

The result is that we confirm the decree of the District Court and dismiss this appeal with costs. This appeal has been supported by the defendant respondent Ah Foon. His learned counsel supplemented the arguments advanced on behalf of the appellant at considerable length. In these circumstances we direct that Ah Choy's costs in this appeal be borne jointly by the appellant Maung Maung and the respondent Ah Foon.

V.B./R.K. *Appeal dismissed.*

* A. I. R. 1930 Rangoon 47

RUTLEDGE, C. J. AND BROWN, J.

H. N. Oppenheimer—Appellant.

v.

M.E. Moolla & Sons Ltd.—Respondents.

Civil Misc. Appeal No. 181 of 1928

Decided on 24th April 1929.

*** Companies Act, S. 229—Company in compulsory liquidation — Secured creditor exhausting his security—As regards balance he should confine his claim to the interest up to winding up only—Interest after that date cannot be included—Pres. Towns Ins. Act S. 49 and Sch. 2, Rr. 20 and 23.**

In compulsory liquidation of an insolvent company a secured creditor after having exhausted his security cannot, in proving as regards the balance of his debt unsatisfied, include interest after the date of his winding up order. A secured creditor in the case of a liquidation is on the same footing as in that of insolvency proceedings and so far as the unsecured portion of his debt is concerned the provisions of the Insolvency Act generally do not suggest any intention of putting secured creditor on the more favourable footing than unsecured: *In re, Savin* 7 *Ch.* 760; *A. I. R.* 1922 *Lah.* 281, *Ref.* and *A. I. R.* 1930 *Rang.* 20, *Affirmed.* [P 48 C 1, 2]

Hay—for Appellant.

Leach—for Respondents.

Rutledge, C. J.—The only point for decision in this appeal is whether the learned trial Judge was right in holding that in compulsory liquidation a secured creditor after having exhausted his security cannot in proving as regards the balance of his debt unsatisfied include interest after the date of the winding up order. Admittedly this is in accordance with English decisions : *In re Savin* (1) and in *In re London Windsor and Greenwich Hotels Co.* (2). The point does not seem to be coverd by authorities in the Indian Courts. The following remarks of Mr. Justice Broadway in *Ram Chand* v. *Bank of Upper India* (3), supports the view taken by the learned trial Judge :

"So far as possible the rules of bankruptcy have been held applicable to liquidation matters. When a company goes into liquidation, a secured creditor may realise his security and prove for any balance there may be outstanding. If he realises his security and has to prove for a balance, the remaining assets of the company would only be liable for such principal and interest as was due on the date of the winding-up order. A secured creditor in the case of a liquidation is on the same footing as in that of insolvency proceedings. He may if he chooses disregard the liquidation proceedings and proceed against his security and that is the position taken up by the Bank in the present case."

The last sentence shows that the passage quoted was not necessary for the decision arrived at, yet I consider that it is a clear and correct statement of the law in India as well as England. In some matters the legislation of India departs a long way from that of England. As regards Company Law and Insolvency, India has closely imitated English precedents. Consequently English decisions must carry great respect and weight. If it were intended to depart from the English rule on this question one would have expected words in S. 229, Companies Act, to indicate this and not a close following of meaning of S. 206, English Act of 1908. For these reasons I see no reason to differ with the decision of the learned trial Judge. The appeal accordingly fails and must be dismissed with costs, five gold mohurs to come out of the estate.

Brown, J.—I agree. The provisions of R. 20, Sch. 2 to the Presidency Towns Insolvency Act might at first appear to be against this view. That section deals with the sale of mortgaged property by a secured creditor and states that the moneys arising from the sale shall be applied firstly in payment of costs and similar charges :

"and in the next place in payment and satisfaction, so far as the same extend, of what shall be found due to such mortgagee, for principal, interest and costs, and the surplus of the sale moneys (if any) shall then be paid to the Official Assignee. But if moneys to arise from such sale are insufficient to pay and satisfy what is so found due to such mortgagee, then he shall be entitled to prove as a creditor for such deficiency, and receive dividends thereon rateably with the other creditors."

If this rule stood by itself, it would seem to me clearly to indicate that the secured creditor was entitled to prove for the difference between the amount realised and the amount of his debt with interest up to the date of sale, but this seems to be opposed to other provisions of the Act and Rules. R. 23 of the same Schedule contemplates the allowing of interest to ordinary creditors only up to the date of the adjudication, and under the provisions of S. 49, Cls. 5 and 6 of the Act :

"Subject to the provisions of this Act, all debts proved in insolvency shall be paid rateably according to the amounts of such debts respectively and without any preference."

Where there is any surplus after payment of the foregoing debts, it shall be applied in payment of interest from the date on which the debtor is adjudged an insolvent at the rate of six per cent per annum on all debts proved in the insolvency."

This rule clearly could not be observed in the case of a secured creditor, who has proved for the balance after realising his security, if he has already been allowed to prove for interest at the mortgage rate long after the date of insolvency. I think it must be held that the intention of the legislature was in this matter to follow the Company and Insolvency Law of England and to lay down the general principle that unsecured creditors should in the first instance claim interest only up to the date of insolvency or of winding up, as the case may be. So far as the unsecured portion of their debts is concerned, the provisions of the Act generally do not suggest any intention of putting secured creditors on a more favourable footing than unsecured. For these reasons, I agree that the appeal must fail and be dismissed with costs, five gold mohurs to come out of the estate.

P.N./R.K. *Appeal dismissed.*

(1) [1872] 7 Ch. 760=42 L. J. B. K. 14=20 W. R. 1027=27 L. T 466.
(2) [1892] 1 Ch. 639.
(3) A. I. R. 1922 Lah. 281=3 Lah. 59.

A. I. R. 1930 Rangoon 49

BAGULEY, J.

Maung San Myin—Applicant.

v.

Emperor

Criminal Revn. No. 100-B of 1929, Decided on 5th August 1929, against order of Sub-Divisional Magistrate. Amarapura, in Criminal Trial No. 14 of 1929.

(a) Burma Excise Act (5 of 1917), Ss. 53 54, 55, 56—Excise Officer is not police officer and admission to him is admissible—Evidence Act S. 25.

Although under Burma Excise Act 5 of 1917 an Excise Officer has power of arrest, search and granting bail he is not a police officer and an admission made to him is admissible in evidence: (1907-9) *U. B. R.* 1, *Held no longer good law.* [P 50 C 1]

(b) Opium Act(1 of 1878),Ss. 14,15 and 16 —Ss.14,15 and 16 make provisions of Criminal P.C. as regards search applicable to searches and not seizures.

Under Ss. 14, 15, and 16 it is only search that has to be carried out in accordance with the rules for searches under Criminal P. C., and the rules have no bearing on seizures. [P 50 C 1]

(c) Criminal Trial—Although search be illegal, conviction for possession of object constituting offence is not illegal.

Although a search made in person's house may be illegal rendering the person who made the search liable to be sued for damages, still if some property is found, possession of which is an offence the person in unlawful possession is liable to be convicted : 4 *L. B. R.* 121, *Ref; A. I. R.* 1925 *Rang.* 205, *Diss. from.* [P 50 C 2]

Judgment.—The applicant has been convicted under S. 9 (c), Opium Act, by the Sub-Divisional Magistrate, Amarapura, and his appeal having been dismissed by the Additional Sessions Judge, Mandalay, he now comes to this Court in revision. The case against him is that certain Excise Officers having received information that he had opium to dispose of, arranged by means of emissaries to buy the opium from him through a dummy purchaser. The first attempt to arrange a meeting between the accused and the dummy purchaser proved abortive. The next night the dummy purchaser was sent out in a car to wait near the Myitnge railway bridge, Excise Officers remained in hiding close by, and it was arranged that as soon as events proceeded far enough to warrant a rush, the lights of the car were to be switched on. The two emissaries were sent off to bring the accused to the spot with the opium. After waiting for some time one of these men came to the car with the accused, and purchaser asked whether he had a sample of the opium with him. This was produced and the purchaser said he would pay and told the driver to switch on his lights. On the lights being switched on the two Excise Inspectors who were in hiding close by rushed up, a Sub-Inspector of Excise who had been standing close to the car disclosed himself, and the accused was arrested. On asking him where the opium was he stated that it was in a boat in the river close by; so the Inspectors went down to the boat. As they arrived a man who was in the boat threw four tins overboard and followed them into the river himself and got away. The tins were recovered from the water and found to contain opium. In the boat were found a gun and a cartridge-belt belonging to the accused; and it is said that when arrested the accused said that he had brought evil on himself as he had intended it to others, having intended to sell the opium first and then arrest the purchaser.

The evidence in support of the case, as I have pointed out above, consists of the statement the two Excise Inspector, of the statements of the ward headman, whom they took with them as a witness, the statements of the two emissaries who were sent out to bring the accused with the opium to the spot, and the statement of Maung Su, the taxi owner. (His Lordships after discussing the evidence of the Crown and the defence continued as follows) : It has been argued that an admission made to an Excise Officer is not admissible : for this there is direct authority in *V. R. Venkataraman* v. *Emperor* (1). This ruling was quoted to the trying Magistrate, but as against that he referred to two Indian cases, viz., *Crown* v. *Wazir Singh* (2) and *Ah Foon* v. *Emperor* (3). Had the trying Magistrate looked into the Acts a little more closely he would have seen that Excise Officers are now appointed under the Burma Excise Act 5 of 1917. The judgment in *Venkataraman's* case (1) was delivered in 1898 and then the present Act was not in force. In those days all Excise Officers were sworn in as police

(1) [1907-09] U. B. R. 1.
(2) [1918] P. R. Crl. No. 3.
(3) [1919] 46 Cal. 411=22 C. W. N. 834=48 I. C. 504=28 C. L. J. 105.

officers because the old Act did not give them the necessary powers of arrest search, granting bail and so on. The Act of 1917 gives all these powers direct to the Excise Officer as Excise Officer, and they are no longer police officers. Their position appears to have been assimilated to the position of Excise Officers of Bengal. Therefore, *Venkataraman's* case (1) must be regarded as out of date and no longer binding.

Another point which has been argued is that the search did not comply with the provisions of S. 103, Criminal P. C. and therefore, the accused must be acquitted. This argument is really entierly beside the point. S. 16, Opium Act, says that all searches under S. 14 or S. 15 shall be in accordance with the provisions of the Criminal Precedure Code. S. 14 refers to searches in a building, vessel or enclosed place. I do not regard a dug out as a vessel from this point of view, and it is quite clear that these things when searched are intended to be regarded as more or less for the time being fixtures. If they have no locale, it is impossible to get witnesses from the locality. S. 15 has two clauses: the first refers to seizures in any open place or in transit; second refers to searches of persons. There was no search in the present case. It is true that the form applicable to searches was utilized; but according to the facts as given by the prosecution it was a case of a seizure of opium in transit, and S. 16, Opium Act does not say that seizures of opium in transit must be made in accordance with the rules for searches under the Criminal Procedure Code. Witness 1, Mr. Lynam, Excise Inspector, answered his question in cross-examination more or less correctly; he says that S. 103 in his opinion would only apply to searches made inside houses and dwelling places. His senior officer, Mr, Paul, is not quite so correct. It, is however, quite manifest that when the article to be seized is on the move and has no locale it may be impossible to get witnesses of the locality to witness its seizure.

It is not necessary for the decision of this case, therefore, to decide whether a person can be convicted on the result of a search which did not comply with S. 103, Criminal P. C. There are divergent rulings on the point. In *Mi Hauk v. Emperor* (4), it was held by Hartnoll, J. (following *Queen-Emperor* v. *Maw Aung*—*P. L. J. B.* 367), that persons who make a search illegally render themselves liable to be sued for damages for this illegal action, but that this illegal action does not affect the question whether the person whose house was illegally searched has committed an offence if property is actually found during the search whose possession constitutes an offence. On the other hand, there is an unofficially reported ruling of the High Court *Ma Htway* v. *Emperor* (5) in which Young, J. (who argued in *Mi Hank's* case (4) for the Crown before Hartnoll, J.), held that because a search did not comply with the provisions of S. 103, Criminal P. C. the conviction must be set aside. It must be noted, however, that in this case there was no appearance on behalf of the Crown and the judgment itself is an exceedingly short one. My own opinion is that Hartnoll, J.'s ruling is correct. There seems to be no officially reported rulng of this High Court on the point.

I hold that the seizure of the opium was regular, and that the admission by the accused when arrested was admissible.

There is another point to which I would call the attention of the trying Magistrate. The accused when called on his defence devoted a good deal of time to discrediting the two excise spies, Maung Pyant and Ba San. Several witnesses were called to depose to the bad character of these two men; some said that they do not work and some say they eat opium, keep prostitutes and so on. All this evidence is entirely irrelevant and should never have been allowed by the trying Magistrate. If he will refer to the Evidence Act, Ss. 146 to 153, he will see how witnesses are allowed to be tested for their veracity. S. 146 relates to cross-examination: it is permissible under instructions to cross-examine a witness as to his lack of work, his habits of consuming opium or his livings on the profits of a brothel; but when those questions have been put, the examining counsel has got to take the answers, and the examination of further witnesses to disprove his answers is not

(4) [1907] 4 L. B. R. 121=14 B. L. R. 202.
(5) A. I. R. 1925 Rang. 205.

allowed, save as shown in S. 153. The credit of witnesses may be impeached also under S. 155, but S. 155 does not allow evidence of a witness' general bad character to be brought in. An attempt was also made to discredit some of the other witnesses, by filing on 23rd May the evidence given by these witnesses in another case. The last witness for the defence had his evidence recorded on 30th April and it is quite contrary to the Evidence Act to try to impeach a witness by means of contradictory statements made unless the contradictory statement is put to him in cross-examination, and these copies of depositions should not have been accepted by the Magistrate, but I find them filed as exhibits.

I would also note one other point. As I have stated, the main defence of the accused is that the excise party went to arrest somebody else and having allowed that person to escape they turned round and accused him of being the owner of the opium. Mr. Lynam stated that, whereas the actual seizure was made on 21st February, he had his information on 5th January and had duly reported his action in connexion with that information in his official diaries, and he offered to produce his diaries. At this point the Magistrate makes a note:

"U Ko Ko Gyi (accused's advocate) objected to the admission of the diary extracts in evidence as irrelevant and that is all that is on the record about the diaries."

The Magistrate should either have definitely admitted them or rejected them and not have left the matter undecided, merely noting that the defence objected. No grounds are given why these extracts from the diaries should have been irrelevant, and of course, it is impossible to say without seeing them whether they were or were not; but the defence is that the case was got up against the accused on 18th February and it would certainly appear in the highest degree relevant to show that the excise department were working the case up against this particular man for more than a month previously.

I see no reason to interfere in revision and therefore dismiss this application.

V.B./R.K. *Application dismissed.*

A. I. R. 1930 Rangoon 51

CARR, J.

Narinjan Dass—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 1210 of 1929, Decided on 4th December 1929, against order of Sixth Addl. Magistrate, Rangoon, D/- 21st August 1929.

(a) Criminal P. C., S. 190 — Complaint charging two people in alternative cannot be accepted—Sanction to prosecute such people is wrong—Burma Ghee Adulteration Act (6 of 1927), S. 11.

It is wrong that any Court should accept a complaint which charges two people in the alternative and it is also wrong that an order sanctioning such a prosecution in the alternative should be passed. [P 52 C 1]

(b) Burma Ghee Adulteration Act (6 of 1927), S. 10 (5)—Whether ghee is to be deemed adulterated or not is question of law—Chemical Examiner is simply to submit result of his analysis and Court is to draw inference therefrom.

Whether the ghee is to be deemed adulterated or not is question of law and it is not a matter on which the chemical examiner should be required to express an opinion. What he has to do is to state the results of his analysis and leave the Court to determine whether on those results the offence charged is proved or not. [P 53 C 1]

O'de Glanville and *Tun Aung Gyaw*—for Appellant.

S. N. Sen—for the Crown.

Order.— The appellant Narinjan Das has been convicted under S. 12, Burma Ghee Adulteration Act (Burma Act 6 of 1927) of importing into Burma adulterated ghee in contravention of the provisions of S. 3 (i) of the same Act and has been fined Rs. 400. In his appeal three main points have been raised. The first contention is that the appellant was not the importer of the ghee in question. This question I do not think it necessary to discuss for reasons which will appear later. The second claim is that there was no valid order of the District Magistrate authorizing the institution of the prosecution. On this point I think that remarks are called for.

Section 11 of the Act provides that:

"no prosecution shall be instituted under the Act without the written order of the District Magistrate."

Why the prosecution in a matter concerning public health should be vested in a judicial officer I do not know. But if that power is so vested I think it is incombent on the officer concerned to exercise it in a judicial man-

ner, after due consideration of the facts of the case. From the records in this case, it would seem that there was in fact no consideration of the facts and that the order has been passed as a matter of course. The Health Officer of the Rangoon Corporation filed a complaint in a printed form against "B. Ram Lall, contractor or his agent Narinjan Das." This bears an endorsement as follows signed by the District Magistrate of Rangoon:

"I sanction the prosecution of B. Ram Lal or Narinjan Das under Ss. 3 and 12, Burma Ghee Adulteration Act, and forwarded this complaint to the Sixth Additional Magistrate, Rangoon, for disposal."

It seems to me to be entirely wrong that any Court should accept a complaint which charges two people in the alternative, and to my mind it is equally wrong that an order sanctioning such a prosecution in the alternative should be passed. As a matter of fact, the Magistrate concerned summoned both the persons named and at the first hearing, objection was taken on the ground that Narinjan Das should not be prosecuted as the agent of accused 1 when B. Ram Lal himself was present. The municipal prosecutor then stated that he was prosecuting both the accused as consignor and consignee of the ghee in question and asked to be allowed to change the heading of the plaint into "Ram Lal and Narinjan Das." This request was granted and the heading of the plaint was altered by the substitution of the word "and" for the words "for his agent." Nobody concerned at the time seems to have noticed that there was a discrepancy between the complaint as amended aud the District Magistrate's order sanctioning the prosecution. However, I do not propose to go further into this matter, or to decide what is the effect of the defects mentioned in the complaint and the sanction, for, I think, that on the next objection to be considered the prosecution case must necessarily fail.

Coming to the third objection, the Act in question nowhere defines "ghee" but S. 3 (1) prohibits the sale or importation etc., of "any ghee which contains any substance which is not derived exclusively from milk." This by implication the Act provides that ghee is a substance derived exclusively from milk, but it does not define the kind of milk from which ghee may be derived. The Act confers no power on the Local Government to frame rules or to fix the standard which saleable ghee must attain; but S. 133 (3), Rangoon Municipal Act (Burma Act 6 of 1922), does empower the Local Government to fix with reference to any article of food or drink a standard of quality, specific gravity or percentage of constituent parts, failure to conform with which shall for the purposes of the Act, raise a presumption until the contrary is proved, that the food or drink is adulterated. And under this section, the Local Government has fixed a standard of quality for ghee in Municipal Departmental Notification No. 39 dated 28th March 1928, published at p. 299 of Part 1 of the Burma Gazette for 1928. This notification reads as follows:

"In exercise of the powers conferred by S. 133, sub-S. (3), City of Rangoon Municipal Act 1922, the Government of Burma (Ministry of Forests) fixes with reference to ghee, the following standard of quality, failure to conform with which shall, for the purposes of this Act, raise the presumption unless the contrary is proved that the ghee is adulterated:

Standard of Quality

Ghee means the pure clarified milk fat of the cow or buffalo, shall have a butyro-refractometer reading of not less than 4p, and not more than 42.5 at 40°C, a saponication value of not less than 220, a Reichert-Woolney value of not less than 24 and a melting point not less than 36°C or more than 39°C."

It may be noted here that this notification defines ghee as meaning the pure clarified milk fat of the cow or buffalo, and, therefore, under that notification anything produced from any other kind of milk would not be ghee.

Returning to the Burma Ghee Adulteration Act, S. 10 provides for obtaining samples of ghee and for the forwarding of such samples to the Chemical Examiner to Government for analysis. sub-S. (5) reads:

"A report signed by the Chemical Examiner to Government shall be sufficient evidence of the result of such analysis."

Coming now to the facts of the case samples were taken of the ghee in question and were sent to the Chemical Examiner whose reports are filed as Exs. B and C. There is only a very slight difference between these reports as to the values mentioned and it will suffice to quote only the report Ex. B which reads as follows:

"Melting point ... ... 37.5°C.
Reichert value ... ... 21.3.
Saponification value ... 213.7.
Butyro-refractometer figure at
40°C ... ... 44.4.

The sample ghee is not of the standard laid down by Government and under the Burma Ghee Adulteration Act the ghee is deemed to be adulterated."

There is no evidence other than this report to prove that the ghee was in fact, adulterated, and Mr. De'Glanvile's contention for the appellant is that this report does not suffice to prove adulteration for the purposes of the Burma Ghee Adulteration Act, under which the appellant has been prosecuted and convicted. He refers to S. 2 of the Act which lays down the cases in which ghee shall be deemed to be adulterated and says that the Chemical Examiner's report does not prove any fact set out in the section.

This objection, I think, must be upheld. There has evidently been some confusion between the provisions of the Act and the notification above mentioned under the Municipal Act. The report is in itself sufficient to show that the ghee does not conform to the standard prescribed in the notification. But that is not the same thing as proving that the ghee is adulterated withing the meaning of S. 2, Ghee Adulteration Act, which in this case it was incumbent on the prosecution to prove.

Mr. Sen for the Corporation relies on the statement in the report that under the Burma Ghee Adulteration Act, the ghee is deemed to be adulterated. I am very clearly of opinion that this is not a matter on which the Chemical Examiner should be required to express an opinion. It is a question of law. What he has to do is to state the results of his analysis and leave the Court to determine whether on those results the offence charged is proved or not. S. 10 (5) only makes the Chemical Examiner's report evidence of the result of the analysis, and in my opinion, the question whether the ghee falls within the mischief of the Act or not is not comprised within the term " the result of the analysis." Whether if the Chemical Examiner had more fully stated the results of his examination, his report might have been sufficient to prove the charge is a question which I do not propose to discuss now. But at any rate, it would have been open to the prosecution in this case to call expert evidence to show that the results obtained on analysis were sufficient to prove the facts bringing the case within the terms of S. 2 of the Act. This has not been done, and in the absence of any such evidence, it seems to me quite clear that the fact the ghee was adulterated has not been proved. I, therefore, allow this appeal, set aside the conviction and sentence of the appellant and direct that the fine paid be refunded to him.

The appellant asks that the ghee be returned to him and I think that on this finding he is entitled to its return. Of course, if he should sell it or otherwise deal with it in Burma, in such a manner as to bring himself within the prohibitions contained in either the Rangoon Municipal Act or the Ghee Adulteration Act, he may be liable to further prosecution. But Mr. De'Glanville says that he intends to send it back to India and I do not think that there is any reason for refusing to return the ghee to him. I set aside, therefore, also the order directing the destruction of the ghee in question and direct that the ghee be returned to the appellant.

P.N./R.K. *Conviction set aside.*

A. I. R. 1930 Rangoon 53

Maung Ba and Brown, JJ.

Ba Yin and *another*—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeals Nos. 607 and 622 of 1929, Decided on 22nd July 1929, against order of Sess. Judge, Shwebo, in Sessions Trial No. 11 of 1929, D/- 9th May 1929.

Criminal P. C., Ss. 164 and 533—Statement of accused recorded under S. 164 but not in strict conformity with it—If error not injurious to case of accused on merit, it can be cured by S. 533.

Even if a statement be not recorded strictly in conformity with S. 164 so long as the Magistrate purports to have recorded it under that section, and even after the statement has been received in evidence, S. 533 can be resorted to and evidence taken that an accused person duly made the statement recorded. S. 533 plainly provides that notwithstanding anything contained in S. 91, Evidence Act, such statement shall be admitted, if the error has not injured the accused as to his defence on the merits : 18 *Cal.* 549 ; 21 *Bom.* 495 ; and

32 *Cal.* 550 ; *Ref.* 9 *Mad.* 224, *Dist.* ; 17 *Cal.* 862, *Diss. from* [P 55 C 2]

R. G. Aiyanger and *L. C. Robertson*—for Appellants 1 and 2.

Maung Ba, J.—Ba Kin aged 18/19 and Ba Yin aged 25, have been convicted of the murder of Thein Maung, a boy of 15, at Shwebo, and sentenced to death.

Ba Kin made a confession, but the Magistrate, who recorded the confession, forgot to take his signature. He noticed the omission on the following day and sent his 2nd Clerk to the jail to obtain Ba Kin's signature. Ba Kin refused to append his signature. At the trial the learned Sessions Judge examined the Magistrate. The Magistrate stated that before he recorded the confession he satisfied himself that Ba Kin wanted to confess voluntarily. Then the Magistrate deposed to what had been stated to him by Ba Kin. The Magistrate finally stated :

"I wrote out all that Ba Kin said and then my clerk Ba Din read it out to him in my presence. I asked him whether what had been read out to him was correct. Ba Kin said that it was correct. . . . I took down the statement of the accused in my Criminal Miscellaneous No. 32 of 1928. This record contains a full and true statement of what the accused Ba Kin told me."

The Magistrate's Bench Clerk, Ba Din, was also examined in the Sessions Court. He states that he was present when Ba Kin made his confession and that he read his statement over to him and Ba Kin acknowledged it to be correct. He further states that the statement recorded in Criminal Miscellaneous No. 32 is the confession made by Ba Kin on that occasion.

On behalf of the two appellants it has been urged that the confession is not admissible in evidence. The learned counsel in support of that contention quoted three cases. The first case is *Queen Empress* v. *Viran* (1). In that case a Deputy Magistrate recorded a statement in the nature of a confession made by *V*. The statement, which was made in Malayalam, was recorded in English and signed by the Magistrate only. Shortly afterwards the Magistrate examined *V* as to this statement and *V* admitted that he had made it voluntarily. *V* retracted the statement later. Parker J. held that the provisions of S. 164, Criminal P. C. are imperative, and S. 533 will not render a confession admissible where no attempt has been made to conform to the provisions of the former section. He further held that inasmuch as the record of the statement of *V* was not admissible, secondary evidence thereof could not be given. The next case cited is *Jai Narayan Rai* v. *Queen Empress* (2). There the accused, when in custody, made a confession to a Deputy Magistrate. The confession was recorded by the Deputy Magistrate in English, though made in Hindi, which the Deputy Magistrate perfectly well understood and could write. It purproted to have been recorded under the provisions of S. 164 and was in reply to one question which was set out. The record bore the signature of the accused and of the Deputy Magistrate, as well as the certificate required by the section. It was held that the provisions of S. 164 read with S. 364 are imperative as to the language in which a confession is to be recorded and that S. 533 does not contemplate or provide for any non-compliance with the law in this respect, and that therefore as it was not impracticable to record the confession in Hindi, the Sessions Judge was right in refusing to admit the document in evidence. It was further held that the Sessions Judge erred in admitting the oral evidence of the Deputy Magistrate as to what accused told him, as, seeing that he was acting under the provisions of S. 164, Criminal P. C., the confession was matter which was required by law to be reduced to the form of a document, and, therefore, under S. 91, Evidence Act, no evidence could be given in proof of such matter except the document.

The third case cited is *Sadananda Pal* v. *Emperor* (3). The accused made a certain statement before a Magistrate who recorded and took his thumb mark. The accused retracted that statement later. The learned Judge held that a thumb mark is not a signature within the meaning of S. 3, Cl. 52, General Clauses Act, or S. 164, Criminal P. C. They, however, returned the record to the Sessions Judge with a direction to take evidence as to whether

(1) [1886] 9 Mad. 224.

(2) [1890] 17 Cal. 862.

(3) [1905] 32 Cal. 550.

the accused duly made the statement recorded.

The last case will not support the argument. The learned Judges who decided the case were of the opinion that the defect could be remedied by taking evidence that the statement recorded was duly made by the accused. In the present case also the learned Sessions Judge of Shwebo has adopted that remedy. The view of the law taken in *Jai Narayan Rai's* case (2), was doubted in *Lalchand* v. *Queen Empress* (4). In considering *Jai Narayan Rai's* case (2), the learned Judges observed:

> "It is unnecessary for us in the present case to do more than say that, as at present advised, we are unable to agree in the view of the law which formed the grounds of that judgment."

Jai Narayan Rai's case (2), was dissented from in *Queen Empress* v. *Visram Babaji* (5). The accused's statement was made in Marathi and recorded in English. The learned Judge held that, assuming that it was practicable to record the statement in Marathi, and that consequently it was irregular, with reference to section S. 364 of the Code, to record it in English, the statement was nevertheless admissible in evidence under S. 533, the irregularity not having injured the accused as to his defence on the merits. *Viran's* case (1), was decided in 1886. The learned Judge, who decided the case, in holding that S. 533 could not be invoked, was no doubt influenced by the fact that no attempt had been made to conform to the provisions of S. 164. It appears from the judgment that prisoner No. 1 made three separate statements before the Deputy Magistrate on 9th May, a fourth on 19th May and a fifth on 31st May; but none of these statements were recorded under Ss. 164 or 364. The questions put and answers given were not written down: they were not taken down in the language in which they were made but in English; they were not signed by the prisoner or certified by the Magistrate. In these circumstances S. 533 could not be invoked. Since the decision of that case some verbal alterations have been made in S. 533. After the word "recorded" the words "or purporting to be recorded" have been inserted. After the words "tendered in evidence" the words "or has been received in evidence" have been inserted. The alterations imply that, even if a statement be not recorded strictly in conformity with S. 164, but so long as the Magistrate purports to have recorded it under that section, and even after the statement has been received in evidence, S. 533 can be resorted to and evidence taken that an accused person duly made the statement recorded. S. 533 plainly provides that notwithstanding anything contained in S. 91, Evidence Act, such statement shall be admitted if the error has not injured the accused as to his defence on the merits. In the present case the confession was recorded under S. 164, and the Magistrate who recorded it complied with the provisions of that section, except that through an oversight he did not take the signature of the confessor. The learned Magistrate has been examined and from his evidence it appears that Ba Kin did make that confession and that he did so voluntarily.

I, therefore, have not the slightest doubt that the confession can be admitted in evidence. When the Magistrate's Second Clerk, Po Yan visited Ba Kin in the jail to obtain his signature, Ba Kin refused to sign, saying that he had confessed on the previous day because the police had asked him to do so; but when he was examined by the committing Magistrate on 11th January 1929, Ba Kin denied that he ever made a confession. He added that when the Court clerk came to him for signature he refused to sign, because he had not made any confession. Had it been true that the confession was made under inducement he would certainly have said so to the Committing Magistrate. In my opinion the confession was quite genuine and it can be used against Ba Kin under the provisions of S. 21, Evidence Act, and it can be considered against the co-accused Nga Ba Yin under the provisions of S. 30 of the said Act. But as against Ba Yin corroboration by independent testimony is essential. (His Lordship then considered the confession in detail and summed up as follows): To sum up, as against Ba Kin there is his own confession which has been sufficiently corroborated. He gave his age as 16, but the Civil Surgeon who exa-

(4) [1891] 18 Cal. 549.
(5) [1897] 21 Bom. 495.

mined him, fixed it between 18 and 19. As against Ba Yin he is implicated by Ba Kin's confession. There is also the evidence of witnesses who saw him going along with Ba Kin and the deceased, and the evidence of Ma Suleman who actually saw him striking the deceased boy with stones. His defence was a denial. Both Ba Kin and Ba Yin tried to establish alibis. I am of opinion that the plea of alibi has not been established. I am satisfied that the guilt of this dastardly and brutal crime has been brought home to both the appellants. For such a crime the sentence passed appears to be the only suitable sentence that could have been passed.

I would, therefore. dismiss both the appeals and confirm the death sentence.

Brown, J.— I have had the advantage of reading the judgment of my learned brother Maung Ba, and I agree with him that the confession in this case was admissible in evidence and that the failure of the Magistrate to secure the signature of the confessing accused has been cured under the provisions of S. 533, Criminal P. C. The record made by the Magistrate who recorded the confession shows that before recording the confession, he asked Ba Kin a number of questions as to the reasons which led him to confess. He asked him whether he knew that the confession might be used as evidence against him, and to this Ba Kin replied in the affirmative. He also asked other questions to satisfy himself of the voluntary nature of the confession. In none of these questions does the Magistrate explain that Ba Kin was not bound to make a confession, but when examined in Court the Magistrate says that he warned the accused that he had nothing to gain by his confession and that it might be used against him, and the Magistrate appended to the foot of the confession the certificate required by S. 164, Criminal P. C., to the effect that he had explained to Maung Ba Kin that he was not bound to make a confession and that if he did so any confession he might make might be used as evidence against him. I am satisfied in the circumstances that there was a substantial compliance with the provisions of S. 164, and S. 364, Criminal P. C., and that any defect in this respect has been cured under the provisions of S. 533.

I agree also that there is sufficient corroboration of the confession to leave no room for reasonable doubt as to the guilt of either of the accused. The confession does not entirely agree with the evidence of the prosecution witness, Maung Ba Lay, as in the confession Ba Kin says that it was Ba Yin who originally called the deceased, saying that he would get compensation for damages to the bicycle, whereas Ba Lay mentioned Ba Kin only. Ba Kin in his confession does not deal with this point at length, and it is possible that he did not speak the truth here as he wished to minimise his part in the assault. I can see no reason, however, for supposing that the confession was not a voluntary one and so far as the case of Ba Yin is concerned, strong corroboration is afforded by the evidence of U Hmu, Maung Pan and Ma Suleman. I see no good reason for doubting the bona fides at any rate of U Hmu and Ma Suleman.

It has been suggested that the confession cannot be used as against Ba Yin, because Ba Yin is assigned the leading part in the crime in the confession. It seems to me clear, however, that the confession does implicate Ba Kin himself in the murder and, therefore, can be considered as against Ba Yin also. The murder was of the most brutal kind and in spite of the youth of the appellant Ba Kin, I do not consider there is any reason for not passing the death sentence on both the appellants.

I agree that both appeals must be dismissed and the sentence of death confirmed in each case.

V.B./R.K. *Appeals dismissed.*

A. I. R. 1930 Rangoon 56

BAGULEY, J.

Maung Kywe—Defendant—Appellant.

v.

Ma Thein Tin — Plaintiff—Respondent.

Special Second Appeal No. 86 of 1929, Decided on 19th August 1929, from judgment of Dist. Judge, Sagaing, in Civil Appeal No. 16 of 1929.

(a) Buddhist Law (Burmese) — Divorce— Meaning of cruelty explained.

Cruelty and physical violence are quite distinct. The essence of cruelty does not consist in violence. It consists in being indifferent to, delighting in another's pain and so it really

depends on the state of the mind of the person inflicting pain rather than the actual infliction of pain. [P 58 C 2]

(b) Buddhist Law (Burmese) — Divorce— Single assault by husband on wife provoked by her does not justify granting of divorce to wife on any terms if character of husband does not suggest likelihood of its repetition.

A single assault by a husband on the wife which is provoked by the wife is not a sufficient ground for the granting of a divorce to a wife on any terms, when the character and habits of the husband are not of a nature to suggest any likelihood of a repetition of the offence. It is true that a divorce as by mutual consent may be granted for a single act of cruelty but a single act of violence without any likelihood of its being repeated is not necessarily an act of cruelty : 1921 *U B.* 2 and 7 *L. B. R.* 79, *Appr.*; (1897-1901) 2 *U. B. R.* 28; (1902-1903) 2 *U.B.R.* 6, *Expl. & Dist.* [P 58 C 1]

(c) Buddhist Law (Burmese)—Divorce.

A divorce is given not to punish a husband for an assault, that is provided for by the criminal law, but to enable the wife to free herself from a bond which becomes intolerable.

Day—for Appellant.

Mitter—for Respondent.

Judgment.—The appellant was the defendant in the trial Court. In that Court the plaintiff, Ma Thein Tin, sued him for a divorce alleging that he had abused her, had threatened to throw a stone at her, had threatened to kill her, had kept from her a large part of the joint property of the marriage and spent it, and had assaulted her on more than one occasion. The defendant denied the allegations and the trial Court found that the quarrels that there had been between them were not sufficient to justify a divorce even as by mutual consent. The trial Judge says that the plaintiff gives three instances of assault, but that only one is really supported by evidence and that this happened at a time when there was a dispute with regard to the sale of some onions : the defendant was going to sell them and the plaintiff objected to their being sold saying that they were wanted for seed ; defendant said that they had enough onions for seed and after that the plaintiff seized hold of the bag of onions, there was a struggle for possession of the bag, and apparently in the end the defendant knocked the plaintiff down. As regards the making away with the joint property, the trial Judge found it not proved. The trial Court dismissed the suit. On appeal to the District Court the learned Judge, found that there had been several quarrels between the parties which culminated in an assault or assaults. The judgment goes on to say :

> "From the testimony of her witnesses there was a recent instance in which the plaintiff was fisted and had a bag of onions thrown at her by the defendant."

This is the only act of ill-treatment which has been definitely found as proved by the lower apppellate Court. With this finding I am in agreement. I think that this dispute over the sale of the onions did culminate in a struggle of some kind ; but that struggle began because the plaintiff seized the bag of onions and tried to wrench it away from her husband. As was only natural, the fight having been started in this way, the husband overpowered his wife, and it is most probable that he struck her at the end of it. The judgment of the lower appellate Court goes on to say :

> "At Burmese Buddhist Law physical assault by the husband on his wife is now considered a matrimonial fault, and a divorce on the terms of a mutual consent is now allowed to a wife on proof of a single act of cruelty on the part of the husband,"

and the learned Judge refers to Lahiri's "Principles of Modern Burmese Buddhist Law." It is always dangerous to refer to a text book and not look up the rulings upon which the text book is based. The quotation from the text book is actually correct, but the statement quoted refers to two officially reported cases. One of these is *Ma Sat* v. *Maung Nyi Bu* (1) and in the whole of this ruling I cannot find the word "cruelty": the learned Judicial Commissioner throughout refers to "misconduct," and the particular misconduct is referred to by the lower Courts as "ill-treatment." The actual act complained of consisted in the husband having assaulted the wife and caused her to drop her "htamein" in public. The facts in this case did not make it necessary to decide whether a single act of misconduct or cruelty would justify a divorce. In this case the defendant admitted that he had ill-treated his wife as he had been drinking, and that he drank toddy 20 days of every month ; and it is clear from the judgment as a whole that it was a case in which there had been more than one instance of physical ill-treatment. The other case referred to is *Po Hau* v. *Ma Talok* (2). In this it is laid down by a single Judge that a divorce could be granted to the wife on the terms of a divorce by mutual

(1) A. I. R. 1921 U. B. 2=4 U. B. R. 68.
(2) [1914] 7 L. B. R. 79=6 Bur. L. T. 134.

consent for a single act of cruelty ; but it is worthy of note that in this case the learned Judge disapproved of a previous ruling : *Ma Ein* v. *Te Maung* (3), in which Parlett, J., stated that :

"adultery on the part of a husband does not alone, or even accompanied by a single act of cruelty, entitle the wife to a divorce,"

and that statement was concurred in by Fox, C. J. It is true that this ruling so far as it refers to adultery has been overruled by the case of *Maung Hme* v. *Ma Sein* (4) ; but with regard to the question of a divorce being allowed for a single act of cruelty it does not appear to have been overruled, and it is a Bench case, not a single Judge case like *Po Han* v. *Ma Talok* (5).

In an unreported case of this Court, *Ma Hla Me* v. *Maung Po Gyi* (6), Pratt, J., states that *Po Hau's* case (2), is authority for the proposition that a wife may claim a divorce as by mutual consent on proof of a single act of cruelty on the part of the husband, and that so far as he is aware this ruling has never been dissented from, and he is satisfied that it is good law. I would note, however, that in the ruling in *Po Hau's* case (2), it is stated that it is clear from the texts cited in S. 303, Kinwun Mingyi's Digest that :

"even where the husband has been guilty of cruelty only once, it is open to the wife to insist on a divorce and she is entitled to get it, subject to a penalty, the penalty being that the divorce shall be effected as if both parties desired it."

A reference to S. 303 referred to, does not, in my opinion, altogether bear out this statement. The leading Dhammathat (Manugye) only refers to the right to divorce for a single act of ill-treatment, if at the same time the husband has taken a lesser wife, and Manu Dhammathat says the same. Chittara is also in agreement with these two Dhammathats, while in the same section, the Rescript Dhammathat, which according to the Digest, is a special amendment of the law passed in 1146 B.E., says that divorce should not be granted for the first fault; only the guilty party should be admonished.

The case of *Ma Sat* v. *Maung Nyi Bu* (1), follows the case of *Ma Gyan* v. *Maung Su Wa* (3). The headnote of this case does not refer to this point at all, but a perusal of the judgment shows that it was a case in which divorce was asked for on the ground that the defendant had committed more than one act of ill-treatment. There had apparently been a series of assaults which had resulted in the parties appearing before arbitrators with the result that a document was drawn up which amounted to an agreement that the wife should be entitled to a divorce and to retain all the property if the husband again misbehaved. Apparently after this document had been drawn up a quarrel took place and the husband pulled his wife's hair, boxed her ears and kicked her more than once. This single act of ill-treatment would of course revive the previous acts which had been condoned by the execution of the agreement and the divorce would naturally follow on the ground that there had been a course of ill-treatment. Another case that has been referred to is *Maung Pye* v. *Ma Me* (7). Here again the husband had beaten his wife and had also falsely accused her of infidelity and there is no question of a divorce having been given for one act of physical ill-treatment.

It is unfortunate that in many of these cases the word "cruelty" has been used as though it were interchangeable with the term "physical violence." The two in my opinion appear to be quite distinct. The essence of cruelty does not consist in violence. "Cruel" is defined in Chambers' Dictionary as :

"Disposed to inflict pain, or pleased at suffering : void of pity, merciless, savage, severe,"

and in the "Concise Oxford Dictionary," the word "cruel" is defined as "indifferent to, delighting in, another's pain." Therefore, cruelty really depends on the state of mind of the person inflicting pain, rather than the actual infliction of the pain. Naturally, a series of assaults which result in pain would warrant the deduction that the person inflicting that pain was indifferent to the pain that was being inflicted ; but if an assault is regarded as a single act of cruelty, the assault must in itself be such as to warrant the assumption that the person committing it was indifferent to, pleased with, the pain he was inflicting.

I entirely agree with the proposition

(3) [1910] 5 L. B. R. 87=3 I. C. 715.
(4) [1917] 9 L. B. R. 191=45 I. C. 953=11 Bur. L. T. 236.
(5) Second Appeal No. 1110 of 1928.
(6) [1897-1901] 2 U. B. R. 28.
(7) [1902-1903] 2 U. B. R. Bud. Law 6.

laid down by May Oung in his work on Buddhist Law, namely :

"there must be at least evidence of such ill-treatment as shows that the husband is a man of violent tendencies,"

to which I would add "that the ill-treatment is likely to recur." A divorce is given, not to punish a husband for an assault, that is provided for by the criminal law, but to enable the wife to free herself from a bond which bids fair to become intolerable.

In the present case I can see no such deduction warranted. There was a rough-and-tumble fight, possibly, in which the husband struck his wife ; but the fight happened on the initiative of the wife, because she started the whole trouble by trying to wrest the bag of onions out of his hand ; and when an assault is committed under provocation, one cannot from the fact of that assault argue that it was an act of cruelty committed by the person assaulting. In this case, nothing whatsoever has been proved which would render it likely that the appellant would commit any further assaults on his wife; he is a man of good character, and the plaintiff's own witnesses testify to this : he does not drink and he does not gamble ; and the charge that he has left his wife destitute can easily be disproved by the evidence of Ma Hnit, the sixth witness called by the plaintiff, who says that comparatively recently the plaintiff took a loan of Rs. 300 from her without any deed and without any security, and the money was repaid to her by the defendant.

I hold that a single assault by a husband on the wife, which was provoked by the wife, is not a sufficient ground for the granting of a divorce to a wife on any terms, when the character and habits of the husband, as in this case, are not of a nature to suggest any likelihood of a repetition of the offence. I do not wish to be regarded as differing from the dictum in which the rulings in *Po Han* v. *Ma Talok* (2) and *Ma Sat* v. *Maung Nyi Bu* (1) are usually summed up, namely, that a divorce as by mutual consent may be granted for a single act of cruelty, but I am of opinion that a single act of violence is not necessarily an act of cruelty, and I hold that the assault in this case is not an act of cruelty, either actually or technically. I would therefore allow this appeal, set aside the order of the lower appellate Court and restore that of the trial Court. As I consider that the husband is not entirely free from blame, and as the possibility of execution proceedings in the future would certainly not help towards a reconciliation between the parties, I direct that each of the parties do bear their own costs throughout.

P.N./R.K. *Appeal allowed.*

A. I. R. 1930 Rangoon 59

CHARI AND BROWN, JJ.

Ma Kin—Appellant.

v.

Maung Po Myit and *others* — Respondents.

First Appeal No. 60 of 1929, Decided on 2nd September 1929, from judgment of Original Side in Civil Regular No. 139 of 1928.

Buddhist Law (Burmese) -- Succession — Younger brother or sister excludes elder brother or sister—But children by former do not exclude children by latter.

A younger brother or sister of the deceased would exclude an elder brother or sister. But where no brother or sister of the deceased survives him, the children by the elder brother are not excluded by the children of the younger brother but each is entitled to equal share : *A.I.R.* 1928 *Rang.* 67 and *A. I. R.* 1924 *Rang.* 73 (*F.B.*), *Rel. on.* ; (1892-96) 2 *U. B. R.* 189, *held not good law.* [P 60 C 1, 2]

Po Han—for Appellant.

Ba Maung and *Maung Myint* — for Respondents.

Judgment. — The property in dispute in this case is the estate of one Daw Pwa, a Burman Buddhist, deceased. At the time of her death, she left surviving the plaintiff-respondent Po Myit and the defendant-respondent Ko Tun Gyaw, who are sons of her elder brother, the defendant-appellant Ma Kin, a daughter of a younger brother, and some grand-nephews and nieces. The only question for decision in this appeal is as to the shares which the different heirs take in her estate. The trial Judge has found that the grand-nephews and nieces take no share, and the correctness of this decision has not been questioned before us. The trial Judge further found that the three nephews and nieces are entitled under Buddhist Law to share in the estate equally. It is against this decision that the present appeal is filed.

It is contended on behalf of the appellant Ma Kin that as she is the daughter

of a younger brother of the deceased, whereas Po Myit and Tun Gyaw are sons of an elder brother she is entitled to the whole estate. The claim is based on the general principle that inheritance shall never ascend when it is possible for it to descend. In Vol. 10, S. 18, Manugye Dhammathat, the following passage occurs :

"When after the death of the parents each of the children is established in his own house, the law that the property shall not ascend is this : If after the heirs have received their share, and established themselves separately, one shall die without leaving direct heirs, i. e., wife or husband, son or daughter, let the property not ascend to the elder brothers or sisters ; let the younger brothers and sisters only of the deceased share it. This is what is meant by not allowing the property to ascend "

From this it is clear that a younger brother or sister would exclude an elder brother or sister. The question we have to decide is whether the same principle has to be extended to the case of nephews and nieces. It might be argued that as succession to an elder brother is held to involve ascent of inheritance, the claim of the children of an elder brother also involves ascent of inheritance and that the children of the younger brother should therefore be preferred to them. But it is dangerous to go too far in making too great deductions from the various principles set forth in the Dhammathats, and we think that the question must depend on whether nephews and nieces are regarded as inheriting in their own right or as representing their deceased parents.

In the case of *Maung Kyaw* v. *Ma Pu* (1), there were three brothers and sisters. The two elder died first each leaving children. On the death of the youngest sister without heirs, it was held that the children of the elder brother and sister inherited per stirpes that is to say that their claim was not in their own right but as representing their parents. If this decision were correct it would be a strong argument in favour of the contention put forward on behalf of the appellant in this case, but in view of the recent decisions of this Court we think it is very doubtful whether the decision in *Maung Kyaw's* case (1) can now be considered as good law.

(1) [1892-96] 2 U. B. R. 189.

In the case of *Maung Po Thu Daw* v. *Maung Pothan* (2), it was held that where the only heirs were grandchildren, the grandchildren were entitled to claim per capita and not per stirpes. At p. 333 (*of* 1 *Rang.*) of the judgment the following passage occurs :

"The balance of probability seems however to be in favour of the former view, since the Burmese system of inheritance is based largely on the personal relations shown to have subsisted between the deceased and the heirs . . . Where, therefore, several individuals stand in the same degree of relationship towards the propositus, and, presumably their personal connexion with the latter was the same there does not seem to be any prima facie reason why an only child should be favoured over and above another who is in exactly the same position except that he is one of the several born of the same parents. Both of them " reached the inheritance " in the same way. "

This case was followed and the principle extended in the case of *Maung Ba Gon* v. *Ma Pwa Thit* (3). The claimants in that case were cousins of the deceased and it was held that they were entitled to claim per capita, that is to say in their own right and not as representing their parents. The principle followed in that case was that when the heirs are all related in the same degree to the propositus they inherit each in his own right and not by representation, and that therefore each shares equally with all the others.

In this case the three claimants are all related in the same degree, as nephew and niece, and following the principle held in *Maung Ba Gon's* case (3) they are entitled to inherit in their own right. That being so, although had their parents been alive at the time of the death of Dwa Pwa the parent of Ma Kin would have inherited the whole estate, it does not follow that now that the parents are dead Ma Kin would inherit the whole of the estate. She does not represent her parent but claims merely as a niece. No case has been cited to us in which the principle that inheritance should not ascend has been carried to the extent we are asked to carry it by the appellant in this case. We are of opinion that the parties must be considered in this case as claiming as nephews and nieces and not as representing their deceased parents and

(2) A. I. R. 1924 Rang. 73=1 Rang. 316 (F. B.).

(3) A. I. R. 1928 Rang. 67=5 Rang. 747.

that the decision of the trial Judge that they are entitled to equal third shares in the estate is correct. We therefore, dismiss this appeal with costs.

P.N./R.K. *Appeal dismissed.*

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* A. I. R. 1930 Rangoon 61

BROWN AND MAUNG BA, JJ.

J. A. Martin—Appellant.

v.

S. M. Hashim and *others*—Respondents.

First Appeal No. 150 of 1929, Decided on 12th November 1929.

*** Civil P. C., S. 47—Question of decree-holder purchaser's possession against judgment-debtor is not covered by S. 47 and order relating to it is not appealable.**

If the decree-holder happens to be the auction purchaser, the property purchased by him cannot be regarded by him as the proceeds of the sale or the fruits of the decree. The proceeds of the sale consist of the purchase money for which the property was sold, and it is the amount of this purchase money which the decree-holder obtains as the fruit of his decree. If he purchases the property he does not get it as an equivalent of the amount of his decree but he has to pay the purchase money and he may do so either in cash or by setting it off against the amount of his decree. The purchase of the property can therefore in no sense be regarded as acquisition of the fruits of the decree and failure to obtain possession of the property cannot affect the decree itself. Thus the question of the decree-holder purchaser's right to possession as against the judgment-debtor is not a question relating to the execution, discharge or satisfaction of the decree. It is not therefore a question within the scope of S. 47 and the order relating to such question is not appealable: 31 *All.* 82; 1 *Pat. L. J.* 232 and *A. I. R.* 1924 *Bom.* 429 (*F. B.*), *Rel. on*; 25 *Mad.* 529, *not Foll.* [P 62 C 2]

Young—for Appellant.
Sanyal—for Respondents.

Judgment. — The appellant abovenamed obtained a mortgage decree against the respondent. In execution of that mortgage decree the mortgage property was put up to sale and was purchased by the appellant. He then applied to the Court to be put in possession of the property he had purchased. An order for delivery of possession was issued, but when the bailiff went to the land to execute that order he found a house on the land and the judgment-debtor in possession of that house. The judgment debtor refused to give up possession and as the house was not mentioned in the delivery order the bailiff refused to put the appellant in possession of the house. The appellant then applied to the Court to direct the bailiff to put him in possession of the house. In passing orders the District Judge remarked:

> "It is sufficient to say for the purpose of this application that the house is not included in the properties mentioned in the sale certificate, nor in the delivery order, and that the bailiff cannot be ordered to make delivery of it at this stage."

The application was refused.

The appellant has come to this Court in appeal against this order, and the first point that we have to decide is whether an appeal lies. The application for possession was made under the provisions of R. 95, O. 21, Civil P. C. An order passed under this rule is not an order against which an appeal lies as an order. The appeal can lie in this case only if the question be held to be one

> "arising between the parties to the suit or their representatives and relating to the execution, discharge or satisfaction of the decree,"

and therefore within the purview of S. 47, Civil P. C. There has been a conflict of opinion in decided cases on this point. The view taken by the High Court of Madras is that the question of the right to possession in such a case is a matter falling within the provision of S. 47, Civil P. C. In the case of *Kasinatha Ayyar* v. *Uthumansa Rowthan* (1) a mortgagee had purchased the mortgaged property in execution of mortgage decree in his favour. He applied to be put into possession of the property and a question arose whether under the terms of the decree he was entitled to be put into possession without paying the amount of prior charge. It was held that the question was one arising under S. 244 of the Code (now S. 47) and that an appeal lay from the order passed.

Two points arose for decision: (1) whether the question was one arising between the parties, and (2) whether it related to the execution, discharge or satisfaction of the decree.

Both these questions were answered in the affirmative. This view has been subsequently followed in other cases decided by the same Court, though in the case of *Sandhu Taraganar* v. *Hussain Sahib* (2) the learned Chief

(1) [1902] 25 Mad. 529=12 M. L. J. 1.
(2) [1905] 28 Mad. 87=14 M. L. J. 474.

Justice whilst accepting the previous decision of the Court remarked:

"If the matter were res integra I should be disposed to hold that the question is not one relating to the execution, discharge or satisfaction of the decree."

The contrary view was taken by the majority of a Full Bench of the High Court of Allahabad in the case of *Bhagwati* v. *Banwari Lall* (3). In that case the decree-holder had brought a suit for possession and the contention was that that suit did not lie. It was held that the suit did lie. The principal judgment of the majority was delivered by Banerji, J, who discussed the matter at considerable length. He was of opinion that the auction purchaser though he happened to be also the decree-holder was not claiming possession in his capacity of decree-holder, and that the matter was not therefore a matter arising between the parties to the earlier suit. He further held that the question was not one relating to the execution, discharge or satisfaction of the decree. In Calcutta the decisions on the point are not uniform though the balance of authority in that Court appears to be in favour of the view taken by the High Court of Allahabad. The High Court of Patna has taken the same view as the High Court of Allahabad. The matter was decided by a Full Bench in the case of *Abdul Gani* v. *Raja Ram* (4). The chief reasons given for the decision were that there was a long course of decisions of the Calcutta High Court in favour of the Allahabad view, and no good reason has been shewn for not following those decisions. The High Court of Bombay was cited in the judgment in that case as having taken the view taken in Madras. But since that decision a Full Bench of the Bombay High Court has considered the point, and has accepted the view taken in the Allahabad case *Hargovind Fulchand* v. *Buhudar Raoji* (5). The learned Chief Justice in the course of his judgment in *Hargovind Mulchand's* case stated:

"in my opinion the decree-holder purchaser does not seek to get possession in execution of the decree but by virtue of his being declared the purchaser at the auction sale,"

(3) [1909] 31 All. 82=1 I. C. 416=6 A. L. J. 71 (F.B.).

(4) [1916] 1 Pat. L. J. 232=20 C. W. N. 829 =35 I. C. 468=3 Pat. L. W. 62 (F.B.).

(5) A.I.R. 1924 Bom. 429=48 Bom. 550 (F.B.).

and this view was accepted by the Bench.

It thus appears that outside Madras the High Courts are almost unanimous in holding that the right of a decree-holder, who is also auction purchaser, to possession as against the judgment-debtor is not a matter that comes within the scope of S. 47, Civil P. C. And even in Madras the learned Sir Arnold White, C. J. has indicated that that would also have been his view had he not held himself bound by the previous decisions of the Court on the subject. As pointed out in the Allahabad case Art. 138, Lim. Act, provides for a suit by a purchaser at a sale in execution of a decree, when the judgment-debtor was in possession at the date of the sale, and it is difficult to see how any such suit could be brought if the provisions of S. 47, Civil P. C., were applicable. And we respectfully agree with the remarks of Banerji, J., in the Allahabad case at p. 101:

"I am also unable to hold that if the decree-holder happens to be the auction purchaser the property purchased by him may be regarded by him as the proceeds of the sale or the fruits of the decree. The proceeds of the sale consist of the purchase money for which the property was sold, and it is the amount of this purchase money which the decree-holder obtains as the fruit of his decree. If he purchases the property he does not get it as an equivalent of the amount of his decree but he has to pay the purchase money and he may do so either in cash or by setting it off against the amount of his decree. In the present case the property was sold for Rs. 400 whereas the amount of the decree was Rs. 87 only. The purchaser has to pay the purchase money in cash and she got the property not in lieu of the amount of her decree but for a much larger sum. The purchase of the property can therefore in no sense be regarded as acquisition of the fruits of the decree and failure to obtain possession of the property cannot affect the decree itself. Even if the decree be one for sale upon a mortgage, and a sale takes place in pursuance of it, delivery of possession to the purchaser is not made under the decree."

We are of opinion that the question of the purchaser's right to possession as against the judgment-debtor in the present case is not a question relating to the execution, discharge or satisfaction of the decree. It is not thefore a question within the scope of S. 47, Civil P.C. We are of opinion therefore that the present appeal does not lie. It is suggested that if we hold that no appeal lies we should deal with the matter in revision. We do not consider, however, that this is a question which can pro-

perly be dealt with in revision. There is at present another application on the matter before the trial Court which has not yet been adjudicated on, and the appellant in any case has his remedy in the filing of a suit.

The present position is an unfortunate one. We understand that the appellant is not greatly concerned as to whether the house should or should not be considered as covered by the decree. If the Court should hold that it is not so covered then he wishes to put the house up for sale in execution. He appears to be perfectly willing to enter into a reasonable compromise in the matter but the judgment-debtor will not respond. In the circumstances and as we are holding that the appeal does not lie but are coming to no decision on the merits, we do not consider it necessary to allow the respondent his costs in this appeal. We dismiss the appeal on the ground that no appeal lies.

P.N./R.K. *Appeal dismissed.*

A. I. R. 1930 Rangoon 63

DAS AND CARR, JJ.

Ma E—Appellant.

v.

Maung Po Ko—Respondent.

Letters Patent Appeal No. 21 of 1929, Decided on 3rd January 1930, from judgment of Burma High Court in Special Second Appeal No. 25 of 1928.

(a) Practice—New plea.

A new plea cannot be allowed to be taken for the first time in a Letters Patent appeal. [P 63 C 2]

(b) Transfer of Property Act, S. 63—Separate possession of accession not possible—Mortgagor is liable to pay compensation only when it is for preservation or made with his assent.

Where separate possession of an accession is not possible, the mortgagor is liable to pay compensation in only two cases, the first being the case of an accession necessary for the preservation of the property and the second that of an accession made with the mortgagor's assent. Fruit trees planted on land by mortgagee are not capable of separate enjoyment and mortgagor is not liable for compensation if they are not planted with his assent nor for preservation of land. *A. I. R.* 1921 *Bom.* 250, *Dist* ; *A. I. R.* 1926 *All.* 67, *Foll.* [P 63, C 2, P 64 C 1]

Thein Maung—for Appellant.

S. Ganguli—for Respondent.

Judgment.—The point raised in this appeal is whether a mortgagee in possession is entitled to the value of the trees planted by him during the time he was in possession of the land. The respondent objects to this point being argued now, because it was never raised by the appellants in any of the other Courts, and never taken by her in her written statement. We think the respondent's contention is correct, and the appellant will not be allowed to raise a new point in a Letters Patent appeal, which has never been taken by her in any of the lower Courts, or in the appeal to the High Court, from which this Letters Patent appeal is filed. It would not be right to allow a party to raise a new plea in such appeals. But, as this point has been argued before us, we might as well give our decision on it.

The appellant's case is that she planted certain fruit trees in the garden land during the time she was in possession of the land as mortgagee and she now claims that she is entitled to compensation for the value of the trees planted by her before the mortgagor is allowed to redeem the land. We do not think she is entitled to any such compensation. She relies on the case of *Dayanu Laxman* v. *Fakira* (1), but we do not think that that case applies to the facts of the present case. We may refer here to a decision in *Nageshwari Rai* v. *Nand Lal* (2) which in our opinion, correctly represents the law on the subject. In that case the mortgagee without the consent of the mortgagor had planted a mango grove on part of the mortgaged property and claimed compensation. It was held in that case that the grove was an accession not capable of separate possession or enjoyment, and as it was not made for the preservation of the principal property from destruction, forfeiture, or sale, nor with the consent of the mortgagor, the mortgager was entitled to the benefit of it without paying compensation. In the course of the judgment the following observations were made ;

"The case, therefore falls under the latter portion of para. 2, S. 63. Fruit trees are clearly not capable of separate possession, apart from the land on which they stand. Where separate enjoyment is not possible the rule laid down by the section is that the accession must be delivered with the property. The mortgagor is liable to pay compensation in two cases only, the first being that of an accession

(1) A. I. R. 1921 Bom. 250=45 Bom. 1301.

(2) A. I. R. 1926 All. 67=48 All. 70.

necessary for the preservation of the property and the second that of an accession made with the mortgagor's assent."

We agree with the observations of the learned Judges in this case. In the present case also it is quite clear that the fruit trees are not capable of separate enjoyment, and it is also clear that the fruit trees were not planted with the assent of the mortgagor. The appeal is therefore dismissed with costs.

P.N./R.K. *Appeal dismissed.*

A. I. R. 1930 Rangoon 64

MAUNG BA AND BROWN, JJ.

Maung Tun Hlaing—Appellant.

v.

U Aung Gyaw—Respondent.

First Appeal No. 136 of 1929, Decided on 12th November 1929, from decree of Dist. Judge, Pyinmana, in Civil Regular No. 30 of 1924.

(a) **Civil P. C.. O. 21, R. 2 (1)—Certification under O. 21, R. 2 (1), is not application under Limitation Act, Art. 182 (5).**

Certification under O. 21, R. 2 (1), not being an application within the meaning of Art. 181 cannot be an application for the purposes of Art. 182 5) and is not a step in-aid of execution: *A. I. R.* 1929 *P. C.* 19, *Rel. on*; *A. I. R.*, 1925 *Rang.* 26, *not Foll.* [P 65 C 1]

(b) **Limitation Act, S 20—" Debt " includes money payable under decree—Person knowing how to write, payment must appear in his own handwriting.**

The word " debt " includes money payable under a decree. In the case of a person who knows how to write the payment must appear in that person's own handwriting and he cannot be allowed to adopt by mere signing, any writing made by somebody else as in the case of an illiterate man: 38 *Mad.* 438; 23 *Bom.* 246 and 23 *Cal.* 546 (*F. B.*), *Rel. on.* [P 65 C 1]

P. K. Basu—for Appellant.

R. G. Aiyangar—for Respondent.

Maung Ba, J.—In Civil Regular 30/24 of the District Court of Pyinmana, the Infant Welfare Committee at Pyinmana obtained a decree against Maung Tun Hlaing and Ma Saw Hla for Rs. 7,279 and costs. There was an appeal from that decree to this Court and the appeal was dismissed on 3rd August 1925. On 12th September 1928, the Infant Welfare Committee assigned the decree to U Aung Gyaw, as the President of the Pyinmana Hospital Committee. On 19th January 1929, Maung Tun Hlaing and U Aung Gyaw made a joint petition to the District Court to note the assignment and to certify that only Rs. 4,500 had been paid towards the decree as detailed below.

9-11-25—500
24-11-25—500
7-12-25—500
1-4-26 —1000
17-6-26 —1000
27-5-27 —500
3-3-28 —500

On 25th February 1929 in Civil Execution No. 7 of 1925 U Aung Gyaw sought to execute the decree for the balance plus interest by attachment and sale of Maung Tun Hlaing's house at Pyinmana. Maung Tun Hlaing objected to the attachment contending that the application for execution had already become time barred. The learned District Judge overruled that objection and allowed the execution to proceed. Hence the present appeal. In the first place he held that the joint petition made on 19th January 1929 amounted to a " step-in-aid of execution " within the meaning of Cl (5), Art. 182, Lim. Act.

That clause reads:

"where the application next hereinafter mentioned has been made the date of the final order passed on an application in accordance with law to the proper Court for execution or to take some steps-in-aid of execution of the decree or order. "

It is necessary to examine the true nature of the joint petition. The petition asks for two things: (1) to note the assignment and (2) to certify payments amounting to Rs. 4,500. It was signed by the assignee decree-holder and the judgment-debtor. The learned District Judge treated that petition as an application made by both the decree-holder and judgment-debtor to certify payments and held that such application was a step-in-aid of execution, relying upon the case of *Law San* v. *Po Thin* (1). That case was decided by a single Judge of this Court and that Judge held that an application by a decree-holder to certify payments made within three years from the date of the decree may be made at any time within three years from such date of payment and will afford the decree-holder a fresh starting point for limitation within the meaning of Art. 182 (5), Lim. Act.

This law must be considered as no longer good in the face of the recent decision of their Lordships of the Privy Council in *Prakash Singh* v. *Allahabad Bank Ltd.* (2). It was held that certi-

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(1) A. I. R 192[illegible] Rang. 2 =[illegible] Rang. 3[illegible]3.
(2) A. I. R. 192[illegible] P. C. 1[illegible]=3 Luck. 684=5[illegible] I. A. 30. (P. C.).

fication to the Court under O. 21, R. 2 (1) by a decree-holder even if made in the form of an application is not an "application within Art. 181, Lim. Act, so as to be barred unless it takes place within three years of the payment certified nor is there any article which limits the time. It follows that though a decree-holder may certify payments at any time yet his certification cannot avail him as an "application" within Cl. (5), Act. 182 also, because O. 21 R. 2 (1) needs no application. If the joint petition be treated as an application by the judgment-debtor under O. 21, R. 2 (2) then the application was already time barred as it was not made within 90 days from the dates of payments under Art. 174. If it be treated as an acknowledgment within S. 19, Lim. Act, it was also time barred, as it was made after the expiration of the period prescribed.

It only remains to consider whether any of the payments mentioned in that joint petition could be considered for the purpose of claiming the benefit under S. 20, Lim Act. The word "debt" used in that section includes money payable under a decree. But the proviso to that section requires that fact of the payment must appear in the handwriting of the person making the payment. Here the petition was not written but it was typed. Under the General Clauses Act "writing" includes printing, lithography, photography and other modes of representing or reproducing words in a visible form. But S. 20 uses the expression "handwriting" and not merely "writing." In view of the imperative nature of the words used we are inclined to hold that in the case of a person who knows how to write the payment must appear in that person's own handwriting and that he cannot be allowed to adopt by mere signing any writing made by somebody else, as in the case of an illiterate person. In this view we are supported by the Madras High Court in *Lodd Govindass Krishna Doss* v. *Rukmani Bai* (3), where a Bench of the Court held that

"Section 20, Lim. Act, requires that in the case of part payment of the principal the entry recording the payment should be written by the person who makes the payment when such person knows how to write; his mere signature to the entry made by another is not a sufficient compliance with the section."

The Bombay High Court held the same view in *Joshi Bhaisanker* v. *Bai Parvati* (4); so did the Calcutta High Court in the Full Bench case of *Mukhi Haji Rahmuttulla* v. *Coverji Bhwja* (5). The payments mentioned in the joint petition would not save limitation. In the result we hold that the application for execution made on 20th February 1929 was time barred. I would therefore set aside the order of the District Court and dismiss the application with costs.

Brown, J.—I agree. It is true that towards the close of their judgment in *Prokash Singh's* case (2) their Lordships of the Privy Council refer to cases in which it had been held that the certification of a payment is a step-in-aid of execution, and specifically stated that it was not necessary to express any opinion with reference to those cases. If, however, an application to certify be held not to be an application within the meaning of Art. 181, it seems necessarily to follow that it cannot be an application for the purposes of Art. 182 (5). Otherwise we should have the startling result that execution proceedings could be revived at any time within 12 years of the decree on certification of a payment, however soon that payment might have been made after the decree.

P.N./R.K. *Decree set aside.*

(3) [1915] 38 Mad. 438=21 I. C. 302=1 M. L. W. 529.

(4) [1902] 26 Bom. 246=3 Bom. L. R. 834.

(5) [1896] 23 Cal. 546 (F. B.).

A. I. R. 1930 Rangoon 65

HEALD AND MYA BU, JJ.

Tun Aung Gyaw—Plaintiff — Appellant.

v.

Burmah Oil Co. Ltd., and *another*—Defendants—Respondents.

Civil Misc. Appeal No. 111 of 1929, Decided on 23rd December 1929, from order of Dist. Judge, Magwe, D/- 13th May 1929, in Civil Regular Suit No. 30 of 1927.

Civil P. C., S. 151—Suit dismissed for default—No good cause shown — It cannot be restored under S. 151 — Civil P. C., O. 9, R. 9.

The Court can only set aside the dismissal of a suit for default when good cause is shown under O. 9, R. 9. It cannot in virtue of its inherent power pass order restoring such suit if

no good cause is shown for non-appearance: 43 *Mad.* 94, *Rel. on.* [P 67 C 1]

N. C. Sen—for Appellant.

Paget—for Respondent 1.

Judgment.—On 10th November 1927 appellant, Tun Aung Gyaw, filed a suit against respondents to recover certain lands, which he valued at Rs. 1,00,000 and compensation for use and occupation, which he assessed at Rs. 63,000. After various amendments of the pleadings in which appellant withdrew his claim to possession of the lands and after hearings on preliminary points, issues were finally framed on 26th November 1928, and it was ordered that lists of witnesses should be filed by 6th December 1928, the case being fixed for the examination of the plaintiff's (appellant's) witnesses on 28th and 29th January 1929 and the defendants' (respondents) witnesses on 30th and 31st January 1929. On 8th December appellant filed a list of witnesses, which was accepted by the Court, but he did not pay the fees necessary to secure their attendance, so that they were not summoned.

When the case was called on 28th January 1929 appellant himself was absent and none of his witnesses were present. A pleader held his advocate's brief and applied for an adjournment on the ground that appellant was ill. He produced a medical certificate which purported to be signed by a registered medical practitioner Raghunath of Rangoon. That certificate was dated 12th January 1929 and said that Tun Aung Gyaw was suffering from severe attacks of headaches and was under the practitioner's treatment. It went on to say that the headache was due to the infection from his ear disease and that the practitioner advised Tun Aung Gyaw to stay in Rangoon for a month for observation and treatment. There was no affidavit or other evidence of identity of the person, said to be Tun Aung Gyaw who was alleged to be the practitioner's patient, with appellant.

The learned Judge refused to accept the certificate and the pleader withdrew from the case. The Judge then dismissed the suit with costs under the provisions of O. 17, R. 2 read with O. 9, R. 8, that is, for default of appearance. Appellant applied that the order of dismissal should be set aside under O. 9, R. 9, and filed an affidavit that he was in Rangoon suffering from ear trouble and headache, coupled with a later attack of piles. He also filed an affidavit sworn by one Ba Thwin, who lived in the same house with him, saying that by reason of illness he was unable to leave the house at any time during January and that he was under the treatment of Raghunath during the whole of that month. It is to be noted that he did not file an affidavit sworn by Raghunath.

The Court took evidence and appellant giving evidence in his own behalf, said that he did not pay into Court the expenses necessary for the issue of summons to his witnesses because he was ill and he swore that he had been attended by the medical practitioner who gave the certificate. In cross-examination he admitted that he was unemployed and had no property or means of any sort, that he had been financed by one Khoo Sein Ban under what he admitted to be a champertous agreement that Khoo Sein Ban was to get a third of the proceeds of the litigation and all his expenses, and that at the time when the money for the witnesses ought to have been deposited in Court Khoo Sein Ban was in financial difficulties and told him that he could not advance any more money. His witness Hla Kyi, in whose house he lives on charity and who said that he was a Burmese "Physician" swore that he treated appellant for headache in January 1929, but his evidence was intrinsically worthless.

Appellant's only other witness Pe Gyi said merely that appellant once told him that he was suffering from piles. On this evidence the Court came to the conclusion that appellant had failed to prove that there was sufficient cause for his non-appearance when the suit was called on for hearing and dismissed his application. Appellant appeals against that order but we see no reason to interfere. Appellant did not file any affidavit sworn by Raghunath and did not call him as his witness. His own admissions show that the reason which he gave for his failure to appear were false, and he certainly did not succeed in proving that he was prevented from appearing by illness, which was the only cause he alleged.

It has been suggested that apart from the provisions of O. 9, R. 8 this Court has under the provisions of S. 151 of the Code inherent power to set aside

the dismissal of a suit for default and that in view of the amount involved in the suit and the amount of the Court-fees paid by appellant, this case is one in which that power should be exercised. The question of the alleged inherent power in a somewhat similar case was considered by a Full Bench of the High Court of Madras in *Neelaveni* v. *Narayana Reddi* (1), and we see no reason to differ from the conclusions of the learned Judges in that case. We hold that there is no such inherent power as that suggested, and since appellant has failed to prove that sufficient cause which he alleged, we dismiss the appeal with costs. Advocate's fees in this Court to be five gold mohurs.

P.N./R.K. *Appeal dismissed.*

(1) [1920] 43 Mad. 94=37 M.L.J. 599=10 M. L.W. 606=53 I.C. 847=(1920) M.W.N. 19 (F.B.).

A. I. R. 1930 Rangoon 67

MYA BU, J.

U Po Thaw and *others*—Appellants.

v.

Ma Thit—Respondent.

Second Appeal No. 143 of 1929, Decided on 6th December 1929, from decree of Dist. Judge, Meiktilla, in Civil Appeal No. 82 of 1928.

(a) Practice—Date of decree must correspond to date of judgment — Civil P. C, O. 20, R. 7.

The date of the decree must correspond to the date of the judgment no matter what the date of the signing of the decree may happen to be. [P 68 C 1]

(b) Limitation Act, S. 5—Date in decree misleading is sufficient cause.

Where the date actually entered on the decree apparently misled the appellant it would obviously be a sufficient cause for admitting the appeal after time. [P 68 C 1]

Halkar—for Appellants.

Judgment.—The District Court of Meiktilla having reversed the decree of the Township Court dismissing the respondent's suit against the present appellants and two others, namely, Maung Po Kywe and Ma Thein May, the appellants have come to this Court on second appeal. Appellants 2 and 3 are the daughters of appellant 1, while the defendants, Maung Po Kywe and Ma Thein May are the sons and daughter-in-law respectively of the plaintiff. By a registered mortgage-deed, dated the 19th October 1922, Maung Po Kywe (or Maung Kywe) and Ma Thein May mortgaged the land in suit to the appellants for Rs. 200 with interest. A suit was filed on this mortgage against Maung Po Kywe and Ma Thein May being Civil Regular No. 186 of 1926 of the Township Court of Meiktilla in which the first appellant, U Po Thaw alone was described as the plaintiff. A preliminary mortgage decree was passed on confession on 20th August 1926, in favour of appellant 1 alone, and this was followed by the final decree dated 12th March 1928, in his favour.

Both the original plaint and the amended plaint filed in the trial Court in the present case are very badly drafted which was clearly due to the failure on the part of the plaintiff's pleader to grasp the true nature of the relief required by the plaintiff. These defects have been duly noticed by the lower appellate Court. The plaint and the amended plaint went wide of the mark by alleging fraud and praying for the setting aside of the decree which had been obtained by U Po Thaw. But the relief that the plaintiff obviously required did not extend to the setting aside of the decree and could have been based on allegations other than the allegations of fraud. These are that she was the owner of the land in suit which her son and daughter-in-law had mortgaged to the appellants without her knowledge and consent and that, therefore, the decree obtained by U Po Thaw against Maung Po Kywe and Ma Thein May was not binding on her property. She was in possession of the property and wanted this decree merely to remove the cloud on her title to the land. I consider that the lower appellate Court is correct in allowing the plaint to be amended in appeal and that it is correct in its view of the court-fee payable on the plaint.

The only point of substance taken up on behalf of the appellants is that the lower appellate Court accepted the appeal after the expiry of the 60 days time allowed for such an appeal.

The judgment of the Court of the first instance is dated 12th September 1928. The date of the decree of the Court of the first instance should in law correspond to the date of the judgment. But the date of the decree is shown as 24th September 1928, which was the date on

which the decree was signed. The Judge of the Court of the first instance should note that the date of the decree and the date of the signing of the decree are two different things. The date of the decree must correspond to the date of the judgment no matter what the date of the signing of the decree may happen to be.

If the period of limitation ran from 12th September, then, the appeal, which was filed on 26th November 1928 was time barred by 12 days, even after deducting three days for copying. But in this case, no objection was taken in the lower appellate Court on the ground of limitation. Though no doubt it is the duty of the Court to reject time barred appeal suo motu, even in the absence of any objection on the part of the opposite party on the ground of limitation, yet what happened in this case is quite excusable, that is, taking the date of the decree as the basis of the date from which the period of limitation is to be calculated if the date entered on the decree is correct then the appeal is in time.

There is no doubt that there has been an error committed by the Court of the first instance, but there is equally no doubt that the period of limitation must be computed from the date of the decree. Even if the appeal happened to be really beyond time, the fact that the date actually entered on the decree had apparently misled the appellant would obviously be a sufficient cause for admitting the appeal after time.

For these reasons, I hold that the appeal was filed in the lower appellate Court in time. It is contended that the appellants took the mortgage in the belief in good faith that the mortgagors were the owners, but it is clear as pointed out by the learned District Judge that the appellants acted simply and solely on the assurance of the mortgagors and took no steps to ascertain, as they should as reasonable men, the truth or otherwise of their mortgagor's' claim. I see no reason to interfere with the decree of the lower appellate Court and dismiss this appeal.

P.N./R.K. *Appeal dismissed.*

A. I. R. 1930 Rangoon 68

HEALD AND MYA BU, JJ.

Burma Oil Co. Ltd.—Appellants.

v.

Ma Tin and *others*—Respondents.

First Appeal No. 26 of 1929, Decided on 11th April 1929, from order of Dist. Judge, Magwe. in Civil Execution No. 13 of 1928.

Civil P. C., O. 21, Rr. 18 and 20—O. 21, R. 20, merely applies provisions of O. 21, R. 18, to decrees for sale in enforcement of mortgage—Mortgage decree for sale under which mortgage debt is recoverable only out of property sold and there is no personal remedy against mortgagors is not decree for payment of a sum of money.

Order. 21, R. 20, merely applies the provisions of O. 21, R. 18, to decrees for sale in enforcement of a mortgage. A mortgage decree for the sale of mortgaged property, while there is no remedy except against the property and where there is no obligation on the part of the mortgagors personally to pay any sum of money is not a decree for the payment of money. Thus a person holding a decree for the sale of mortgaged property but under which the mortgage debt is not recoverable except out of the property mortgaged cannot be allowed to set off that decree against a personal decree for money held by his mortgagor against him. It is true that ordinarily a mortgage decree for sale is a decree for the payment of a sum of money but a decree for sale under which the mortgage debt is not recoverable otherwise than out of the property sold is not an ordinary decree for sale in enforcement of a mortgage: 29 *Mad.* 318, *Cons.* and *Doubted*; 38 *All.* 669 and 33 *All.* 240, *Cons.*

[P 69 C 2, P 70 C 1, P 71 C 1]

Mootham—for Appellants.

N. M. Cowasjee and *Kyaw Din*—for Respondents.

Heald, J.—In 1907 two brothers, Po Kan and Po San, as owners of six oil-well sites, leased those sites to one Lim Chin Tsong for 25 years and in 1908 they mortgaged the same sites to the same Chin Tsong for Rs. 75,000. Chin Tsong assigned his rights under both the lease and the mortgage to the present appellants. In Suit 21 of 1926 of the District Court of Magwe the present respondent Ma Tin, who was Po Kan's widow and sole heiress, and her father, the present respondent Po Gon, sued appellants to recover certain moneys which they alleged to be due in respect of the lease. Their case was that at the time of the lease Po Kan was the sole owner of the sites, Po San being merely his benamidar, that on Po Kan's death his widow Ma Tin became sole owner of the sites, that Ma Tin had assigned part of her interest in the sites to her father Po

Gon, and that therefore Ma Tin and Po Gon as owners of the sites were entitled to moneys due in respect of the lease. In the result they obtained a decree for over Rs. 25,000 but were ordered to pay certain costs and court-fees.

In Suit 25 of 1926 of the same Court appellants sued the same Ma Tin and Po Gon, as well as Po Kan's brother Po San for sale of the sites in enforcement of the mortgage. They impleaded Po San not only because he was a party to the mortgage but also because he claimed an interest in one of the sites on the strength of an award in respect of a claim which he had made against Po Kan's estate. Po San admitted, it may be noted, that Po Kan was sole owner of the sites at the time of the lease and the mortgage. Appellants obtained a final decree for the sale of the sites in enforcement of their mortgage for over a lakh and a quarter of rupees.

Appellant then claimed that under R. 18 read with R. 20, O. 21 of the Code they were entitled to set off against the amount due to them in respect of the mortgage decree the amount due by them under the decree in Suit 21. The Court held that in view of the fact that appellants had no personal remedy against respondents in respect of the mortgage debt, their debt which was due to respondents personally could not be set off against the amount of the mortgage decree. Appellants appeal on the ground that the provisions of O. 21, R. 20, give them an absolute right to set off the one debt against the other. R. 20 says that the provisions contained in R. 18 shall apply to decrees for sale in enforcement of a mortgage, and the decree which appellants have obtained is undoubtedly a decree for sale in enforcement of a mortgage. If therefore the provisions of R.18 can be applied to that decree they must be so applied.

Rule 18 says that where applications are made to the Court for the execution of cross-decrees in separate suits for the payment of two sums of money passed between the same parties and capable of execution at the same time by such Court, then one of those two sums of money may be set off against the other. It says futher that the holder of a decree passed against several persons jointly and severally may treat it as a cross decree in relation to a decree passed against him singly in favour of one or more of such persons. It goes on to say that the rule shall not be deemed to apply unless the decree-holder in one of the suits in which the decrees have been made is the judgment-debtor in the other and each party fills the same character in both suits.

In the present case there is in my opinion no question that Ma Tin and Po Gon fill the same character in both suits. Ma Tin became owner of the properties which were leased and mortgaged as being her husband's sole heiress and she has since transferred part of her interest in the properties to her father Po Gon. In each case they were parties to the suit as being owners of the sites which were the subject in the one case of the lease and in the other of the mortgage. Application has been made to the Court for execution of both decrees and both decrees are capable of execution by that Court at the same time. So far as Ma Tin and Po Gon were concerned the decrees were passed between the same parties, namely between them and appellants, and the provisions of Cl. 4, R. 18, meet an objection on the score of Po Gon's being a party to one of the decrees. Thus far therefore it seems that the provisions of R. 18 are applicable to the present case. Nevertheless I find it difficult to hold that a mortgage decree for the sale of the mortgaged property, while there is no remedy except against the property and where there is no obligation on the part of the mortgagors personally to pay any sum of money, is a decree for the payment of a sum of money. Unfortunately the case law on the application of Rr. 18 and 20, O. 21, is very meagre.

Appellants' learned advocate has referred us to the case of *Krishnan* v. *Venkatapathi* (1), which was decided before R. 20, O. 21, became law. In that case a third party obtained a decree against Krishnan for the recovery of money by the sale of certain lands, while Krishnan held a simple money decree against the same third party. Venkatapathi attached the decree against Krishnan in favour of the third party in excution of a decree for money

(1) [1906] 29 Mad. 318.

which he held against the third party. Krishnan objected to the attachment on the ground that he was entitled to set off the money decree, which was made against the third party in his favour, against the third party's decree against him for sale of the lands. The question to be decided was whether the decree for money could be set off against the decree for the sale of the lands, and the decision of the learned Judges was that the decree for the recovery of money by the sale of lands was essentially a decree for money and that therefore a dacree for money could be set off against that decree, so that the amount for the recovery of which the lands were to be sold could be reduced by the amount due under the decree for money. The case of *Vaidhinathasamy* v. *Somasundaram* (2), on the authority of which the learned Judges came to that decision, was a mortgage suit in which there was a personal remedy against the mortgagors as well as a remedy against the mortgaged property and anything which was said in that case with reference to a case where there was no personal remedy must necessarily have been obiter. For the consideration of the question whether a decree is or is not a decree for the payment of sums of money, there seems to me to be a material difference between a case where there is a personal remedy for money under the decree and a case where is no such remedy, and in view of the fact that the learned Judges did not consider that difference I think that the correctness of their judgment, for which they gave no reasons beyond their opinion that a decree for the recovery of money by the sale of property is essentially a decree for money and their reference to the earlier case, is seriously open to doubt.

Appellant's learned advocate referred us also to the case of *Nagar Mal* v. *Ram Chand* (3). In that case Nagar Mal held a simple money decree against Ram Chand and Ram Chand held a decree against Nagar Mal for a larger amount in respect of a charge on immovable property. Nagar Mal applied for execution of his decree but the Court allowed Ram Chand to set it off against his decree. It does not appear whether or not in that case there was a personal liability against Nagar Mal under the decree in respect of the charge, but if there was a personal remedy that case is in my opinion no guide for the decision of the present case.

The only other case cited before us was *Sheo Shankar* v. *Chunni Lal* (4). In that case Sheo Shankar held two money decrees against Chunni Lal and Chunni Lal held a mortgage decree for sale of certain properties, one of which belonged to Sheo Shankar having been bought by him from the mortgagor after the date of the mortgage. Chunni Lal claimed to set off his mortgage decrees against Sheo Shankar's money decrees. Sheo Shankar pleaded that although he was bound by the mortgage decree so far as that part of the mortgaged property which belonged to him was concerned he was not liable personally for the amount of that decree or any part of it. He said that the mortgage decree gave him merely an option to save his property from sale by paying the mortgage money, that he was not bound and did not propose to exercise that option, and that, so far as he was concerned, the decree-holder's remedy under the mortgage decree for sale was solely against his property which was subject to the mortgage. The learned Judges said that the matter depended on the interpretation to be placed on Rr. 18 and 20, O. 21, of the Code. They pointed out that for the application of R. 18 it was necessary that the decrees should be decrees " for the payment of sums of money " and that each party should fill the same character in both suits. They pointed out further that Sheo Shankar had obtained the money decrees in his favour in his individual and personal capacity and that in the mortgage suit he was not ordered to pay any sum of money in his individual and personal capacity but was only given an option to do so if he liked, in order to save from sale some property in which he was interested. For this reason they held that the character in which Sheo Shankar was sued in the case on the mortgage was different from the character in which he obtained his decrees for money and that therefore, in

(2) [1905] 28 Mad. 473=15 M. L. J. 126.

(3) [1910] 33 All. 240=8 I. C. 835=7 A. L. J. 1179.

(4) [1916] 38 All. 669=36 I. C. 948=14 A. L. J. 776.

spite of the provisions of R. 20, R. 18, could not be applied to the case.

In the present case, as I have said above, the parties do in my opinion fill the same character in both suits, but the fact that there was no personal liability under the mortgage decrees was common to both cases and in my view the real reason why such cases cannot be brought within the purview of R. 18 is that the mortgage decree in such cases is not a decree "for the payment of sums of money." It may be noted that ordinarily a mortgage decree for sale is a decree for the payment of a sum of money. In the form of a preliminary mortgage decree for sale, which is given as Form No. 4, Appendix D to the Code, it is provided that if the net proceeds of the sale are insufficient to pay the mortgage debt with interest and costs, the plaintiff shall be at liberty to apply for a personal decree for the amount of the balance, and R. 6, O. 34, says that where the net proceeds of the sale of the mortgaged property are found to be insufficient to pay the amount of the mortgage debt, the Court may pass a decree for the balance if such balance is legally recoverable otherwise than out of the property sold. If the balance is not so recoverable, the decree is not an ordinary decree for sale in enforcement of a mortgage, and since in my opinion it cannot be regarded as a decree for the payment of a sum of money, I would hold that R. 18 cannot be applied to it.

Respondent's learned advocate has pointed out that in the present case the application of that rule would involve hardship on the respondents. It is said, and it seems highly probable, that by reason of the appellants having allowed the mortgage to run on for many years, the mortgage debt is now very much in excess of the value of the mortgaged property. By reason of appellants' delay in filing their suit on the mortgage they have lost their right to recover the mortgage debt except out of the property. If they are allowed to set off the debt due by them to Ma Tin and Po Gon against the mortgage debt they will receive by virtue of their mortgage decree more than that decree entitles them to recover to the extent of the personal decree against them, and to that extent by reason of the accident that a decree has been given against them in favour of their mortgagors personally they will be relieved against the consequences of their own default in allowing their personal remedy to become time barred and in allowing the mortgage debt to exceed the value of the mortgage security. Such a result could hardly have been intended by the legislature when it enacted R. 20, but if that rule could be applied the hardship which would result would of course be no excuse for refusing to apply it, But as I have said R. 20 merely applies the provisions of R. 18 to decrees for sale in enforcement of a mortgage, and as I am of opinion that R. 18 is inapplicable to this particular decree by reason of the fact that it is not a decree for the payment of a sum of money, I would dismiss the appeal with costs, advocate's fee to be ten gold mohurs.

Mya Bu, J.—I concur.

P.N./R.K. *Appeal dismissed.*

A. I. R. 1930 Rangoon 71

DAS, J.

Tavoy Municipal Committee—Appellants.

v.

Maung Po Khin and *another*—Respondents.

Second Appeals Nos. 313 and 314 of 1929, Decided on 12th December 1929, from decree of Dist. Judge, Tavoy, in Civil Appeals Nos. 12 and 13 of 1929.

Tort—Negligence—No statutory obligation on municipality to fence chaung—Accident caused owing to absence of fencing—Municipality is not liable.

Where there is no statutory obligation on the part of the municipality to fence a chaung which is not a public thoroughfare, it is not liable in damages for any accident that might have been caused owing to there being no fencing. [P 71 C 2]

Wellington—for Appellants.

S. Loonee—for Respondents.

Judgment.—In this case it is admitted that the pit in question was in the middle of a "chaung," that the chaung was not a public thoroughfare and that there is no statutory obligation on the part of the municipality to fence a chaung. I do not see how the municipality can be held liable for anyone falling in the pit dug in the middle of the chaung. I cannot understand how a pit dug in the middle of a chaung can be fenced unless we fence the whole chaung.

The cases quoted by the lower appellate Court do not help the respondent's case. The case of *Lynch* v. *Nurdin* (1) was a case where the carriage was allowed to stand in a public thoroughfare and the decision of that case has also been doubted in subsequent decisions. The case of *Cooke* v. *M. G. W. Railway of Ireland* (2) was a case where there was a statutory obligation on the part of the railway company to fence the place.

As I have stated, there is no such statutory obligation on the part of the municipality. If children will trespass in the land belonging to somebody else and fall into a pit in that land, they do so at their risk and the owner cannot be held liable and especially in a case like this, where it is only a case of deepening an already existing chaung, I therefore allow these appeals and the two suits will be dismissed with costs in all Courts.

P.N./R.K. *Suits dismissed.*

(1) 1 Q. B. 29=4 P. & D. 672=5 Jur. 797=10 L. J. Q. B. 73.

(2) [1909] A. C. 229=78 L. J. P. C. 76=25 T. L. R. 375=53 S. J. 319=100 L. T. 626.

A. I. R. 1930 Rangoon 72

MYA BU AND BAGULEY, JJ.

Ma Bi and *another*—Appellants.

v.

Ma Khatoon and *others*—Respondents.

First Appeal No. 28 of 1928, Decided on 17th June 1929, against judgment of Dist. Judge, Mandalay, in Civil Suit No. 77 of 1927.

(a) Mahomedan Law—Succession—Owner dying leaving several heirs—All become co-owners and tenants-in-common—Suit for recovery of possession by one co-owner against another in actual possession is governed by Limitation Act, Art. 144 and not Art. 123.

When a Mahomedan owner dies leaving several heirs, they all become co-owners and tenants-in-common. A joint owner is legally entitled to retain possession of joint property. Even if he is in exclusive possession of such joint property his possession is ordinarily to be referred to his legal title. The other co-owners are accordingly in constructive possession of the property. If, therefore, the co-owner in actual possession dispossesses any one of the other co-owners, the suit that is brought for recovery of possession is not a suit for a distributive share of the property of an intestate but is a suit to recover possession of the defined, though undivided, share of the co-owner in the possession of the other co-owners. Such a suit is not covered by Art. 123 at all and must fall under the general Art. 144, limitation running from the date when the defendant's possession became adverse : *A. I. R.* 1928 *All.* 467, (*F. B.*) *Foll.*; *A. I. R.* 1921 *Bom.* 56, *Ref.*; *A. I. R.* 1924 *Rang.* 155, *Dist.* [P 73 C 1]

(b) Co-owners—Dispossession — Ouster is necessary—It cannot be inferred merely from non-enjoyment of definite benefit.

When co-owners are in joint possession to prove dispossession of a co-owner his ouster has to be proved very definitely and provided there is no break in social reation among the co-owners, the fact that the co-owner never enjoyed a definite benefit from the estate will not lead to the inference of ouster : 10 *L. B. R.* 45 and *A. I. R.* 1928 *Rang.* 6, *Ref.* [P 73 C 2]

(c) Evidence Act, S. 114 — Piece of land adjacent to joint property in name of joint owners it presumed to be joint.

When a piece of land is adjacent to a piece of joint property which is registered in the names of the joint owners of the joint property, it is for those who assert that it is not joint property to prove their assertion. [P 74 C 1]

Ko Ko Gyi—for Appellants.

S. Mukerji—for Respondents.

Baguley, J.—The appellants in this case are two sisters. They were defendants 1 and 2 in the original suit. The first three respondents were originally plaintiffs; they are the legal representatives and heirs of one Mahomed Esa, who was the brother of defendants 1 and 2 (now appellants). The remaining respondents who were made defendants in the lower Court are legal representatives and heirs of another brother of the two appellants, who died before this case was brought.

The plaintiffs sued the defendants for all property left by their father and husband Mahomed Esa. They said that Mahomed Esa had entrusted defendants 1 and 2 with Rs. 10,000 to take care of on his behalf. They also said that the parents of Mahomed Esa, Ma Bi and Ma Rahima and the father of the remaining defendants had left behind property which had never been partitioned among their children, and they claimed for Mahomed Esa's share in the corpus of the inheritance property. The claim for Rs. 10,000 was rejected by the lower Court. The learned Judge, however, found that two pieces of land known as holdings 3 and 4 were inherited by the two brothers and two sisters, and he directed that these properties be sold and the proceeds distributed in certain shares among the plaintiffs, the two principal defendants and the remaining defendants. Against this decree, so far as it gives an interest in the sale proceeds to the original plaintiffs, defendant 1 and 2 now appeal.

The first point which was argued is that the suit should be held to be barred by Art. 123, Lim. Act. It is not contested that the parents of Mahomed Esa died more than 12 years before the filing of the suit; but it is argued that there has never been any distribution of the estate, that it has been enjoyed in common by the heirs, and that therefore it is not a question of applying Art. 123 but Art. 144, Lim. Act.

Appellants rely upon *Po Kin* v. *Shwe Bya* (1) in which it was held:

"The appropriate article for suits instituted against co-heirs for a share in the corpus of an inheritance is Art. 123, Lim. Act."

This ruling, it is claimed, has been followed in *Ma Tok* v. *Ma Yin* (2) and *Maung Shwe An* v. *Maung Tok Pyu* (3) On the other hand it must be remembered that the parties in these three cases were all Burmese-Buddhists; the parties in the present case are Sunni Mohamedans.

There is an important Full Bench ruling *Rustom Khan* v. *Janki* (4), in which the question of the applicability of Art. 123 or Art. 144, Lim. Act, in cases such as the one now in question was examined. The parties in this case were also Mahomedans, and it was held in this case that despite the Privy Council ruling of *Maung Tun Tha* v. *Ma Thit* (5):

"when a Muhammadan owner dies leaving several heirs they all become co-owners and tenants-in-common. A joint owner is legally entitled to retain possession of joint property. Even if he is in exclusive possession of such joint property, his possession is ordinarily to be referred to his legal title. . . . The other co-owners are accordingly in constructive possession of the property. . . If therefore, the co-owner in actual possession dispossesses any one of the other co-owners, the suit that is brought for recovery of possession is not a suit for a distributive share of property of an intestate but is a suit to recover possession of the defined, though undivided, share of the co-owner in the possession of the other co-owners. Such a suit is not covered by Art. 123 at all and must fall under the general Art. 144, limitation running from the date when the defendant's possession became adverse."

The same point of view seems to have occurred to Lentaigne, J., in *Po Kin's* case (1) in which at p. 405 (*of* 1 *Rang.*) referring to *Nurdin Najbudin* v. *Bu Umroo Bu* (6) he states that the judgment of Macleod, C. J., show that the plaintiff had been in possession of the property as one of the co-heirs, though holding with the other co-heirs as undivided and as tenants-in-common, and that accordingly Art. 144 applied: and he further stated that he agreed with that view because the claim had technically ceased to be a suit for recovery of a share of inheritance inasmuch as such inheritance had been in fact previously possessed by the plaintiff and held jointly, and the inheritance aspect of the case was merely the basis of fixing the title and rights enjoyed by plaintiff in such possession. In *Maung Shwe An's* case (3), Brown, J., refers to this passage in *Po Kin's* case (1) and says that there is an exception in a case where the co-heirs including the plaintiff claiming a share have gone into possession and the plaintiff is subsequently ousted and refused his share.

It will therefore be seen that the Rangoon High Court has been moving in the direction in which the Allahabad Full Bench moved before the last quoted ruling was published; and in the Allahabad ruling we definitely have stated that Mohamedan co-heirs are in joint possession. When co-owners are in joint possession; the ouster of one co-owner has got to be proved very definitely indeed: vide *Hari Pru* v. *Mi Aung Kraw Zan* (7); and in the present case although there is no definite proof that Mahomed Esa was ever enjoying any definite benefit from the estate left by his parents, there is the fact admitted that he lived in the same house with Ma Bi and Ma Rahima for a year or so before he died, during which period they apparently kept him; he had been visiting the house regularly even before that time whe he came back from his business trips of Calcutta. There is no proof of any break, socially or financially, between himself and his sisters, and for these reasons I agree with the learned District Judge that the claim cannot be held to be barred by limitation.

The second ground of appeal is that the lower Court wrongly placed the burden of proof on the two defendant-appellants with respect to the ownership of the house, holding 4. The plaintiffs

(1) A. I. R. 1924 Rang. 155=1 Rang. 405.
(2) A. I. R. 1925 Rang. 228=3 Rang. 77.
(3) A. I. R. 1928 Rang. 6=5 Rang. 582.
(4) A. I. R. 1928 All. 467=51 All. 101 (F. B.).
(5) A. I. R. 1916 P. C. 145=44 Cal. 379=44 I. A. 42 (P. C.).
(6) A. I. R. 1921 Bom. 56=45 Bom. 519.
(7) [1919] 10 L. B. R. 45=52 I. C. 629=12 Bur. L. T. 129.

aver that holding 4 was part of the property inherited by defendants and their brothers from their parents. Defendants aver that holding 4 was given outright to the two sisters, Ma Bi and Ma Rahima by one Ma Bon. The trial Court found that the Zerbadi witnesses on either side were utterly unreliable and both sides were perjuring themselves whenever they thought it would suit their purpose. On a perusal of the record of the evidence, I am quite prepared to accept this valuation which the District Judge placed upon the evidence. It is therefore necessary to decide the point as to whether the house was inherited as joint property or whether it was received as a gift, on such outside evidence as may be available, combined with the burden of proof.

Holding 4 is directly adjacent to holding 3, which has admittedly descended from the parents of the parties. Holding 3 stands in the name of their mother, Ma Hnit, but it is on record that when a mortgage of this property was being negotiated, Mahomed Esa joined in the mortgage. Holding 4 stands in the three names: Mahomed Esa, Ma Bi and Ma Rahima. There it no dispute but that there was property inherited by the parties which was in their joint possession ; and when we get a piece of land adjacent to a piece of joint property which is registered in the names of the joint owners of the joint property, it is I think for those who assert that it is not joint property to prove their assertion. According to Ma Bi and Ma Rahima, there were four people present at the oral gift made by Ma Bon; two of them are dead and of the remaining two, one swears that there was such a gift and the other swears that there was not.

In view of all the surrounding circumstances of this case, I am of opinion that the lower Court was quite correct in calling upon defendants 1 and 2 to prove their assertion that holding 4 was their separate property and not part of the estate; and the land having been held to be part of the joint estate, in the absence of evidence to the contrary, the house on that land must be regarded to be in the same owners as the land.

The next point to be dealt with is the allegation by defendants 1 and 2 that Mahomed Esa renounced his rights to inherit his parents' estate. The evidence on this point is entirely oral. The learned District Judge has dealt with it in a manner which leaves little to be said by an appellate Court.

The oral testimony as to renunciation must be regarded as that of witnesses who in other respects are perjurers and very possibly in this respect also. The facts which defendants 1 and 2 set out to prove in their oral evidence are quite different from those stated in their written statement. In their written statement they say that after the death of both parents Mahomed Esa renounced his rights to inheritance; in their evidence they tried to prove that the renunciation was really arranged by the father during his lifetime. I see no reason to hold that the alleged renunciation has been proved. It is quite possible that Mahomed Esa did spend much of his parent's estate, but particularly among Mohamedans, the sons are often regarded as very superior to the daughters, and parents allowed for behaviour of this kind. Whether his other brother renounced his rights to inheritance or not is quite another matter; the point was not in issue and we are not concerned with it in the present appeal, but because one brother renounced his rights, it in no way follows that another brother has renounced his rights.

The next point argued was that Mahomed Esa divorced Ma. Khatoon before he died. This, even if proved, of course would not disentitle the children to inherit. The conception of Mohamedan Law among Mohamedans of this class is tinctured with a strong leaning towards Burmese ideas. The defendants, however, were quite prepared to allow their brother's rights to a divorce purely at his desire, which would of course be impossible under the Burmese-Buddhist system, but it is a point which must be known to all Mohamedans that the word commonly used by a Mohamedan when divorcing wife is talaq, and there is no allegation that this word was ever used. If a Mohamedan divorces his wife by another form very cogent proof of this divorce by reliable evidence will be required, and of this there is none in the present case, because there is no reliable oral evidence on the point at all.

The last point which was argued was that defendants 1 and 2 were entitled to reimbursement out of the estate the money which they paid on the mortgage. Evidence with regard to this mortgage is most unsatisfactory. The mortgage deed itself was never produced, and the circumstances under which it came into existence have never been properly explained. It is alleged that the mortgage was effected to pay off a previous mortgage, but there is no real proof of the previous mortgage, and on the plain assertion of Ma Bi and Ma Rahima, discredited as the evidence of these persons is, it is impossible to say that they are entitled to get back all the money they borrowed on this mortgage from the estate, when it is quite possible that they spent the whole proceeds themselves.

For these reasons I consider that the judgment of the lower Court must be supported. I would therefore dismiss this appeal with costs.

Mya Bu, J.—I concur.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1930 Rangoon 75

BROWN AND MAUNG BA, JJ.

Ma Galay and *another*—Appellants.

v.

Ma E Mya and *others*—Respondents.

First Appeal No. 69 of 1929, Decided on 12th November 1929.

Buddhist Law (Burmese) — Succession—Half-blood sister or brother and full nephew or nieces are to be considered equally related for purposes of inheritance.

Half-blood brother or sister and full nephew or nieces are to be considered equally related in blood. Thus where a person dies leaving behind a half-blood younger sister and brother as well as nephews and nieces, also of the person's full younger brother, each is entitled to equal share: 12 *Bur. L. T.* 103, *Held too wide.* [P 75 C 2]

Ba Si—for Appellants.

Maung Myint Kya Gaing and *Kin Maung Gyi*—for Respondents.

Judgment.— Respondent 1 Ma E Mya and the deceased were both spinsters. For about 35 years they lived together and carried on business jointly. Ma Gyi died in February 1927 having a half interest in the joint business. Ma Gyi left appellants-plaintiffs who are her half sister and half brother, and also respondents-defendants 2 to 4, who are her full nephew and full nieces. A preliminary issue as to who should be Ma Gyi's heirs was framed. The learned District Judge following the law laid down by Maung Kin, J., in *Taung Mro v. Aung Kydu* (1) that :

" full blood relations exclude half blood relations although the latter may be nearer in degree,"

held that the respondents would exclude the appellants. He accordingly dismissed the suit. From that dismissal the present appeal has been preferred. The Dhammathats are silent on this point. The nearest rule of partition in the Manukye is that mentioned in S. 18 which runs :

" When after the death of the parents the children live separately (after division of property) the law that the inheritance shall not ascend is this : Upon the death of such relations without leaving wife or husband, son or daughter, let not inheritance ascend to elder brother or sister let younger brothers or sisters only enjoy it."

According to the rule, Ma Gyi's estate should go to her younger brothers or sisters, if any. Unfortunately her younger full brother Aung Bu had predeceased her leaving three children who are respondents 2 to 4. Pitted against these we have the deceased's younger half brother and half sister who are the appellants. May Oung, J., in his treatise on Buddhist law expresses an opinion that the full blood brother or sister being closer it would be right to give him or her preference to half blood brother or sister. We feel inclined to agree with him. But in our opinion the law laid down by Maung Kin, J., that full blood relations exclude half blood relations, however, nearer in degree of relationship is too wide. We might agree with him if he had said that among relations of the same degree the full blood should be preferred to the half blood.

Is a half brother or sister nearer related than a full nephew or niece? This question is one not very easy to answer. Among full blood relations a sister or brother is no doubt nearer than a niece or nephew. Can the same be said in the case of a half blood sister or brother? We have our doubts and we are inclined to think that they are equally related in blood. In the present case the appellants are younger than Ma Gyi so was Aung Bu, the father of respondents 2 to 4. In these circumstan-

(1) [1919] 12 Bur. L. T. 103=58 I. C. 488.

-ces we consider it equitable to hold that the appellants and respondents 2 to 4 are heirs and that each of the five pairs is entitled to a fifth part of the estate. The learned District Judge has passed a queer decree. He dismissed the suit, but at the same time passed a preliminary administration decree. The decree of the District Court is set aside and the case remanded for trial on the merits. Each party to bear its own costs in this Court. Costs in the trial Court to follow the final result.

P.N./R.K. *Case remanded.*

A. I. R. 1930 Rangoon 76

OTTER, J.

Ah Phone—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 151-B of 1929, Decided on 13th May 1929, against order of Sub-Divisional (Special Power) Magistrate, Henzada, in Criminal Misc. No. 35 of 1929.

Criminal Trial—Case ready for hearing—Adjournment should not be made simply for finding out evidence existence of which is entirely problematical.

Cases may arise where evidence is difficult to procure and numerous and lengthy adjournments must be granted, but when once the case is ready for hearing adjournment should not be made in order to search for evidence, the existence of which is entirely problematical. [P 76 C 2, P 77 C 1]

The Court prosecutor came to the Court intending to base his case upon the evidence of the witnesses called. These witnesses for the prosecution denied that the accused committed the offence for which he was tried. There was no intimation that further evidence was forthcoming but the prosecutor informed the Court that he would file list of additional witnesses later.

Held: that adjournment should not be made in the case and accused should not be kept under shadow of a charge. [P 76 C 2]

Hay—for Applicant.

Judgment.—This case is referred by the Sessions Judge, Henzada, with a view to setting aside an order made by the Sub-Divisional Magistrate, Henzada. The charge was under S. 64-A, Excise Act, for earning a livelihood by the sale of illict seinye. On 9th February 1929, the Sub-Divisional Magistrate issued notice to "all prosecution witnesses to appear on 19th February."

On this day the accused Ah Phone appeared with his advocate; no less than four witnesses were examined for the prosecution. All these persons with one exception denied categorically that the accused was reputed to earn his livelihood by selling illicit seinye. A headman, however, did say that he had heard from some one whom he did not remember and whose accuracy he was not able to vouch for that the accused did earn his livelihood in the manner suggested.

According to the diary the Court prosecutor being in this unfortunate position intimated that he would file a further list of additional witnesses later. Thus it is evident that he came to Court intending to base his case upon the evidence of the four witnesses he called. He had already in effect closed his case. In order to allow a roving commission to obtain other evidence the Sub-Divisional Magistrate adjourned the case. This he certainly should not have done. There was no intimation that further evidence was forthcoming, and it is perfectly clear that as the witnesses relied on by the prosecution would not give the evidence expected of them an endeavour was made to put matters right by making a search in the hope of finding others who would prove more satisfactory and ordering the accused to attend whenever summoned.

It is true that at a later date three prosecution witnesses are said to have attended the Court, but this application had been filed meanwhile. The facts I have set out above are taken from the diary in the case, but the Sessions Judge was of opinion that the Magistrate on the conclusion of the hearing on 19th February said he would pass orders later in the day, but instead ordered the adjournment I have referred to; and moreover the Sessions Judge also thought that the Court prosecutor was not instructed at all. If so, of course the Magistrate is still more to blame for not disposing of the case once and for all. Cases should not be adjourned sine die for further evidence unless there is some real foundation for believing that such evidence in fact exists; and moreover accused persons should not be kept under the shadow of a charge in circumstances such as these. The action of the Magistrate was certainly oppressive.

There is no doubt of course that cases may arise where evidence is difficult to procure and numerous and lengthy adjournments must be granted, but when once the case is ready for hearing as

this case apparently was, adjournments should not be made in order to search for evidence, the existence of which is entirely problematical. One further point must be referred to. I observe that the Magistrate has signed the certificate appearing upon the usual form provided for recording the statement of the accused. The certificate is of course that such statement was taken "in the presence and hearing etc. of the Magistrate." But no statement whatever is recorded. This absurd and irregular action of the Magistrate is on a par with the general conduct of the proceedings which I have already described. The order of 19th February 1929, is set aside and the proceedings instituted on 22nd January 1929 are quashed.

P.N./R.K. *Proceedings quashed.*

C

A. I. R. 1930 Rangoon 77

MAUNG BA, J.

Mohamed Hayat Mulla—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 117 of 1929, Decided on 25th March 1929, from order of Dist. Magistrate, Rangoon, in Criminal Regular Trial No. 133 of 1927.

(a) Criminal P. C., Ss. 366 and 367—Omission to write judgment before passing sentence should not vitiate trial unless it occasions failure of justice—Criminal P. C., S. 537.

Though it is desirable that Magistrates should obey the express provisions of the law, yet the omission to write a judgment before pronouncing a sentence should not necessarily vitiate the trial, unless such omission has in fact occasioned a failure of justice: 14 *All.* 242 and 27 *Mad.* 237, *not Foll.*; 23 *Cal.* 502, *Rel. on.* [P 78 C 1]

(b) Criminal P. C., S. 367—Omission to sign judgment is mere irregularity curable by Criminal P. C., S. 537.

Where a Magistrate prepares a judgment but does not sign it, such omission to sign the judgment amounts to a mere irregularity curable by S. 537: *A. I. R.* 1925 *All.* 239, *Rel. on.* [P 78 C 1]

Rauf—for Appellant.

Judgment.—Appellant aged 64 appeals from a sentence of four years' rigorous imprisonment on three charges of cheating in the last case tried by the late U Po Nu as Additional District Magistrate, Rangoon. The first legal objection taken is that the sentence is illegal as there is no judgment signed by the learned Magistrate. On the record there is a judgment prepared by the late U Po Nu. From the affidavits of his two clerks, Maung Tha Tun and Maung Ba Sein, it would appear that that judgment consists of 12 paragraphs out of which paras 1 to 3 were written by Tha Tun at U Po Nu's dictation, paras 4, 5, 6 and 7 were typed by U Po Nu himself, and the remaining 5 paras were written by Maung Ba Sein at U Po Nu's dictation; that the corrections in the judgment were by U Po Nu himself; that that judgment was pronounced in open Court and the accused sentenced to four years' rigorous imprisonment on the evening of 22nd December 1928; that U Po Nu then handed that judgment to his Bench Clerk Maung Tha Tun to be fair typed; and that unfortunately U Po Nu died before he could sign the fair copy.

The appellant's learned advocate relied upon the case of *Queen-Empress* v. *Hargobind Singh* (1). In that case Hargobind and two others were tried for murder, found guilty and sentenced to death. The sentence was passed first and the judgment written afterwards. The sentence was held to be illegal, and the learned Judges observe:

> "The requirements of Ss. 366 and 367 are no mere matters of form. The provisions of those sections are based upon good and substantial grounds of public policy and whether they are or not, Sessions Judges must obey them and not be a law to themselves. Any Judge at the conclusion of the evidence in a case, some of which may be not quite distinct in his mind owing to the length of the trial, might pass sentence on a prisoner and find it impossible afterwards honestly to put on paper good reasons for having convicted him, or, on the other hand, might direct that the accused be set at liberty and find it impossible afterwards honestly to put on paper good reasons for the acquittal. The law wisely requires that the reasons for the decision shall accompany the decision, and shall not be left to be subsequently inserted or recorded."

This decision was approved by a Bench of the Madras High Court in the case of of *Bandanu Atchayya* v. *Emperor* (2). There too the Sessions Judge passed sentences on the accused persons and wrote the judgment some days afterwards. The learned Judges held that this was a violation of Ss. 366 and 367, Criminal P. C., and was more than an irregularity, and that it was a defect which vitiated the convictions and sentences. But a Bench of the Calcutta

(1) [1892] 14 All. 242=(1892) A. W. N. 831)
(2) [1904] 27 Mad. 237.

High Court in *Tilak Chandra Sarkar* v. *Baisagomoff* (3), held a contrary view. The learned Judges held that the omission of the Magistrate in recording a judgment before pronouncing his sentence was an omission or irregularity which fell within the purview of S. 537 of the Code, and so the sentence itself, by reason of this irregularity, was not an illegal sentence so as to render the trial nugatory.

Sub-S. (4) of S. 366 reads:

"Nothing in this section shall be construed to limit in any way the extent of the provisions of S. 537."

I am inclined to think that, though it is desirable that Magistrates should obey the express provisions of the law, yet the omission to write a judgment before pronouncing a sentence should not necessarily vitiate the trial, unless such omission has in fact occasioned a failure of justice. In the present case it cannot be said that there was no written judgment at all. The learned Magistrate might have signed the judgment already prepared, though it looked untidy and might append a fair copy of it later. It is true that S. 367 says that a judgment shall be dated and signed by the presiding officer in open Court at the time of pronouncing it. In my opinion the omission to sign the judgment amounts to a mere irregularity curable by S. 537. In *Emperor* v. *Ram Sukh* (4), Mukerji, J. held such a view. There a Magistrate wrote a judgment with his own hand but forgot to sign and date it, and it was held that this did not amount to more than an irregularity, such as would be cured by S. 537.

I now come to the second legal objection with regard to the jurisdiction of the Court. Three charges were framed against the appellant; firstly that he cheated Dudumia at Mudon in the Amherst District by dishonestly inducing him to deliver Rs. 143, secondly that he cheated Maung Tun Gyaw at Taloktaw in the Hanthawaddy District, by dishonestly inducing him to deliver Rs. 11; and thirdly that he cheated Hakim Khan at Thanatpin in the Pegu District by dishonestly inducing him to deliver Rs. 10-10-0. S. 177 lays down that every offence shall ordinarily be inquired into and tried by a Court within the local limits of whose jurisdiction it was committed. In the present case the alleged cheating was committed in the Pegu, Hanthawaddy and Amherst Districts and the trial took place in Rangoon. The question is whether the irregularity has vitiated the trial. S. 531 provides that no finding, sentence or order of any criminal Court shall be set aside merely on the ground that the inquiry, trial or other proceeding in the course of which it was arrived at or passed, took place in a wrong Sessions division, district, sub-division or other local area, unless it appears that such error has in fact occasioned a failure of justice. In my opinion there has been no failure of justice by this error relating to territorial jurisdiction. (Then his Lordship considered the facts and the evidence in respect of the charges of which the appellant was convicted and concluded as follows.) In my opinion the conviction of cheating cannot be sustained. The appeal is allowed, the convictions and sentences are set aside and the appellant is acquitted.

P.N./R.K. *Sentence set aside.*

(3) [1896] 23 Cal. 502.

(4) A. I. R. 1925 All. 299=47 All. 284.

A. I. R. 1930 Rangoon 78
Special Bench.

RUTLEDGE, C. J., BROWN AND ORMISTON, JJ.

Commissioner of Income-tax, Burma—Applicant.

v.

P. K. N. P. R. Chettyar Firm—Assessee.

Civil Ref. No. 11 of 1929, Decided on 10th January 1930, from Civil Misc. Appln. No. 10 of 1929, reported in *A. I. R.* 1930 *Rang.* 33.

(a) Income-tax Act (11 of 1922), S. 27—Discretion — Sufficiency of cause should not be decided arbitrarily.

Under S. 27, the Income-tax Officer has a discretion. This discretion consists of a power to decide whether the cause shown is or is not sufficient. He must not decide this question capriciously, arbitrarily or in manner which is unsound: *A. I. R.* 1930 *Rang.* 35, *Rel on.*

An assessee, a Hindu undivided family carrying on a money lending business being thereunto required by notice under S. 22 (2) submitted a form of return, but it was not in form prescribed under R. 5 (a) under S. 59. The Income-tax Officer acting under S. 22 (4) called for complete accounts of business. Books were filed, but the Income-tax Officer was of opinion that the assessee had suppressed certain books and for this default and for the default in respect of the return, made assessment under S. 23 (4) to the best of his judgment. The assessee applied to the Income-tax

Officer under S. 27 for cancellation of assessment which was refused.

Held: the discretion was properly exercised. [P 80 C 1, 2]

(b) Income-tax Act (11 of 1922), S. 66 (2) —Question other than one referred cannot be raised.

It is not open to the assessee to raise before the High Court any question other than that referred to. [P 80 C 1]

Govt. Advocate—for the Commissioner.

Hay and *Venkatram*—for Assessee.

Ormiston, J.—The assessee, a Hindu undivided family carrying on a money lending business, being thereunto required by a notice under S. 22 (2), Income-tax Act, submitted a form of return declaring an income of 3,40,000 as the income for the previous year. R. 19 of the Rules made by the Board of of Inland Revenue, in exercise of the powers conferred by S. 59 of the Act, provides that the return of total income for Hindu undivided families shall be in the form therein presented, which is headed: "Statement of total income during the previous year." To the form are appended certain notes. Note 5 (a) is:

"When you keep your accounts on the mercantile accountancy or book profits system you must file return in the following form:"

Then follows the form. R. 5 (b) is:

"Where you do not keep your accounts in such a form you must file a statement showing how you arrive at the taxable profits."

The notes are part of the rule and have as much validity as the statement of total income above referred to. S. 59 (5) of the Act declares that rules made under the section when published in the Gazette of India shall have effect as if enacted in the Act. Admittedly the assessee filed neither a return under note 5 (a) nor a statement under note 5 (b). The Income-tax Officer then acting under S. 22 (4) called for complete accounts of the business. Books were filed. The Income-tax Officer was of the opinion that the assessee had suppressed certain books and for this default and for the default in respect of the return made the assessment under S. 23 (4) to the best of his judgment. The assessee then applied to the Income-tax Officer under S. 27. That section so far as relevant provides that where an assessee satisfies the Income-tax Officer that he was prevented by sufficient cause from making the return required by S. 22, the Income-tax Officer shall cancel the assessment and make a fresh assessment. The Income-tax Officer refused to make a fresh assessment and the assessee under S. 30 appealed against such refusal to the Assistant Commissioner. The Assistant Commissioner while deciding in favour of the assessee on the question of the books was of opinion that the return made under S. 22 (2) was not in accordance with the statutory requirements and (under S. 31) refused to set aside the assessment made under S. 23 (4). The assessee then applied to the Commissioner under Ss. 66 (2) and 33. The Commissioner refused under S. 33 to interfere on the assessee's behalf and, being of the opinion that no question of law arose, rejected the application made under S. 66 (2). Application was then made in Civil Miscellaneous No. 10/1929. This Court differing from the Commissioner, held that a question of law namely, whether or not the discretion given by S. 27 was properly exercised. arose out of the Assistant Commissioner's order under S. 31 and required the Commissioner to state a case, and refer it to Court. The Commissioner has accordingly referred the following question:

"whether or not the discretion given by S. 27 was properly exercised in this case."

The question referred has not been argued. Mr. Hay contended that the reference having been made it was open to him to argue any question of law which might be considered to arise and that he was not confined to the question referred. The only authority cited for the proposition is *in re, The Commissioner of Income-Tax* v. *S. P. K. A. M. Chettyar Firm* (1). The particular quetion of law decided in that case related to the validity of an assessment under S. 23 (4), it being there held that, because the assessment in question was entirely arbitrary, it was illegal. I have referred to the record of that case, and it appears that the question there referred was:

"whether the Income-tax authorities acted legally in assessing the applicant under S. 23 (4)."

This involves two questions, the first being whether the authorities ought to have applied S. 23 (4) and the second being whether the assessment made by the authorities under that section was

(1) A. I. R. 1930 Rang. 35=7 Rang. 669.

in fact according to the best of their judgment. The second question was in fact referred and it was open to the Court to answer it. The case is, therefore no outhority for Mr. Hay's contention that he is entitled to argue a question other than that referred and he has put forward no argument in its favour. The language of Sub-Ss. 2, 3 & 5, S. 66 appears to be against it. Under Sub-S. (2) the assessee may require the Commissioner to refer to the Court 'any question of law arising out of' an order. Thereupon the Commissioner is to state the case and refer it. But he may refuse to state it on the ground that no question of law is involved. If he does so refuse, it is open to the Court, under sub-S. 3 to require him to state the case and refer it. If the reference is under sub-S. (2) the reference is of a question of law required by the assessee to be stated. In that case it could hardly be contended that it was open to the assessee to argue any question which he had not required the Commissioner to state. The same principle should apply when it is the Court which requires the Commissioner to make the reference and to state the case. Sub-S. (5) is even more conclusive. The High Court upon the hearing of any case referred to it "shall decide the questions of law raised thereby." I am of the opinion, therefore, that it is not open to the assessee to raise before the Court any question other than that referred. The question which Mr. Hay desires to raise is whether the assessment in the present case is in fact arbitrary and therefore illegal. The question actually referred as to whether the discretion under S. 27 was properly exercised in this case has, as I have said, not been argued by counsel. It may be very shortly answered. In *In re, Commissioner of Income-tax* v. *S. P. K. A. A. M. Chettyar Firm* (1) it was stated with reference to an assessment by an Income-tax Officer to the best of his judgment, that :

"he must make it according to the rules of reason and justice, not according to private opinion, according to law and not humour and that the assessment is not to be arbitrary, vague and fanciful, but legal and regular."

It was held that the assessment in question was illegal, because it was entirely arbitrary, and did not purport to be founded on any materials or reasons beyond the Income-tax Officer's private opinion.

I am of the opinion that the same principles are applicable to the exercise of the discretion under S. 27. The Income-tax Officer has to be satisfied that the assessee was prevented by sufficient cause from making the return required by S. 22. The Income-tax Officer under S. 27 has a discretion. This discretion consists of a power to decide whether the cause shown is or is not sufficient. He must not decide this question capriciously, arbitarily or in a manner which is unsound. There was a statutory obligation on the part of the assessee to comply with the requirements of note 5 subjoined to the return, and he did not comply with these requirements. His only reason for his default was that he was unable to do so, because Chettyar's account in general and his in particular were not kept on a yearly basis. The obvious reply to this is that it would be possible for him by taking sufficient trouble to have extracted such information from his own books, as would have enabled him to construct a profit and loss account for the preceding year and thus to have put himself into a position to comply with the imperative provisions of the law. On the face of it, therefore he had not shown sufficient cause for non-compliance with the requirements of note 5, and the Income-tax Officer was justified in so holding. I would answer the question referred that the discretion given by S. 27 was properly exercised in this case.

The order on the application to compel the Commissioner to state a case directed that the costs thereof should abide the final order for costs to be made on the reference. The Commissioner was wrong in refusing to state a case and refer a question of law on the request of the assessee. I would order him to pay the assessee the costs of that application, advocate's fee Rs. 85. The question of law having now been decided in favour of the Commissioner I would order the assessee to pay to the Commissioner the costs of the reference, advocate's fee 85.

Rutledge, C. J.—I agree.

Brown, J.—I agree.

V.B./R.K. *Reference answered.*

** A. I. R. 1930 Rangoon 81

Full Bench

HEALD, OFFG. C. J., CHARI, MAUNG BA, OTTER AND BROWN, JJ.

Phan Tiyok and *another*—Appellants.

v.

Lim Kyin Kauk and *others*—Respondents.

Civil Reference No. 8 of 1930, Decided on 7th January 1930, made by Chief Justice and Brown, J., in First Appeal No. 280 of 1928, Decided on 13th June 1929.

**** (a) Burma Laws Act. S. 13 (1)—(Per *Full Bench*) — Chinese Buddhists are not Buddhists—Succession Act, S. 29 — (*Maung Ba*, and *Otter, JJ.*, Contra).**

Per *Full Bench.*—Chinese Buddhists are not Buddhists within the meaning of S. 13 (1) of Burma Laws Act, and of the exceptions to S. 29, Successions Act, (*Maung Ba*, and *Otter, JJ.*, Contra). [P 105 C 1, 2]

**** (b) Buddhist Law (Burmese) — Applicability—(Per *Full Bench*)—Succession Act, should govern succession to estate of Chinese Buddhist except where he adopts Burmese form of Buddhism—Chinese customary law should also not be applied — Succession Act, S. 29—(Per *Otter, J.*,Contra).**

Per *Full Bench.*—Unless it is proved that a Chinese Buddhist born in China, who was domiciled and died in Burma, had abandoned his Chinese Buddhist religion and had adopted Burmese Buddhism, Burmese Buddhist Law does not govern the succession to his estate. The Chinese Customary Law also cannot be held to apply to it. The succession to his estate should be governed by Succession Act. (*Case Law discussed*). [P C 105 1, 2]

Per *Otter. J.* — Chinese Customary Law governs the succession to the estate of a Chinese Buddhist. [P 111 C 2]

A. J. Darwood, Kyaw Din, Mg. Kun and *Zeya*—for Appellants.

Po Han, Cawasjee and *Leach*—for Respondent 1.

Opinion

Heald, Offg. C. J.—In Suit No. 19 of 1928 of the District Court of Amherst Lim Kyin Kauk, claiming to be a son of Baw War, whom he alleged to have been a Chinese Confucian born in China and at the time of his death domiciled in Burma, sued for the administration of Baw War's estate by the Court and for partition and possession of his share. His mother Ma Hnin Bu, had already been granted Letters of Administration in respect of the estate in Civil Miscellaneous Case No. 24 of 1927 of the same Court, and it may be noted that in those proceedings she had described Baw War as a Chinese Confucian, and that her step-daughter, Ma Lwe, who opposed her application had described him as a Chinese Buddhist. In the suit Lim Kyin Kauk joined as defendants his mother, who as has been said was administratrix of the estate, his sisters Ma The The, Ma E Zin and Ma E Kyu, his minor brother Lim Kyin Swi, one Phan Tiyok, who was the widower of his half sister Ma Thein, and his half sister Ma Lwe, who is now the wife of her deceased sister's widower Phan Tayok. Ma Thein and Ma Lwe were Baw War's daughters by an earlier wife, Ma Nu, who had died, and it may be noted that both Baw War's wives, Ma Nu and Ma Hnin Bu were daughters of Chinese fathers.

In his plaint Lim Kyin Kauk said that if Baw War was a Buddhist then under the Chinese Customary Law, which had been held to apply to the estate of "Chinese Buddhists" he and his younger brother Lim Kyin Swi would be jointly entitled to the whole of the estate, as being Baw War's only sons, while if Baw War was a Confucian, the Indian Succession Act, would apply to his estate, so that the widow would be entitled to a one-third share and he personally would be entitled to one-seventh of the remaining two-thirds, since there were seven children who would share equally.

The real contest was between the second wife with her family on the one side and the representatives of the first wife on the other, the latter being admittedly in possession of a considerable part of the estate. These representatives were Ma Lwe and her husband Phan Tiyok as representing her sister Ma Thein. In their written statement Ma Lwe and Phan Tayok did not deny that Baw War was a Chinese Confucian born in China and domiciled in Burma but they alleged that Burmese Buddhist law applied to his estate and they said that under Burmese Buddhist law Lim Kyin Kauk had no interest in the estate so long as his mother, Ma Hnin Bu was alive. They pleaded further that on 30th October 1923, after the death of Baw War which according to both parties occured on 21st January 1923, the matter of the partition of the estate was referred to the arbitration of two arbitrators, namely Baw War's brother San Ya and one Maung Kin, by Ma

Thein and Ma Lwe on the one side and Ma Hnin Bu and her eldest daughter Ma The The on the other, that in making that reference Ma Hnin Bu represented her other children, namely Ma E Zin, Ma E Kyu, Lim Kyin Kauk, and Lim Kyin Swi, that by the award of those arbitrators certain properties were allotted to themselves and certain properties to Ma Hnin Bu and her children, and that Lim Kyin Kauk as well as Ma Hnin Bu and her other children were bound by the award and the partition made in accordance with it.

Ma Hnin Bu's case was that Baw War was a Confucian and that therefore the Succession Act applied to his estate, so that she as Baw War's widow was entitled to one-third of his estate and his children by her were entitled to equal shares with the two daughters by the earlier wife. She said that the alleged partition was only a temporary arrangement whereby Ma Thein and Ma Lwe, who were Baw War's eldest children, were given the custody of a large part of the estate until it could be properly administered, and she asked the Court to declare the shares in the estate to which the various parties were entitled.

Her children, other than Lim Kyin Kauk, pleaded that their father Baw War was either a Confucian or a "Chinese Buddhist," and that whether he was regarded as a Confucian or Buddhist the law applicable to his estate would be the Chinese Customary Law, under which the corpus of the estate would belong to the two sons, Lim Kyin Kauk and Lim Kyin Swi, and the widow and daughters would be entitled to maintenance out of it. As for the alleged arbitration and partition they said the Lim Kyin Kauk, Ma E Zin, Ma E Kyu and Lim Kyin Swi were all minors at the time of the alleged transaction and could not be bound by it.

The Court framed an issue as to what law was applicable to Baw War's estate, Burmese Buddhist Law, Chinese Customary Law, or the Succession Act. This issue involves consideration of the question what was Baw War's religion, since if he was not a Buddhist there can be no doubt that the Succession Act would apply to his estate.

I have already pointed out that all the pleadings except that of the children Ma The The, Ma E Zin, Ma E Kyu, and the minor Lim Kyin Swi, admitted that Baw War was a Chienese Confucian, while the written statement of those children said merely that he was either a Confucian or a "Chinese Buddhist." There was therefore nothing in the pleadings to suggest that Baw War, if he was a Buddhist, was anything but a "Chinese Buddhist," that is to say, that there is nothing to suggest that he had adopted the Burmese Buddhist religion.

All that there was in the evidence about Baw War's religion was a statement of the daughter Ma Lwe that he was a Buddhist who carried out "shinbyu" (noviciation) ceremonies and built "zayats" (rest houses), that monks were invited and fed, that he used to make subscriptions at festival times and used to go to monastery and make offerings, and that he once went on a pilgrimage to Mandalay, and a statement of Ma Hnin Bu, the widow, that his funeral was carried out in accordance with Chinese customs and that she adopted the Chinese form of mourning. She admitted that Burmese Buddhist monks were invited to the funeral because the deceased was a Buddhist, and that he built rest houses and "noviciated" other people's sons. It is to be noted, however, that there is no suggestion that he "noviciated" his own sons, though Lim Kyin Kauk was certainly old enough to be "noviciated" before Baw War died. It is to be noted too that Baw War's brother, San Ya, one of the two men who are said to have acted as arbitrators, gave his own religion as Confucian, although he had lived in Burma for over 40 years and that he was not asked about Baw War's religion.

In his judgment the learned Judge said that it was admitted by all parties that Baw War was a Chinaman and was a Buddhist, and he found that Baw War was a "Chinese Buddhist." On this finding he held, as he was bound by the rulings of this Court to hold, that Chinese Customary Law applied to his state. Ma Lwe and her husband appealed and one of their grounds of appeal was that the trial Court was wrong in finding that the Chinese Customary Law applied to the estate and should have held that Burmese

Buddhist Law applied. The Bench, before whom the appeal came, referred the following question to a Full Bench, namely:

"Does Burmese Buddhist Law govern the succession to the estate of a Chinese Buddhist born in China but who was domiciled and died in Burma?."

Section 29, Succession Act says that Part 5 of that Act, which is the part dealing with intestate succession shall not apply to the property of any Hindu, Mahomedan, Buddhist, Sikh, or Jain, but that save as provided by that section the provisions of that part shall constitute the law of British India in all cases of intestacy. S. 13, Burma Laws Act says that where in any suit or other proceeding in Burma it is necessary for the Court to decide any question regarding succession, inheritance or marriage the Buddhist law, in cases where the parties are Buddhists, shall form the rule of decision except in so far as such law has by enactment been altered or abolished or is opposed to any custom having the force of law, and that in cases not so provided for, by any other enactment for the time being in force the decision shall be according to justice equity and good conscience. So far as excepted classes are concerned the law of succession to their estates is the personal law of the indivdual whose succession is in question, so that in respect of questions regarding succession and inheritance the matter in the case of the excepted classes is simplified by the fact that it is not the personal law of the parties which has to be considered, as it is in cases relating to marriage, but only the personal law of the deceased. If a Chinese is a Confucian and not a Buddhist no difficulty arises, because a Confucian does not fall within any of the classes excepted from the application of S. 29, Succession Act and therefore Chap. 5 of that Act applies to his estate.

The difficulty in dealing with the estates of Chinese who have been domiciled and have died in Burma arises from the fact that the Chinese seem to follow several religions or so called religions at the same time, or that their religion is a mixture of several religions, so that when they die their relatives are able to describe them as belonging to that particular religion, out of the two or three or more which they professed, which will give those relatives a share or a larger share in the estate. There is of course a large Chinese population in Burma. The two countries have a common land frontier and in Upper Burma there are large numbers of Chinese who or whose ancestors came into Burma by land, while in Lower Burma there is a large Chinese population who or whose ancestors have come into Burma by sea, many of them by way of the Straits Settlements, where there are many Chinese. There have naturally therefore been large number of cases concerning the estates of Chinese in Burma, and some of them have been published in the official reports.

In 1881 in the case of *Hong Ku* v. *Ma Thin* (1) a question arose as to whether a grant of probate of the will of a Chinese was made without jurisdiction by reason of the deceased's being a Buddhist and therefore belonging to one of the classes exempted from certain provisions of the Indian Succession Act. The Judge of Moulmein who tried the case said:

"It is admitted in the first place that Iyan Shok (the deceased) was domiciled in British Burma. The property in dispute, i. e., a house situate in Moulmein, is immovable property in British India and the succession to that property is regulated by the law of British India under S. 5 of the (old) Succession Act. Section 331 of that Act (the provisions of which are similar to those of S. 29 (1), of the present Act) provides that the provisions of that Act do not apply to the intestate or testamentary succession to the property of any Hindu, Mahomedan or Buddhist. A question of fact therefore arises as to whether the deceased Iyan Shok was a Buddhist. The only evidence given on this point is that of the witness Gwin Chan, the son-in-law of the deceased. The witness states that the deceased was of the same religion as himself. He states that he worships one Kong Choo Kong ; whether or not this is the same as the idol Kwan Shee Yin mentioned in Davis's work on China I am unable to say, but I think that it is clear from the evidence of this witness that the deceased professed a form of Buddhism. The tenets of transmigration of souls and the sanctity of animal life are characteristic of Buddhism, and it would appear that Kong Choo Kong was the name given by the witness to the Chinese Buddha. The worship of nats is not inconsistent with the profession of Buddhism any more than a belief in ghosts is a superstition inconsistent with Christianity. The pongyis (Burmese Buddhist monks) were invited to the funeral of the deceased and four of his wives were Burmese Buddhists. Even if the deceased were Confucian or Rationalist he

(1) [1872-1892] L. B. R. 135.

might still hold a religious belief in Buddha, for both the sects of Fo and Tao appear rather to be systems of philosophy than what we understand by the term religion. In the words of Mr. Davis, formerly His Majesty's Chief Commissioner in China, whatever the other opinions or faith of a Chinese may be, he takes good care to treat Confucius with respect, and as we have before observed that Confucianism is rather a philosophy than a religion, it can scarcely be said to come into direct collision with the religious persuasions . . . . . .

I therefore find that the deceased Iyan Shok was a Buddhist and that his form of religion was not essentially different from that of the Burmese."

Sir John Jardine who delivered the judgment of the Special Court of Lower Burma before which that decision came on appeal, said that he considered that reasoning speculative and based on too slender a set of facts. He pointed out that the invitations to the pongyis to the funeral was not given by the deceased and was explainable by the circumstances that four of his wives were Burmese Buddhists. After considering the religions of China as described in various works of reference, including those of my own learned teacher, the late Dr. Legge, he came to the conclusion that there are three chief religions in China, namely Confucianism, which is (or was) the State religion, Taoism, which represents an aboriginal worship of spirits with a philosophy and a tinge of Buddhism superadded, and Foism which is a decadent form of Buddhism. He seems to have been of opinion that the worship of a goddess, "Kwan Yin" or "Kwan Shai Yin," was distinctive of Chinese Buddhists. He said that the point for decision under the Burma Courts Act was not whether Buddhism or Confucianism are religions or philosophies but whether Confucians or Taoists are Buddhists and on that point he came to the conclusion that they were not. He went on to say that it would be as wrong to presuppose of a Chinaman that he is a Buddhist as to presume of an Indian that he is a Hindu and not a Mahomedan, and that such things require to be proved before a Court can form any opinion. He said that he doubted whether we may have any reason for calling the law of China Buddhist law, that he knew of no authority for the proposition that the dhammathat or even the general body of Buddhist law, is and exclusive lex loci, and that under the Courts Act Buddhist law became one of several leges fori. He doubted whether a Buddhist coming from a distant country must be held subject to the Burmese Buddhist law of marriage or succession merely because he has a civil domicile here and has married, among other wives, a Burman Buddhist, and whether it is obligatory on our Courts in Burma to apply the Burmese Buddhist law to Buddhists from Ceylon or China. He raised the question as to what law has to be applied to a foreign Buddhist whose own law is not founded on Buddhist institutions, and said that the subject teemed with difficulties. He pointed out that questions of a similar kind are likely to arise wherever Chinese communities are settled, and that the Chinese were found everywhere in Burma especially in the towns. He suggested that the Buddhist law mentioned in the Courts Act was not necessarily Burmese Buddhist law or the law of the dhammathats. In the result he found that it was not proved that the deceased was a Buddhist, and he held that the Indian Succession Act applied and that the will and probate were valid. In connexion with the judgment of the trial Court I venture to suggest that "Kong Choo Kong," whom the deceased was said to have worshipped was probably Confucius, "Kung Tsu" being a name given by the Chinese to Confucius himself.

I have dealt with this judgment at some length not merely because it is the judgment of one of the most learned of the Judicial Commissioners of Lower Burma, particularly in matters relating to Burmese Buddhist law, but also because it anticipates many of the difficulties which have arisen in subsequent cases and particularly the difficulty of applying what is called Burmese Buddhist law, which is not in any way Buddhistic, being merely that development of the archaic Hindu law which the Burmese, when they adopted Buddhism, borrowed from the law books of the Buddhist schismatics from Hinduism and applied to themselves, to a Chinese so called Buddhist whose personal law, which has become known as Chinese Customary law, is neither Buddhistic nor related in any way to Burmese Buddhist law.

The next case in order of date is that

of *Fone Lan* v. *Ma Gyi* (2), which was decided in 1903. In that case the plaintiff claimed to be an adopted daughter of a "Chinese Buddhist" who was domiciled and had died in Burma, and to be entitled under Burmese Buddhist law to a share of his estate. The Judge in the trial Court had decided that the law applicable to the estate was not Burmese Buddhist law but "Chinese Buddhist law," and had dismissed the plaintiff's suit. The case came on appeal before a Bench of the late Chief Court of Lower Burma, and Sir Charles Fox, who delivered the judgment of the Bench, said that there is no such thing as "Chinese Buddhist law" regarding succession or inheritance and that so far as appeared from anything available to the Court that contention was correct. Various witnesses had spoken to customs in China regarding succession but none of them connected such customs with religious belief nor had any books or commentaries been referred to which enjoined rules as to succession and inheritance upon Chinese who profess the Buddhist faith.

It must be argued that because it was admitted that the deceased was a Buddhist domiciled in Burma, the law which must be applied to the succession and inheritance to his estate in Burma was the Buddhist law prevailing in Burma, on the grounds that the deceased having been a "Buddhist" S. 331 of the (old) Succession Act prevented that Act from being applied to the case, and that the parties to the suit being Buddhists S. 13, Burma Laws Act compelled the Court to apply the laws contained in the dhammathats followed and recognized by the Burmese, the laws contained therein being the only laws on the subject of succession and inheritance which could be said to be "Buddhist law." With reference to this argument the learned Judge mentioned the statement of the learned Judicial Commissioner in *Hong Ku's* case (1) to the effect that he knew of no authority for the proposition that the dhammathat is an exclusive lex loci and doubted whether it was obligatory on the Courts in Burma to apply the Burmese Buddhist law to "Buddhists" from Ceylon or China. He said that in the case of Hindus and Mahomedans the Courts of India, on questions of marriage, succession, and inheritance, administer the personal law applicable to the parties that on such questions there is no such thing as a general Hindu law or a general Mahomedan law, but there are different schools of law and different commentaries by which Hindus and Mahomedans are governed, and there are also customary laws often divergent from the laws laid down in the commentaries, and further there are the decisions of their Lordships of the Privy Council and of the High Courts in India which have on some matters settled what the law applicable to the parties is, that the law of commentaries, the customary law and the law as laid down by decisions of the Courts make up what is known as the Hindu and the Mahomedan Laws, and that each individual of the Hindu and Mahomedan faiths is accorded the personal law applicable to him in matters of marriage, succession or inheritance.

He expressed an opinion that when in S. 13 Burma Laws Act the legislature used the words "Mahomedan Law" and "Hindu Law," it meant the particular laws applicable to the particular Mahomedan and Hindu parties, and that if that was the meaning of the terms Hindu Law and Mahomedan Law in S. 13, then the term "Buddhist Law" in that section must mean the law of succession, inheritance, or marriage applicable to the particular Buddhist parties in the case. He said that the law of dhammathats was not the outcome of the teaching Buddha but was of Hindu origin, that it would be incongruous to apply to Buddhists "who do not apparently reverence even the same Buddha" as the Burmese, laws which are not connected with the Buddhist religion and are accepted only locally, and that it would be in accordance with the principle of the decisions of the Courts in India to accord to the oriental, whose estate is in question, the rules of succession applicable to one of his class dying in his native country. He said that there did not appear to be any written law on the subject of succession in China and, therefore, the law applicable to the estate of the deceased Chinese Buddhist would be the Chinese Customary Law, and he held that it was for the plaintiff to prove that by the

(2) [1906] 2 L. B. R. 95.

customary law applicable to Chinese Buddhists she was an adopted daughter of the deceased and as such entitled to share in his estate. That decision naturally carried great weight as being the judgment of a Judge who was for many years the Chief Judge of the Chief Court, but it is open to the criticism that the law which it applied to the estate of a person who was said to be a "Buddhist" was not in any sense "Buddhist Law". I may, however, note at this stage that the learned Judge's suggestion that Chinese Buddhists do not reverence the same Buddha as the Burmese Buddhist receives some confirmation from Johnston's " Buddhist China" (3) from which it appears that the Burmese, who are strict Hinayanists, worship only the historical and human Gautama Buddha, who having attained divinity represents the Godhead so far as they are concerned, while the Chinese, who are Mahayanists worship a different Buddha, known as Amitabha, who being mythological and essentially divine, represents all the divine Buddhas of last eternity who constitute the Godhead and of whom Gautama Buddha was one human incarnation, and also worship "Kwan Yin" a kind of " Holy Spirit" of Amitabha, who although not yet perfect God (or Goddess) nevertheless, being mythological and superhuman, escapes the taint of authentic humanity, which according to Mahayanists ideas attaches to Gautama Buddha, and whose images, as ojbects of worship, take the place in Chinese temples which in Burmese temples is taken by the image of Gautama Buddha.

The next reported case, *Apana Charan Chowdry* v. *Ma Shwe Nu* (4), was decided in 1907. In that case Ma Shwe Nu, who was a daughter of a Chinese, claimed a right of pre-emption under Chinese Customary Law in respect of land sold by her father to another of his daughters and sold by that daughter's daughter to a stranger. The Judge of the District Court held that Chinese Customary Law on the subject of a right to pre-emption of land, if there is such a law, could not apply. The lower appellate Court took the contrary view and the case came before the Chief Court in second appeal. The learned Judge, who dealt with the case in the Chief Court, said that if the deceased was not a Buddhist the provisions of the Indian Succession Act would appply to his estate and the law of China would not apply, and that if he was a Buddhist, then under S. 13, Burma Laws Act, Buddhist law would have to be applied, but that law would not be the Buddhist law of Burma but the Buddhist law of China, which is applied to the estates of Chinese Buddhists in China. He went on to say that if the deceased was a " Chinese Buddhist" it would be necessary for the plaintiff to show that there is a " Chinese Buddhist law" in China, applicable to Chinese Buddhist only as apart from the customary law of the country applicable to all the inhabitants whether Buddhists or not, and that by that law there was a right of pre-emption. It is clear from this judgment that the learned Judge appreciated the difficulty of applying to the estate of a person, who was regarded as a Buddhist, Chinese Customary Law or anything but what was in fact Buddhist Law within the meaning of that term in S. 13 Burma Laws Act.

In the case of *Ma Thein Shin* v. *Ah Shain* (5), which was decided in 1914, the son of a Chinese by his first wife sued his father's second wife and her daughter to recover the whole of the estate of his father on the ground that under Chinese Customary Law he was entitled to the estate to the exclusion of the widow and the daughter. The case came on appeal before a Bench of the Chief Court of Lower Burma, and the learned Judge who delivered the judgment of the Court said that although the defendants denied in the lower Court that the deceased was a Buddhist they had not appealed against the finding that he was a Buddhist and their grounds of appeal were expressly based on the assumption that he was a " Chinese Buddhist" that it followed that the Indian Succession Act was not applicable to the case, that under S. 13 Burma Laws Act the case must be decided according to Buddhist Law, which as explained in *Fone Lan's* case (2) meant the customary law applicable to the

(3) Buddhist China by R. F. Johnson published by John Murray, London, 1913.

(4) [1908] 4 L. B. R. 124.

(5) [1914] 8 L. B. R. 222 = 24 I. C. 367 = 7 Bur. L. T. 246.

deceased, that there appeared to be no written law on the subject of inheritance among Chinese Buddhists and that in the absence of definite evidence as to the share of the estate to which the widow would be entitled under Chinese Customary Law he thought that the Bench might proceed according to justice, equity and good conscience and would not be far wrong in awarding the widow one-third share :

"which is the share which she would have received if the Indian Succession Act were the law applicable to the case.

In the next case, *Ma Pwa* v. *Yu Lwai* (6), which was decided in 1916, the plaintiff claimed to be an adopted son of the deceased, who was a "Chinese Buddhist" and his first wife, and sued the second wife and widow of the deceased and a child, who also claimed to have been adopted by the deceased and the first wife, for administration of the estate of the deceased and for possession of his share. The deceased in that case was not himself a Chinese settler in Burma but was the son of such a settler and had been born in Burma. Sir Charles Fox, C. J., who delivered the judgment of the Bench before whom the case came on appeal, said that the first question to be considered was the question as to what law was applicable to the parties. He said that the deceased had been brought up to follow Chinese customs, that the funerals of members of the family to which he belonged had been according to rites observed by the Chinese, that the members of the family who had given evidence professed to be "Chinese Buddhists" that the widow, whose father was a Chinese, professed to be a "Chinese Buddhist" and have never indicated any desire to have any but the law applicable to "Chinese Buddhists" applied, that the plaintiff also claimed to have that law applied, and that in these circumstances he thought that the decision in *Fone Lan's* case (2) should be followed and the customary law of "Chinese Buddhists" should be applied so far as it could be ascertained. He went on to say that neither from the evidence nor from the books of reference could an entirely confident conclusion be reached as to how the questions in issue would be decided in China, but he dismissed the plaintiff's suit on the ground that he had failed to prove the adoption which he alleged.

This same estate was the subject matter of another appeal which came before another Bench of the Chief Court in 1918 in the case of *Ma Pwa* v. *Ma Yin* (7). In that case the girl who calimed to be an adopted daughter of the deceased and his first wife sued the widow that is the second wife, for a declaration that she was adopted and was the sole heir of the deceased. The trial Judge had found that the girl was adopted but that it was not proved that the adoption was in accordance with the requirements of the Chinese Customary Law. He had suggested, however, that as the person adopted was a Burmese girl and the adoption took place in Burma and in the manner usual amongst Burmese Buddhists, the adopted child was invested with the status and rights of a child adopted by Burmese Buddhists. The Bench said that that view could not be accepted, that the effects of adoption and the status and rights of the person adopted depend on the personal law of the adoptive parents, but that because in that case it was clear that there was an intention to adopt and that that intention was carried out, it must be held that all the incidents of an adoption under the personal law of the deceased and his wife, namely, Chinese Customary Law, attached to the adoption. They held further that under Chinese Customary Law an adopted daughter is entitled to succeed to the estate in the absence of natural children and in the absence of an adopted son, and that the adopted daughter excluded the widow, who was entitled merely to maintenance out of the estate. This judgment seems to me to raise somewhat actually the question whether the Chinese Customary Law, under which a son excludes from inheritance the widow and the daughters, and a daughter in the absence of sons excludes the widow, and even an adopted son or daughter excludes the widow, can be regarded as being according to justice equity and good conscience.

In the case of *Kyin Wet* v. *Ma Gyok* (8), which was decided in 1918, the

(6) [1914] 8 L. B. R. 404 = 34 I. C. 99 = 9 Bur. L. T. 187.

(7) First Appeal No. 10 of 1918, Decided on 22nd January 1919.

(8) [1918] 9 L. B. R. 179=47 I. C. 148=12 Bur. L. T. 21.

plaintiff claimed to be the adopted son of a Chinese, and sued under Chinese Customary Law for possession of the estate of his adoptive father, who had died.

The District Court had found that, although the deceased conformed more or less to Burman Buddhist practices in subscribing to religious works and festivals, he nevertheless adhered to his ancestral religion, which was Conficianism, and held that in the absence of definite evidence it was not proved that he was a Buddhist. The Bench of the Chief Court, before whom the case came on appeal, said that unless the plaintiff could prove that the deceased was a Buddhist the law governing the devolution of his estate would be the Succession Act, while if he was a Buddhist the law to be applied would be the Chinese Customary Law applicable to "Chinese Buddhists." They did not agree with the statement of the learned Judge who decided the case of *Apana* v. *Ma Shwe Nu* (4) that it was for the plaintiff to show that there is a "Chinese Buddhist Law" applicable to "Chinese Buddhists" only, as apart from the customary law applicable to all the inhabitants of China whether Buddhists or not, but preferred to follow the decision in the case of *Ma Pwa* v. *Yu Lwai* (6). They said that as the law stood they could not give effect to Chinese Customary Law unless the deceased was found to be a Buddhist, and after considering various books of reference, they came to the conclusion that every Chinaman who is not a Christian or Mahommedan is probably a Confucian and may be a Buddhist as well as a Confucian, but that he cannot be assumed to be a Buddhist without evidence of the fact. Nevertheless, so far as the case before them was concerned they said that the deceased, "like the bulk of his fellow countrymen" was probably a Buddhist before he came to Burma, but, assuming that he was not, the fact that he became a Buddhist after he came to Burma would be sufficient under S. 13, Burma Laws Act to warrant the application of Chinese Customary Law to his estate. All that I consider it necessary to say about that judgment is that the truth of the assumption that the bulk of Chinese in China are in fact Buddhists is doubtful.

In the case of *Gyan Shi* v. *Kin Twi* (9), which was decided by the same Bench in the same year, the contest was for Letters of Administration between two women who claimed to be widows of the deceased, a Chinese, who had been domiciled and had died in Burma. One of the claimants alleged that the deceased had left an adopted son, who under Chinese Customary Law would inherit his estate. The Bench said that no evidence had been recorded as to the religion of the deceased, that if he was a Confucian only, then the case would be governed by the Succession Act, but if he was a Buddhist the widows under the Chinese Customary Law would apparently be entitled only to maintenance, and the adopted son if his status were proved, would be the sole heir to the deceased, that the District Court had found that the deceased was a Buddhist, and that they considered the evidence sufficient to establish that finding. They accordingly applied Chinese Customary Law, and finding that the adoption was established ordered Letters of Administration to be granted to one of the widows for the use and benefit of the minor adopted son.

In the case of *Maung Kwai* v. *Yeo Choo Yone* (10), decided in 1919, it was held that Chinese Customary Law is the law of succession applicable to the estates of "Chinese Buddhist" and that that law contemplates the disposition of property by will, and reference was made to a memorandum written in 1892 on the use of wills by Chinese, which appeared in the old Lower and Upper Burma Courts Manuals and which appears as Appendix 14 in the present Burma Courts Manual.

In the same year in *Ma Si* v. *Hoke Hu* (11), Sir Daniel Twomey, who delivered the judgment of the Bench, followed his own judgment in the earlier case of *Ma Thein Shin* v. *Ah Shein* (5) in applying the Succession Act, as the rule of justice, equity and good conscience, so as to give the widow a one-third share in the estate of her husband who was a "Chinese Buddhist" and was domiciled in Burma at the time

(9) [1919] 10 L. B. R. 2[illegible]=51 I. C. 608=12 Bur. L. T. 69.

(10) [1919] 10 L. B. R. 159=57 I. C. 900=13 Bur. L. T. 18.

(11) Special Second Appeal No. 65 of 1919.

of his death. The unreported case of *Li Tuck Loan* v. *Daw Khin* (12) which was instituted on the original side of this Court in 1921, is interesting not only because there was the usual dispute about the religion of the deceased but because it was decided on a reference to the arbitration of Mr. (now the Honorable Sir) Lee Ah Yain, an advocate of this Court, who is himself the son of a Chinese father, was born and is domiciled in Burma, and has been for some years one of the two Ministers to the Governer of Burma. In that suit the deceased was a son of a Chinese domiciled in Burma. His mother was the daughter of a Chinese father and he was born and died in Burma. His wife was also the daughter of a Chinese father and called herself a Chinese Buddhist. After his death she obtained Letters of Administration under the Succession Act on the footing that he was a confucian. His eldest son then sued the widow and the other children for the administration of his estate by the Court and for recovery of his share. He alleged that the deceased was a Chinese Confucian and Buddhist. The widow and the other children pleaded that the deceased was a Confucian only and not a Buddhist, their intention being presumably to invoke the provisions of the Succession Act and to advoid the application of Chinese Customary Law. The dispute was referred to the arbitration of Mr. Lee Ah Yain as sole arbitrator, and his finding was in the following words :

"It is admitted that Li Foke Shain, deceased worshiped the goddess Kuan Yin and he was also one of the trustees and treasurer of the Kuan Yin temple in Rangoon when he was alive."

There can be no doubt that Li Foke Shain . . . . . was a Chinese Buddhist by religion. The ruling case on the religion of the Chinese is *Kyin Wet* v. *Ma Gyok* (8). Therefore the law applicable to the estate of Li Foke Shain deceased is the Chinese Buddhist Law. Under the said law the widow is entitled to maintenance so long as she remains unmarried and on her death her burial expenses. An unmarried daughter is also entitled to maintenance and on her marriage her marriage expenses. Subject to these rights a son is entitled to the rest of the estate. If there are more than one son, they share equally between themselves. In this case the heirs entitled to the estate consist of the widow, three sons and three unmarried daughters. As the estate is to be finally divided among the said heirs it is impracticable to fix the amount of maintenance, marriage and burial expenses. Mr. E Alabaster in his Notes and Commentaries on Chinese Criminal Law at page 585 says :

" as a matter of fact, however, and indeed it appears indirectly from this case, male heirs existing, unmarried daughters are nevertheless entitled to dower in the proportion of one-half the son's share."

I think it will be just and equitable if I allow the widow and the three unmarried daughters each one half of the son's share. I therefore decide that the whole of the estate be divided into five shares, the three sons to take one share each, and the widow and the three unmarried daughters to take one-half share each."

That award, which it will be noticed was a compromise between the rights given by the Succession Act, and those given or supposed to be given by the Chinese Customary Law, was accepted by all the parties without dispute and was made a decree of the Court.

In 1923, in the case of *Po Maung* v. *Ma Pyit Ya* (13), in which I delivered the judgment of the Bench, the estate in question was that of a Chinese woman, domiciled in Burma, who had been married first to a Chinese, who professed the Chinese Buddhist religion, and later to a Shan, who was probably a Burmese Buddhist. The Shan widower and his daughter by the deceased sued the daughter of the deceased by her Chinese husband for a decree in accordance with an alleged award and partition, or in the alternative for the administration of the estate and possession of their shares. The Bench found that the deceased was a "Chinese Buddhist" at the time of her death and on the strength of the rulings which have been cited above held that the law to be applied to her estate would be the customary law of "Chinese Buddists" that is, the Chinese Customary Law.

In the case of *Bon Kwi* v. *Ma Kye Yon* (14), which was also decided in 1923, the same Bench applied Chinese Customary Law to the estate of a deceased "Chinese Buddhist" and on the footing of that law, as stated in the case of *Po Maung* v. *Ma Pyit Ya* (13), found

(12) O. S. Civil Regular No. 364 of 1921.

(13) A. I. R. 1923 Rang. 180=1 Rang. 161.
(14) A. I. R. 1923 Rang. 236.

that in cases where there are children the widow takes no share in the deceased husband's estate, thus disagreeing with the view expressed by the late Chief Court in the cases of *Ma Thein Shin* (5) and *Ma Si* (11) that there was no sufficient evidence as to what the widow's share would be under Chinese Customary Law and that the rule of the Succession Act might therefore be applied as being the rule of justice, equity and good conscience.

In the case of *Ma Sein* v. *Ma Pan Nyun* (15) the estate in question was that of the Burmese wife of a "Chinese Buddhist" who lived and died in Burma. The Chinese husband predeceased his Burmese wife and after the latter's death a dispute arose between their children, the two daughters, who under Chinese Customary Law would not be heirs, claiming that their mother was a Burmese Buddhist so that Burmese Buddhist Law applied to her estate while the two sons, who under Chinese Customary law could exclude their sisters as heirs, alleged that their mother professed the "Chinese Buddhist" religion, and that therefore Chinese Customary law applied to the estate. On the evidence the Bench came to the conclusion that the deceased, although a Burman by birth and a Burmese Buddhist before her marriage, had adopted Chinese customs and the "Chinese Buddhist" form of religion and that therefore Chinese Customary law applied to her estate.

The case of *Saw Kyaik Kee* v. *Saw Ngwe Sit* (16), concerned the estate of a "Chinese Buddhist" who had been domiciled and had died in Burma. The plaintiff claimed to be an adopted son and as such to be entitled under Chinese Customary law to half the estate as against the defendant who was a legitimate son of the deceased, born before the alleged adoption. No question whether Chinese Customary law or some other form of law applied to the estate was raised in that case, the dispute between the parties being whether or not a Chinese who already has a son can adopt another son and if so whether the plaintiff was in fact adopted. The Bench of this Court before whom the case came on appeal said that there was little evidence as to the Chinese Customary law of adoption, but, after consulting the usual books of reference, they came to the conclusion that under that law the plaintiff could legally have been adopted so as to be entitled to "some share" in the estate, and being unable to determine what that share would be they remanded the case to the trial Court for disposal with a suggestion that if it was proved that the plaintiff had been adopted the question of the share to which he was entitled might be decided by arrangement between the parties or by arbitration and that in default the Court should decide it according to justice, equity and good conscience. That decision is cited merely as showing the difficulties of ascertaining what the Chinese Customary law on any particular question is, and of applying so much of it as can be ascertained to the facts of the particular case which is before the Court.

Another case which illustrates the difficulties which have arisen in the Courts in dealing with the estates and in deciding as to the religion of Chinese domiciled and dying in Burma is the case of *Lee Lim Ma Hock* v. *Saw Ma Hone* (17). That case concerned the estate of a Chinese woman, and the plaintiff, claiming that she was his mother, applied for Letters of Administration under the Succession Act, that is on the footing that she was not a Buddhist. It may be noted that he subsequently admitted that the woman was not in fact his mother, but claimed that she had adopted him as her son. In his application for Letters he said that the deceased was a Confucian by religion and in an affidavit which he filed he said that he himself was a Confucian. If the deceased had been a Buddhist, Letter of Administration, if they were to be taken out at all, would have had to be taken out under the probate and Administration Act because S. 150 of that Act said that no proceedings to obtain Letters of Administration to the estate of any Buddhist should be instituted except under that Act. It is clear therefore that the claimant's case was

(15) A. I. R. 1924 Rang. 219=2 Rang. 94.
(16) First Appeal No. 265 of 1924.
(17) A. I. R. 1924 Rang. 221=2 Rang. 4.

that the deceased was a Confucian and not a Buddhist. Three daughters of the deceased, who were of the age of majority, there being a fourth daughter who, a minor, also applied for Letters in respect of the estate of the deceased. They too described their mother as a Confucian and applied for the Letters under the Indian Succession Act and not under the Probate and Administration Act.

It is clear therefore that their case also was that the deceased was a Confucian and not a Buddhist. The claimant, who had alleged that he had been adopted by the deceased, died during the pendency of the application and letters under the Succession Act were granted to the three daughters, the learned Judge remarking in his order that the Succession Act does not recognize adopted children. After the claimant's death his widow applied for Letters of Administration in respect of his share under the Succession Act and in her application she described him as a Confucian. Letters were granted to her under that Act. She then sued the three daughters, who held letters in respect of their mother's estate, for declaration that her husband, as adopted son of the deceased woman, had been her sole heir and as such was entitled "under the customary law prevailing amongst Confucians" to the whole of her estate. That suit, on the footing that the deceased woman was a Confucian and not a Buddhist, was bound to fail because the Succession Act, which on that footing would apply to her estate, does not recognize adoption. For this reason, nearly six months after the suit was instituted, the claimant's widow alleged for the first time that the deceased woman was a Buddhist as well as a Confucion and the plaint was amended so as to allege that both the deceased woman and the claimant, her alleged adopted son, were Chinese or Confucian Buddhists and that the claimant was the sole heir of the deceased woman "under the customary law prevailing among Chinese or Confucian Buddhists". In spite of the fact that it had been the case of the claimant himself and of his widow, who was the plaintiff in the case, that both the deceased woman and the alleged adopted son were Confucians and not Buddhists, the Court came to the conclusion that they were both Buddhists and accordingly held that under Chinese Customary Law the claimant was the sole heir of the deceased woman and was entitled to the whole of her estate. Meanwhile, the three daughters of the deceased woman, as administratrices of her estate, had sold certain immovable property which formed part of her estate, and the claimant's widow, as administratrix of the claimant's estate, sued them and the purchaser of the property for a declaration that the sale was void and for possession of the property, it being part of her case that because, after the grant of Letters under the Succession Act, the deceased had been found to be a Buddhist, the letters must be regarded as having been granted under the Probate and Administration Act, under which the sale of the property without the leave of the Court would be voidable, although under the Succession Act it would be valid. In the result the widow's suit was dismissed and the case is interesting chiefly because one of the Judges of this Court who dealt with the appeal suggested that Buddhism could not have been a very prominent feature of the religion of the deceased woman and because it is probable that she was not a Buddhist at all.

In the case of *Man Han* v. *The V. R. M. A. L. Chettyar firm* (18), the Chettyar had obtained a decree against a Chinese, Nan Chin Ya, and in execution had attached certain property. Man Han, who was a daughter of a Chinese and was or had been Nan Chin Ya's wife, filed a suit for a declaration that the property belonged to her and not to Nan Chin Ya, having been allotted to her by partition on an alleged divorce. The lower appellate Court dismissed the plaintiff's suit on the ground that under Chinese Customary law all the property inherited or acquired by the wife ordinarily belongs to the husband and that the plaintiff was unable to prove the alleged transfer of the property to her. The learned Judge of this Court, who dealt with the case in second appeal, said that as regards the law applicable it had been taken for granted, though it was difficult to see on what ground, that the law applicable to

(18) A. I. R. 1926 Rang. 172=4 Rang. 110.

such cases is the "vague and archaic and unascertainable" Chinese Customary law, that the provision of S. 13, Burma Laws Act that where the parties are Buddhists the Buddhist law shall apply presupposes the existence of a Buddhist law applicable to the particular class of Buddhists before the Court, and that as there is no Buddhist law which is applicable to Chinese Buddhists, it is necessary for the Courts to decide such cases according to justice, equity and good conscience. He went on to say:

"It has been held, though on what grounds it is difficult to conceive, that the Chinese Customary law in the case of Chinese Buddhists is according to justice, equity and good conscience. I am unable to agree with this, because it is a well known fact that immigrants usually evolve customs of their own. The Courts in India are bound by statute to administer the personal law of the parties in certain cases, e. g. where the parties are Hindus, Mahomedans or Buddhists. It is neither necessary nor desirable to extend the principle of the applicability of the personal law any further, or for the purpose of doing so to enunciate the obviously absurd proposition that a decision according to the archaic Chinese Customary law, is, even in cases where Chinamen are concerned, a decision in accordance with justice, equity and good conscience. I would have imagined that a decision according to justice equity and good conscience in such cases is a decision founded on the law of the forum or what I may call the common law of India."

On this view of the case the learned Judge held that the lower appellate Court was wrong in applying what it imagined to be a rule of Chinese Customary law to the case.

There had been another strongly worded protest against the application of the Chinese Customary law, in this case to the question of the validity of the "marriage" of a Chinese Confucian with a Burmese Buddhist woman, in the case of *Ma U* v. *Kyin Tat* (19), and the learned Judge, who decided that case and who is himself a Burman Buddhist, subsequently in the case of *Ma Yin Mya* v. *Tan Yauk Pu* (20), referred to a Full Bench the question whether in the case of Chinese Buddhists the Burmese Buddhist law regarding marriage is applicable as the lex loci contractus, or if not what law is applicable. In making the the reference the learned Judge said that the law regarding marriage among "Chinese Buddhists" is by no means settled, that the term "Buddhist" used in S. 13, Burma Laws Act is a wide term and may include any nationality other than Burmese, that it would appear that ordinarily, irrespective of nationality, when the parties are Buddhists, the law to be applied is Buddhist Law, that in the case of Burmese Buddhists the Buddhist Law applicable is contained in the dhammathats, which are collections of rules in accordance with the customs and usages of the Burmese people, that he had tried to find out what the personal law of a "Chinese Buddhist" is but had only succeeded in finding the law applicable to the Chinese in general, including non-Buddhists, that there appeared to be no special law for those Chinese who are Buddhists, and that if the law applicable to all Chinamen alike is to be applied to those Chinamen who are Buddhists the enactment requiring Buddhist Law to be applied to Buddhist parties would become a dead letter in the case of "Chinese Buddhists." The learned Chief Justice, who presided over the Full Bench, said that ordinarily it is the lex loci contractus which governs the formal requisites of a marriage, but that question in this country is complicated by the provisions of S. 13, Burma Laws Act which provides that in deciding questions regarding marriage the Buddhist Law is to form the rule of decision where the parties are Buddhists. He observed that the phrase in S. 13 is "the Buddhist Law" and not "the Burmese Buddhist Law," and that there are Chinese, Thibetan, Sinhalese and Chittagonian as well as Burmese Buddhists, but he went on to say that the only Buddhist Law of which the Courts in this province have ever taken cognizance is Burmese Buddhist Law, and that for a foreign Buddhist to escape the application of Burmese Buddhist Law he must show that he is subject to a custom having a force of law in this country, that the custom is opposed to the provision of Burmese Budhdist Law applicable to the case, and further that that custom will not work injustice to a party who is a subject of this province.

After dealing with the case law on the subject of the application of S. 13, Burma Laws Act, particularly to the marriage of Chinese with "Burmese Buddhist" women he came to the con-

(19) Criminal Revn. No. 664-B. of 1925.
(20) A. I. R. 1927 Rang. 265=5 Rang. 406 (F.B).

clusion that Chinese Customary Law ought not to be applied in cases regarding the validity of a marriage between a "Chinese Buddhist" and a Burmese Buddhist woman. The other learned Judge who delivered a judgment on the reference and who was the Judge who made the reference said that the term "Buddhist Law" used in S. 13, Burma Laws Act is a misnomer, because "Buddhist" means what appertains to the Buddhist faith and Buddhism has laid no law which is to be applied to secular matters. In this connexion it may be noted that the Vinaya to which the learned Chief Justice referred in his judgment, is a purely ecclesiastical and not a secular law. The learned Judge went on to say that there is no such thing as Chinese Buddhist Law, that:

"the law which exists is the general customary law applicable to all Chinamen alike, whatever creed they may belong to, that a Chinaman may be either a Buddhist or a Confucion or a Taoisit or all three,"

that the law regulating the forms of marriage is the lex loci contractus, and that the lex loci contractus of the Buddhists in Burma is the one to be found in the dhammathats known as Burmese Buddhist Law. It seems to me that the difficulty in the case of marriage, as distinct from succession and inheritance, is that there is no general law of marriage in India similar to the general law of succession which is embodied in the Indian Succession Act, but with the greatest respect I venture to suggest that it might have been possible to base the validity of a marriage between "Chinese Buddhist" man and a Burmese Buddhist woman on consideration of justice, equity and good conscience or on the basic conditions which are generally recognized by civilized races as necessary to contsitute marriage, such as permanent cohabitation with a view to the procreation of children and with the repute of marriage, rather than on the requirements of Burmese Buddhist Law or of any other particular form of law. However that may be, the judgment of the Full Bench in fact decided merely what are the formal requisites for the validity of a marriage between a "Chinese Buddhist" man and a Burmese Buddhist woman, and did not decide that the legal effect of such a marriage on the property of the parties would be that of a marriage under Burmese Buddhist Law.

But in the further appeal in *Chettyar Firm* v. *Man Han* (21) which was heard after the decision of the Full Bench had been given, a Bench of this Court in effect applied a rule of Burmese Buddhist Law to a question relating to the ownership of the property of a couple who were married in Burma, the husband being Chinese and his wife the daughter of a Chinese, in a case where it is possible that neither of the parties to the marriage was a Buddhist. In the case of *Chan Pyu* v. *Saw Sin* (22) the plaintiff claimed to be an adopted son of a "Chinese Buddhist," who was domiciled and had died in Burma, and to be an heir to the estate of the deceased, not under Chinese Customary Law but under Burmese Buddhist Law. The deceased had left a will and the plaintiff alleged that under Burmese Buddhist Law there is no power to make a will and that the will was therefore invalid. The defendants denied the alleged adoption and said that Chinese Customary Law applied and that under that law there was right to make a will, which had been recognized for many years in the Courts in Burma. In view of the rulings mentioned above the learned Judge who tried the case found himself unable to decide whether Burmese Buddhist Law or Chinese Customary Law ought to be applied to the case, but in the result he found that the alleged adoption was not proved, and dismissed the suit. The case came on appeal before a Bench of this Court and the learned acting Chief Justice said that in his opinion the expression "Burmese Buddhist Law" is a misnomer since it connotes the customary Law of Burmese Buddhists, which is of Hindu origin. He went on to say that it was his considered opinion that it must be regarded as settled law that ordinarily Chinese Customary Law governs the succession to the estate of a Chinaman domiciled in Burma, and that it must also be regarded as established that the "Chinese Buddhists" in Burma have customary rules of inheritance in conflict with those found in the Burmese Buddhist Law. He said that assuming that the Burmese Buddhist Law ap-

(21) A. I. R. 1927 Rang. 2. 9=5 Rang. 443.
(22) A. I. R. 1929 Rang. 22=6 Rang. 623.

plied it was impossible in the circumstances of the case to rule out from consideration the fact that the deceased was in fact a Chinese, observed Chinese customs and ceremonies, and was a Taoicit, a Confucian and an ancestor-worshipper as well as a Buddhist. The other learned Judge doubted the correctness of the finding of the Full Bench that the words "the Buddhist Law in cases where the parties are Buddhists" in S. 13, Burma Laws Act mean, so far as Burma is concerned, Burmese Buddhist Law in cases concerning any adherents to the Buddhist religion irrespective of whether they are Burmese Buddhists or not. He said that such a reading appeared to him to introduce into the statute by implication a qualification of the words "Buddhist Law," without introducing a similar qualification of the term "Buddhists" that he inclined to the view that if the term "Burmese" was to be introduced at all it must be introduced in both cases, so that the section would apply "the Burmese Buddhist Law in cases where the parties are Burmese Buddhists." He also pointed out that what is known as Burmese Buddhist Law has no connexion with the Buddhist religion, and is called Burmese Buddhist Law

"merely because it is that modification or development of the ancient Hindu Law which the Burmans, who are Buddhists, apply to themselves."

He said that although the decision in the Full Bench case would be binding on him if the case were regarding the validity of a marriage, it was not binding on him in respect questions relating to succession or inheritance, and that he refused to apply it to the case which was before him, which was a case of inheritance or succession. He said further that in his opinion the "Chinese Buddhists" who were originally immigrants into Burma, and their descendants possessed distinctive family customs, that their view of adoption is fundamentally at variance with the Burmese Buddhist Law and is not Buddhistic but Taoistic, and that their habit of making wills, which is also opposed to the principles of Burmese Buddhist Law, is a custom having the force of law. He said finally that if he had not been bound by the Full Bench decision as to Burmese Buddhist Law controlling all Buddhists, he would have held that the facts of the case brought within the legal category of sub-S. (2) or (3), S. 13, Burma Laws Act, and he expressed, the opinion that in principle the case had much affinity with the decision of their Lordships of the Privy Council in the case of *Ma Yait* v. *Chit Maung* (23) in which their Lordships held that the Succession Act and not the Hindu Law or the Burmese Buddhist Law applied to the estates of descendants of marriages between Hindu men and Burmese women who are known as Kalias.

The case of *Leong Hone Waing* v. *Leong Ah Foon* (24) is another example of the difficulties and disputes which have arisen in Courts about the religion of a Chinese who was born in China but was domiciled and died in Burma. The deceased in that case, Leong Chye, a wealthy Chinese merchant and landowner of Moulmein, died in 1919. He had made three wills, one in 1910, another in 1914, and the third and last in 1919. In all those wills he had solemnly declared himself to be a Confucian. He had also executed two deeds of gift not long before his death. By the deeds of gift he had conveyed a large proportion of his property to Leong Ah Choy, the younger of his two surviving sons, and by his last will he gave legacies to various relatives but made Leong Ah Choy his sole heir, disinheriting the elder of his two surviving sons, Leong Ah Foon, with whom he had quarrelled. Leong Ah Choy took out probate of the last will, but some seven or eight years later, Leong Hone Waing, who was a son of Leong Ah Foon but who claimed to have been adopted as a son of Leong Ah Wong, another son of Leong Chye who had died many years before, sued for the administration of Leong Chye's estate. He alleged that Leong Chye's execution of the last will and of the two deeds of gift was induced by undue influence on the part of Leong Ah Choy and that in any case the will was invalid because Leong Chye was a Buddhist, and under the Chinese Customary Law, which, as he alleged, was applicable to Chinese Buddhists: there was no power to make a will. There was evidence that Leong Chye had worshipped

(23) A. I. R. 1922 P. C. 197=11 L. B. R. 155=49 Cal. 310=48 I. A. 553 (P.C.).
(24) A. I. R. 1930 Rang. 42=7 Rang. 720.

at a temple in which there was an image of "Kwan Yin" and had occasionally done reverence to that image, that he and his wife had made an offering of a "tazaung," which is a Buddhistic religious building, that he had dedicated certain lands as a site for a Buddhist pagoda, that he had "noviciated" three of Leong Ah Choy's sons, and that certain Buddhist ceremonies were performed at the funeral of his wife, who was known by the Burmese name of Daw Hlaing and who was admittedly a Buddhist.

In spite of that evidence both the trial Court and the Bench of this Court before whom the case came on appeal found that in view of Leong Chye's own solemn declarations that he was a Confucian it was not established that he was a Buddhist and that, therefore the law which was applicable to his estate was the general law of succession which is embodied in the Indian Succession Act. They found further that the allegations of undue influence were not established, and on those findings they affirmed the validity of the will and of the two deeds of gift and dismissed Leong Honge Waing's suit.

I think that I have mentioned all the reported cases relating to succession or inheritance in respect of "Chinese Buddhists" and their number indicates the frequency with which such cases arise in Burma and the importance of the question referred. There are at present a number of cases pending in this Court, the decision in which will depend on the finding of this Full Bench, and in view of the fact that the question before us is one of pure law, such of the counsel engaged in those cases as desired to be heard on this reference have been heard more or less as amici curiae, in addition to the learned advocates who are engaged in the case out of which the reference arises.

The contest at the Bar has been mainly between those who contend that Burmese Buddhist Law should be applied to the estate in question, and those who say that Chinese Customary Law should be applied, but I venture to suggest that even if "Chinese Buddhists" are Buddhists within the meaning of S. 13, Burma Laws Act, as to which I am more than doubtful, there is a third course which is open. It seems clear that there is no form of Buddhist Law which applies to "Chinese Buddhists" as being their own personal law. The intention of S. 13, Burma Laws Act, is in my opinion to apply the personal law, if such law exists, and to apply justice, equity and good conscience if there is no personal law which is applicable. There being no Buddhist personal law of Chinese Buddhists which can be applied to their estates, I suggest that the case of such estates does not fall within the purview of sub-S. (1), S. 13, Burma Laws Act, and, if it falls within S. 13 at all, must fall within sub-S. (3) which provides for the application of "justice equity and good conscience." The law which applies to the estates of all Chinese in this country, except those who have been called "Chinese Buddhists," is the Succession Act, and since that law may reasonably be regarded as a law of justice, equity and good conscience and it applies to the estates of all other Chinese, there would seem to be nothing contrary to justice, equity and good conscience in applying it to the estates of Chinese Buddhists also.

The first of the learned advocates who maintained that Burmese Buddhist Law should be applied to the estates of "Chinese Buddhist" immigrants, who had been domiciled and had died in Burma, referred us to the "statement of objects and reasons" for the enactment of the Succession Act of 1865, and also to the "Report of the Law Commissioners" as showing that the Act was intended to be of general application throughout India, subject of course to the exceptions provided in the Act itself, but it is not necessary to go beyond the wording of the Act in order to establish that proposition. He said that it followed that the ordinary law of Succession in India is contained in the Succession Act, and that statement is clearly correct. As for the Chinese Customary Law he contended that since it is admittedly not Buddhist Law, it must have been applied in Burma as a rule of justice equity and good conscience and not as Buddhist Law, and that it is inequitable that that law should be applied to the estate of a Chinese who calls himself, or whose surviving relatives call him, a Buddhist, and should not be applied to the estate of a Chinese

who is a Confucian or a Taoist, whose personal law it is equally, but to whom the Succession Act must be applied. He said that there are no customs peculiar to Chinese Buddhists as such in Burma, that the custom of making wills which was recognized in *Hong Kue's* case (1) was not a Buddhist custom, and was not peculiar to "Chinese Buddhists." He went on to contended that the term "Buddhist Law" in S. 13, Burma Laws Act, which, he remarked, is an Indian and not a Burma Act, must so far as Burma is concerned, have been intended to mean the Burmese Buddhist Law, which is to be found in the dhammathats and could not possibly have meant Chinese Customary Law. He argued that a Buddhist who acquires a domicile in a Buddhist country must be presumed to intend to subject himself to the Buddhist Law of that country.

He suggested that the remarks in *Fone Lan's* case (2), were merely obiter dicta because the adoption alleged in that case was held not to be established either under Burmese Buddhist Law or under Chinese Customary Law. He referred to a passage cited in that judgment from the case of *Ma Tin* v. *Doop Raj Barna* (25) where the widow of a Chittagonian Buddhist claimed Letters of Administration in respect of her late husband's estate under the Probate and Administration Act, and where it was said that

> "prima facie, as a Buddhist, deceased would come under the Buddhist Law of the country at large and the burthen of proving any special custom or use varying the ordinary Buddhist rules of inheritance would be on the person asserting the variance."

That proposition was doubted in *Fone Lan's* case (2), and even if it is verbally correct it does not go far towards showing that Burmese Buddhist law must be applied to "Chinese Buddhists." The learned Advocate referred to the case of *Saw Maung Gyi* v. *Thu Kha* (26) which dealt with a question of the validity of a marriage of a Chinese, apparently a "Chinese Buddhist," and a Burmese Buddhist woman, but that case seems to have been decided mainly on a consideration of Chinese Customary Law. He referred also to the case of *Ma Thein Shin* v. *Ah Shain* (5), but in that case, as I have already pointed out, the learned Judges applied not the Burmese Buddhist Law but the Succession Act as the rule of justice, equity, and good conscience. He referred further to the case *Ma Shein* v. *Saw Chan Sein* (27) in which also a question of the validity of a marriage between the son of a Chinese man and a Burmese Buddhist woman arose. The wife claimed a maintenance order under the Criminal Procedure Code and the Magistrate dismissed her application because there was no marriage ceremony as required by "Chinese Buddhist Law." The learned Judge of the chief Court who dealt with the case in revision said that he thought it clear that according to Burmese Buddhist Law there was a valid marriage that if "Chinese Buddhist Law" was applicable, there was nothing to show that any particular ceremony was essential to a valid marriage under that law, and that, the parties having cohabited for several years as man and wife, the presumption that there was a valid marriage must prevail. That case therefore, does not go far towards showing that Burmese Buddhist law ought to be applied to the estates of "Chinese Buddhists" domiciled and dying in Burma. The learned advocate referred also to the case of *Sein Kyi* v. *Ma E* (28), which also is a case relating to marriage, and which is interesting because the learned Chief Judge said in it that:

> "prima facie there is no strong reason why the Customary Law of the man should be applied and the Customary Law of the woman utterly disregarded, at any rate up to and the time of the marriage."

That statement seems to me to support my suggestion that in such cases it is "justice equity and good conscience" which should be applied, rather than either Burmese Buddhist Law or Chinese Customary Law. In commenting on *Kyin Wet's* case (8), the learned advocate referred us to *Apana's* case (4), which was therein dissented from, and said that *Apana's* case (4) supported his argument. He went on to say that in the absence of proof that there is any Chinese Buddhist Law applicable to Chinese as Buddhists, the law of the

(25) [1894] 1 Chan Toon's Leading cases 370.
(26) [1915] 8 L. B. R. 208=30 I. C. 715=8 Bur. L. T. 198.
(27) [1915] 8 L. B. R. 225=32 I. C. 818=9 Bur. L. T. 81.
(28) [1915] 8 L. B. R. 399=34 I. C. 159=9 Bur. L. T. 179.

Succession Act should be applied as being justice, equity and good conscience. It may be noted in this connexion that, although the learned Advocate was contending that Burmese Buddhist Law ought to be applied, he seems in this instance, unless I misunderstood his argument, to have been constrained to fall back on the Succession Act and not the Burmese Buddhist Law as the law of justice equity and good conscience. In dealing with the case of *Man Han* v. *The V. R. M. A. L. Chetty,s firm* (18) he pointed out that it did not appear in that case that Man Han was a "Chinese Budhist" and this, as I have already said, seems to be correct. He relied on the fact that Burmese Buddhist Law was actually applied in *Man Han's* second case (21), but it must be remembered that that was not a case of succession or inheritance. He also relied strongly on the Full Bench decision in *Ma Yin Mya's* case (20), but that again was a case relating merely to the validity of a marriage, and not to succession or inheritance.

The learned advocate, who succeeded him in the argument on the same side, also relied strongly on *Ma Yin Mya's* case (20), and particularly on the passage :

"It is a principle of Private International Law ...... that the lex loci contractus governs the formal requisites of a marriage,"

but it seems to me difficult to apply that dictum to matters of succession and inheritance which are not matters of contract. He referred us to the English case of *Undy* v. *Undy* (29) and particularly to the remark of Lord Westbury that civil status is governed universally by one single principle, namely, that of domicile, that it is on this basis that the personal rights of a party, that is to say, the law which determines his marriage, succession, testacy or intestacy, must depend. He contended that because the deceased is ex hypothesi a Buddhist domiciled in Burma, the Burmese Buddhist Law, must apply to his estate. That is certainly a good argument against the application of Chinese Customary Law, but I am very doubtful whether it is an equally good argument for the application of Burmese Buddhist Law, which is certainly not the general law of succession and inheritance in India or Burma, that law being as I have said, contained in the Succession Act. The learned advocate admitted that but for the provision of S. 13, Burma Laws Act and S. 29, Succession Act, the law which would have had to be applied to the estate would have been the general provisions of the Succession Act, but he contended that because the deceased was a Buddhist the law to be applied must be Buddhist Law, and that because the Burmese Buddhist Law is the only existing Buddhist Law, that law must be applied. He referred us to the statement of Sir Charles Fox that the Chinese Customary Law is wholly unconnected with the Buddhist faith, but he seems to have overlooked the admitted fact that what is known as Burmese Buddhist Law is equally unconnected with the Buddhist faith, both Burmese Buddhist Law and and Chinese Customary Law being merely forms of an entirely non-Buddhist law which happened to be applied in the one case to Burman Buddhists, and in the other to Chinese, whether Buddhists or otherwise. The learned advocate went on to say that Sir Charles Fox's dictum that :

"It would be in accordance with the principle of the decisions of the Courts in India to accord to the oriental, whose estate is in question, the rules of succession applicable to one of his class dying in his native country,"

is too widely stated, and for this reason he reprobated the quotation of that dictum in *Po Maung's* case (13), He pointed out that the only religions in favour of which exceptions were made in S. 13, Burma Laws Act were the three Indian religions, namely, Buddhism, Mahomedanism and Hinduism, and that no similar exception was made in favour of the Chinese religions, Taoist, Confucian or Shinto. He might perhaps have added to the latter list "Chinese Buddhism" since "Chinese Buddhism" whatever it may be, can hardly be regarded as one of the Indian religions. He contended that the intention of the exceptions to the Succession Act and of the Burma Laws Act was that their own laws on matters of succession, inheritance and marriage should be applied to subjects of India and not to subjects of foreign countries but it would seem to follow from that argument that the general law of India on those matters, that is the Succession

(29) 1 S. and D. 441.

Act, and not the law which happens to apply in India to particular members of one of the excepted classes was intended to be applied to foreigners domiciled in India. The learned advocate referred us to the case of *Abdurahim* v. *Halimabai* (30) in which their Lordships of the Privy Council held that although Memons, who are a sect of Mahomedan converts from Hinduism, retain in India the Hindu Law of succession, nevertheless Memons who had been domiciled for many years in Monbasa among Mahomedans, who did not follow the Hindu Law of succession, might abandon and in that particular case were proved to have abandoned their custom of following the Hindu Law of succession and might conform to the Mahomedan Law of the particular class of Mahomedans among whom they lived. Their Lordships said :

"Where a Hindu family migrate from one part of India to another prima facie they carry with them their personal law, and if they are alleged to have become subject to a new local custom, this new custom must be affirmatively proved to have been adopted; but when such a family migrate to another country and being themselves Mahomedans, settle among Mahomedans, the presumption that they have accepted the law of the people whom they have joined seems to their Lordships to be one that should be much more readily made. All that has to be shown is that they have so acted as to cut themselves off from their old environments. The anology is that of a change of domicile on settling in a new country rather than the analogy of a change of custom on migration within India. The question is simply one of the proper inference to be drawn from the circumstances. In the present case it is to be observed that it does not appear that the Memons in Monbasa have at any time established any distinctive political or social organization for themselves. Such organization as has been formed appears to have been formed mainly if not entirely for purposes of worship. There seems to be no sufficient reason ...... for regarding the Memons who have emigrated from Cutch to Monbasa as other than a number of individual Mahomedans who have settled down among a people who are of their own religion. It does not appear that these Memons have ever as a body claimed to be outside the system of law which naturally follows from that religion and so prevails among the Mahomedans of Monbasa."

On the strength of these remarks the learned advocate has contended that Buddhist immigrants from China should be regarded as Burmese Buddhists, but from the cases which have been cited it is clear that the Chinese in Burma have always claimed to be outside the Burmese Buddhist system of law and that they have claimed and succeeded in proving customs, as for example, the custom of making wills, which are repugnant to that system, while they have always maintained a distinctive social and religious organization of their own, particularly in the matter of their special clubs and associations and their temples. With reference to the Chinese custom of making wills, the learned advocate contended that it ought never to have been recognized in Burma because it is not a custom which falls within the exception to sub-S. 13, Burma Laws Act, not being immemorial, unbroken, exercised as of right, reasonable, certain, compulsory and unopposed. All that need be said on this subject is that the custom had been recognized by the Courts in Burma at any rate since 1881, which was long before the Burma Laws Act became law, and that the right has constantly been exercised by Chinese in Burma, and was mentioned by their Lordships of the Privy Council in the case of *Maung Dwe* v. *Haung Shain* (31) as a recognized custom which impugnes on the strict Buddhist view that intestacy is compulsory. With reference to the case of *Chan Pyu* v. *Saw Sin* (22) the learned advocate contended that when the learned Judge said :

"It is my considered opinion that it must be regarded as settled law that ordinarily Chinese customary law governs the succession to the estate of a Chinaman domiciled in Burma,"

he was not considering the general law but was only considering the law relating to that particular case, but that statement is obviously incorrect. He contended also that that expression of opinion was obiter, on the ground that the alleged adoption was not proved, and, it was, therefore, unnecessary to consider whether Burmese Buddhist Law or Chinese Customary law applied to the case, but this statement also seems to me to be incorrect. He said further that it is not true that the Courts have consistently applied Chinese Customary Law to the estates of "Chinese Buddhists," and that *Po Maung's* case (13) is in fact the only case in which that law has been applied. A reference to the cases which I have

(30) A. I. R. 1915 P. C. 86=43 I. A. 35 (P.C.).

(31) A. I. R. 1925 P. C. 29=3 Rang. 29=52 I. A. 73 (P.C.).

cited shows that in many of them the Judges at any rate thought that they were applying the Chinese Customary Law. He went on to contend that if Chinese Customary Law is to be applied to such estates it will be necessary for the Courts in this country to keep themselves up to date in respect of changes in that law, which in view of the present state of China are likely to occur, and that the Courts cannot reasonably be expected to undertake so difficult a task. He said that in any case Chinese Customary Law is not a custom having the force of law in Burma, adopted by the Chinese in Burma for themselves, but is a custom of the Chinese in China, and that, therefore, it cannot be recognized by the Courts in Burma under the exception to sub-S. (1). S. 13, Burma Laws Act.

He relied on the passage from *Ma Thein Shin's* case (4) quoted in *Po Maung's* case (13) and said that if the rules of justice, equity and good conscience were to be applied, as therein suggested, these rules must be the rules of Burmese Buddhist Law. Finally he referred us to the case of *Bartlett* v. *Bartlett* (32) in which the question for decision was whether a Mahomedan British subject domiciled in Egypt could make a will in contravention of the Mahomedan Law to which he was subject, and their Lordships of the Privy Council applied Mahomedan Law, the parties being all Mahomedans, in accordance with the terms of an ordinance which was in force in Egypt and which provided that in all matters relating to inheritance the Court should in the case of persons belonging to non-christian communities recognize and apply the religious law or custom of the person concerned. It is difficult to see how that decision supports his contention that Burmese Buddhist Law ought to be applied to the estates of "Chinese Buddhists" domiciled and dying in Burma.

The next learned advocate who took up the argument on the same side pointed out that if, as was found by the Full Bench in *Ma Yin Mya's* case (20), the Burmese Buddhist Law governed questions of the validity of a marriage between a "Chinese Buddhist" domiciled in Burma and a Burmese Buddist woman, then, if it should be held that Chinese customary law applied to the estate of the "Chinese Buddhist" husband, the Burmese Buddhist widow be deprived of the property which it was obviously the intention of the Full Bench that she would inherit. This may or may not be true, but, if it is true, I do not think that it goes far towards showing that Burmese Buddhist Law must be applied to the estate of "Chinese Buddhists." It is true, as the learned advocate points out, that Burmese Buddhist Law was in effect applied by this Court in the second of *Man Han's* cases (21), but that was not a case of succession or inheritance, and the decision in that case is not binding on this Bench. He said that there are Chinese in all the villages in Burma and that those Chinese entirely identify themselves with Burmans.

I am of opinion that that statement is entirely untrue and that wherever possible the Chinese regard themselves as a separate community, wearing their own dress, speaking their own language, having their own social associations, and following their own religion and customs. The learned advocate argued that if Chinese Customary Law were applied to "Chinese Buddhist" then a "Chinese Budhist" husband by making a will could deprive his Burmese Buddhist wife of all right to inherit his estate, but that the result would be that Burmese Buddhist wives would divorce their "Chinese Buddhist" husbands so as to get the share of the property of the marriage to which they would be entitled on divorce under Buddhist Law. This argument overlooks the fact that under Chinese Customary Law, if there are any children natural or adopted the wife is not the husband's heir, that the testamntary power enables the husband to provide for the wife, and that it may not be correct to assume that the Burmese Buddhist Law would apply to the partition of property on divorce of a "Chinese Buddhist" husband and a Burmese Buddhist wife. The learned advocate pointed out that S. 13, Burma Laws Act referred only to religion not to nationality, but it is to be noted that it refers equally to religious not national law and it is admitted that

(32) [1925] A. C. 377.

what is called Burmese Buddhist Law is not in fact a law of the Buddhist religion. He contended that there was no justification for applying Chinese Customary Law in Burma and he argued that therefore Burmese Buddhist Law ought to be applied.

The learned advocate who opened the argument on the other side said that, so far as the case out of which the reference arises was concerned, he was only interested to show that Burmese Buddhist Law did not apply, that he did not propose to show what law did apply if, as he alleged, Burmese Buddhist Law did not apply, and that his case was that S. 13, Burma Laws Act could not make Burmese Buddhist Law applicable to the estate of "Chinese Buddhists." He contended that when the Burma Laws Act was passed the legislature must have known that there were many Indian Buddhists, and could not have meant to apply Burmese Buddhist Law to them, so that the words "Buddhist Law" in S. 13 could not have been intended to mean "Burmese Buddhist Law". He referred us to the fundamental rule that a statute is to be expounded "according to the intent of them that made it." that;

"it is a strong thing to road into an Act of Parliament words which are not there and in the absence of clear necessity it is a wrong thing to do,"

and that;

"We are not entitled to read words into an Act of Parliament unless clear reason for it is to be found within the four corners of the Act itself."

He contended therefore that we are not entitled to read S. 13 as if it referred the Burmese Buddhist Law, except of course in connexion with Burmese Buddhists. He referred us to the Full Bench case of *Thein Pe* v. *U Pet* (33) as showing that the Burmese Buddhist Law is merely the body of customs observed by the Burmese Buddhists, and he said that the only connexion between those customs and the Buddhist religion is the accident that the Burmese who have adopted them are Buddhists. He denied that the Chinese in Burma have ever identified themselves with the Burmans, and he referred us to *Ma Yait's* case (23) as showing that Burmese Buddhist Law ought not to be applied to them even if they did follow certain Burmese Buddhist customs, but that the Succession Act should be applied by way of justice equity and good conscience. He contended that if profession of the Buddhist religion or acceptance of the tenets of Buddism were the proper test then in *Ma Yait's* case (23) Burmese Buddhist law would have had to be applied since their Lordships found that the deceased in that case "observed to a certain extent the rites and ceremonies of the Hindu religion" but that he also "observed and followed the Buddhist religion to a great extent." He contended further that even if identification with the Burmese had been the test, Burmese Buddhist Law would have had to be applied since the deceased in that case dressed as a Burman, used the Burmese language as his ordinary mode of speech and was in fact a leader of the Burmese Buddhist community in Burma, and he argued that if neither acceptance of Buddhism by the deceased as one of two or more religions which he followed nor such close identification with Burmese Buddhists as was proved in that case was sufficient to warrant the application of Burmese Buddhist Law to his estate under S. 13 (1), Burma Lwas Act, then in view of the facts that the Buddhism of Chinese immigrants into Burma is an entirely different form of Buddhism from that of the Burmese Buddhists, that that Buddhism, like that of the deceased in *Ma Yait's* case (23), is only part of the religion followed by the deceased and is not a very prominent feature:

"of their religion, and that the Chinese in Burma do not identify themselves with the Burmese in any way except that they not infrequently marry Burmese wives,"

as in fact did the son of the deceased in *Ma Yait's* case (23), there can be no justification for holding that Chinese immigrants domiciled in Burma are "Buddhists" within the meaning of that word intended in S. 13, Burma Laws Act so as to make it necessary for the Courts in this country to apply the Burmese Buddhist Law to their estates. He referred us to the case of *Mailathi Anni* v. *Subraya Mudaliar* (34) where it was held that a Hindu widow who was a subject of French

(33) [1907] 3 L. B. R. 175 (F. B.).

(34) [1901] 24 Mad. 650=11 M. L. J. 309.

India and who under the Hindu Law as administered in French India was sole heir to her husband's estate did not by migrating to British India after she had inherited the estate bring herself under the operation of the Hindu Law as administered in British India so as to divest her of the estate which she had already inherited in French India, but it is difficult to see how that case is relevant to the questions which arise on the present reference. He contended that the decision in *Bartlett's* case (32) did not affect his contention that Burmese Buddhist Law could not be applied to Chinese domiciled in Burma because in that case all the parties were Mahomedans of the same class. He referred to the case of *Sheo Singh Rai* v. *Dakho* (35) for the purpose of citing the remark of their Lordships of the Privy Council that:

> "It would certainly have been remarkable if it had appeared that in India, where under the system of laws administered by the British Government a large toleration is as a rule allowed to usages and customs differing from the ordinary law whether Hindu or Mahomedan, the Courts had denied to a large and wealthy communities existing among the Jains the privilege of being governed by their own peculiar laws and customs when those laws and customs were by sufficient evidence capable of being ascertained and defined and were not open to objection on grounds of public policy or otherwise, "

and he contended that those principles ought to be applied to Chinese domiciled in Burma, who, as he said are large and wealthy communities whose own peculiar laws and customs are now well defined and ascertained. He said that the tendency of the Courts to follow customary law is now well recognised and as supporting this statement he referred to the judgments of their Lordships of the Privy Council in *Abraham* v. *Abraham* (36), in *Fanindra* v. *Rajeswar* (37) and in *Sheo Singh Rai's* case (35) and he suggested that the customs followed by the Chinese in Burma, though they might be merely the customs followed by the Chinese in China were the customs which should be applied by the Courts in Burma to the Chinese domiciled in Burma. He did not deny that Burmese Buddhist Law might be applied to a Chinese who has adopted the Burmese Buddhist religion just as in *Ma Sein's* case (15) the Chinese Customary Law was applied to a Burmese woman who had adopted the Chinese husband's customs and religion, but he drew a distinction between a Chinaman who has adopted Burmese Buddhism and what is called a "Chinese Buddhist." He contended that a "Chinese Buddhist Law" exists and that Chinese Buddhist Law in Burma must be the customary law followed by "Chinese Buddhist" in Burma and that it makes the differences that it is not in any sense Buddhist Law but is the customary law followed by all Chinese in China, since, even so it is as much Buddhist Law as what is called Burmese Buddhist Law is neither being in fact Buddhist Law at all. He referred to the case of *Yeap Cheah* v. *Ong Cheng* (38), where as he asserted, their Lordships of the Privy Council followed so far as possible the habits and usages of the Chinese domiciled in the Straits Settlments, but a perusal of the judgment in that case seems to me not to support that assertion. He referred to the maxim of stare decisis and said that the Chinese Customary law had been followed for so many years by the Courts of this country that the practice ought not to be unsettled, and in supports of this proposition he referred to a remark of their Lordships of the Privy Council in *Chotay Lal* v. *Chunnoo Lal* (39) to the effect that:

> "after the series of decisions which has occured in Bengal and Madras it would be unsafe to open them by giving effect to arguments founded on a different interpretation of old and obscure texts; and they agree . . . . . that Courts ought not to unsettle a rule of inheritance affirmed by a long course of decisions unless indeed it is manifestly opposed to law and reason."

In the same connexion he cited the case of *Smith* v. *Keal* (40), but I do not think that either of these cases is exactly apposite. He summed up his contentions as follows:

(1) Budhist law in S. 13, Burma Law Act, is not limited to Burmese Buddhist

(35) [1875-78] 1 All. 688=5 I. A. 87=3 Sar. 807=3 Suther 529 (P. C.).

(36) [1861-63] 9 M. I. A. 195=1 W. R. 1=1 Suther 501=2 Sar. 10 (P. C.).

(37) [1885] 11 Cal. 463=12 I. A. 72=4 Sar. 610 (P. C.).

(38) [1874-75] P. C. A. 381.

(39) [1879] 4 Cal. 744=6 I. A. 15=3 Sar. 880 (P. C.).

(40) [1889] 9 Q. B. D. 340=31 W. R. 76=47 L. T. 142.

law, but includes whatever customary law particular classes of Budhists may follow, such law being Buddhist law not because it is law prescribed by the Buddhist religion but because it is law followed by Buddhists; (2) Burmese Buddhist law cannot be applied to "Chinese Buddhists', because they are governed by a customary law of their own which is opposed to Burmese Buddhist law; and (3) S. 13 (1) Burma Laws Act does not apply to the case. and therefore, in accordance with the decision of the Privy Council in *Ma Yait's* case (23) justice, equity and good conscience must be applied and in the circumstances of the case Chinese Customary law is the rule of justice, equity and good conscience.

The learned advocate who followed on the same side contended more positively that Chinese Customary law must be applied to the estates of "Chinese Buddhist" immigrants who at the time of their death were domiciled in Burma. He said that under S. 13, Burma Laws Act, if Burmese Buddhist law applies to "Chinese Buddhists" in matters of succession and inheritance it must also apply in matters of religious usage and institutions, which he regarded as absurd. He contended that the principle involved is that in the case of the classes excepted from the operation of the Indian Succession Act, the personal law of the parties is to be applied in matters of inheritance and succession, and as enunciating that principle he referred to S. 112, Government of India Act. He relied on the case of *Parbati* v. *Jagdis* (41) as showing that even family customs have been recognized by the Courts in India and on the statement of their Lordships of the Privy Council in *Balwant Rao* v. *Baji Rao* (42) that:

> "it is absolutely settled that the law of succession is in any given case to be determined according to the personal law of the individual whose succession is in question."

It may. however, be noted that that dictum refers to succession to persons of the excepted classes. He said that the Chinese in Burma have retained their own dress, their own language, and their own customs, particularly in respect of matters of marriage, adoption, and the making of wills and he referred to the evidence given by Sir Lee Ah Yain in *Chan Pyu's* case (22) and in suit No. 82 of 1928, which is still pending on the original side of this Court. In this connexion it will be remembered that Sir Lee Ah Yain was the arbitrator who in effect decided *Li Tuck Lone's* case (12) and that although in that case he professed to follow Chines Customary law he did not in fact follow it, but followed what was in effect a rule of justice equity and good conscience. The learned advocate further cited the statement of their Lordships of the Privy Council in the case of *Khatubai* v. *Mahomed Haji Abu* (43) that the judgments of the Courts are good evidence of custom and he submitted that the judgments of the Courts in this country show that "Chinese Buddhists" domiciled in Burma have customs which are opposed to the Burmese Buddhist law.

He relied on the suggestion of Sir Charles Fox in *Fone Lan's* case (2) that the Buddha whom the Chinese reverence may not be the same Buddha as the Burmese reverence and he contended that the Buddhist law which is to be applied under S. 13 (1), Burma Laws Act must be a law which is common to both parties to the litigation. With reference to the statement of the learned Judge in *Man Han's* first case (18) that the Chinese Customary Law is "vague and archaic and unascertainblo" he contended that, that law is ascertainable by evidence, and that the evidence given in the various cases which have been or are now before the Courts shows what are the customs of the Chinese not in China but in Burma. He reiterated the argument that we are not entitled to read S. 13, Burma Laws Act as if, the word "Burmese" were inserted before the words "Buddhist law" and that if we insert Burmese before "Buddhist law" we must insert it also before "Buddhist" in the same sentence. He concluded his argument by saying that the correct construction of S. 13 is that the Buddhist law to be applied under that section is the Buddhist law applicable to Buddhists of the same class as the deceased whose estate is in question, that, that Buddhist Law in the case of

(41) [1902] 29 Cal. 433=29 I. A. 82=8 Sar. 205 (P. C.).

(42) A. I. R. 1921 P. C. 59=48 Cal. 30 (P. C.).

(43) A. I. R. 1922 P. C. 411=47 Bom. 146=50 I. A. 108 (P. C.).

the estate of a "Chinese Buddhist" in Burma is the Chinese Customary law applied by "Chinese Buddhist" in Burma to themselves, and that the anomaly that the Indian Succession Act applies to the estate of all other Chinese in Burma except "Chinese Buddhist" and that Chinese Customary law, which is common to all Chinese including others than "Chinese Buddhists" is applied only to "Chinese Buddhists" and is not applied to other Chinese, whose personal law it is equally with Chinese Buddhists, is due merely to an omission on the part of the legislature to provide for the case of Chinese who are not "Chinese Buddhists."

To these arguments the other side replied that the maxim stare decisis cannot be applied so as to prepetuate an obvious illegality, that S. 13 (1), Burma Laws Act, says expressly that where the parties are Buddhists, Buddhist law must be applied, that Chinese Customary law is admittedly not Buddhist law, that therefore the application of that law is contrary to S. 13 (1), Burma Laws Act, and is illegal, and that the alternative under S. 13 is either to apply Burmese Buddhist law or to apply the Indian Succession Act as being the general law of succession and inheritance in India as being a law of justice, equity and good conscience. I have set out at length the case law and the arguments of counsel thereon and it only remains for me to formulate the conclusions at which I have arrived.

The cases seem to me to establish the following propositions:

(1) The Chinese, whether in Burma or China, are not Buddhists in the same sense as Burmese are Buddhists, that is in the sense that they profess Buddhism and no other religion. The Chinese whether in Burma or China, are ordinarily Confucian, that being or having long been the official religion of China, but their Confucianism is tinged sometimes with Buddhism, sometimes with Taoism, and often with both and with one or more of the other religions of China. I doubt whether any Chinese would say that he is not a Confucian but any one who is familiar with the doctrines of Confucianism knows that confucianism is merely a moral code which lacks those superstitious sanctions which religions usually employ. It is doubtless for that reason that the Chinese ordinarily have recourse to other religions to supply that defect and adopt to some extent in addition to Confucianism Buddhism or Taoism or both, since both of those religions supply a superstitious or supernatural sanction by way of punishment for breaches of the moral law. However that may be, it seems clear that what are called "Chinese Buddhists" are not Buddhists in the same sense as the Burmese are Buddhists and I suggest that they are not "Buddhists" in the sense intended by the word "Buddhist" in S. 13 (1), Burma Laws Act.

(2) The cases which have been cited seem to me to establish that there is no such thing as "Chinese Buddhist" law, that is a law which is applied to "Chinese Buddhists" as Buddhists and not as Chinese.

(3) It is admitted that, except for the ecclesiastical law contained in the Vinaya and the commentaries which are purely ecclesiastical law books, what is called "Burmese Buddhist law" is in no sense Buddhist law, but is merely that modification of Hindu law which the Buddhists adopted when they seceded from Hinduism, and which the Burmese, since they adopted Buddhism, have developed and applied to themselves as their customary law. It may be noted that many passages in the dhammathats are taken direct from the old Hindu law books and recognise Hindu customs, particularly in the matter of caste and the subjection of women, which are directly opposed to Burmese Buddhist ideas.

(4) There is no relationship between the Chinese Customary law and the Burmese Buddhist law. The only feature which they have in common is the custom of adoption, which so far as Burmese Buddhist law is concerned is certainly derived from Hindu law and there is nothing to suggest that there is any connexion between the Chinese custom of adoption, which is much more restricted than the Burmese custom, and Buddhism.

I do not think that it is true that the Chinese settlers in Burma have adopted customs or a customary law different from those which they or their ancestors brought with them from China. The only exception to this general statement of which I am aware, after

over 30 years' service in Burma as a Magistrate and Judge, is that when a Chinese marries a Burmese wife the daughters usually receive Burmese names and wear Burmese dress and are regarded as Burmese, while the sons are being regarded as Chinese. This exception is, however, more apparent than real, since it is in accordance with the Chinese disregard of women, which is as different from the Burmese Buddhist attitude towards women as that is from the attitude of the old Hindu law.

The Chinese are peculiarly conservative. In spite of the fact that in Burma they are living among a people who are probably remotely akin to them in race they retain their own dress and their own customs. In the towns they have their own places of worship, which bear no resemblance to Buddhist temples, and their own cemetries. They retain their own funeral ceremonies, and particularly, wherever possible their own peculiar coffins, their own funeral processions, their own elaborate monuments or gravestones. It is true that on occasion they make offerings to Burmese Buddhist monks, or contribute towards the cost of Burmese Buddhist religious edifices, but so do most of us who live in Burma and have Burmese Buddhist friends. It is true that, when they have Burmese Buddhist wives, Burmese Buddhist monks are sometimes invited to their funerals, but, as Sir John Jardine pointed out, this fact does not go far towards showing that they have themselves adopted the Burmese Buddhist forms of religion. I know of no case in which it has been established that a Chinese has adopted the Burmese Buddhist form of religion, though there is a case, which has been cited, where it was held that a Burmese Buddhist woman had adopted the Chinese form of religion. When Chinese witnesses take the oath in the Courts of this country they always take it in the Chinese fashion that is by burning a piece of the special oath paper which is supplied to the Courts for their use, or if there happens to be no such paper available, by breaking a cup or saucer. The reason for this is doubtless that that form of oath has been specially provided for Chinese witnesses under S. 7, Oath Act, but there is also a form provided for Buddhist and I have never known a Chinese witness claim to use the Buddhist form. In any case it is clear that for the purposes of the Oaths Act in Burma, Chinese have always been distinguished from Buddhists. When a Chinese witness is asked his religion, as all witnesses are asked in this country before the oath is administered, the usual answer is "Chinese religion" and the cases which have been cited show how difficult it is to get any information as to which of the various religions of China a Chinese professes to follow, the reason in my opinion being that the "Chinese religions" is a mixture of several religions and is not entirely Confucion or Buddhist or Taoist, so that a Chinese may be said to follow any of those religions. In this connection it may be noted that if an affirmative answer to the question "Do you revere Buddha?" were regarded as conclusive proof that the witness is a Buddhist, then it would follow that Hindu witnesses are also Buddhists since Buddha is one of the Hindu Gods and is revered by Hindus. Reference has already been made in the cases and in the arguments to the recognition by the Courts of this country of the right of Chinese, whether Buddhist or otherwise to make wills, and that right, which is constantly exercised, is in direct opposition to the fundamental principles of the Burmese Buddhist law of inheritance.

The conclusions which I would draw from these considerations are that a "Chinese Buddhist," that is a Chinese who reverences Buddha as one of several deities who are objects of his worship, is not necessarily a Buddhist any more than a Hindu who worships Buddha as one of his deities is a Buddhist, and that, "Chinese Buddhists" are not "Buddhists" within the meaning of that word in S. 13 (1), Burma Laws Act. I think that on the analogy of the decision of their Lordships of the Privy Council in *Ma Yait's* case, (23) in which their Lordships held that the deceased in that case whose paternal ancestors were Hindus and who himself "observed to a certain extent the rites and ceremonies of the Hindu religion," was not a Hindu within the meaning of the Burma Laws Act and the exceptions to the Succession Act, and in which fur-

ther they confirmed the trial Court's decision that the said deceased who "also observed and followed the Buddhist religion to a great extent" was not a Buddhist for the purposes of these acts so that the Succession Act applied to his estate, we may reasonably hold that "Chinese Buddhists", who, as I believe follow the doctrines of Confucianism and possibly also of Taoism in addition to some of those of Buddhism, are not Buddhists within the meaning of sub-S. (1) of S. 13, Burma Laws Act and of the exceptions to the Succession Act. I would therefore hold that the Succession Act governs the succession to the estates of "Chinese Buddhists", whether born in China or born in Burma, who were domiciled and died in Burma, just as it governs the succession to the estates of other Chinese who were domiciled and died in Burma. I would add that even if "Chinese Buddhists" are regarded as Buddhists within the meaning of S. 13 (1), Burma Laws Act, Chinese customary law cannot be applied to their estates because it is not Buddhist law, that there is no reason why "Burmese Buddhist law," which is not the general law of succession in India but is the customary law only of the excepted classes, namely Burmese Buddhists, and further is not Buddhist law, should govern the succession to their estates, and that since the law of justice, equity and good conscience must be applied under S. 13 (3), Burma Laws Act in the absence of any Buddhist law which is applicable as the personal law of the deceased, the Succession Act should govern the succession to the estates of "Chinese Buddhists" as being the law of justice, equity and good conscience, particularly in view of the fact that it is the general law of succession in India and is the law which governs the succession to the estates of all other Chinese domiciled and dying in Burma, whose personal law is identical with that of "Chinese Buddhists."

An exception must of course be made in the case of a "Chinese Buddhist" who is proved to have abandoned his "Chinese Buddhist" religion and to have adopted Burmese Buddhism, but so far as I know no such case has yet been established and from my experience of the Chinese in Burma I think that it is unlikely to occur, at any rate in respect of a Chinese born in China. My answer to the question referred must therefore be that unless it is proved that a "Chinese Buddhist" born in China, who was domiciled and died in Burma, has abandoned his "Chinese Buddhist" religion and has adopted Burmese Buddhism, Burmese Buddhist law does not govern the succession to his estate. I would direct that the costs of the hearing before the Full Bench abide the final decision in the appeal, advocates' fee for the advocates engaged in the case out of which the reference asises to be 20 gold mohurs.

Chari, J.—I have read the judgment of my Lord the Officiating Chief Justice and I concur with him in his answer to the question referred and in the reasoning on which the answer is based. I am specifically expressing my concurrence in the reasoning, as the question actually referred is merely the applicability of Burmese Buddhist law to the estate of a Chinese Buddhist, and the further question as to what law does apply if Burmese Buddhist law does not has not been referred to the Full Bench. It is, however, clear from the judgment that, in the opinion of the Officiating Chief Justice with which I am in entire agreement, the Burmese Buddhist law does not apply to the estate of Chinese Buddhist, because the law actually applicable is the Succession Act or the principles embodied in that enactment as being in accordance with justice, equity and good conscience.

Maung Ba, J.—I have had advantage of reading the judgment of the learned Chief Justice who has fully reviewed the previous case law on the subject. I agree with him in the answer proposed. I only wish to add a few words. With all respect, in my opinion, the term "Buddhist" used in Cl. (1), S. 13, Burma Laws Act, is wide enough to include a Chinese Buddhist. Buddhism has two main schools—Mahayan and Hinayan and many subsects. China follows the Mahayan school while Burma follows the Hinayan school. Naturally there must be differences in beliefs etc., but the same Buddha is revered. A Chinese Buddhist is still a Buddhist. But there are some Chinamen who have adopted such form. But we are not out of the woods yet. Although the ordinary

Chinese Buddhist is a "Buddhist" within the meaning of S. 13, Burma Laws Act, there is no law which can be called "Buddhist Law" recognized by the Chinese Buddhists residing in Burma, apart from the general Customary Law applicable to both Buddhist and non-Buddhist Chinaman. They do not recognize the dhammathats which are recognized by the Burmese Buddhists and which have come to be known as the Burmese Buddhist Law. So it may not be right to force Burmese Buddhist Law upon a Chinese Buddhist who has not adopted the Burmese form of Buddhism. In these circumstances the best solution would be to apply to ordinary Chinese Buddhists the law of justice, equity and good conscience as provided in Cl. 3, S. 13, Burma Laws Act. The Succession Act applies to non-Buddhist Chinamen, and so its principles relating to intestate succession might be applied to Buddhist Chinamen as well, except those who have adopted the Burmese form of Buddhism. To the latter Burmese Buddhist Law might justifiably be applied.

Otter, J.—I have had an opportunity of reading and considering the judgment of the learned Officiating Chief Justice upon this reference. I regret that I do not feel able to agree with the conclusion arrived at by him, and I need not say that it is with diffidence that I venture to express an opinion which differs from the considered view of a Judge whose experience renders him peculiarly fitted to answer the question put to us. The learned Officiating Chief Justice holds the view the Chinese Buddhists should not be regarded as Buddhists within the meaning of either the Succession Act of 1865 or S. 13, Burma Laws Act of 1898. In this connexion it is admitted that the word "Buddhist" must bear the same meaning in each of these Statutes, and this would appear to clearly follow from the judgment of the Privy Council in the case of *Ma Yait* v. *Maung Chit Maung* (23). The learned Officiating Chief Justice thus came to the invitable conclusion that the answer to the question directed to us must be in the negative. We are asked at the Bar, however, to say, in the event of our answer to the referred question being in the negative, what law is applicable in such a case, and my Lord answered this question, as he was bound to do, by saying that the Succession Act applies.

It will be well, therefore, to state as shortly as possible my reasons for holding a view contrary to that arrived at by my Lord and then to endeavour to suggest the system of law which I would hold applicable in the circumstances. As I understand the judgment of my Lord, the main line of reasoning underlying his conclusion is that a Chinaman, though he may profess himself a follower of one or other of the many schools of Buddhism which exist in China, yet as he may, and as I understand it, generally does, profess veneration for the philosophy of Confucius as well, and in addition may at the same time venerate the cult of Taosim (a form of devil worship) he cannot be a Buddhist in the same sense as the Burmese are Buddhists, and therefore is not a Buddhist within the meaning of S. 13 (1), Burma Laws Act.

It seems to me that prima facie there is nothing in either of the provisions under review which would confine the term "Buddhist" either to one who professes the Buddhist religion and none other, or to Buddhists who are Buddhists in the same sense as the Burmese are Buddhists. From a study of the case of *Kyin Wet* v. *Ma Gyok* (3) and also of "Buddhist China" (3) by R. F. Johnston (referred to in this decision), it would appear to me that it would be using the word "Buddhist" in its ordinary meaning to describe vast numbers of Chinamen as Buddhists. There can be no doubt that a form of Buddhist religion existed in China many centuries before any form of Buddist religion was embraced in Burma. Throughout the work I have referred to, such persons are described as Buddhists, and it is perhaps worthy of mention that on p. 2 of this book there is a description of a tablet in one of the most famous Buddhist monasteries in China showing the figures of the representatives of the three systems standing side by side. Sakyamuni Buddha occupies the place of honour in the centre, with certain representations intended to emphasise his importance around him; on his left stands Lao Chun, alleged to be the founder of Taoism; and on the right stands China's most holy sage, Confucius.

It is true that Buddhism may be a

declining religious force in China. It would appear, however, that this state of things applies far more to Taoism than to Buddhism today, the former being apparently regarded by the more enlightened Chinaman as an anachronism and a survival of a more barbaric age. It is equally plain, I think, that Confucianism is substantially a philosophy, and, as my Lord points out, is not attended by religious sanctions. But Buddhism is in China a living force of the most important kind today, I have no doubt at all. This is of course only significant when considering the matter from the point of view of the tests to be applied. If it be established that Buddhism is such a force today, that fact I think goes a long way to disturb such a theory as for instance that, because a Chinaman who believes in this religion may say his religion is "Chinese" when taking the oath in a Court of Law, he is therefore not a Buddhist.

Furthermore, I find it difficult to hold the view that as the cult of Buddhism practised in China differs from that observed in Burma, the word "Buddhist" in the provisions under review is not wide enough to cover the case of a Chinese Buddhist. In this connexion, I would refer to the evidence given before me in the case of *Chan Pyu* v. *Saw Sin* (22) by the Hon'ble Lee Ah Yain, as he then was. In that case, one of the suggestions was that the deceased was not a Buddhist but was a Confucian, and the result of the evidence of Sir Lee Ah Yain (as he now is) seems to me to be that, whereas there may be cases where a Chinaman who is not a vigorous upholder of the Buddhist religion but tends, for example, to confine himself more particularly to Confucianism, it might be difficult to describe him as a Buddhist. He was asked, however, what his opinion would be as to the religion of a Chinaman who habitually embraces Buddhism, and his answer was "Buddhist". In answer to a question by the Court, he said that he called the dead man a Chinese Confucian, but "it would not be incorrect to describe him as a Chinese Buddhist". He also stated that he had not observed the deceased worshipping Kwan Yin or Kwan Shi Yin, the goddess of mercy, and the inference from his evidence in my view is that if he had observed such worship, he would have described the deceased as a Buddhist. I have referred in some little detail to the evidence of this witness for he is, I suppose, one of the most learned authorities, upon such subjects as this, now living in Burma. It is true, of course, that the question in that case was whether in fact the deceased was a "Buddhist", not whether the word "Buddhist" in S. 13 was capable in law of being correctly applied to him. Upon the former point, Sir Lee Ah Yain clearly agreed with the view expressed in *Kyin Wet's* case (8), viz., that one of the test questions might be whether the particular Chinaman worshipped Kwan Yin, also known as Kwan Shi Yin. There can be no doubt whatever that this person is an object of extreme veneration among a large body of Chinese Buddhists, and he (or she for he apparently changed his sex) is said to have been one of the attendant bhodisats of the God Buddha Amitahla. According to "Buddha and the Gospel of Buddhism" (1916) by Ananda Coomaraswamy (at p. 247) this God is said to have been the most popular of all Buddhas and to have ruled over the heaven Sukhavati, the pure land or Western Paradise. With him is associated the historical Gautama as earthly emanation. I mention these pages for they seem to make it clear that the Buddhist religion practised by very many Chinamen is closely akin to that practised by the Burmese, who certainly reverence Gautama. I have no doubt at all then that very many Chinamen profess as an integral and highly important part of their belief a form of the Buddhist religion closely akin to that existing in Burma. It seems, therefore, that considerations of a most cogent nature are required to prevent the word Buddhist from having application in any context to an individual who could be proved to be a bona fide follower of Buddhism as practised in China.

Upon this aspect of the case, may not the true view be that each case must depend upon the particular observance of the individual. It may well be that it would not be correct in a large number of cases to describe a Chinaman as a Buddhist, even through he venerated Buddhist tenets to some extent, I would quote the words of Jardine, J., in *Hong Ku* v. *Ma Thin* (1):

"I think also that it would be as wrong to pre-suppose of a Chinaman that he is a Buddhist as to presume of an Indian that he is a Hindu and not a Mahomedan, or of an Irishman that he is a Catholic and not a Protestant. Such things must be proved before the Court can form any opinion."

Upon this view, the judgment of the Privy Council in the case of *Chotay Lall* v. *Chunnoo Lall* (39), may be referred to. Their Lordships had been dealing with the argument that a man had only to call himself only a Jain for it to be presumed that he was governed by the customs different from the ordinary law, and it was said:

"On the contrary, the effect of that case is that the customs of the Jains, where they are relied upon, must be proved by evidence, as other special customs and usages varying the general law should be proved, and that in the absence of proof the ordinary law must prevail."

I realise, however, that the matter does not rest here, and that in the view of my Lord, Chinese Buddhists are not contemplated by the provisions under examination for another and somewhat different reason. He says if I understand him correctly, that the Chinese Buddhists cannot be regarded as Buddhists within the meaning of the section for if they are their personal law must be applied to them. But this is impossible, he argues, because Burmese Buddhist law clearly cannot be applied to them, for it is not their personal law; nor, he says, can Chinese Customary law for it is not their personal law in the same sense that Hindu and Mahomedan Law is personal to Hindus and Mahomedans. The force of the argument is obvious; but I venture to think that the difficulty ought not to be regarded as fatal. It is elementary knowledge that there are many kinds of Buddhists, Cinhalese and Siamese (to mention only two races) who may be Buddhists; and certainly in the case of Cinhalese I believe them to be as much Buddhists as I have tried to show that Chinese may be Buddhists. Surely the legislature must be taken to have contemplated this, and to have meant when it said "Buddhists" to have meant Buddhists without qualification. If the word Buddhist had been intended to mean Burmese Buddhist only, it would have been simple to say so. In this connexion may it not be said that if "Burmese Buddhists" alone were contemplated, it would have been provided that "Burmese" Buddhist law should apply to them.

May it not be, that the difficulty that, I apprehend, my Lord felt himself to be in, is more apparent than real? Upon the hypothesis that the personal law of individual races is to be preserved to them, may it not be correct (if I may paraphrase what was said in *Fone Lan's* case (2) as long ago as 1903) that the personal law is the particular Buddhist law applicable to the particular Buddhist parties in the case. It is perfectly true that the personal law of the Chinese, viz. Chinese Customary law, is not their personal law in the same sense that Hindu and Mahomedan Law is personal to these races, for it is not personal to Chinese Buddhists alone; but although in China this law applies to many Chinamen who are not Buddhists it certainly applies to those who are. There is nothing in the statute so far as I can see which would deny to a portion of a race its personal law merely because that law applies also to others of that race. Moreover, I cannot lose sight of the fact that their Customary law has been applied to Chinamen in Burma on at least one highly important matter, viz., the power of testamentary disposition, for very many years. Furthermore there has been no change in the habits of the race in Burma so far as I know. They still preserve their own customs and institutions, and their right to test was at least recognized by their Lordships of the Privy Council as recently as in the year 1924; see: *Maung Dwe* v. *Khoo Haung Shein* (31).

While I fully appreciate, therefore, the difficulty felt by my Lord, it seems to me that it is not insuperable. In any event I am of opinion that the inconsistency pointed out by him is not sufficiently grave to deprive the word Buddhist of its ordinary and natural meaning. I shall have occasion to return to the subject of Chinese Customary law when I deal with the question as to what law is applicable to Chinese Buddhists, and there is only one aspect of the matter which remains to be mentioned. So far as I know it has never been seriously suggested in any case before this Court that a Chinaman could not be properly described as a Buddhist within the meaning of the

provisions under consideration. In case after case, the question has been whether upon the evidence the individual in question was or was not a Buddhist by religion, and if so, as to what system of law was applicable to him. It is true that it follows from this that the matter has not, except perhaps in *Hong Ku's* case (1) and also in *Kyin Wet's* case (8) been seriously considered from the angle of vision adopted by my Lord. Yet it is at least remarkable that if the view held by him be correct, in no case has the point been urged upon the one side or the other. Moreover, not one of the learned advocates appearing before us dealt with the question from this point of view. In any event, although as is evident, the conclusion arrived at by my Lord provides a simple solution to the many difficulties attendant upon the whole question, it seems to me that this Court should be slow to pronounce a ruling, the result of which be that in every such case decided since the year 1881 a serious consideration has been overlooked. The principle of stare decisis seems to me to be of peculiar importance upon a question of this kind, and I need in this connexion only refer to the case of *Chotay Lall* v. *Chunni Lall* (39), already mentioned in my Lord's judgment.

Being of opinion, therefore, that Chinese Buddhists are Buddhists within the meaning of the section I must further consider what system of law should be held applicable to them in the circumstances under review. I do not propose to deal at any length with the arguments of the learned advocates who appeared in the case, for they are examined fully in the judgment of my Lord. It seems to me, as I have indicated above, that in considering this matter it must never be lost sight of that throughout the Statute law of India and also in decided cases, the tendency to preserve to the individual his personal law has been followed. I need only mention on this point *Ma Yait's* case (23) (and the cases therein referred to) and also *Abraham* v. *Abraham* (36). It is perfectly true, as my Lord pointed out, that the main difficulty in the way of applying Chinese Customary law is not of course "Buddhist law" in the ordinary sense of these words. Upon this point I would refer again to the case of *Fone Lan* v. *Ma Gyi* (2) where the view of the Judicial Commissioner in *Hong Ku's* case (1) that the dhammathat is not an exclusive lex loci was said to be correct. The learned Chief Judge in *Fone Lan's* case (2) went on to deal at length with the cases already decided upon this point, and as his judgment has formed the basis of the line of later authorities, I would refer to certain passages contained in it. On p. 97 of the report he says:

> "In India, as in this province, each individual of the Hindu or Mahomedan faiths is accorded the personal law applicable to him in matters of marriage, succession or inheritance. There is a presumption that a Hindu family is ordinarily governed by the law prevailing in the country of its origin and not by the law of habitat for the time being. . . . In regard to Mahomedans of the Sunni sect the Hanifea Code is applied, whilst the case of Mahomedans of the Shia sect the Imameea Code is followed. Customary law when proved is applied to both Hindus and Mahomedans as for instance in the case of Jain tribes and Khoja Mahomedans, and the cases in which special family customs have been proved and adopted. On consideration of what the Hindu and Mahomedan Laws are composed of, I take it that when in S. 13, Burma Laws Act, 1898, the legislature uses the words "Mahomedan Law" and "Hindu Law," it means the laws applicable to such Mahomedan and Hindu parties whensoever such laws may be derived."

In other words, the personal law of that particular kind of Buddhist. The learned Judge goes on to construe the words "Buddhist Law" in the same way, viz., as meaning the law of succession, inheritance, marriage etc., applicable to the Buddhist parties in the case. It is perfectly true that in the case of a marriage between a Chinese Buddhist and a Burmese Buddhist woman, a Full Bench of this Court has held that the Burmese Buddhist law must prima facie apply see: *In re, Ma Yin Mya* v. *Tan Yauk Pu* (20). The ratio decidendi, however, there was, that the law governing a marriage should be the lex loci contractus. This may well be so. In the present case, however, the question only is as to the law applicable to the succession to a deceased man's estate and may perhaps be treated from an entirely different point of view. In this connexion, I do not lose sight of the fact that my Lord in the present case seems to incline to the view that *Ma Yin Mya's* case (20) might have been decided upon the grounds of jus-

tice, equity and good conscience. However that may be, the principle laid down in *Fone Lan's* case (2) has, as appears plainly from the judgment of my Lord, been followed in many later authorities. Of these I propose only to refer again to one of the most recent of them all. viz., *Chan Pyu's* case (22). My Lord has already set out a considerable extract from the judgment of the Officiating Chief Justice in that case, and I will only mention one passage here, namely that to be found on p. 631 of the report :

"I would also observe that strictly speaking the expression 'Burmese Buddhist Law' is to my mind a misnomer since it connotes the customary law of Burmese Buddhists which is of Hindu origin, although it is true that the Vinaya is inter alia a repository of Buddhist Ecclesiastical law. It is my considered opinion that it must be regarded as settled law that ordinarily Chinese Customary Law governs the succession to the estate of a Chinaman domiciled in Burma."

Thus it will be seen that while he regarded Chinese Customary Law as applicable in succession cases, the learned Judge dealt a blow at the criticizm that this system of law ought not to apply upon the ground that it is not Buddhist Law for he shows that such law is not really Buddhist Law at all. He also affirms the principle of stare decisis to which I attach so much importance in the present case. Before leaving *Chan Pyu's* case (22), I would refer briefly to the judgment of Cunliffe, J., who, in rejecting the theory that Burmese Buddhisht Law applied, emphasised the argument that if such a contention were correct, the provision ought to read "the Burmese Buddhist Law in cases where the parties are "Burmese Buddhists," his view of course being that if the words "Burmese" be read as inserted before the words "Buddhist Law," it should also be inserted before the word "Buddhist." It seems to me that there is considerable force in this argument, and it has indeed been raised from time to time in previous cases.

The second, and perhaps more important difficulty standing in the way of the construction under review is that Chinese Customary Law is not personal to Chinese Buddhists for all Chinamen, be they Buddhist or not, are subject to the customary law. I have already mentioned this difficulty and I repeat that it seems to me that the legislature did not intend that, because in the case of a particular Chinaman an application of his personal law to him involved the application of a law applicable to other Chinamen as well, this fact should prevent him from enjoying the benefit of his own system of law. It is perfectly true that for example a man who was purely and simply a Confucian would not be within Sub-S. (1) S. 13 and the Succession Act would apply to his estate. But the legislature clearly intended to preserve for followers of certain religions their own personal law. Now the term Confucian, as I understand it, really means an individual who follows the philosophy of Confucianizm such philosophy having no religious aspects at all. I think therefore that the legislature may well be taken to have disregarded Confucians.

Moreover as I have said, Chinamen as a whole in this country have never identified themselves with the native Burmese, and they have not except in certain cases (which I believe to be rare) cut themselves off from their own customs and institutions. On the contrary their conduct has been otherwise. In particular, as my Lord points out, they have always claimed to stand outside the Burmese system of law and as I have pointed out, they have claimed and succeeded in proving customs, as for example that of making wills. This custom, it is scarcely necessary to say, is of peculiar value in this Province where under the Burmese Buddhist Law the power of testamentary disposition is unknown.

In this connexion I would briefly refer to the exception to S. 13 (1), Burma Laws Act. At first sight it would seem an attractive solution to the problem under review to hold that Chinese Buddhists prima facie come within this subsection, but that in any case where they can prove the existence of such a custom as is provided in the exception, they are exempt from the incidence of the "Buddhist Law." But this would involve the hypothesis that prima facie "Burmese" Buddhist Law applies to persons who are not "Burmese" Buddhists, and denied to Chinese Buddhist the direct benefit of their own personal law. This possible solution must therefore in my view be rejected.

One strong argument in favour of applying Chinese Customary Law remains to be mentioned. It is that if it be the true view that Burmese Buddhist Law should be applied that proposition involves the application of Burmese Buddhist Law upon matters of religion or caste. This, it has been pointed out at the Bar, must be surely wrong. There is also another view of the matter to which I am bound to refer. It is said (and with some force) that "Chinese Customary Law" ought not, and indeed cannot, be applied, for such law even where found is of little or no authority, and in any event is vague and hard to ascertain. There can be no doubt, of course, that the present state of affairs in China does not encourage the belief in a stable system of law administered by Courts of authority. Nor no doubt upon certain subjects is the Chinese Law clear or crystallized. But we have text books such as Alabaster & Jamieson. There is the Chinese Criminal Code, and it has been said that a new Civil and Commercial Code is to come into force in the year 1930; see the notification of 27th April 1929, adressed to six of the Great Powers. It remains to be seen of course whether any real intention to introduce or power to enforce such a code exists. This must be at least doubtful.

There are, however, experts in these matters, and in this province there is as I have shown at least one Chinese lawyer of knowledge and experience, and there are no doubt others. It must also be borne in mind that it is only on the matters mentioned in the provisions under review that the law need be ascertainable; and upon the question under consideration in the present case I think there would be no difficulty in ascertaining the law. But however that may be, in my view it is far from being conclusive against the application of Chinese Customary Law that it is difficult in some cases to ascertain it. If, however, it should transpire that no customary law existed upon a particular point, a Court might well apply the law of justice, equity and good conscience. As to what would constitute such law, I would prefer to reserve my opinion until a concrete case arises.

I have now set out my reasons for arriving at the conlusions which seem to me to be material to this reference, and I have endeavoured to confine myself to the more general considerations applicable to the matters under review. Most briefly my reasons are: (1) That a Chinaman may very frequently be accurately described as a "Buddhist." (2) That such a man is just as much a Buddhist as a Burmese Buddhist. (3) The Statute says that on certain matters "the" Buddhist Law is to be applicable to Buddhists, but there is no such thing as Buddhist Law apart from Burmese Buddhist law, which is not Buddhistic in origin and ought only to be applied to Burmese. (4) That in view of (3) "the" Buddhist Law must be something else, viz., the personal law of the Chinese, viz., Chinese Customary Law. (5) That Chinese Customary law has been applied to Chinese Buddhist in Burma since 1881.

My answer then to the question addressed to us must be in the negative, and to the further question propounded at the Bar I must hold that Chinese Customary Law applies. And I would only add this that in every such case the Court must be satisfied upon evidence that particular deceased was a Buddhist within the meaning of S. 29, Succession Act and S. 13, Burma Laws Act.

Brown, J.—The question that has been referred for our decision runs as follows:

"Does Burmese Buddhist Law govern the succession to the estate of a Chinese Buddhist born in China, but who was domiciled and died in Burma ?".

When the case was argued before us at the Bar, a further question was dealt with, namely, if Burmese Buddhist Law is not applicable, what is the law that is applicable? The learned Officiating Chief Justice in his long and exhaustive judgment has dealt fully with the question of law raised and the judicial decisions on the subject and I agree generally in the answers proposed by him to the reference. I was a member of the Full Bench in the case of *Ma Yin Mya* v. *Tan Yauk Pu* (20) in which we held that the Burmese Buddhist Law regarding marriage is prima facie applicable to Chinese Buddhists contracting marriage in Burma as the lex loci contractus. The question we have now to decide is not a question of marriage but a question of succession. The learned Chief Justice in his judgment

in *Ma Yin Mya* v. *Tan Yauk Pu* (20) at. 413 (of 5 *Rang.*) remarked:

"It will be observed that the phrase in S. 13 (1), Burma Laws Act is . . . . . "the Buddhist Law where the parties are Buddhists," and not the Burmese Buddhist Law. We know that there are Chinese, Thibetan, Sinhalese and Chittagonian Buddhists. The only Buddhist Law, however, in my opinion of which the Courts of this province have ever taken cognizance is Burmese Buddhist Law. And for a foreign Buddhist to escape from the application of Burmese Buddhist Law, he must show that he is subject to a custom having the force of law in this country and that that custom is opposed to the provision of Burmese Buddhist Law applicable to the case."

I concurred generally in the learned Chief Justice's judgment, but the point before us then was a point only with reference to marriage and although the passage I have quoted from the judgment might suggest that the Burmese Buddhist Law would be applicable also to cases of succession amongst Chinese Buddhists, that result did not necessarily follow from our decision on the question before us and we did not intend to lay this down as the general law. So far as matters of succession are concerned, there is undoubtedly a very long line of decisions to the effect that Burmese Buddhist Law is not applicable to Chinese Buddhists. This view has been taken almost universally by the Courts for nearly 50 years and a very strong case would have to be made out for taking a different view now. It is true that Burmese Buddhist Law is the only Buddhist Law of which we have any real knowledge. I do not think, however, that it necessarily follows that that law must be applied in matters of succession to all Buddhists of whatever nationality they may be and whatever customs they may follow. The Hindu law is laid down in S. 13 as the law to be followed in the case of Hindus and the Mahomedan law in the case of Mahomedans. But in the cases of both of Hindus and Mahomedans, variations of the law are applied in accordance with the particular race or caste to which the persons concerned belong. The Burmese Buddhist Law is the law applicable to Burmese Buddhists in Burma but it does not follow that the same law must be applied without any modification to Buddhists coming from another race and country. It is not really Buddhistic in its origin, and is applied to the Burmese Buddhists because it is the law to which they have been subject from time immemorial. Chinese Buddhists have never been subject to it and it cannot be called Buddhist law at all when considered in its possible reference to them. So far as succession is concerned, I do not consider that Burmese Buddhist law is applicable to Chinese Buddhists. The principle of stare decisis is on this point entitled to very great weight and I agree that the answer to the reference that has been made to us must be in the negative.

There remains, however, the more difficult question as to what law is applicable in such a case. The learned Officiating Chief Justice suggests that the answer is to be found by holding that a Chinese Buddhist is not a Buddhist at all within the meaning of the Indian Succession Act or S. 13, Burma Laws Act. As pointed out by him in the case of *Ma Yait* v. *Maung Chit Maung* (23), their Lordships of the Privy Council held that the late Maung Ohn Ghine was neither a Buddhist nor a Hindu within the meaning of the Indian Succession Act although, he observed to a certain extent the rites and ceremonies of both religions. Their Lordships held that the law applicable in his case was the law as laid down in the Indian Succession Act. I agree that in accordance with the principles approved in *Ma Yait's* case (23), many persons who call themselves Chinese Buddhists cannot be held to be Buddhists at all under the provisions of the Indian Succession Act or of the Burma Laws Act. The difficulty, however, in answering the question that we have to decide in the manner proposed appears to me to be this that, according to the terms of reference, what we have to decide is the law applicable to the estate of a Chinese Buddhist. It is assumed by the terms of reference that the person concerned is a Buddhist and we cannot therefore now go into the question whether or not, in fact he is a Buddhist within the meaning of the acts concerned.

I agree, however, that although we must assume for the purpose of this case, that a Chinese Buddhist is a Buddhist, within the meaning of the two acts concerned, the law applicable must be held

to be the law as laid down in the Indian Succession Act. My learned brother Otter J., in coming to a different opinion has dwelt strongly on the principle of stare decisis. It is true that for a large number of years, the Chinese Customary law has been generally applied by the Courts of this province in dealing with succession to the estate of a Chinese Buddhist but the first reported case definitely laying down as a principle that this law must be followed appears to be the case of *Fone Lan* v. *Ma Gyee* (2) decided less than 30 years ago. The case of *Hong Ku* v. *Ma Thin* (1) on which considerable stress has been laid in the arguments before us whilst an authority for the view that the Burmese Buddhist law would not be applicable in such a case does not lay down that the Chinese Customary law should be applied. The position arising from the application of this law is an exceedingly anamalous one.

It has been pointed out by the learned Officiating Chief Justice that the Chinese very largely follow the three religions of Confucianism, Buddhism and Taoism. Admittedly succession to the estate of a Chinese Confucian is governed by the rules of the Indian Succession Act. Admittedly the Chinese Customary law is the law applicable to all Chinamen in China whether they be Confucians, Buddhists or Taoists. It can hardly have been intended by the legislature that a special privilege should be accorded to a Chinaman who has emphasized the Buddhist side of his religion that is not accorded to another Chinaman who calls himself a Confucian although in many cases, he is probably as favourably inclined towards Buddhism as his fellow countryman. This by itself would not be a sufficient reason for holding that the Chinese Customary law cannot be applied in the case of the Chinese Buddhists ; but the chief difficulty I find in the way of applying the Chinese Customary law is that I am unable to see how such law can in any sense be called Buddhist law. It has been suggested that Buddhist law in the case of a Chinese Buddhist must be interpreted to mean the law that would have been applicable to the particular Buddhist concerned if he had died in his native country. This seems to me to be straining the meaning of the term 'Buddhist law' further than is justifiable It has been pointed out that so far as Burmese Buddhist law is concerned, the name is a misnomer and that the law is not Buddhist in origin in any way.

That is no doubt correct. But it is quite clearly the law applicable to Burman Buddhists as such. Although not Buddhist in origin, it is now the accepted law that applies to indigenous Buddhists of Burma, and to followers of no other religion. The Chinese Customary law may apply to Chinese Buddhists, but it is in no sense whatsoever connected with Buddhism and applies in China equally to Buddhists and non-Buddhists. I find myself unable to hold that the Chinese Customary law can be called Buddhist law simply because it would be applicable to a Chinaman in China if he happened to be a Buddhist. It has been contended that the policy incorporated in the Succession Act and the Burma Laws Act is the policy of allowing all Orientals to be governed by their own personal customs so far as matters of succession are concerned. It is to be noted, however, that the special provisions of each act are applicable only to religions which are generally followed in India. Confucianism which is not of the religions ordinarily prevailing in India does not come within the scope of these provisions. Europeans in India are governed by the Succession Act although in many cases, the rules of succession enacted are not those in force in their own country. I do not think it can be held that there was any intention to accord special privileges with regard to personal law except to subjects of British India. S. 13 (1), Burma Laws Act, lays down :

> "Where in any suit or other proceeding in Burma, it is necessary for the Court to decide any question regarding succession, inheritance, marriage or caste, or any religious usage or institution, the Buddhist law in cases where the parties are Buddhists. . . . . shall form the rule of decision except in so far as such law has by enactment been altered or abolished, or is opposed to any custom having the force of law."

And Cl. (3) of that section reads :

> "In cases not provided for by sub-S. (1), sub-S. (2) or by any other enactment for the time being in force, the decision shall be according to justice, equity and good conscience."

In the view I have taken there is in Buddhist law applicable to Chinese Buddhists. The case of the Chinese Bud-

dhist is not therefore provided for by sub-S. (1). Under this section, the law of succession in the case of Chinese Buddhist must therefore be in accordance with justice, equity and good conscience. I find myself unable to hold that the application of the Chinese Customary law which is archaic and, so far as our knowledge goes, extremely uncertain, fulfils these conditions. The Indian Succession Act contains the general law of the land which is applicable to any one other than the excepted classes. It is applicable to the Chinese Confucian and has always been held to be so. Its provisions can reasonably be held to be in accordance with justice, equity and good conscience in their application to Chinese Buddhists. I am of opinion that the Indian Succession Act governs the succession to the estate of a Chinese Buddhist. I agree with the order proposed by the learned Officiating Chief Justice as regards the costs of this reference.

P.N./R.K. *Reference answered.*

A. I. R. 1930 Rangoon 114

BROWN, J.

Maung Ba Chit and *another*—Accused—Appellants.

v.

Emperor—Opposite Party.

Criminal Revns. Nos. 341-B and 342-B of 1929, Decided on 15th October 1929, from order of Sess. Judge, Moulmein.

(a) Criminal P. C., S. 239 — Persons charged with criminal conspiracy to steal timber for certain term and also with habitually receiving and dealing with it during that term in pursuance of conspiracy—There is no misjoinder—But trial will be bad if persons are charged with stolen timber outside the conspiracy.

There is no misjoinder where the accused persons are charged as being parties to a criminal conspiracy to steal Government timber for a term of years and also with habitually receiving and dealing with that timber knowing or believing it to be stolen property during the same period in pursuance of the conspiracy. But if the charge is for habitually receiving stolen timber outside the said conspiracy, the trial will be bad and must be set aside as void : 25 *Mad.* 61 (*P.C.*), *Dist.*

[P 117 C 1, 2]

(b) Criminal P. C., S. 342—Object of examination of accused is to enable him to explain anything appearing in vidence against him—In complicated case general questions asking him what he has to say in explanation of evidence against him is insufficient.

The object of the examination of the accused is to enable him to explain anything appearing in evidence against him. It is impossible to lay down any hard and fast rule as to what question should be put in any particular case. The failure to put certain vital questions will not vitiate a trial if the accused is in no sense prejudiced by that failure. But in a complicated case it would be an entirely insufficient compliance with the provisions of the section to put a general question asking the accused what he has to say in explanation of the evidence against him. Thus where the prosecution is mainly based on the contents of the documents which are obscure and capable of more explanations than one it is of special importance that the accused should be asked specifically as to what his explanation of the doubtful passages is: *A. I. R.* 1925 *Cal.* 361 and *A. I. R.* 1924 *Rang.* 172, *Rel. on.*; *A. I. R.* 1929 *Rang.* 331 and *A. I. R.* 1925 *Rang.* 258, *Ref.*

[P 118 C 2]

(c) Penal Code, S. 378—Licensee cutting trees in Government forest not covered by license—Officer competent to give consent for their removal out of possession of Government giving it on understanding that timber to be removed was covered by license — Consent held not valid within S. 378 and theft of timber held to have been committed.

Where the licensee cuts down trees in the Government forest which are not covered by his license and where the person authorized to give consent to remove them out of the possession of Government gives it by issuing removal pass and the bill of title to timber on the understanding that timber to be removed was timber covered by the license and thus the consent is given under a misconsception of fact there is no such consent as is meant by S. 378 and in such circumstances offence of theft of timber is committed : 1 *Bom.* 610, *Dist.*

[P 120 C 2; P 121 C 1]

(d) Criminal Trial—No specific instance of theft or receipt of stolen property proved—Court asked to infer from several obscure documents in possession of accused that there was conspiracy to commit theft—Accused not questioned about documents—Inference cannot be drawn—Criminal P. C., S. 342.

Where no specific instance of theft or of receipt of stolen property is proved and the Court is asked as a result of several obscure documents found in possession of accused to infer that there has been conspiracy to commit theft, it is a dangerous thing to draw such an inference as to any such conspiracy among the accused without questioning them about the documents : 37 *Cal.* 467, *Rel. on.*

[P 123 C 2; P 124 C 1]

De Glanville Grant and *Darwood*—for Appellants.

Gaunt—for the Crown.

Judgment.—The two petitioners, Ba Chit and Maung Naw, were sent up by the police before the First Additional Special Power Magistrate, Moulmein,

together with nine others, on various charges. After taking enough prosecution evidence to satisfy him that prima facie case had been made out, the Magistrate discharged four of the accused and framed charges against the other seven under S. 120-B, read with S. 379, and S. 413, I. P. C. The Magistrate found all the persons who were charged guilty. They all appealed to the Sessions Judge. The Sessions Judge set aside the convictions as regards five of the appellants but upheld the convictions and sentences in the case of the two petitioners. The two petitioners have both been found guilty under S. 120-B, and Ba Chit has also been found guilty under S. 413 and Maung Naw under S. 413 read with S. 109. They have each been sentenced by the Sessions Judge on the second charge only to two years' rigorous imprisonment. Both Ba Chit and Maung Naw have now come to this Court in revision against the orders of the Sessions Judge.

It generally happens that cases in which charges of conspiracy are brought are complicated cases. The present case is not exception to that rule. A large number of witnesses were examined at enormous length and the case took about nine months to try before the Magistrate, and, although the record of the oral evidence is so bulky, the convictions have been based mainly on certain documents which were found in the possession mostly of the two petitioners. Ba Chit was a timber trader in Moulmein, dealing in timber on a large scale. He had various licences and permits for the extraction of timber from the forests. He himself never went to the forests at all, the timber being extracted on his behalf by agents or contractors. Maung Naw was a servant of Ba Chit who used to visit the forests from time to time. The exact scope of his duties there, is disputed, but he had generally to look after the interests of Ba Chit.

A few months before the institution of this case, the Divisional Forest Officer as a result of personal inspection, found a large number of stumps of green Pyinkado, trees in an area where permits had been given only for the extraction of aule-natthat timber, that is to say, dead or fallen trees. Stated in broad terms, the prosecution is that for the last two years there has been a widespread conspiracy in which the petitioners took part to obtain timber by illicit means. That conspiracy involved several subordinate officials who were bribed from time to time by Ba Chit. At the time that the charges were framed against the seven accused, it appears that, though there was evidence to show that the four accused, who were not charged, had been conspiring separately to steal timber, the view of the Magistrate was that they were not parties to the same conspiracy as the petitioners.

Charges were framed against the petitioners under the provisions of S.120-B and S. 413, I. P. C. The charge against Ba Chit under S. 120-B reads as follows:

"That you during the two years prior to 15th August 1928 (the date on which this case was reported), were a party to a criminal conspiracy to steal timber in the Ataran Forest Division with headquarters at Moulmein, and in agreement with the accused, Maung Naw, Maung Po Thein, Maung Tun Byu, Maung So Min, Maung Ye Gyan and Maung Khin in consequence whereof Government timber was stolen from Winyaw and Natchaung Ranges in the said Forest Division and thereby committed an offence punishable under S. 120-B read with S. 379, I. P. C."

The second charge against him was:

"That you during the two years prior to 15th August 1928 (the date on which this case was reported,) were a habitual receiver and dealer in Government timber which you know or had reason to believe to be stolen property and thereby committed an offence punishable under S. 413, I. P. C."

The charges against Maung Naw were couched in similar terms. Against the other accused charges of conspiracy only were framed. The first objection that has been raised on behalf of the petitioners in this case is that there has been a misjoinder of charges, and that, therefore, the whole trial is void. It is suggested that in any case the two charges against the same person could not be sustained; that a thief cannot also be a habitual receiver of stolen property; and that the receipt of stolen propety in pursuance of a conspiracy of this nature cannot reasonably be called "habitual receiving" within the meaning of S. 413. The question whether the two charges can be sustained does not I think, properly arise in considering whether there has or has not been a misjoinder. It has been contended on behalf of the petitioners, and in my opinion the contention is perfectly correct, that in considering whether there has

been a misjoinder of charges or not, we have to consider not what orders were passed by the Court, but what was the subject of the charge.

The point for consideration at present therefore, is whether a joinder of the charges, as framed, is or is not justified by the provisions of the Criminal Procedure Code. Under the provisions of S. 239, Criminal P. C., persons accused of different offences committed in the course of the same transaction may be charged and tried together. It has, of course, not been suggested that all the accused could not properly be tried together under the first charge, that of conspiracy, but it is urged that the joinder of this charge with the second charge under S. 413 is not justified, as the offences charged in the two charges are not offences committed in the course of the same transaction.

It appears that in the case, as originally presented before the Magistrate, it was suggested that Ba Chit received stolen property, not only in pursuance of the conspiracy charge in this case, but also from other traders who were not themselves parties to this particular conspiracy. In the words of the Government Advocate when addressing the Court before the framing of the charge:

"The wider conspiracy for which the other accused have been joined with the above in this case is a conspiracy to make use of Ba Chit as a habitual dealer in stolen property.—120-B, 413."

If the accused in the present case has been charged with being a habitual dealer in stolen property which came from these other accused, then it is no doubt that there has been a misjoinder. Can it, however, be said that this is the meaning of the charge? The other four accused, from whom, it was suggested, Ba Chit used to receive stolen timber, were not charged in this trial at all. The trial proceeded only against the persons alleged to have taken part in the special conspiracy charged.

It must be admitted that the second charge in this case is not happily worded, and it might be read to include a charge of receiving stolen timber outside this particular conspiracy. But I think that, if the wording of the charge be taken in conjunction with the circumstances under which it was framed and the whole conduct of the trial of the case, it is clear that it was never intended, and that it was never understood by any of the accused that it was intended that any habitual receiving should be considered except habitual receiving in the course of the present conspiracy.

The first charge sets forth that during the two years prior to 15th August 1928 the accused were parties to a criminal conspiracy to steal Government timber. The second charge sets forth that during the same two years the accused was a habitual receiver and dealer in Government timber, which he knew or believed to be stolen property. The charge should certainly have had added to it some such words as "in pursuance of the said conspiracy". But the wording of the two charges shows quite clearly that the periods covered by the two charges are the same, and at the time that the charges were framed the four other accused persons were struck off the list of accused in this case. This indicates very clearly that, although the charges were faultily framed, it was never the intention of the Magistrate in fact to consider timber received by the accused from these other four accused persons who were not subsequently charged; nor in the proceedings themselves have I been able to trace any sign of any attempt subsequent to the charge to prove such receipt, or anything to suggest that at any period after the charge the petitioners, or any of the other accused, really thought that this illegal receipt from persons not in the conspiracy was included in the charges. The position, therefore, seems to me to be this. The charges framed are unfortnaately framed vaguely and read by themselves could undoubtedly be read to cover matters outside the transaction of conspiracy. But in actual fact they were never intended to cover such matters, and were never understood by any of the accused as covering such matters.

The question is whether in these circumstances there has been a misjoinder which vitiates the trial. The leading case on this point is the case of *Subrahmania Ayyar* v. *Emperor* (1). In that case an accused person had been tried in one trial charged with no less than forty-one acts extending over a period of two years. That was plainly

(1) [1901] 25 Mad. 61 = 28 I. A. 257=8 Sar. 160 (P.C.).

in contravention of the S. 234, Criminal P. C., which provided that a person might only be tried for three offences of the same kind if committed within a period of twelve months. It was held that such a procedure was absolutely fatal to the validity of the trial and could not be cured by the provisions of S. 537, Criminal P. C. In the course of their judgment their Lordships of the Privy Council observed at p. 97:

"Their Lordships are unable to regard the disobedience to an express provision as to a mode of trial as a mere irregularity. Such a phrase as irregularity is not appropriate to the illegality of trying an accused person for many different offences at the same time and those offences being spread over a longer period than by law could have been joined together in one indictment. * * * * *

"The remedying of mere irregularities is familiar in most systems of jurisprudence but it would be an extraordinary extension of such a branch of administering the criminal law to say that when the Code positively enacts that such a trial as that which has taken place here shall not be permitted that this contravention of the Code comes within the description of error, omission, or irregularity."

It has been contended before me that on the face of this authority I am bound to hold that the trial in the present case is bad and that the defect cannot be cured irrespective of any question as to whether the accused have or have not been prejudiced. I have also been referred to various later rulings of the Indian High Courts in which this decision of the Privy Council has been followed. I do not think, however, that it is necessary to refer to any of these cases in detail, as none of them are really analogous to the present case. There can be no doubt whatever that had the accused in this case been in fact tried for habitually receiving stolen timber outside the conspiracy, I should have no option but to hold that the trial was bad and must be set aside as void. In such circumstances, in the words of their Lordships of the Privy Council, there is a positive enactment that such a trial should not be permitted. But in my view of the case, there was not in fact any such trial here. The charges were not drafted as carefully as they should have been, and, if read by themselves, might have been held to include charges that could not legally be joined with the conspiracy charge. But the error here was one of form and not of substance. The joint trial of the charges of receiving from outside sources and being a conspirator was not a reality. There was in fact no such joint charge, only the appearance of one, and the circumstances are entirely different from those dealt with in *Subrahmania Ayyar's* case (1). In that case there can be no question that there actually had been a trial together of 41 acts, only three of which could have been legally joined together. The misjoinder was quite clearly one of substance as well as of form.

In the present case the trial which has actually taken place is the trial under charges of conspiracy and of receiving stolen property in pursuance of that conspiracy. There has not in fact been any trial which the Code has positively forbidden. There has merely been an error in the wording of the charge, which has in fact affected nobody.

In my opinion the circumstances of this case are entirely different from the circumstances of *Subrahmania Ayyar's* case (1), and the case is one where the error can be cured by the provisions of S. 225, Criminal P. C. There was, in my opinion, no joint trial of two offences which could not be tried together. There was merely an error of the particulars required to be stated in the second charge—an error which can be cured by S. 225. I do not understand it to be seriously suggested that the petitioners have in fact been prejudiced by this error. My finding on this point, therefore, is that there has been no such misjoinder of charges as necessitates by itself the setting aside of the proceeding of the trial Court.

The next point which has been raised on behalf of the petitioners is, to my mind, one of greater difficulty. After the examination of some of the prosecution witnesses, but before the framing of the charges, the accused were examined generally on the case and they were further examined later after other prosecution witnesses had been examined. They were questioned as to the oral evidence against them. Their convictions, however, are based chiefly not on the oral but on the documentary evidence.

There are a very large number of documents which have been relied on by the prosecution. They consist in part of letters of the alleged conspirators and in part of entries in diaries of the accused. The Courts below have held chiefly from general deductions drawn from these documents that the petitioners were parties to the criminal conspiracy ; but so far as these documents were concerned, the only questions put to Maung Ba Chit were as to the documents having been seized in his possession and as to certain documents being in his handwriting and in the handwriting of his wife. His attention in his examination was not drawn to the contents of any of the documents which were held to be incriminatory ; nor was he asked for any explanation in any single case. The same remarks generally apply to Maung Naw.

Section 342, Criminal P.C., lays down that for the purpose of enabling the accused to explain any circumstances appearing in the evidence against him, the Court shall question him generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence. I held in the case of *Nga Hla U* v. *Emperor* (2), that a failure on the part of the Court further to examine an accused person after two of the prosecution witnesses had been recalled for further cross-examination, after the charge had been framed, did not necessarily vitiate the whole trial if the accused person was not in any way prejudiced thereby. I see no reason to change the view I took in that case, a view of which Carr, J., has expressed a general agreement in the case of *K. M. Subbayya Naidu* v. *Emperor* (3). But the question that arises in this case is a very different one, and the contention is that the petitioners have in fact been very seriously prejudiced by the failure on the part of the Magistrate.

Different views have been taken as to the exact meaning of this section. In the case of *Emperor* v. *Alimuddin Naskar* (4), it was held by Mukerji, J., that the section requires the Court to put to the accused the salient facts and circumstances of the case in a succinct form, and to ask him if he has any explanation thereof to offer. Newbould, J., took a different view. He held that a formal question in general terms, which gives the accused an opportunity of making a statement of his defence with his own lips is a sufficient compliance with the mandatory provisions of S. 342, Criminal P. C., since it enables the accused to explain any circumstances appearing in the evidence against him.

In the case of *Maung Hman* v. *Emperor* (5), May Oung, J., took substantially the same view as Mukerji, J. He remarked as follows :

"The object of the section is to enable the accused to explain each and every circumstance appearing in evidence against him. A Judge or Magistrate should note every point which he thinks he will have to put into the scale against the accused and then question him on each point. Otherwise it is impossible for the accused to know what is in the Court's mind. Several points may be made by the prosecution ; some of these the Court considers good others are regarded as practically worthless. But the accused is not afforded any reasonable opportunity of clearing up the case by such a question as : "What have you to say ?" The specific point or points which weigh against him must be mentioned ; for if this is not done, he cannot reasonaby be expected to be able to explain it or them."

With these remarks I generally agree. The object of the examination of the accused is clearly to enable him to explain anything appearing in evidence against him. It is impossible to lay down any hard and fact rule as to what questions should be put in any parlicular case nor would the failure to put certain vital questions vitiate a trial if the accused were in no sense prejudiced by that failure. But in a complicated case like the present I think it would be an entirely insufficient compliance with the provisions of the section to put a general question asking the accused what he had to say in explanation of the evidence against him.

A very large number of the passages in the documents on which the prosecution relies are in themselves obscure and capable of more than one explanation ; and, where the prosecution is mainly based on the contents of such documents then, it seems to me of special importance that the accused should be asked specifically as to what their

(2) A.I.R. 1925 Rang. 258=3 Rang. 139.
(3) A.I.R. 1929 Rang. 331=7 Rang. 470.
(4) A. I. R. 1925 Cal. 361=52 Cal. 522.
(5) A. I. R. 1924 Rang. 172=1 Rang. 689.

explanation of the doubtful passages are. I do not suggest that they have to be questioned about every single one of the documents separately, or that no document could be used against them as to which a specific question had not been put. But in order to comply with the spirit of the provisions of this section, there should at least in my opinion have been some examination of the accused as to the contents of some of the more important documents.

The question for consideration, therefore, is whether the accused can be said to have been prejudiced by the failure to put these questions, and whether, in the absence of such questions, it is possible to uphold the convictions. I find it impossible to answer this question satisfactorily without considering in some detail the documents themselves and what they can be held to have proved. But before considering the contents of the documents, it seems to me necessary to have some clear idea of what the offences charged are and what it is necessary for the prosecution to prove to establish those charges.

The main charge against the petitioners is that they conspired together to commit theft of timber with a number of other persons. In the first place they are not charged with any isolated act of theft. They are charged with widespread conspiracy to commit theft extending over a period of two years; and in the second place the conspiracy they are charged with is one of committing theft. A number of the documents produced on behalf of the prosecution indicate that the accused, Ba Chit, has been bribing various forest subordinates and clerks, some of whom were accused in the trial Court. But reprehensible though the wholesale bribery may be, bribery is not theft, and the evidence as to bribery is only relevant in this case so far as it supports other evidence to show the existence of the conspiracy to commit theft. The phrase "illicit felling" has been constantly used in connexion with this case. It is a somewhat unfortunate phrase to use in connexion with so artificial a charge as the charge of conspiracy to commit theft.

As I understand the prosecution case it mainly is that Ba Chit, through his agents, has during the last two years been deliberately cutting down green Pyinkado trees, which were not covered by the terms of the licences and permits held by him. The licences and permits he holds are of three kinds-namely, (i) Legwinthit, or permission to fell timber on revenue paying land; (ii) Gaikthit, or permission to fell any standing Pyinkado within seventy-five feet of a kyaung; and (iii) Aule-natthat or a license to cut in Government Forests what are known as "Aule-natthat" trees. There is no official definition of the word Aule-nat that, but it has been held to mean standing trees which have died and trees which have fallen naturally.

The suggestion for the prosecution is that under cover of this Aule-natthat licence, Ba Chit, through his agents, has in fact been cutting down growing Pyinkado trees on a large scale. There are various other Forest offences and fraudulent practices which Ba Chit is alleged to have committed or it is alleged the documents indicate, have been committed on his behalf and with his connivance. The lower Courts have held that the cutting of green Pyinkado trees not covered by a licence is necessarily theft. I agree that if the cutting on a large scale has been proved, then most of the necessary ingredients of theft are clearly present. There has been an intention to take property dishonestly out of the possession of Government and there has been a movement in order to such taking. The only point which raises difficulty in this respect is whether it can be held that the dishonest intention was to take the property without the consent of the person in possession. It would appear that if a green Pyinkado has been cut in most cases it has not been taken down the Moulmein before the licensee has paid the revenue due to Government thereon.

The procedure to be followed before timber extracted by private persons can be at the disposal of the person extracting it is described by Mr. Ricketts the Divisional Forest Officer. The trees when felled are dragged to a place previously agreed upon and fixed by the Forest Department Officers for measurement. The property hammer mark must be affixed to the stumps and the logs by the permit-holder or his agent

within 24 hours of the felling. The Forest Department measures the timber either at the stump or at the place fixed that is the bank of the nearest floating stream. The logs are then measured by the revenue marker who is either the Range Officer or some one specially deputed by the Divisional Forest Officer. The marker then records the measurement in the regulation book giving the serial number of the logs measured. A copy of the measurement is then sent to the head office at Moulmein. There it is checked and if royalty has not been prepaid a chalan is prepared and sent to the licenseholder. If the royalty has been prepaid the total amount is then entered in the register and debited against the permits. On the chalan royalty is paid in Moulmein and debited in the register likewise. After that a pass order is issued from the head office to the revenue marker and a copy of the pass order is supplied to the licensee. The revenue marker is instructed by the pass order to put the akauk or revenue paid mark on the timber and to issue bills and removal passes. The bill issued is on a printed form on which the revenue marker enters details of the logs under measurement and also the impression of his akauk. This bill is given to the representative of the owner in the forest and is apparently in the nature of a title deed to the timber. At the same time a removal pass is issued. Except on such a pass no timber can be removed. The result of all this procedure is that to all intents and purposes the timber remains in the possession of Government until the bill and the removal pass are issued. Pyinkado is then made up into raits and floated downstream. Before reaching Moulmain it has to pass and be checked at the revenue station at either Ngante or Htake.

It has been urged on behalf of the petitioners that even though timber were originally cut and removed with a dishonest intention it remains in the possession of Government until the extractor obtains the removal pass and the bill connected with it, and that it cannot, therefore, be said to have been removed out of the possession of Government without Government's consent. I think it must be conceded that in such circumstances the consent of Government or its representative, has been obtained to the removal of the timber.

In the case of *Reg* v. *Hanmanta* (6), the accused had cut down wood which had been removed to a Government Depot. It was subsequently taken away by the accused from the Government Depot with the consent of a Forest Inspector but without paying any Government dues. The Timber was held to have been in the possession of this Inspector on account of the Government. But it was held that the timber was not removed with the consent of Government as the Inspector was not authorized to give consent and that was clearly known to the accused person.

The circumstances of this case are very different. Here the consent was given by the person clearly authorized to give it after the payment of the full duty. I think, however, that presuming that there was a deliberate intention from the very first to obtain timber which the accused knew he had no right whatsoever to fell the offence would be theft on the ground that the consent given to the removal by Government was a consent based on a misconception of fact.

Section 90, I. P. C. lays down :

"A consent is not such a consent as is intended by any section of this Code, if the consent is given by a person . . . under a misconception of fact and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such . . . misconception."

To what extent this section applies to the provisions of S. 378, I. P. C., I find it very difficult to decide. If it means that any misrepresentation of fact inducing a consent would result in that consent not being a consent within the meaning of S. 378, then it is difficult to see what distinction can be drawn between the offence of theft and claiming property dishonestly by means of cheating.

I have been unable to find any authority on this point. It seems to me, however, that in the circumstances just described it must be held that the consent has been given under a misconception of fact. Had the responsible officer who agreed to accept the revenue and to the issue of the removal pass and

(6) [1877] 1 Bom. 610.

the bill of title been aware that the timber in question was timber which the licensee had no right whatsoever to fell, there can be no doubt that the consent to the removal would never have been given. Consent was given on the understanding that the timber to be removed was timber covered by a license. If in fact it was timber not covered by a license at all there was a misconception as to the property for which consent was given. I think, therefore, that in such a case it must be held that there was no such consent as is meant by S. 378, I. P. C., and that in such circumstances the offence of theft was completed.

There are other respects in which some of the documents suggest that offences may have been committed. According to Mr. Ricketts one way in which Government might be defrauded would be by passing down timber on which the akauk mark had never been placed and on which revenue had never been paid, and escaping the attention of the revenue depot at Ngante either by concealing the timber or by bribing those in charge of the revenue stations. I think it is clear that timber taken in this way would be obtained by theft. It is quite clear that the person who took the timber out must have known that any forest subordinate who gave a consent thereto had no authority to give such consent.

Another method in which it has been suggested that Government may be defrauded is by influencing the officer deputed to measure the log and having short measurement returns sent to headquarters, the result being a defrauding of Government revenue. I do not think this method of fraud necessarily involves theft. If the timber was timber covered by the licenses it cannot be held that there was any dishonest intention when the timber was cut and moved to the river bank. After that, the timber remained in the possession of Government until it was handed over to the licensee or his agent with the bill of title. Possession was then made over to the licensee or his agent and it was after possession and title had been made over to him that any moving which could be called dishonest took place. The offence probably amounted to an offence of cheating, but that is not the offence the accused are charged with conspiring to commit nor is property obtained by means of cheating stolen property within the meaning of S. 413.

Various other offences punishable under the Forest Act such as the failure to put a property mark on the stump after felling a tree clearly would not amount to theft. The two petitioner may have conspired together and with others to bribe forest officers and to defraud Government in various ways but their convictions in this case cannot be upheld unless it has been shown that they entered into a general conspiracy to commit theft and were habitual receivers of stolen property, or abetted the habitual receiving of stolen property. And in reading the documents we have to consider to what extent they implicate the accused in these particular offences. The Magistrate at p. 12 and the following pages of his judgment has detailed in chronological order what he considers the principal documents for the prosecution case. The first ten extracts dealt with by him it is not necessary here to discuss. They merely indicate that bribes were being paid on a large scale to dishonest clerks and subordinates, but do not indicate for what purpose they were being paid. We have then Ba Chit's diary (Ex. 3-B) of date 7th February 1927. This diary contains the entry :

> "What arrangement has been made to give tips to the rangers at Chaung Nakwa to tell them not to have any fear it the logs are under size."

This entry does suggest collaboration with the rangers, but its exact meaning is obscure. It is possibly a suggestion that under-measurement should be shown. If so, according to the view I have taken it would not involve theft. Before using an obscure reference of this sort, it is clear that Ba Chit's explanation should have been obtained.

The next document is a letter (Ex. R.) dated 3rd March 1927. This is a letter from Si Khaing to Ba Chit and appears to suggest that the rangers are being persuaded to under-measure timber. On 8th of April, Maung Naw wrote to Ba Chit Ex. 2. (v) This refers to the cutting down of Kyungut of teak poles and suggests that Ba Chit should use his influent with Ye Gyan. The prosecution do

not allege that they have proved theft with regard to Kyungut or teak poles and this document does seem to me to be of much value.

In the diary of Maung Naw on 15th April (Ex. 5 F) there is a joking reference to the cutting of 300 standing green teak trees. The next day Maung Naw wrote the letter (Ex. 3 B) to Ba Chit, in which he said that Maung Kin had taxed him with getting his workmen to fell 300 Kyunguts and had jokingly said that he would prosecute. The allusion is too obscure for any satisfactory deduction to be made from it, especially when Maung Naw has not been asked to explain it.

On 27th April there is an entry in Maung Naw's pocket diary (Ex. 5 F C). In that Maung Naw says that he was accused by Tun Byu of cutting green teak trees. He denied it, but when they accompanied the forester to inspect the stumps, he found the information was not without foundation, and had to persuade the forester to overlook the matter. I do not think it is a fair reading of this entry that Maung Naw had been privy to the felling of the green teak trees. All that it suggests is that that he did his best afterwards to hush the matter up and save Ba Chit's property mark.

Two days later, on 29th April, Maung Naw wrote to Ba Chit the letter (Ex. 3 A). The prosecution has placed special reliance upon the letter. In this letter, Maung Naw states

"U Si Khaing has in his possession over 400 aule natthat standing trees or logs. They are not genuine aule natthat but converted ones."

He then goes on to state that Tun Byu had made an inspection of stumps accompanied by Maung Naw and Si Khaing. Maung Naw suggests that Ba Chit shall call Tun Byu and give him about 100. He adds that U Si Khaing said that he might be responsible for the money given to Tun Byu and that Sit Khaing intended to work the said timber during the rains. This certainly suggests that Maung Naw and Ba Chit are attempting to save Si Khaing from the consequences of his felling Pyinkadoes outside the terms and limits of the licenses and permits. The last part of the extract however might suggest that Sit Khaing himself is shouldering the responsibility and undertaking to work the timber. It does not seem to me necessarily by itself to show that Ba Chit and Maung Naw were taking over the timber themselves and the Court certainly would not be justified in giving it that interpretation without first hearing what Maung Naw or Ba Chit had to say in explanation. (His Lordship then referred to other letters dated 1st of May, 9th May, 17th June, 6th, 13th, 20th and 30th of September, 3rd and 15th of the November and proceeded.) On 28th April Maung Faw wrote a letter (Ex. C) to U Ba Chit and some stress has been laid on this letter. He speaks about the inspection by the Divisional Forest Officer. He says that the Divisional Forest Officers has not yet discovered a single log of theirs as they have cut them down elsewhere. He says that he has suspended dragging of logs. The letter does suggest a guilty conscience, but Maung Naw should certainly have been asked to explain it before any inference could be drawn against him. Prior to this, on 18th March Po Thein had written a letter (Ex N) to Ba Chit. In it he says that his duty is to use his brain to get timber in addition to that extracted under the permit. It is of course possible to obtain timber other than that covered by Ba Chit's permit in other ways than by theft.

On 28th April Maung Naw wrote Ex. B to Ba Chit. In this letter he says that they have cut their rafts down to cause the raft to sink in the middle of the Chaung apparently because they can get no one to prepare the rafts. He also says that he has sunk 40 logs of Po Thein, and nearly 100 of his own. The next letter written by Maung Naw to Ba Chit is dated 12th May (Ex 3). He talks of Sit Khaing's difficulties, but does not say anything very specially relevant to this case. The next letter (Ex. F) dated 13th May is more important. Maung Naw refers to the Divisional Forest Officer's inspection and to the Divisional Forest Officer's diving for logs. He says that witnesses have been arranged to make Sit Khaing responsible for the logs discovered. He also refers to villagers being bribed, apparently not to help the Divisional Forest Officer. This seems to be a letter which Maung Naw should have been asked to explain. It may suggest a guilty conscience and it may suggest the adoption of various

dishonest means, but it does not necessarily suggest theft.

I have referred I think now to most of the documents on which the prosecution principally rely as proving the conspiracy to commit theft. There is oral evidence as well and my attention has been specially drawn to some of it by the learned Government Advocate. Mr. Rickett's evidence shows that green Pyinkado was cut down on a large scale, but admittedly there were a large number of different traders working in the forests concerned and this by itself does not prove anything against Maung Naw or Ba Chit. As regards Ba Chit, Mr. Ricketts gives no definite evidence. In fact he says as far as the payment of royalty demanded is concerned, there had been no default and Ba Chit has a clean sheet. Sit Khaing says definitely that he was encouraged to cut green Pyinkado by Ba Chit. On his own showing, Sit Khaing is an accomplice and he is an accomplice giving evidence without having been made an approver and therefore liable to prosecution at any time. His evidence has rightly been accepted with caution by the lower Courts and his statement that he was encouraged to cut green Pyinkado by Ba Chit is obviously by itself of little value. On this point he has no corroboration on whatsoever. Ba Chit's son Tun Sein and his coolies Maung Pein and Po Chein say that Maung Naw pointed out what trees were to be felled. This evidence would be of value against Maung Naw if it could be believed, but in fact all these witnesses would seem to be more or less accomplices and the lower Courts have not relied on their evidence. Sein Ban speaks of forming rafts in which out of 1,100 logs some 600 were geen and says Maung Naw was present. But under his Gaikthit and Legwinthit permits, Ba Chit was entitled to extract green timber. Pan U says that he felled green timber under Sit Khaing's orders, but does not implicate Ba Chit or Maung Naw. The Sessions Judge has treated, and in my opinion rightly treated, the evidence of Sit Khaing, Tun Sein, Maung Pein and Po Chein as untrustworthy. The oral evidence by itself obviously is of little value for the purpose of establishing the guilt of the accused. That being so, it seems to me to be of the highest importance that before using the documents against the two petitioners in the way they have been used, some explanation should have been obtained from them as to their contents. On this point of the failure to examine the accused about the document, the learned Sessions Judge has remarked:

> "It is contended that there ought to have been a distinct and separate question in respect of each document, some what in the following form."

You see the Ex. 10Z. According to this, Maung Naw says that he sent you 130 stolen logs. Is there anything that you wish to explain in connexion with this? If it was only in connexion with such documents that there had been failure to put questions, there would be a great deal to be said for the view that the failure to put such questions was not of much importance. But none of the important documents in this case contained any definite statement that stolen logs had been sent. The allusions in the letters are nothing like so definite as this. They are most of them obscurely worded and can only be interpreted as referring to stolen timber if read with other evidence in the case. I have specially indicated some of the documents in which I think questions ought to have been put. It is quite true that the numerous entries about payments of illegal gratification do suggest that bribery has been going on on a very large scale and there are indications that as a result of this bribery Ba Chit has had considerable influence with forest subordinates. There are, however, an enormous number of ways in which such influence could be used without any question of theft being involved. Admittedly it has not been proved that any particular timber has been taken by Ba Chit without payment of revenue and it is clear that the prosecution are not able to prove any specific instance of theft or of receipt of stolen property. Had they been able to do so, there would certainly have been a charge of that particular offence. The Courts have been asked as a result chiefly of a mass of documentary evidence to infer that there has been a conspiracy between Ba Chit and others to commit theft. The evidence is in fact largely circumstantial and depends on the meaning of certain documents. The case

seems to me to be one in which the remarks of Jenkins, C. J., in the case of *Barindra Kumar Ghose* v. *Emperor* (7) are particularly apposite. At p. 508 the learned Chief Justice remarks:

"There is always the danger in a case like the present that conjecture or suspicion may take the place of legal proof, and, therefore it is right to recall the warning addressed by Mr. Baron Alderson to the jury in *Reg* v. *Hodge* (8)."

Where he said:

"The mind was apt to take pleasure in adapting circumstances to one another, and even in straining them a little, if need be to force them to form parts of one connected whole, and the more ingenious the mind of the individual, the more likely was it considering such matters, to overreach and mislead itself, to supply some little link that is wanting, to take for granted some fact consistent with its previous theories and necessary to render them complete."

I think it can be said that not one of the documents relied on by the prosecution in itself clearly convicts either Maung Naw or Ba Chit of an intention of committing theft. The contention would be that the accumulated effect of all these documents read together leads to a fair presumption that they had entered into a definite conspiracy for this purpose. Before reaching such a conclusion, it seems to me specially necessary to bear in mind Mr. Baron Alderson's observations and that it would be an exceedingly dangerous thing to draw an inference as to any such conspiracy without having asked either of the two petitioners to explain the contents of any single one of the documents that have been used. In an ordinary case dependent chiefly on oral evidence, an accused person would from the very nature of things have a very clear idea of what evidence was likely to be considered of importance against him by the Court. In such a case a failure to examine him properly might not be of very great importance. In a case such as the present, it seems to me impossible for the accused to know by the light of nature exactly what particular passages from the mass of documents produced are considered by the prosecution or by the Court as requiring an explanation.

It was, therefore, of far more importance that they should have been asked what their explanation of the documents was than in any ordinary case where the evidence was mainly oral. Without their having been so questioned, I find it impossible to hold that they have had a really fair trial or that a finding can justly be come to that they were guilty of a conspiracy to commit theft or of habitually receiving stolen property. It might be possible to send the case back to the trial Court for the two petitioners to be examined further now, but that course would obviously be unsatisfactory. An examination now would be a poor substitute for an examination which should have taken place nine or ten months ago and would involve in all probability the taking of a large amount of fresh evidence. The proceedings are already sufficiently complicated and if made more so would become well nigh unintelligible. It is possible also to order a new trial, but that to my mind is in the circumstances unjustified. I have indicated that I am not at present satisfied as to the exact meaning of the principal document relied on by the prosecution. The petitioners have already undergone a trial of enormous length and have served a term of over two and a half months' imprisonment. The case is by no means such a clear one that it can be said with any confidence that a conviction after a new trial on the charges framed would be likely. I am of opinion that the interests of justice would not be served by the ordering of a new trial. I set aside the convictions of the two petitioners, and direct that they be acquitted and released so far as this case is concerned.

P.N./R.K. *Convictions set aside.*

(7) [1910] 37 Cal. 467=7 I. C. 359=14 C. W. N. 1114.

(8) [1838] 2 Lew. 227.

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MYA BU AND BROWN, JJ.

Government Advocate of Burma—Applicant.

v.

Saya Sein—Respondent.

Criminal Misc. Appln. No. 54 of 1929, Decided on 25th October 1929.

(a) Contempt—Article in newspaper commenting on pending proceedings is contempt—But such contempt to be punishable must interfere with due administration of justice.

It is contempt to publish an article in a newspaper commenting on the proceedings of a pending criminal prosecution or civil action. But the summary jurisdiction possessed by a High Court to punish for contempt ought only to be exercised when it is probable that the

publication will substantially interfere with the due administration of justice: 41 *Cal.* 173; *McLeod* v. *St. Aubyn*, (1899) *A. C.* 549; *Plating Co.* v. *Farquharson*, (1881) 17 *Ch. D.* 49, *Rel. on.* [P 126 C 1]

(b) **Contempt—Article in newspaper suggesting that on account of youth of Judge he is unlikely to differ from decision of lower Court — It is attack on his competency as Judge and amounts to contempt.**

Any act done or writing published calculated to bring a Court or a Judge of the Court into contempt or to lower his authority is a contempt of Court. But if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, that cannot be regarded as contempt.

Where an article does not confine itself to the justice of the decision but also suggests that the Judge on account of his youth is unlikely to differ from the decision of a lower Court, it is an attack on the competency of the Judge and amounts to contempt: *In the matter of a Special Reference from the Bahama Islands*, (1893) *A. C.* 138, *Dist.* [P 127 C 1]

Government Advocate—for Applicant.

Ba Han—for Respondent.

Judgment.—On the motion of the Government Advocate, the respondent Saya Sein, has been called on to show cause why he should not be punished for contempt of Court. The respondent is the printer and publisher of a paper known as "The Kesara" newspaper at Moulmein. A case had been tried in the Court of the Special Power Magistrate, Moulmein, against one U Ba Chit and a number of others. In the trial Court all the accused who had been charged were convicted. They all appealed to the Sessions Court and that Court whilst setting aside the convictions of the other appellants, confirmed the convictions of Ba Chit and Maung Naw.* The complaint is with reference to an article published in "the kesara" newspaper on 6th August 1929, after the Sessions Judge had passed orders. At the time of the writing of the article, an application in revision had been filed in this Court and the hearing of that application was then pending. It is claimed that the respondent is guilty of contempt for two reasons: firstly that in the article in question he had commented on a matter which was sub-judice and secondly that the article in itself was one that was likely to bring the Judge and the Court into contempt.

The article sets forth briefly the orders passed by the Sessions Judge and then goes on to say:

"In view of the fact that the said case implicated a big timber merchant of the non-Burmese community, it has not only exercised the public mind much and aroused special interest and discussion but the Court room was also crowded by spectators, who came to watch the proceedings during the hearing of the case, both before the lower Court and the Sessions Court. However an appeal having been preferred in the Sessions Court, directly the lower Court had passed its judgment and sentence, we had thought that justice would prevail and have waited quietly without writing anything regarding the lower Court's judgment. Now upon a consideration of the Sessions Judge's judgment as we do not feel that justice has been done, we shall, in duty bound have to write and express our comment and criticism."

The article then proceeds to comment on the case. It suggests that if the facts are proved the conviction should have been under the Forest Act and not under the Indian Penal Code. It then goes on to say:

"Here in *U Ba Chit's* case he has been convicted not under the Forest Act which is applicable but under S. 413, I. P. C., and awarded a sentence of imprisonment for the very first offence and therefore we are very sorry. Pondering over this state of affairs, in the light of the saying of the ancients (lit), "living not for life's sake but for honour" every thoughtful person will be able to gauge the extent of grief and shame to which U Ba Chit a respectable resident who has won the trust and confidence of the people and who has acted as one of their Municipal Commissioners, Pagoda trustees, and executive members of the local religious and social associations has been subjected. Mr. Wright, the Sessions Judge who heard U Ba Chit's appeal is yet a youth of little experience, and it must be said that his decision is not different from that of the lower Court in the same way as the water of a well so to speak is not different from that of a pond. In connexion with youthful Sessions Judges, Williams, J., of the Calcutta High Court has recently made a definite statement in his judgment in a case heard by him thus:—'Owing to the practice peculiarly in vogue throughout India of investing young judges of little legal experience in the Districts with full powers to pass sentences of death a great responsibility had devolved upon the High Court.' In accordance with the dictum thus expressed as on account of the decision of a youthful Sessions Judge, U Ba Chit has been subjected to a great shame as much as to feel like almost dying of it, and as such he deserves a very great sympathy and so we have to write this by way of explanation."

The respondent does not deny publication of this article. He expresses his willingness to tender an apology if we should think that the article did amount to contempt. But it is contended that, in fact there has been no contempt of Court which would justify this Court in taking action. In Halsbury's Laws of England Vol. 7, para. 614, it is laid

*[This matter came up before the High Court and appears on p. 114 of this issue—Ed.]

down that it is contempt to publish an article in a newspaper commenting on the proceedings of a pending criminal prosecution or civil action.

When the comments were published in the present case, there were proceedings pending in this Court. We understand the respondent to claim that he was unaware of that fact when he wrote the article. But he must have known that in such eases revision proceedings were bound to follow and we do not consider that on this ground alone he can be held not to have been guilty of contempt. But it has been constantly laid down that the summary jurisdiction possessed by a High Court to punish for contempt on the ground that an article was published during the pendency of criminal proceedings ought only to be exercised when it is probable that the publication will substantially interfere with the due administration of justice.

In the case of the *Legal Remembrancer* v. *Motilal Ghose* (1), the learned Sir Lawrence Jenkins, C. J., observes at p. 221:

> "It is not enough that there should be a technical contempt of Court; it must be shown that it was probable that the publication would subsequently interfere with the due administration of justice . . . . . Thus we find Lord Morris in delivering the judgment of the Privy Council in *McLeod* v. *St Aubyn* (2) describing committal for contempt of Court as a weapon to be used sparingly and always with reference to the interests of the administration of justice. This is an authority that must command our respect. But it does not stand alone. In *Plating Co.* v. *Farquharson* (3) Jessel M. R. after saying that the practice of making their motions against innocent people ought to be discouraged as far as possible, added, 'they lead to a great waste of time and to considerable amount of costs, and unless the Court is satisfied that the publication is a contempt which interferes with the course of justice, of course, the Court ought not to interfere, while James, L. J. said of the motion made against the proprietors of the newspaper who inserted an advertisement in the ordinary course of business and that it seemed to him to be idle and extravagant and a thing to be strongly discouraged and later he says "I think these motions are contempt of Court in themselves, because they tend to waste the public time."'

We do not think it necessary to labour this point as we do not understand the correctness of the principle to be contested. Can it then reasonably be said that the publication of the present article was at all likely to interfere with the due administration of justice because it was published during the pendency of the revision proceedings in this Court? We cannot see how it is possible to hold that there was any such probability. We do not think it would be contended that this Court is likely to be influenced by a suggestion that because a certain act may amount to an offence under the Forest Act, therefore it should not also be punished under the Indian Penal Code. There is no question of any witnesses, jurors or assessors being influenced. Revisional matters are dealt with by a Judge alone, and for the most part are concerned with questions of law.

The article does not in itself suggest that the writer had any thought of proceedings that must follow in revision. He definitely states that he reserved his comment until the trial in the Sessions Court was over, and we see no reason to suppose that he published the article with any idea that anything he said would be likely to have any effect on the revisional proceedings. That of course would not save him, if, in fact, the article was likely to have such an effect. But in our opinion, there is no probability whatsoever that the publication would substantially interfere with the due consideration of the case in revision before this Court. We do not wish to be understood as approving of the making of comments on pending judicial proceedings, such comments are clearly always severally to be depreciated. But even if the comments in this case amounted to a technical contempt on the ground that they were made whilst the case was sub judice, we think that the authorities are clear that the case is not one in which on this ground the Court would be justified in exercising its summary powers.

There remains, however, for consideration the other point which has been raised. It is contended that the attack in the report made on the Judge itself amounts to contempt of Court. It has been laid down that any act done or writing published which is calculated to bring a Court or a Judge into contempt, or, to lower his authority, or to interfere with the due course of justice, or

(1) [1914] 41 Cal. 173=18 C. L. J. 452=20 I. C. 81=17 C. W. N. 1253.
(2) [1899] A. C. 549=68 L. J. P. C. 137=48 W. R. 173=15 T. L. R. 487=81 L.T. 158.
(3) [1881] 17 Ch. D. 49=50 L. J. Ch. 406=29 W. R. 510=44 L. T. 389.

the lawful process of the Court is a contempt of Court. This principle was definitely enunciated in the case of *The Queen* v. *Gray* (4). At p. 40 of the report Lord Russel, C. J., states :

"Any act done or writing published calculated to bring a Court or Judge of the Court into contempt or to lower his authority is a contempt of Court. That description of that class of contempt is to be taken subject to one and an important qualification. Judges and Courts are alike open to criticizm and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no Court could or would treat that as contempt of Court. The law ought not to be astute in such cases to construe adversely what under such circumstances and with such an object is published ; but it is to be remembered that in this matter the liability of the press is no greater and no less than the liability of every subject of the queen."

If the article complained of had confined itself to fair criticism of the justice of the decision of the Sessions Court, then no questson of contempt on this ground would arise. But the article goes farther than this. It does not confine itself to the justice of the decision, but definitely attacks also the competency of the Judge who tried the case. It suggests that the Judge on account of his youth, was unlikely to differ from the decision of the lower Court and finally states:

"On account of the decision of a youthful Sessions Judge U Ba Chit has been subjected to a gret shame as much as to feel like almost dying of it, and as such he deserves a very great sympathy."

There is, it is true no suggestion whatsoever against the honesty or character of the Judge. But it seems to us inevitable that the publication of such remarks in a public newspaper must tend to bring the Court and the Judge who heard the appeal into contempt.

We have been referred on behalf of the respondent to the case of *In the matter of a Special Reference from the Bahama Islands* (5). In that case the Chief Justice of the Bahama Islands was attacked in a letter published in a newspaper. It was held that the letter in question though it might have been made the subject of proceedings for libel, was not in the circumstances calculated to obstruct or interfere with the course of justice or the due administration of the law. and, therefore, did not constitute a contempt of Court, It seems to us, however, that that case can be clearly distinguished from the present case. There was in that case no criticism of the Judge's action in the trial of any case. It was rather a personal attack on the Chief Justice than a direct attack on his administration of justice. In the present case there is quite clearly an attack on the Judge not in his personal and private capacity but in his capacity as a Judge in the conduct of a particular case. The comments are to the effect that there has been a failure of justice owing to the incompetence of the Court, and we cannot but look upon such comments as being likely to bring the Court into contempt, and if unchecked, ultimately to interfere with the course of justice or the due administration of the law. We are, therefore, of opinion that the publication of the article in question did amount to a contempt of Court, and we are bound to protect Subordinate Courts from such attacks.

The respondent did not at once, when called upon to show cause, tender an unconditional apology, but in the complaint as filed before us, what was chiefly insisted on was that the publication of the article amounted to a contempt, because it took place during the pendency of the revision proceedings in this Court. On this ground we have held that no case has been made out for us to take action, and we must, therefore, hold that on the main ground taken in the application the respondent was justified in raising the objection he did.

We understand that he is ready now to tender an apology to the Court. Bearing in mind the fact that there is no suggestion made against the integrity or personal character of the Judge in the article complained of, and that cases of this kind are fortunately rare in this province, we allow the respondent an oppotunity of tendering an apology before passing sentence upon him.

On the judgment having been read over the respondent states that he regrets that the remarks appearing in the article complained of were derogatory and in contempt of the Court of Sessions and the Judge of that Court, and that he tenders an unconditional apo-

(4) [1900] 2 Q. B. D. 36=64 J. P. 484=82 L. T. 534=48 W. R. 474=16 T. L. R. 305.

(5) [1893] A. C. 138.

logy, and he undertakes to be careful not to offend in a similar manner again. In all the circumstances of the case, we consider that the apology may properly be accepted. We accept the apology and discharge the respondent. Considering that the main ground on which the petition was made has failed, we make no order for costs of this application. Dr. Ba Han for the respondent, undertakes that the fact of an unqualified apology having been made will be published in the respondent's newspaper.

P.N./R.K. *Order accordingly*

A. I. R. 1930 Rangoon 128

CARR, J.

M. S. Ponnuswami and *another*—Accused—Applicants.

v.

Emperor—Opposite Party.

Criminal Revn. No. 566-B of 1929, Decided on 3rd February 1930, from order of Dist. Magistrate, Myingyan, in Criminal Revn. No. 530 of 1929.

Penal Code, Ss. 206 and 207—Civil suit must be actually pending.

The words "intending thereby to prevent that property from being taken into execution of a decree or order which has been made or which he knows likely to be made by a Court of justice in a civil suit" refer to a civil suit which is actually pending before a Court. [P 128 C 2]

Bose, Venkatram and *De*—for Applicant.

Guha and *Ganguli*—for the Crown.

Judgment.—In this case one Essa Ismail filed a complaint charging one Ayakaranam wtih an offence under S. 206, I. P. C. and the petitioners with an offence under S. 207. It was alleged that the first named had made and the petitioners had accepted a fraudulent transfer of the goods of the first named in order to prevent their seizure under a decree which was likely to be passed in a civil suit in favour of the petitioner. No civil suit had in fact been filed, and it appears that none has been filed even yet. Indeed on the day before he filed the complaint the complainant had filed an application for the adjudication of Ayakaranam as insolvent. It has been urged that in view of this last fact the prosecution could not be launched by virtue of S. 195, Criminal P. C. I am inclined to think that this is correct, but will not go further into the point, because the Magistrate held that the pendency of a civil suit was a condition precedent to the commission of the offence alleged to have been committed. On that ground he discharged the petitioners and their co-accused.

On an application in revision the District Magistrate took a different view and ordered a futher inquiry into the case. This is an application for revision of the District Magistrate's order. Neither Magistrate has given any authority for the view taken by him; no authority on either side has been cited before me, and I have not been able to find any similar reported case. The sections provide for the punishment of fraudulent transferors and transferees who have made or accepted the transfer :

> "intending thereby to prevent that property from being taken into execution of a decree or order which has been made, or which he knows to be likely to be made, by a Court of justice in a civil suit."

In my opinion those words refer to a civil suit which is actually pending before a Court. It is, of course, possible to argue that if the complainant had a good actionable claim against the transferor and had threatened to file a suit, the transferor must have known that if the complainant did file a suit he would be likely to obtain a decree, and that the wording of the section is wide enough to cover this. But reading the section as a whole I think that this is too wide a meaning to attribute to its words and that they can be held to refer only to a suit actually in existence. I therefore set aside the order of the District Magistrate directing a further inquiry and restore the order of the Second Additional Magistrate of Myingyan discharging the accused in his Criminal Regular Trial No. 35 of 1929. This order applies to the accused Ayakaranam as well as to the petitioners.

P.N./R.K. *Accused discharged.*

A. I. R. 1930 Rangoon 129

BAGULEY, J.

Ma E Se—Appellant.

v.

Ma Bok Son—Respondent.

Civil Revn. No. 52 of 1929, Decided on 24th July 1929, against order of Township Court, Pakokku, in Civil Execution No. 9 of 1929.

Civil P. C., S. 60 (c)—Agriculturist's house occupied by him in village or his hut in field are both exempted.

An agriculturist's house occupied by him, is exempt from attachment; and this would apply both to his house in the village and also to his hut in the field if he had one: 12 *Bom.* 363, *Dist.* [P 129 C 2]

Day—for Appellant.

Tambe—for Respondent.

Judgment.—This is an application in revision of an order passed by the Township Judge, Pakokku, in his execution case No. 9 of 1929.

In this case the respondent attached a house belonging to the judgment-debtor in execution of an ordinary money decree. Objection was raised that the house was the property of a cultivator and occupied by him, and, therefore, was free from attachment under S. 60 (c), Civil P. C. It is described as a house with bamboo flooring, bamboo mat walling and bamboo roofing, and therefore, presumably, is not of great value.

The order of the trial Court is short. The fact that the judgment-debtor was a cultivator does not seem to have been disputed; but it was stated that this house was in the village and during the cultivation season the cultivators lived in a hut put up on his *ya* land. The trial Judge quoted the case of *Jiwan Bhaga* v. *Hirva Bhaiji* (1), and stated that it was held therein that only the house occupied by an agriculturist bona fide for the purpose of cultivation is exempted. The first comment I make on this ruling is that it was not under the existing Code of Civil Procedure, and S. 60 (c) of the present Code differs in its wording from the old S. 266. In the second place, it was held that the judgment-debtor in that case was not really an agriculturist: he was something which is described as bhagdar, and it is stated that his character as a bhagdar predominates over his other character as an agriculturist; so I deduce that this judgment-debtor was not mainly an agriculturist; he had some other form of occupation. It is also mentioned on p. 365, that there is in Bombay the Bhagdari Act dealing with this very special and very limited class of property.

(1) [1888] 12 Bom. 363.

Section 60 (c), Civil P. C., states that:

> "houses and other buildings (with the materials and the sites thereof and the land immediately appurtenant thereto and necessary for their enjoyment) belonging to an agriculturist and occupied by him,"

are exempt from attachment and sale. In the present case, the property attached is a house which belongs to an agriculturist and is occupied by him; and giving their plain meaning to the words of the section, I entirely fail to see how it can be said that the house is liable to attachment. The trial Judge says that if this meaning is given to the section, most of the houses in Burma cannot be attached, which would be very absurd. This may be the case, but it is not for him to say whether the law is absurd or not; it is his duty to enforce the law as it is. It is rather strange that there has been no published ruling on the point up to date, because to my personal knowledge such cases have come up many times in lower Courts.

I hold that an agriculturist's house occupied by him, is exempt from attachment: and this would apply both to his house in the village and also to his hut in the field if he has one.

I consider the refusal of the trial Judge to give effect to the plain meaning of the wording of the section can only be described as perverse, and I am therefore of opinion that this Court can interfere in revision.

I set aside the order of the lower Court and direct that the attachment of the house in question be removed. The respondent to pay the appellant's costs in both Courts; advocate's fee in this Court two gold mohurs.

V.B./R.K. *Revision allowed.*

*** A. I. R. 1930 Rangoon 130**

CHARI, J.

Maung San Da—Appellant.

v.

Maung Chan Tha and *another* — Respondents.

Special Second Appeal No. 115 of 1929, Decided on 22nd August 1929, from judgment of Dist. Judge, Pegu in Civil Appeal No. 113 of 1928.

* **Benamidar—Right to sue—All parties to transaction knowing benami nature of contract—Defence raised that party suing is benamidar—Meaning of such defence is that real owner is unwilling to enforce his claim —Real owner coming as witness for defendant—Suit by benamidar to enforce claim in such circumstances is not tenable.**

No doubt a benamidar can maintain a suit in respect of contracts and can maintain a suit in respect of immovable property though he is merely a benamidar, but when all the parties to the transaction know that the person appearing as party to the contract is not the real party and when a defence is raised that the party suing is a benamidar the real meaning of that defence is that the real owner, or the person really entitled to the benefit of the contract, is not willing to maintain the suit to enforce his claim and that the benamidar is maintaining it in spite of the unwillingness of the real owner to do so. Therefore a suit by a benamidar in such circumstances to enforce a contract is not tenable. [P 131 C 1]

Kyaw Htoon—for Appellant.

So Nyun—for Respondents.

Judgment.—Maung San Da, the appellant before this Court, filed the suit out of which this appeal arises for specific performance of a contract entered into by the defendants and Maung San Da (Ex. A). By that agreement the defendants, admitted having sold a house to Maung San Da and stated that they entered into the agreement because at that time they were unable to go to effect registration. There is, therefore, a clear implication that the defendants should execute a registered deed of conveyance whenever called upon to do so.

The defence was that the defendants never intended to contract with Maung San Da but with his mother, Daw Me Ya, and that they signed a piece of blank paper which was afterwards filled in without their knowledge and Maung San Da's name put in as the purchaser instead of Ma Me Ya's with whom they intended to treat. It was also alleged that in any event Maung San Da was only a benamidar of Ma Me Ya.

The first of the two defences raised need not be considered at all because it is an incredible statement, in view particularly of the fact that the agreement was attested by two witnesses. The second defence was not put in as clearly as it might have been, but what was meant is clear enough. The learned Judge of the trial Court gave a decree in favour of the plaintiff, but in appeal this decree was reversed by the District Judge.

It is urged in this second appeal that even if Maung San Da is a benamidar, the defendants cannot resist his suit. On the question whether Maung San Da was or was not as a matter of fact the benamidar of his mother, the evidence is perfectly clear. The money paid to one of the old lady's daughters, to whom the two executants of the agreements were themselves indebted was, at their request, borrowed from a Chettyar on a promissory note signed by Maung San Da and his mother. The mother states in evidence that she intended to borrow the money; that the money was her own; and that she, as a matter of fact, discharged the promissory note. She produced the discharged promissory note, and it may be assumed that she was the one who paid the money to the Chettyar. She also states in evidence that Maung San Da joined in the execution of the promissory note because the Chettyar insisted on his doing so. It is, therefore, clear that the money paid to Ma Saw Nyun was the money of the mother, Daw Me Ya.

It is possible to argue that Daw Me Ya, though she paid the money, intended that the benefit of the agreement should accrue to her son, but this presumption is rebutted by Ex. 1 filed in Criminal Regular Trial No. 84 of 1928, in which Maung San Da admits not only that the money was his mother's, but that his own name was put in as a temporary measure, that is in effect, that he was a benamidar of his mother.

The only point for consideration is whether the defendants could resist the suit if Maung San Da was, as he undoubtedly was, a benamidar of his mother. The rights of a benamidar to enforce claims in respect of contracts entered into by him have been recognized by all the Courts in India; except that in respect of immovable property, some of the High Courts did not recognize the benamidar's right to recover possession.

This matter has been set at rest by the Privy Council, and, as the law now stands, a benamidar can maintain a suit in respect of contracts and can maintain suits in respect of immovable property though he is merely a benamidar. This, however, does not dispose of the question now before me. When all the parties to the transaction know that the person appearing as a party to the contract is not the real party, and when a defence is raised that the party suing is a benamidar, the real meaning of that defence is that the real owner, or the person really entitled to the benefit of the contract, is not willing to maintain the suit to enforce his claim, and that the benamidar is maintaining it in spite of the unwillingness of the real owner to do so.

In this case, though the mother who gave evidence for the defendants does not say so in so many words, it is perfectly clear that she was not a willing party to the plaintiff's enforcing performance of the contract entered into on her behalf. The defence raised, therefore, is a good one, and, in the circumstances of this case, the plaintiff's suit is on that account bound to fail.

I, therefore, confirm the judgment and decree of the lower appellate Court though not for the reasons actually stated by the learned Judge. The appeal is dismissed with costs.

P.N./R.K. *Appeal dismissed.*

* A. I. R. 1930 Rangoon 131

HEALD AND MAUNG BA, JJ.

U Thwe—Appellant.

v.

A Kim Fee and *others*—Respondents.

First Appeal No. 107 of 1929, Decided on 4th June 1929, from judgment of Dist. Judge, Hanthawaddy, in Civil Regular No. 42 of 1928.

(a) Arrest—Arrest is effected by touch—Criminal P. C., S. 46.

In making an arrest the person authorized to make it shall actually touch the body of the person to be arrested, unless there be a submission to the custody by word or action: 6 *W. R.* 690, *Rel. on.* [P 132 C 1]

*** (b) Tort—Illegal arrest—Arrest of pleader exempted from arrest under S. 135, Civil P.C., does not entitle him to claim damages for tort—Proof of malice in obtaining such arrest is essential to claim them.**

A pleader is exempted under S. 135, Civil P. C., from arrest under Civil process while attending a Court in connexion with any matter pending before it. Therefore even if he is arrested he can claim exemption and get himself released, but such arrest would not entitle him to claim damages for tort. To claim damages it is essential that the arrest is procured maliciously and without reasonable and probable cause: *Williams* v. *Taylor*, 6 *Bing* 186 and 4 *Cal.* 583, *Rel. on.* [P 132 C 2]

Ba Thein (2)—for Appellant.

Judgment.—This is an appeal by U Thwe, Advocate of Kyauktan, from a judgment and decree of the District Court of Hanthawaddy, dismissing his suit with costs which amount to a little over Rs. 1,000. The suit was against (1) A. Kim Fee, Rice-mill owner, Kyungale; (2) the Secretary of State for India in Council and (3) U Ba Tun, Barrister-at-law, Rangoon, for the recovery of Rs. 6,000 as damages for illegal arrest.

In Civil Execution No. 26 of 1928 of the Sub-divisional Court of Kyauktan, U Ba Tun as Kim Fee's advocate filed an application for the execution of a decree against U Thwe for the recovery of Rs. 158-4-0 by his arrest and imprisonment. In due course a warrant was issued for his arrest. U Thwe alleged that on 20th April 1928, while he was engaged in his professional capacity in the Township Court of Kyauktan, the process server arrested him in open Court and that he paid the decretal amount under protest then and there. He further alleged that on account of such illegal arrest he was considerably disgraced and humiliated.

The learned District Judge held that there had been no arrest. He further held that even if arrest could be considered to have been effected, the Secretary of State was not responsible as the arrest was an act of State and that U Ba Tun also could not be held liable so long as he kept himself within the four corners of the power-of-attorney and did not act from ulterior motives of his own. As regards the decree-holder, Kim Fee, he observed that U Thwe had suffered no damages whatever and that if damages were due, he would assess at the figure of one pie. But in view of his finding that there had been no arrest he dismissed the suit awarding separate costs for each defendant.

Mr. Ba Thein (2) urged that the lower Court committed an error in coming to the finding that there was no arrest at law. The Civil Procedure Code does

not lay down how an arrest is to be made; but the Criminal Procedure Code has laid down in S. 46 how an arrest is to be made. There it is laid down that in making an arrest the police officer or other person making the same shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action. This seems to be the mode of arrest recognized in English law. In Stroud's Judicial Dictionary, it is thus stated :

"An arrest of a person by a duly authorized officer is accomplished if the officer lawfully touch him ; the power of effecting actual capture is not essential: *Sandon* v. *Jervis* (1)."

Process server, Maung U, who executed the warrant in question, has deposed :

"The Judge was sitting on the Bench. Plaintiff was sitting on a chair in front of him. I walked up with the warrant behind the plaintiff's chair and put the warrant in front of him and showed it to him saying. This is for you. You are arrested."

The process server further said that he did not lay hold of U Thwe nor did he lay hands on him. U Thwe himself has given evidence. He stated :

"The process-server came from behind me and said that as there was a warrant against me he had come to arrest me. He put the warrant on the table in front of me. He then said he had arrested me. He whispered this to me. He then did something, either touched my person or touched the chair. I paid the money at once."

The warrant itself may be usefully referred to in this connexion. It contains these words :

"These are to command you to arrest the said defendant and unless the said defendant shall pay to you the said sum of Rupees . . . . to bring the said defendant before the said Court with all convenient speed."

In his report endorsed on the warrant, the process-server stated that he arrested the judgment-debtor but as the judgment-debtor paid the decretal amount he did not bring the judgment-debtor to Court. So far as U Thwe and the process server are concerned, both are under the impression that U Thwe was arrested ; but strictly speaking the arrest could not be held to have been effected in the absence of clear proof that U Thwe's person was actually touched. The process-server was positive that he never touched U Thwe and the latter could not positively state that he was touched by the process-server.

(1) [1858] 6 W. R. 690.

It could not also be held that there had been a submission to the custody by word or action on the part of U Thwe. We are therefore inclined to accept the finding of the lower Court that there been no arrest.

We might even go further and say that there was no cause of action. It is true that under S. 135, Civil P. C., U Thwe was exempted from arrest under civil process while attending a Court in connexion with any matter pending before it. Even if he were arrested, he could claim exemption and get himself released but that arrest would not entitle him to claim damages for a tort. To claim damages it is essential that the arrest was procured maliciously and without reasonable and probable cause. U Thwe himself in his cross-examination had to admit this :

"I knew I would have to pay the money some time, so I paid it because it was legally due by me."

In *Williams* v. *Taylor* (2), it was held :

"If a person has a reasonable and probable cause for asserting a legal right, he cannot be sued for setting the law in motion to enforce that right, however vindictive may be his feelings against his adversary."

This was quoted by a Bench of the Calcutta High Court in *Raj Chunder Roy* v. *Shama Soondari Debi* (3). In that case in execution of an ex parte decree the plaintiff was arrested. Subsequently the plaintiff succeeded in getting that decree set aside on the ground that the claim was false. The plaintiff claimed Rs. 5,000 as damages. She obtained a decree in the trial Court and the decree was confirmed by the appellate Court ; but on second appeal the High Court reversed the decree holding that the plaintiff had failed to prove absence of reasonable and probable cause. For the above reasons the appeal is dimissed under O. 41, R. 11.

P.N./R.K. *Appeal dismissed.*

(2) [1841] 6 Bing 186.
(3) [1879] 4 Cal. 583.

*A. I. R. 1930 Rangoon 132

RUTLEDGE, C. J. AND BROWN, J.

K. Y. Chettyar Firm and *another*—Appellants.

v.

Jamila Bi Bi—Respondent.

First Appeal No. 289 of 1928, Decided on 13th June 1929,

(a) Transfer of Property Act, S. 52—Doctrine of lis pendens applies to transfers under Court sales independently of Act—Principles of S. 52 should be considered.

Although the provisions of S. 52 do not apply specifically to a transfer of property under a court-sale, nevertheless the doctrine of lis pendens does apply to such a transfer independently of the operation of that Act: and in deciding whether the rule should be applied to the facts of a particular case, the general principles as set forth in S. 52 must be considered: 25 *Cal.* 179 (*P. C.*); 12 *Cal.* 414; 15 *Cal.* 756 (*P.C.*); 23 *All.* 60, *Ref.* [P 135 C 1]

* **(b) Transfer of Property Act, S. 52—Principle of lis pendens applies to administration suits in which estate charged in action is specifically and clearly indicated—General claim for administration is not enough.**

An administration suit is a sufficient lis pendens so as to entitle the plaintiff to priority over any other transferee taking subsequently to the registration of the lis from a specific devisee who is a defendant, if previously to the transfer the real estate sought to be charged in the action is clearly and specifically indicated, a mere general claim for administration is not enough: *Price* v. *Price*, (1887), 35 *Ch. D.* 297, *Ref.*; *A. I. R.* 1924 *Rang.* 221, *Dist.* [P 136 C 1]

Hay—for Appellants.

Chari—for Respondent.

Judgment.—In Civil Regular No. 7 of 1914 of the District Court of Hanthawaddy, the present respondent Jamila Bi Bi brought a suit for the administration of the estate of her deceased father K. E. Cassim Rowther. Defendant 1 in that suit was K. E. Mohamed, one of the heirs. The District Court passed a preliminary administration decree on 8th January 1917. The proceedings then went before a Commissioner for an enquiry amongst other things as to what the estate consisted of.

The land in dispute, Holding No. 27 of 1914-1915 of Nanyaw Kwin, was claimed before the Commissioner to be part of the estate. The Commissioner submitted his report on 26th April 1917 and recorded amongst his findings that Holding No. 27 was part of the estate.

Very considerable delay then occurred in the disposal of the suit. But on 29th April 1926 a final decree was passed. In that decree holding No. 27 was declared to be part of the estate and it was directed that the defendant should give to the plaintiff two-third of shares of this and other immovable property.

Meanwhile the K.Y. Chettyar firm, appellant 1, obtained a money decree against K. E. Mohamed, defendant 1, in the administration suit. In the execution of that decree they put the land now in suit up for sale and they themselves purchased the land in execution on 30th October 1917. They have since transferred their rights to K. Y. C. M. Chettyar firm, appellant 2.

In the suit out of which the present appeal has arisen Jamila Bi Bi has sued the two appellants for possession of two-thirds of the land in question and for mesne profits. The suit has been decreed in her favour and the two Chettyar firms have come up to this Court in appeal.

The trial Court held that at the time of the purchase of the land at the Court auction by the K. Y. Chettyar firm the right of K. E. Mohamed to the property in suit was directly and specifically in question in the administration suit. The Court therefore held that in accordance with the doctrine of lis pendens the auction purchaser was bound by the decision in the administration suit and could therefore make no defence to the present suit instituted by Jamila Bi Bi. The correctness of this decision has been contested on two main grounds. It is contended, firstly, that the doctrine of lis pendens does not apply at all to the case of a involuntary transfer of property under a court-sale and it is contended, secondly, that the doctrine cannot be applied to an administration suit and that the right to the property in dispute here was not directly and specifically in question in the administration suit. The doctrine of lis pendens, so far as it applies to private transfers, is laid down in S. 52, T. P. Act. Under S. 2 (d) of the Act nothing in the Act save as provided by S. 57 and Chap. 4 shall apply to any transfer by operation of law, or by, or in execution of, a decree, or order of a Court of competent jurisdiction. It is clear therefore that the provisions of S. 52 are not made applicable under the Transfer of Property Act to the circumstances of the present case. But that does not necessarily conclude the matter. The effect of S. 2 (d) of the Act is that the provisions of the Act generally apply to private transfers only and that transfers under order of a Court are not in any way affected by the Act. It cannot, however, be assumed that legislature intended that the general principle specifically declared by the Act to apply to private transfers should

not also apply to involuntary transfers under the orders of a Court. The Act does not affect the law relating to some such transfers in any way. It leaves the law as regards to them exactly where it was before.

There does not seem to be any reported decision in Burma on the point; but there is a considerable mass of authority in decisions of the different High Courts in India to the effect that the general doctrine of lis pendens should be applied to voluntary transfers in a court-sale, and on the three separate occasions their Lordships of the Privy Council have clearly indicated their opinion that this is the correct view of the law.

In the case of *Nilakant Banerji* v. *Suresh Chandra Mullick* (1) the question arose whether a purchaser under a writ of fieri facias was bound by the decision in a suit affecting the property bought to which he was not a party but which was pending at the time of the purchase and to which his judgment-debtor was a party. The High Court of Calcutta held that the purchaser was not bound by the decision in the pending suit. Their Lordships of the Privy Council, whose judgment was delivered by Lord Hobhouse, did not expressly decide this point; but at p. 421 of the judgment they state:

"Whether the High Court are right in their limitation of the doctrine of lis pendens may as above intimated, be doubted, but it is not worth while to pursue that question, because, assuming that they are right, the fact is that the plaintiff did not ignore the purchase by Khagendra."

The next case in which the Privy Council considered the point is the case of *Radhamadhub Holdar* v. *Monohur Mukerji* (2). In that case a mortgagee had brought a suit to enforce his charge; and during the pendency of the suit the appellant had purchased the property in dispute. It had been held by the High Court in an earlier rent suit between the parties that inasmuch as the mortgagee's suit to enforce his charge was pending at the time of the sale to the appellant, the appellant was bound by those proceedings. In the case before their Lordships of the Privy Council the appellant was seeking to enforce his right to redeem. Their Lordships of the Privy Council at p. 761, after setting forth the facts as to the rent suit state:

"On that ground the rent suit was decided against Radhamadhub. Radhamadhub now comes to redeem: but the right to redeem rests on precisely the same ground as the right to rent was rested. In each case the question is equally: who is the true representative of Matangini? Therefore their Lordships conceive that the matter was expressly decided by the High Court in rent suit; but they desire to add that even if it had not been so decided they see no reason to believe that any amount of argument would induce them to come to a different conclusion than that to which the High Court came."

Here again the question of the applicability of the doctrine of lis pendens was not specifically decided. The appeal was decided on the ground of res judicata. But the judgment of their Lordships indicate very clearly their agreement with the view of the High Court in the earlier case that the doctrine of lis pendens did apply.

The third case in which the Privy Council have considered the question of the applicability of the doctrine of lis pendens to a sale in execution is the case of *Moti Lal* v. *Karrabuddin* (3). In that case the defendants had purchased at an auction sale certain properties. In the course of their judgment their Lordships remark at p. 185:

"It may be as well here to dispose of a very extraordinary contention set up for the defendant. He bought whatever interest belonged to the heirs of Agha who were mortgagees and to Yusuf and Nasim who were mortgagors. But three months before he bought, Masih had instituted his suit against those very persons to establish his title against them, and it was established by the decree of November 1885. Is it possible for the defendant to allege that, as against Masih or his heirs the heirs of Agha or Yusuf or Nasim has any interest to convey to him? The District Judge holds that the defendant is free from the decree because he was no party to the suit, and because the transfer to him was made prior to the decree. If that were law, it is difficult to see in what cases a pending suit would be any protection; and Mr. Branson very properly declined to argue in support of that view."

This is a clear pronouncement in favour of the view that the doctrine of lis pendens does apply to transfers of land under a Court auction sale. It is true that the provisions of the

(1) [1885] 12 Cal. 414=12 I. A. 171=4 Sar. 685 (P.C.).

(2) [1888] 15 Cal. 756=15 I. A. 97=5 Sar. 211 (P.C.).

(3) [1897] 25 Cal. 179=24 I. A. 170=7 Sar. 222 (P. C.).

Transfer of Property Act bearing on the subject were not discussed and that the matter was not argued before their Lordships. But their Lordships clearly definitely adopt the view of the law already clearly indicated in the two earlier decisions to which we have referred.

The question was specially considered with reference to the provisions of S. 52, T. P., Act, by the High Court of Allahabad in the case of *Sukdeo Prasad* v. *Jamna* (4). In that case it was decided that although the application of the provisions of S. 52, T. P. Act was barred by the provisions of S. 2 (b) of the Act, nevertheless the doctrine of lis pendens did apply to the case of a transfer at a Court sale. We do not think that it is necessary to cite any further authority on the point. Although there are some earlier decisions in support of the view argued for the appellants, those decisions must be taken to have been overruled by the decisions of their Lordships of the Privy Council and no recent authority have been cited to us in favour of the view that the doctrine of lis pendens would not apply. On the first point raised by the appellant we are therefore of opinion that, although the provisions of S. 52, T. P. Act, do not apply specifically to a transfer of property under a Court sale, nevertheless the doctrine of lis pendens does apply to such a transfer independently of the operation of that Act; and in deciding whether the rule should be applied to the facts of a particular case, the general principles as set forth in S. 52 must be considered.

We now come to the decision of the second point raised. S. 52 lays down that during the active prosecution in any Court having authority in British India, or established beyond the limits of British India by the Governor General in Council, of a contentious suit or proceeding in which any right to immovable property is directly and specifically in question, the property cannot be transferred or therwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court, and on such terms as it may impose.

It is argued that this section does not apply to an administration suit; and we have been referred on this point to the case of *Lee Lim Ma Hock* v. *Saw Mat Hone* (5). In that case the parties to the suit had obtained letters of administration to the estate of the deceased person and as administrators had transferred certain immoveable property belonging to the estate. It was held that where an administrator disposed of property during the pendency of an administration suit the principal of lis pendens is not ordinarily brought into operation by the institution of that suit. The decision was based on an unreported decision of the late Chief Court of Lower Burma in civil miscellaneous application No. 14 of 1921 (**A. L. A. R. Chetty firm* v. *Ma Thwe*). In that case one Maung Tun Pe had obtained lettters of administration to an estate. A suit was then brought by one Maung Thwe for a declaration that he was the sole heir and was entitled to the whole estate. It was held that the doctrine of lis pendens does not apply to a sale of a portion of the estate by Tun Pe as administrator. In the judgment in that case the following passage occurs;

"The suit was in the nature of an administration suit and to such suits, speaking generally, the doctrine of lis pendens does not apply ...... The right to this particular plot of land must be 'directly and specifically in question.' In such a suit as this one the land in suit may no doubt be said to be directly in question, but it cannot be said to be specifically in question. The fact that possession was prayed for is not enough and the decree could not deal specifically with the land. It declared Maung Thwe to be a co-heir and as such co-owner of the estate with Tun Pe. The result was that as laid down in S. 44, T. P. Act, Maung Thwe was held to be entitled to joint possession and joint enjoyment of the estate and also to a right to obtain partition thereof. The estate was, however, being administered by an administrator and Maung Thwe's rights were in respect of the estate as it remained after the administration. The administrator was entitled to sell any portion of the estate to pay the debts and the estate was liable for the expenses of the administration. Ma Shwe Pon could not be deprived of the benefit of her purchase as the purchase price came to the hands of the administrator. If he was guilty of misappropriation Maung Thwe's remedy would be against him and his estate and to that estate Maung Thwe has now succeeded. He could only set aside the sale to Ma Shwe Pon on the ground of fraud which is not alleged or for want of the Court's sanction which remedy has lapsed and might never have been granted."

(4) [1900] 23 All. 60=(1900) A. W. N. 199.

(5) A. I. R. 1924 Rang. 221=2 Rang. 4.
[*A. I. R. 1923 Rang. 69.]

It is clear therefore that the decision in this case was based largely on the fact that the person who sold the land was the administrator of the estate. The administrator can be considered as dealing with the estate on behalf of the heirs. That is not the position here. There is no suggestion that K. E. Mahomed was the administrator of the estate and the decree against him was a decree against him in his personal capacity. This decision is therefore no authority for the view that the doctrine of lis pendens cannot apply in a case such as the present one.

In the case of *Price* v. *Price* (6) it was held that a :

> "creditor's action for general administration may be a sufficient lis pendens, before final decree, so as to entitle the plaintiff to priority over a purchaser or mortgagee taking, subsequently to the registration of the lis, from a specific devisee who is a defendant, if the plaintiff, previously to the purchase or mortgage, has sufficiently indicated the real estate sought to be charged in the action ; a mere general claim for administration of the real and personal estate not being of itself a sufficient indication of intention to make liable the specifically devised real estate."

In the present case the action was not by a creditor but by an heir. But that is no reason for not applying the same principle. When the suit was first filed by Jamila Bi Bi in 1904 there was no specific mention of the property belonging to the estate and no indication as to the property which was claimed ; at that stage of the proceeding, we are of opinion that the doctrine of lis pendens could not have been held to apply. But the sale to K. Y. Chettyar firm did not take place until August 1917 ; and some time before that date the commissioner had made a report to the Court in which he definitely found that the land in suit did belong to the estate and should be dealt with in the decree. He recorded a definite finding that the plaintiff was entitled to a third-share of the immovable properties which included this land. There had clearly been a definite indication by this time as to the property claimed in the administration suit and we agree with the learned trial Judge that the right to this piece of land was before the auction sale directly and specifically in question in the administration suit. The fact that it was so in question was actually mentioned in the proclamation of sale before the purchase by the Chettyar and the notice attached to the proclamation was to this effect :

> "These properties are claimed to be part of the estate of the late Cassim Rowther in Civil Regular No. 7 of 1914 of this Court, which is still pending."

We are of opinion that in these circumstances the doctrine of lis pendens has been applied correctly in present case by the trial Judge. We therefore dismiss this appeal with costs.

V.B./R.K. *Appeal dismissed.*

(6) [1887] 35 Ch. D. 297.

A. I. R. 1930 Rangoon 136

MYA BU AND BAGULEY, JJ.

Ma Sin—Appellant.

v.

Ma Pu and *others*—Respondents.

Civil Misc. Appeal No. 48 of 1928, Decided on 10th June 1929, against order of Dist. Judge, Mandalay, in Civil Suit No. 8 of 1928.

Civil P. C., Sch. 2, R. 21—Parties agreeing to abide by award of majority of arbitrators —Four arbitrators appointed—Three preparing award without consulting and in absence of fourth to which fourth does not agree—Award is not binding on parties and three arbitrators are guilty of misconduct.

Where in an agreement to refer a matter in dispute to arbitration of four arbitrators it is expressly laid down that the parties would abide by the award of the majority of them, an award by three out of the four arbitrators, made without final discussion with and in the absence of the fourth and to which he does not agree, is not binding on the parties. The three arbitrators must be regarded as having been guilty of misconduct : *7 All.* 523 and *A. I. R. 1924 Rang.* 153, *Rel. on.* and 7 *Mad.* 174, *Dist.* [P 133 C 1, 2]

Sanyal—for the Appellant.

Ko Ko Gyi—for Respondents.

Baguley, J.—This appeal arises from an application under S. 21, Sch. 2, Civil P. C., to file an award.

The parties are heirs of one U Chit, and they entered into an agreement to refer to arbitration the question of the estate left by him. The agreement to refer to arbitration is a fairly lengthy one, and states that the four arbitrators have been appointed by the parties in order that the whole estate of the deceased U Chit, consisting of moveable and immovable property, might be divided among them according to Mahomedan Law. The agreement also places a time limit on the arbitration, and, after referring to what should happen if any

of the arbitrators withdrew or was removed from office or unable to act, the parties (in para. 10) agree to abide by the decision that may be given by the four arbitrators, or to abide by the decision of the majority if there be any difference of opinion.

The arbitrators began their duties and produced an award, referred to as Ex. A. In this award they fixed the shares of the heirs, the sister of the deceased taking four shares, his widow two shares, and his cousin one share, each ; they also specifically divided up some of the moveable property left by the deceased, but they did not partition the immovable property among the heirs. In my view the actual division and separation of the shares was the reason for which the arbitrators were appointed. This award (Ex. A) was unanimous.

After this, in some way or another, the attention of the arbitrators seems to have been drawn to the fact that they had failed in the object for which they had been appointed, because they had not divided up the property and had merely stated the shares into which some of it was to be divided. After this a second award (Ex. B), which does divide up the immovable property was drawn up and signed by three of the arbitrators ; but it was apparently not agreed to by the fourth arbitrator who did not sign it. It is this second award which plaintiff now seeks to have filed.

The learned District Judge considered the question whether Ex. A or Ex. B was to be filed. He found that Ex. A was incapable of execution by reason of its incompleteness and inaccuracy and that Ex. B was invalid because it was not signed by all the arbitrators and : "there being no provision regarding the prevailing of the majority opinion." This last reason is clearly due to an oversight. The reference to arbitration most clearly provides for the parties accepting the decision of the majority in case of there being lack of agreement. Against this order of the District Judge the original plaintiff has filed the present appeal.

There are two real grounds of importance : the first is that the lower Court erred in holding that Ex. A was incomplete and incapable of execution, and the second is that Ex. B being signed by the majority of the arbitrators was a good award. With regard to the first point in which it is contended that Ex. A was a good award, it seems quite clear that if Ex. A were accepted and filed we should merely have the state of affairs that the parties were joint owners in certain proportions of certain immovable property. This would not fulfil the end for which the arbitrators were appointed. It would be incapable of execution and if the parties wished to enjoy their shares separately they would have to file a suit for partition. Ex. A is clearly incomplete. With regard to Ex. B, the actual state of affairs seems to be that one party had an advisor or supporter, one Soon Thin, who is not unknown to these Courts as a dabbler in litigation. When the arbitrators produced Ex. A, he being conversant with a certain amount of law, saw at once that it was not a good award as it failed to divide up the property ; so he sent a letter to the arbitrators pointing out that it was inaccurate. This letter first found its way to one of the arbitrators, Hla Din, vide his evidence. He gave the letter back to the clerk who brought it and said that no more could be done as the award had already been made. After this it was sent on to another arbitrator, Maung Ba Kyi ; it was he who wrote Ex. B without giving notice to the parties and apparently in the absence of the arbitrator Hla Din.

The other arbitrator who has been examined as witness (U Ywet) seems to know very little about it, but he seems to have signed the award blindly without knowing what it was all about. It appears from his evidence that Maung Nyein and Ba Kyi on receipt of this letter from Soon Thin promptly drew up Ex. B and got him to sign it without discussion and then sent it on to Hla Din for him to sign too, but he refused to sign it. The question then is whether this is an award by the majority of the arbitrators which has got to be accepted by the parties in accordance with para. 10 of the reference to arbitration. It is clearly an award by three arbitrators, made in the absence of the fourth and without his being given an opportunity of consulting with them about it.

There seems to be very little authority on this point. An important case appears to be that of *Nand Ram* v.

Fakir Chand (1). In this case, on p. 528, Mahomed, J., says :

"What the parties to a reference to arbitration intended is that the persons to whom the reference is made should meet and discuss together all the matters referred, and that the award should be the result of their united deliberations. This conference and deliberation in the presence of all the arbitrators is the very essence of the arbitration, and the sole reason why the award is made binding."

This view of the matter appears to me to be correct and as differentiating well between an award by the majority of four arbitrators and an award by three arbitrators without reference to the fourth. This case, it is to be noted, is one in which there were three arbitrators and the parties agreed to abide by the decision of the majority, but in actual fact one of the arbitrators never acted at all.

The case of *Gurupathappa* v. *Narasingappa* (2), has been quoted, but this does not help because there was no provision that the award of the majority of arbitrators should be binding.

In *Thammiraju* v. *Bapiraju* (3), there were three arbitrators appointed but one of them was absent during the examination of witnesses. All three whoever were present at the majority of the meetings and at the final meeting when the award was drawn up. In this case nothing is said as to whether it was specially provided that the opinion of the majority of the arbitrators was to prevail, but it was held that one of the arbitrators has been guilty of misconduct by absenting himself from the meeting and the other two arbitrators have been guilty of misconduct in examining witnesses in the absence of the third arbitrator. The case of *Nand Ram* v. *Fakir Chand* (1) was quoted, apparently with approval.

The only other case to which we have been referred is an unofficially reported case in the *A. I. R.* 1924 *Rang.* 153 namely, *Abdulla* v. *M. V. R. S. Firm & Sons* in which Po Han, J., expressed himself as being of opinion that when a matter has been referred to the arbitration of five arbitrators and it was expressly laid down that the parties abide by the award of the majority of them, an award made by three arbitrators out of the five in the absence of the other two, who took no part in the arbitration proceedings, could not be regarded as a valid award by the majority of the five arbitrators which would bind the parties. With this opinion I am in entire concurrence.

For these reasons I am of opinion that an award of three arbitrators, made without final discussion with the fourth arbitrator and in his absence and to which he does not agree, is not an award by a majority of four arbitrators, which under the present deed of reference would have to be accepted, but is an award by three arbitrators. The three arbitrators must be regarded as having been guilty of misconduct in drawing up the final award without consulting the fourth one at all.

I would therefore dismiss this appeal with costs, advocate's fee three gold mohurs.

Mya Bu, J.—I concur.

V.B./R.K. *Appeal dismissed.*

(1) [1885] 7 All. 523=(1885) A. W. N. 139.
(2) [1894] 7 Mad. 174.
(3) [1889] 12 Mad. 113.

A. I. R. 1930 Rangoon 138

CHARI, J.

Nga Nyi Gyi— Accused—Appellant.

v.

Emperor

Criminal Appeal, Decided on 29th July 1929.

Criminal P. C., S. 393 read with Burma Act (8 of 1927)—Sentence in different cases collectively exceeding period fixed—Person cannot be punished with whipping.

The word "sentenced" which occurs in S. 393, Criminal P. C., and in the Burma Act 8 of 1927, must be read in a general sense, and, if a person is sentenced for any period exceeding the period fixed by the Act whether in conviction in one case or more than one, he cannot be punished with whipping : 1 *Mad.* 56, *Rel. on.* [P 139 C 1]

Tun Byu—for the Crown.

Judgment.—The accused in this case was properly identified by Ma Sein Pu and his guilt has been established.

The case was admitted because a sentence of whipping was passed in addition to the seven years' rigorous imprisonment passed on the accused. In a previous case, Criminal Regular No. 140 of 1929 in the Court of the same Magistrate the accused was sentenced to four years' rigorous imprisonment, and the sentence of seven years passed on him was directed to run after the expiry of the sentence in the previous case.

The question arises whether a sentence of whipping is legal. Under S. 393, Criminal P. C. no male sentenced to death or to transportatinn or to penal servitude or to imprisonment for more than five years could be punished with whipping. This has been altered by the Burma Act 8 of 1927 and the term of five has been extended to seven years. The question for decision is whether a person, who is sentenced in two different cases to punishments which collectively exceed the term of seven years, could be punished with whipping. In a Madras case *Re, Proceedings of the High Court* (1) it has been held that a person, who has been punished with the classes of punishment specified in S. 393, Criminal P. C. but in a different case and for a different offence, could not be punished with whipping in a subsequent case in which he has been convicted. It seems to me, therefore, that the word "sentenced" which occurs in S. 393, Criminal P. C., and in the Burma Act 8 of 1927, must be read in a general sense, and, if a person is sentenced for any period exceeding the period fixed by the Act whether in conviction in one case or more than one, he cannot be punished with whipping. The order of whipping in this case is illegal and therefore set aside.

The explanation offered by the District Magistrate is accepted. The trial Magistrate's explanation is also accepted, as the question is not free from doubt and the section of the Burma Act is undoubtedly capable of the construction which the learned Magistrate put on it.

V.B./R.K. *Order accordingly.*

(1) [1876] 1 Mad. 56.

A. I. R. 1930 Rangoon 139

BROWN, J.

Maung Tin—Applicant.

v.

Kyinnahon—Respondent.

Civil Revn. No. 65 of 1929, Decided on 30th August 1929, from judgment of Dist. Judge, Tharrawaddy, in Civil Appeal No. 120 of 1928.

(a) Practice—Judge.

Where a Court of a particular place is vested with the powers of a Small Cause Court to try suits up to a particular amount, whoever occupies that Court is competent to try those suits. [P 139 C 2]

(b) Practice — Appeal — Same Judge presiding over Small Cause Court and Township Court and by mistake trying suit of Small Cause nature as Township Court—No appeal lies from his decree.

Where the same Judge presides over Small Cause Court and a Township Court and tries by mistake as Judge of the Township Court a suit of a Small Cause nature, the mistake does not alter the character of the suit and no appeal lies from the decree : (1907-1909) 2 *U.B. R. Small Cause* 1, *Rel. on.* [P 139 C 2P 140 C 1]

Guha—for Applicant.

Hock—for Respondent.

Judgment.—The respondent brought a suit against the petitioner for recovery of Rs. 181-6-0, the value of damage which he alleged was caused to his paddy by the petitioner. The trial Court held that it had not been proved that the damage was caused by the petitioner and dismissed the suit. The respondent appealed to the District Court. The District Court held that, from the facts proved, it could safely be presumed that the damage to respondent's paddy was due to the action of the petitioner, and gave the respondent a decree for Rs. 139. The petitioner has come to this Court in revision on the ground that no appeal lay to the District Court.

The suit was of a Small Cause nature and cognisable by a Court of Small Causes; and the Judge of the Township Court of Gyobingauk, who tried the present case, has been vested with the power of a Small Cause Court up to Rs. 200. It is suggested on behalf of the respondent that the Judge of the Township Court has not been vested with Small Cause Court power by name. It may be the case that the Judge has not been appointed by name but only by virtue of his office as Judge of the Township Court. But no authority has been cited to me for the view that the Judge has, therefore, not the power of a Small Cause Court.

The damages claimed were less than Rs. 200 and the suit was, therefore, within the competence of the Small Cause Court : and under the provisions of S. 16, Provincial Small Cause Courts Act, it was not cognisable by any other Court. In the case of *Nga Shwe Tha* v. *Nga Po* (1) it was held that, where the same Judge presided over a Small Cause Court and a District Court, and tried by mistake as Judge of the District Court a case of a Small Cause nature, the mis-

(1) [1907-1909] 2 U. B. R. Sm. C. C. 1.

take did not alter the character of the suit, and that no appeal lay from the decree. The decision of the High Court of Bombay in the case of *Shankarbhai* v. *Somabhai* (2) was followed. The same principle seems to me to apply to this case. The suit must be treated as though it had been tried by a Court of Small Causes and no appeal lay. The orders passed by the District Court are, therefore, illegal. I, therefore, set aside the decree of the District Court and restore that of the trial Court dismissing the suit of the plaintiff-respondent. The plaintiff-respondent will pay the costs of the defendant-petitioner in all three Courts.

P.N./R.K. *Decree set aside.*

(2) [1901] 25 Bom. 417=3 Bom. L.R. 129.

* A. I. R. 1930 Rangoon 140

HEALD, OFFG. C. J., AND CHARI, J.

Sulaiman—Appellant.

v.

Tan Hwi Ya—Respondent.

First Appeal No. 30 of 1929, Decided on 26th August 1929, from judgment of Dist. Judge, Pegu, in Civil Regular Suit No. 47 of 1926.

(a) Civil P. C., O. 6, R. 17— Ordinarily Court will refuse defendant to amend his written statement after plaintiff has called all his evidence on issues of fact arising in the case and has closed his case — Where new defence of law arises from plaintiff's evidence, it may, however, be considered even after plaintiff has closed his case on facts.

Leave to amend pleading is a matter in the discretion of the Court, and the Court would ordinarily be justified in refusing to allow a defendant to amend his written statement so as to raise new issues of fact when nearly two years have elapsed since the filing of his original written statement and when the plaintiff has called all his evidence on the issues of facts raised by those written statements and has closed his case. But if on the facts appearing in the plaintiff s evidence a new defence of law arises, it may be taken into consideration even if the plaintiff has closed his case on facts. [P 142 C 1]

*** (b) Contract Act, S. 23—Execution of bond obtained by creditor from his debtor for debt due by agreeing to drop criminal prosecution pending in respect of debt — Payment guaranteed by person without knowledge of prosecution—Criminal prosecution dropped — Agreement by person is binding on him though original bond is void.**

Where a creditor obtains the execution of a bond for a debt due to him from his debtor by agreeing to drop a criminal prosecution which was pending in connexion with the debt and where the bond is signed by a person as guarantee for the payment of the debt covered by the bond, who at the time when he agreed to guarantee it had no knowledge of the criminal prosecution and where the prosecution was dropped, the agreement to guarantee the debt is not void under S. 23, even if the bond itself is void under that section and the agreement must be held to be binding on him: *A. I. R.* 1926 *Cal.* 59; *A. I. R.* 1927 *Lah.* 530 and *A.I.R.* 1927 *Lah.* 465, *Ref.* [P 142 C 1]

Kya Gaing—for Appellant.

Ba Maw—for Respondent.

Heald, Offg. C. J.—Respondent sued appellant, as one of the three signatories of a mortgage bond for Rs. 4,000, to recover Rs. 6,100, which he alleged to be due on the bond for principal and interest, by the sale of the mortgaged property, and he claimed a personal decree for any amount which might remain outstanding after sale of the property against appellant as well as against the other two signatories of the bond. Appellant's name did not appear in the body of the bond, and respondent said in his plaint that appellant signed the bond as surety for the repayment of the amount for which the bond was given with interest thereon. The other two signatories of the bond, who were appellant's brother, Thein Maung and Thein Maung's wife, did not contest the suit and are not parties to this appeal.

Appellant denied that he signed the bond or stood surety for the debt and said that if he did sign the bond he would not be liable on it because his name did not appear in the body of the document. He also filed later a written statement in which he pleaded that the bond was void for material alteration by the addition of his name to it. The lower Court accepted the view that the bond was void as against appellant for material alteration and dismissed the suit as against him. Respondent appealed and a Bench of this Court set aside the dismissal of the suit as against appellant and remanded the case for disposal on the issue whether or not appellant guaranteed the payment of the debt due on the bond.

After the remand and after respondent had examined all his witnesses on the issue which then arose and had closed his case, appellant applied for leave to file still another written statement in which he desired to raise a new defence that the bond was executed under coercion, undue influence, and pressure of criminal prosecution, and that the main consideration of the bond

was the abandonment of the criminal prosecution. That application was made nearly two years after appellant had filed his earlier written statement.

The learned Judge said that he could not allow the new written statement to be filed at a stage when respondent had closed his case, but he went on to say that as the matter was a question of law he must decide it if necessary, and in his judgment he said that the defence which appellant desired to raise was a mere afterthought. On the evidence the Judge found that appellant signed the bond as guarantor, and gave respondent a preliminary mortgage decree for sale in the usual form with a right to a personal decree against appellant as well as against the other defendants for any amount which might remain outstanding after the sale of the mortgaged property. Appellant appeals on grounds that he did not sign the bond, that if he did sign it his signing it would not make him liable on it, that he did not guarantee repayment of the debt, and that the object of the bond was to secure the dropping of a criminal prosecution. On the evidence there is no room for doubt that appellant signed the bond as guarantor, and the only ground of appeal which has been pressed is that the object of the bond was the stifling of a criminal prosecution and that because the bond was void under S. 23, Contract Act, appellant was under no obligation in respect of it as guarantor.

The case seems to me to raise the following questions :

(1) Whether after respondent had called his evidence and closed his case on the issues which arose on the pleadings, those issues being issues of fact, appellant ought to be allowed to amend his written statement so as to raise a new defence involving (a) issues of fact or (b) issues of law.

(2) Whether appellant would be free from liability under his agreement to guarantee payment of the debt for which the bond was given if the bond was in fact void under S. 23, Contract Act.

Appellant clearly could not plead at the same time that he did not guarantee the debt and that he guaranteed it with the object of stifling a criminal prosecution, and as a matter of fact there is no evidence that he had any knowledge of the criminal prosecution at the time when he agreed to guarantee the debt. He said himself that he had no personal knowledge of the criminal prosecution. It must be taken therefore that his agreement to guarantee the debt was not void under S. 23, Contract Act, even if the bond itself was void under that section.

The admitted facts of the case are as follows. Respondent advanced Rs. 6,000 to appellant's elder brother Thein Maung for him to purchase paddy to be supplied to respondent. Thein Maung failed to supply the paddy and respondent prosecuted him. Thein Maung then asked the elders of the village to intercede with respondent on his behalf, and by reason of the intervention of the elders respondent agreed to accept from Thein Maung and his wife a mortgage bond for Rs. 4,000 provided that payment of the money was guaranteed by a surety, and to drop the criminal prosecution. The bond was executed by Thein Maung and his wife, and then appellant was sent for, and agreed to guarantee the payment. Thereafter the prosecution was dropped. The charge brought by respondent against Thein Maung is said to have been one of "criminal breach of trust," but Burmans do not distinguish between "criminal breach of trust" and "criminal misappropriation," the two offences being ordinarily called by the same name in Burmese, so that the fact that that name has been translated in the record as "criminal breach of trust" does not prove that the charge was in fact one under S. 406, I. P. C.. while the fact that the charge was allowed to be withdrawn suggests strongly that it was a charge under S. 403 and not under 406 of the Code. If it was a charge under S. 403 it was compoundable with the permission of the Court and no question of the application of S. 23, Contract Act, would arise. For this reason alone it would appear that appellant failed to establish his defence, and that his appeal must fail. But in the circumstances of the case it may be desirable that we should consider the questions of law which arise in the lower Court's record as it stands.

The first question is as to appellant's claim to be entitled to raise a new defence after the respondent had called his evidence and closed his case. Under O. 6, R. 17, leave to amend pleadings is a

matter in the discretion of the Court and in my opinion the Court would ordinarily be justified in refusing to allow a defendant to amend his written statement so as to raise new issues of fact when nearly two years had elapsed since the filing of his original written statements and when the plaintiff had called all his evidence on the issues of fact raised by those written statements and had closed his case. But if on the facts appearing in the plaintiff's evidence a new defence of law arises, I see no reason why it should not be taken, even after the plaintiff has closed his case on the facts, and therefore, although I would refuse to allow appellant to plead in this case that the bond was executed under coercion or undue influence, or to offer evidence that it was executed under pressure of a criminal prosecution, I would allow him to raise the defence based on the provisions of S. 23, Contract Act, in so far as that defence arose out of the evidence given by respondent or his witnesses.

As far the second question I have already said that I am not satisfied that any question of the application of S. 23. Contract Act, arises because I do not regard it as proved that the prosecution was one for a non-compoundable offence, and I may add that even if the offence was non-compoundable it would appear from the case of *Dwijendra* v. *Gopiram* (1) to say nothing of the cases of *Harjas* v. *Tek Chand*, *A. I. R.* 1927 *Lah.* 465 and *Shanti* v. *Lal Chand*, *A. I. R.* 1927 *Lah.* 530, which seems not to have been officially reported that it does not necessarily follow that because a criminal prosecution for a non-compoundable offence has in fact been withdrawn as a result of an agreement, the object of that agreement was opposed to public policy and the agreement was void under S. 23, Contract Act. If those cases were rightly decided they seem to cast doubt on the correctness of the decision of a learned Judge of the late Chief Court of Lower Burma in the case of *Nagappa Chetti* v. *Ma U* (2).

But even if the bond was void as between respondent and the principal debtors, I do not think that appellant would be relieved of liability under his separate agreement to pay the debt, since that agreement was not void under S. 23, Contract Act. There was certainly a debt due by Thein Maung and his wife to respondent, and I see no reason why appellant should be relieved from the liability, which he undertook, to pay so much of that debt as was covered by the bond. I would therefore hold that the personal decree against appellant was properly given and I would dismiss his appeal with costs.

Chari, J.—I concur.

P.N./R.K. *Appeal dismissed.*

(1) A.I.R. 1926 Cal. 59=53 Cal. 51.
(2) [1905] 3 L.B.R. 42.

A. I. R. 1930 Rangoon 142

DAS, J.

Maung Po Din and *another* — Applicants.

v.

Maung Tha Saing and *another*—Respondents.

Civil Revn. No. 109 of 1929, Decided on 17th December 1929, against decree of Dist. Judge, Minbu, in C. I. No. 56 of 1928.

(a) Registration Act, S. 49 — Suit for money lent on unregistered mortgage bonds is competent—Such documents can be used as evidence of loan.

A person can sue for the money lent on unregistered mortgage bond and use the documents as evidence of the loan. All that the Registration Act says is that the unregistered documents cannot be used for the purpose of proving the mortgages unless they are registered. [P 142 C 2]

(b) Civil P. C., S. 115—Act amounting to denial of justice—Revision lies.

Where the lower Court acts in a way which amounts to a denial of justice, High Court can interfere in revision. [P 143 C 1]

B. K. B. Naidu—for Applicants.

Maung Aye—for Respondents.

Judgment.—There is no doubt in this case that the lower appellate Court apparently misconceived the merits of the case and did not know the law on the subject. The suit in this case was on two mortgage bonds which were unregistered, but the suit was only for the money lent and not a suit on the mortgages. There is no doubt that a person can sue for the money lent and use the documents as evidence of the loan. All that the Registration Act says is that the documents cannot be used for the purpose of proving the mortgages unless they are registered. The plaintiffs in this suit were only suing for the money lent, and the lower appellate Court was absolutely wrong in holding that the

plaintiffs could not sue. It is argued that no revision lies, but where the lower appellate Court acts in a way which amounts to a denial of justice, this Court can always interfere in revision. I would therefore set aside the decision of the lower appellate Court and restore that of the trial Court with costs in all Courts.

P.N./R.K. *Decree set aside.*

A. I. R. 1930 Rangoon 143 (1)

DAS, J.

Daw Pwa Thwe and *another*—Appellants.

v.

Daw The Nu and *others*—Respondents.

Special Second Appeal No. 371 of 1929, Decided on 19th December 1929, from judgment of Dist. Judge, Pyapon, in Civil Appeal No. 57 of 1929.

(a) Landlord and Tenant — Purchase of paddy for consideration from tenant—Landlord alleging it was bought with knowledge of his lien—Onus is on him to prove it.

Where a person buys paddy from a tenant for consideration, a landlord, if he alleges that the person bought it with the knowledge of his lien, has to prove that it was so purchased. [P 143 C 1]

(b) Landlord and Tenant — There is no principle of acquisition of lien by landlord over paddy of his tenant—Mere agreement that tenant should not sell paddy before payment of rent does not give lien to landlord.

There is no principle by which the landlord can get a lien over the paddy of his tenant. Each case must be decided on the evidence in that case. The mere agreement between the landlord and tenant that the latter is not to sell or in any way alienate the paddy before the rent is paid does not give any lien to the landlord. To have it he must have possession of the paddy : *A. I. R.* 1925 *Rang.* 366, *Dist.* [P 143 C 2]

Zeya—for Appellants.

Maung Gyee—for Respondents.

Judgment.—There is no doubt in my mind that the decision of the lower appellate Court is wrong. Both the Courts have held that appellants purchased the paddy for consideration. It is for the plaintiffs to prove that they (appellants) purchased the paddy with the knowledge of the plaintiff's lien, if the plaintiffs have any lien at all. The plaintiffs had produced no evidence to prove that their rent had not been paid, and that the appellants knew that they had a lien over the paddy. Appellants are bona fide purchasers for value and they cannot be held to be bound by any alleged lien of the plaintiffs simply because the plaintiffs entered into an agreement with their tenants that the tenants are not to sell or in any way alienate the paddy before the rent is paid. That does not give any lien over the paddy to the plaintiffs. To have a lien the plaintiffs must have possession of the paddy. It is not alleged by the plaintiffs that they ever obtained possession of the paddy. It is admitted in this case that the tenants had also sold paddy previously to somebody else, and there is nothing in the evidence to show that the appellants knew at the time they purchased the paddy in suit that the landlord's rent had not been paid. The cases quoted by the lower appellate Court have no bearing to the present case as each case must by decided on the evidence of that case. There is no principle by which the landlord gets a lien over the paddy of his tenant. The case of *Maung Han* v. *Ko Oh* (1) was quite different from the present case, and is not an authority in favour of the plaintiffs in this case. I must therefore set side the decree of the lower appellate Court and the plaintiffs' suit against the present appellants must be dismissed with costs in all Courts.

P.N./R.K. *Suit dismissed.*

(1) A. I. R. 1925 Rang. 366.

A. I. R. 1930 Rangoon 143 (2)

MYA BU AND BAGULEY, JJ.

Ma Kin and *others*—Appellants.

v.

U Ba and *others*—Respondents.

First Appeal No. 12 of 1929, Decided on 5th June 1929, against juddment of Dist. Judge, Sagaing, in Civil Suit No. 2 of 1929.

(a) Specific Relief Act, Ss. 10 and 11—Suit for possession of corpse does not lie under Ss. 10 or 11.

Suit for possession of a corpse will not lie under Ss. 10 or 11 as a corpse cannot be regarded as moveable property : 25 *All.* 129, *Appl.* [P 144 C 2]

(b) Civil P. C., S. 9—Suit by relation of deceased for possession of corpse and declaration of right to bury it can be maintained.

The law regards the right to burial as a civil Court right and recognizes the rights of an executor to obtain or retain possession of a corpse. The rights of an executor may reasonably be extended to the nearest relation of the deceased in the absence of an executor. Therefore a suit by a relation for possession

of a corpse and a declaration of a right to bury it will lie. 26 *Bom.* 198 ; 7 *Bom.* 323 and 30 *Mad.* 15, *Rel. on.* [P 145 C 2]

Ko Ko Gyi—for Appellants.

A. C. Mukerjee—for Respondents.

Baguley, J.—This case concerns the body of one Ma Pwa Myit, dead, for the right to bury which two parties are contending.

Ma Pwa Myit was a Burmese woman and was brought up as a Buddhist. As a Buddhist she married a Burmese-Buddhist husband. When that marriage came to an end she became a Mahomedan and married one Po Thet, a Zerbadi. Po Thet died after he had been married to Ma Pwa Myit for a matter of about 30 years, and rather more than a year later Ma Pwa Myit died. Before she died, the three appellants, Burmese-Buddhists, two of whom are related to her, established themselves in her house, and after her death they claimed the right to bury her on the allegation that before her death she had reverted to her original Buddhism and therefore should be buried in the Buddhist manner.

The respondents are a number of Mahomedans of the quarter, two of them related either to Ma Pwa Myit or her deceased husband. They deny that Ma Pwa Myit ever reverted to Buddhism and they claim the body in order that they may give it a Mahomedan burial.

The plaintiffs filed their suit in the District Court within a day or two of Ma Pwa Myit's death, before any funeral had taken place. The case was tried almost on the spot, and an appeal was filed with almost equal rapidity. In the meanwhile the body of the unfortunate lady has been sealed up in a coffin and is still waiting to be taken to its last resting place.

The body was originally in the possession of the Buddhist defendants. The Mahomedans were the plaintiffs and, therefore, the attacking party, and it is argued on behalf of the appellants that the case is one of which no civil Court can take cognizance. When asked to state under what law or section the suit was filed Mr. Mukerjee stated that the suit lay under S. 10 or 11, Specific Relief Act. In argument, however, he appeared to rely more on S. 9, Civil P. C.

In my opinion, no suit will lie under S. 10 or 11, Specific Relief Act. S. 10 refers to "Specific moveable property," and S. 11 refers to "a particular article of moveable property." I am of opinion that a corpse cannot be regarded as moveable property "there is no property in a dead body" vide Wharton's Law Lexicon, p. 229 and if there can be no property in a dead body a dead body cannot be regarded as an article of moveable property. This view is taken by Burkitt, J., in *Emperor* v. *Ramadhin* (1) in which he held that a human body living or dead, cannot be the subject of a theft as defined in S. 378, I. P. C., with the possible exception as a museum specimen or body which was intended to be used for dissection. This is a criminal ruling, but I think it would apply equally to a civil matter and I note that Burkitt, J., assumes that the law on this question would be the same in British India as in England.

The suit therefore will not lie under S. 10 or 11, Specific Relief Act.

The question then remains whether the suit will lie under S. 9, Civil P. C. S. 9 runs :

"The Court shall (Subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred."

The present suit is one for possession of a corpse and a declaration of the right to bury it.

On this point the appellants cite *Vasudev* v. *Vamnaji* (2):

"Suits as to relegious rites or ceremonies, which involve no question of the right to property or to an office, are not suits of a civil nature nor are they intended to be brought within the jurisdiction of the civil Courts."

It is argued that as there is no property in a dead body and the question of burial of the corpse is a religious rite or ceremony, it involves no question of the right of property and, therefore, no suit for either of these matters can be brought before the civil Courts. On the other hand, the plaintiffs can also rely upon reported cases. In *Ramrao Narayan* v. *Rustomkhan* (3) it was held that the right of a party of performing rites at the graves is a matter which can be decided by civil Courts. Again, in *Anandrao Bhikaji* v. *Shan-*

(1) [1902] 25 All. 129=(1902) A. W. N. 191.
(2) [1881] 5 Bom. 80.
(3) [1902] 26 Bom. 198=3 Bom. L. R. 717.

Dakicharya (4) it was held that the right of exclusive worship of an idol at a particular place set up by a caste is a civil right for adjudication by civil Courts, and in *Kooni Meera Sahib* v. *Mahomed Meera Sahib* (5) it was held that the right of burial is a civil right. So it would appear that the weight of opinion is that the right of burial is a civil right.

Again, although there is no property in a corpse the right to its possession will apparently be recognized by law. As I have already mentioned, Burkitt, J., in the Allahabad case cited, mentions that the law on this subject is the same in India as in England. If we turn to Halsbury's Laws of England (Vol. 14, p. 240) we find:

"Where a person appoints executors they are prima facie entitled to the possession and are responsible for the burial, of the dead body;"

this despite the fact (as pointed out in the footnote) that there is no property in a corpse, and in the same way, I find the passage in the same work (Vol. 3, 405):

"The law in general recognizes an incident to the duty to dispose of the body, rights to the possession of the body until it is disposed of."

Authority for the last passage is given as 2 *Bl. Com.* 508, as explained in *Williams* v. *Williams* (6) at 664. Neither of these books are available for reference, but I think the accuracy of the quotation may be taken in view of the authority of this standard work. If therefore, the law recognizes the rights of an executor and presumably any similar representative to obtain or retain possession of a corpse, and also regards the right to burial as a civil right the present suit will lie.

The question of court-fees was not seriously argued before the Bench.

This disposes of the five grounds of the memorandum of appeal. There only remains the question whether Ma Pwa Myit died a Buddhist or a Mahomedan. If she died a Mahomedan the plaintiffs will undoubtedly be entitled to succeed. I guard myself against saying that all the plaintiffs would be entitled individually to succeed on the ground that they are Mahomedans; but among the plaintiffs are relations of the deceased, a stepdaughter of the deceased and a cousin of the husband, and I would hold that a Mahomedan relation of the deceased would be entitled to possession of the body and would be entitled to bury it in preference to a Buddhist relation of approximately equal standing if the deceased died a Mahomedan. In the same way, if the deceased died a Buddhist, I would hold that the Buddhist relation would be entitled to possession of the body and the right to bury it in preference to a Mahomedan relation of equal standing.

With regard to the religion of the deceased at the time of her death, I am of opinion, that the burden of proving that she reverted to Buddhism lies upon the defendants. The deceased was undoubtedly born and brought up a Buddhist, but she embraced the Moslim faith when she married her second husband and she remained a Moslim for many years. In the written statement (para. 8) it is stated that Ma Pwa Myit became a Buddhist again about a year after the death of U Thet. That would only be a few months before her death. When a person is admitted to have been a Mahomedan for a matter of about 30 years, it is incumbent upon the person who asserts that she subsequently changed her faith to prove that she did so. The burden of proof, therefore, lies on the defendant. Mr. Ko Ko Gyi for the appellants, on this point quotes *Mt. Hayatunnissa* v. *Sayyid Muhammad Ali Khan* (7). This case, however, differs from the present one as it did not refer to a change from one religion to another but from one sect to another sect. Further, this ruling is entirely one of evidence. The report begins:

"The question in the appeal was one of evidence and its effect, whether Wazirunnissa died a Sunni or Shia."

A perusal of the evidence shows that the case was settled entirely on the evidence and the question of burden of proof did not come up for decision at all. (After considering the evidence on both the sides, his Lordship clucluded.) I would, therefore, hold that the deceased died a Mahomedan and so her Mahomedan relations are entitled to possession of the body and to perform the funeral ceremonies over it, and I

(6) [1882] 20 Ch. D. 659.

(7) [1890] 12 All. 290=17 I. A. 73=5 Sar. 521 (P.C.).

would, therefore, dismiss the appeal with costs.

I note that the trial Court has given very little in the way of pleader's fees, but I do not think the fee should be calculated ad valorem on the value of Rs. 10,000 which is obviously inflated. I would fix the fee of the appeal in this Court at ten gold mohurs.

Mya Bu, J.—I concur in the judgment of my learned brother.

All that I would like to add is to stress that the success of the plaintiffs' suit depends mainly on the fact that among the plaintiffs there is one (namely, Ma Bi Khin) than whom none of the defendants is nearer related to the deceased; that Ma Bi Khin is a Mahomedan while the defendants are Buddhists, and the deceased was a Mahomedan. If the law recognizes the rights of an executor to obtain or retain possession of a corpse, the same rights may reasonably be extended to the nearest relation of the deceased in the absence of an executor, and where two nearest relations belonging to different religions dispute as to the religious rites or custom according to which the funeral of the deceased should be conducted and the dead body buried, it is only fair and equitable to extend the rights to the one who belongs to the same religion as the deceased.

P.N./R.K. *Appeal dismissed.*

A. I. R. 1930 Rangoon 146

CUNLIFFE AND CARR, JJ.

Ma Ngwe Bwin—Appellant.

v.

Ko Po Win and *others*—Respondents.

First Appeal No. 123 of 1929, Decided on 4th February 1930, against decree of Dist. Judge, Insein, D/- 21st March 1929.

Buddhist Law (Burmese) — Inheritance—Serious quarrel between father and child and use of unfitting abusive language by latter to former—Afterwards total absence of filial relationship between them—Child loses right to inherit father.

Where a serious quarrel takes place between a child and father a few years before latters, death in which the former behaves in such a way as if he was going to use weapons against the father and abuses him in the manner most unbecoming to a child and where afterwards there is a total absence of filial relationship, the child loses the right to inherit to its father. [P 147 C 1]

F. S. Doctor—for Appellant.

Paw Tun & Jagannathan — for Respondents.

Judgment.—The only question that arises in this appeal is whether it has been proved that the appellant Ma Ngwe Bwin has lost her right to inherit her father, U Shwe Yan, by reason of filial misconduct and separation of filial relationship. The respondent called two witnesses who gave evidence of a very serious quarrel between the appellant and her son on the one side and her father on the other at a time a few years before his death when they were all living in the same house. According to these witnesses the appellant seized a dah and her son was armed with a stick, and they behaved as if they were going to use these weapons against the old man. They swear also that both the appellant and her son abused the old man in most opprobrious terms which were totally unfitting for use by a child or grandchild to his father or grand father. This caused the plaintiff, a brother of the appellant to take his father away to his own house where the old man lived until the time of his death.

It is admitted by the appellant that during that time she never visited her father. Admittedly also, she did not visit him during his illness and was not present at the funeral. She says that she was never informed either of his illness or of his death. But one witness has been called who swears that he was sent to inform her of the old man's illness and that she refused to come to see him, using a most disrespectful language about her father. All this evidence for the plaintiff has been believed by the trying Judge and against it there is nothing to set but appellant's own evidence and that of the headman of the village, who says that no report of such a serious quarrel as is alleged was made to him, and that he never heard of such a quarrel. He admits, however, that the plaintiff did make a report to him about the behaviour of appellant and her son.

We can therefore see no sufficient reason for differing from the opinion of the trying Judge. The learned advocate for the appellant has objected that he asked for further particulars of the misconduct alleged than were given in para. 10 of the plaint, and that no further particulars were given. We are of opinion that the particulars given in the

plaint were quite sufficient. The quarrel about two years before his death was alleged, and there was no need in the plaint to go into greater details as to what happened during that quarrel. It was also allsged that there had been a total absence of filial relationship since the time of the separation. That also was sufficient allegation to put the appellant on her defence. We can therefore see no reason for interference with the findings of fact, and we agree with the Additional District Judge that the facts established are sufficient to cause the appellant to lose her right to inherit. This appeal is therefore dismissed with costs.

P.N./R.K. *Appeal dismissed.*

A. I. R. 1930 Rangoon 147 (1)

CUNLIFFE AND CARR, JJ.

Ma Kyin Myaing—Appellant.

v.

M. L. R. M. Muthaya Chettyar—Respondent.

Misc. Appeal No. 210 of 1929, Decided on 4th March 1930, from an order of Dist. Judge, Tharrawaddy, in Misc. Case No. 93 of 1929.

Provincial Insolvency Act, S. 6 —Assets less than liabilities is not sufficient ground.

A person cannot be adjudicated an insolvent on the mere ground that his assets are less than his liabilities. [P 147 C 2]

E. Maung—for Appellant.

Judgment.—The appellant has been adjudicated insolvent on the petition of the respondent, a creditor. The respondent in his petition alleged thet the appellant had committed two acts of insolvency, firstly, that she had made a fraudulent conveyance of her property and secondly that she had suspended payment of her debts and had given notice of such suspension to the respondent himself. These allegations were denied by the appellant and when the case came to hearing,the respondent made no attempt to prove either of these allegations. In fact his own evidence in cross-examination shows that the second allegation was untrue. The respondent having failed to produce any proof of his allegations the case should have come to an end there and then and the petition should have been dismissed. Instead of that, however, the learned Judge of the District Court has adjudicated the appellant an insolvent on the ground that her property is not sufficient to cover the amount of her debts. It would seem that he has not taken the trouble to read S. 6, Provl. Ins. Act, which sets out the various acts which amount to acts of insolvency. That section does not provide that the mere fact that a person's assets are less than his debts is an act of insolvency. The respondent petitioner failed entirely to establish any grounds on which the appellant could be adjudicated insolvent. We, therefore, allow this appeal, set aside the order of the District Court and dismiss the respondent's petition with costs in both Courts. Advocate's fee in the District Court 2 gold mohurs and in this Court 3 gold mohurs.

P.N./R.K. *Appeal allowed.*

A. I. R. 1930 Rangoon 147 (2)

DAS, J.

Maung Kun—Applicant.

v.

Ma Kyaw Shin—Respondent.

Civil Revn. No. 249 of 1929, Decided on 14th January 1930, against order of Dist. Judge, Bassein, D/- 11th May 1929.

Buddhist Law (Burmese)—Husband and wife—Though salary of husband may be joint property of husband and wife, wife cannot claim any definite share in the same.

Though the salary of the husband may be the joint property of himself and wife, still wife is not entitled to any definite share of the salary. All that she is entitled to is to be maintained out of his salary. [P 148 C 1]

Tun Aung—for Applicant.

Judgment.—The facts of the case are as follows :

The respondent Ma Kyaw Shin, obtained a decree against her two daughters, one of whom was Ma Mya Tin, the wife of the petitioner. In execution of that decree she applied for attachment of 1/3 share of the salary of the petitioner and the District Court passed the order. It is clear that, in this case, the decree was obtained against Ma Mya Tin in her personal capacity, and not as representing the partnership of the said Ma Mya Tin and her husband Maung Kun. It appears to me clear that though the salary of the petitioner may be the joint property of himself and Ma Mya Tin still Ma Mya Tin cannot claim any definite share in the same and it cannot be said that any definite share of the salary of the husband belongs to the wife, and as such attachable in execution of a decree obtained against the wife personally.

The District Judge held that because Ma Mya Tin was a dependent spouse of the respondent there, she was as such entitled to 1/3rd of his salary, and that consequently the decree-holder was entitled to execute the decree by attaching 1/3rd of the hnsband's salary. I do not know of any law by which it can be stated that a Burmese Buddhist wife is entitled to 1/3rd of the salary of the husband, and I do not agree with this proposition. The salary may be the joint property of the husband and wife and still it cannot be said that the wife is entitled to any definite share of the salary. All that she is entitled to is to be maintained out of his salary. I would therefore set aside the order of the District Judge and dismiss the respondent's application to attach the husband's salary.

P.N./R.K. *Order set aside.*

A. I. R. 1930 Rangoon 148

MAUNG BA AND BROWN, JJ.

Ma Khin Oh—Appellants.

v.

Ma Kin Gale—Respondents.

First Appeal No. 17 of 1929, Decided on 12th November 1929, from decree of Dist. Judge, Magwe, in Civil Regular No. 24 of 1926.

(a) Buddhist Law (Burmese) — Applicability — Succession to an Ayo — Burmese Buddhist Law applies.

The principles of Burmese Buddhist Law are to be applied in determining who is the nearest rightful female heir to succeed to an "Ayo" in the absence of an undisputed and ancient custom to the contrary. [P 149 C 2]

(b) Buddhist Law (Burmese) — Succession—Female holder of Ayo dying leaving full brother's daughter and half sister—Former is entitled to succeed in preference to latter.

When a person dies leaving a full brother or sister, and a half brother or sister, the former is entitled to preference in matter of succession in view of the fact that former relationship is closer at least when the half blood have divided. Where the last female holder of an Ayo dies leaving a half sister and a daughter of a full brother, the latter is entitled to succeed to the Ayo in preference to the former. *Taung Mro* v. *Aung Nyun Second Appeal No.* 123 *of* 1916 *Held too wide*: 10 *B. L. R.* 107, *Rel. on.* [P 150 C 1]

Thein Maung—for Appellant.

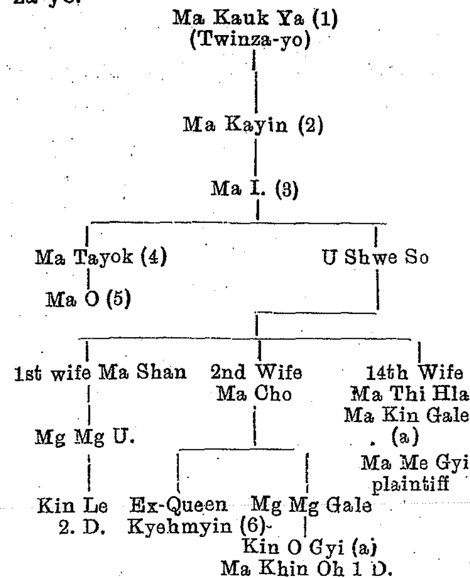
Kyaw Din—for Respondent.

Judgment.—This appeal arises out of a dispute as to who should succeed the late Ex-Queen Kyehmyin as "Twinza-yo." The following extract quoted in the Upper Burma case of *Mg Tha Zin* v. *Ma In* (1) will explain what "Twinza-yo" means. Dr. Noetling in his report on the Petroleum Industry in Upper Burma observes :

"It is one of the peculiar features of the Yenangyaung Oil Field that its exploitation has been in the hands of a corporation since the earliest times. There are 24 families which enjoy the right to dig for oil in a certain not well-defined area close to the villages of Beme and Twingon. These families are called "Yoya" families, and every member of them was entitled to dig for oil. The head of one of these families is called the "Twinza-yo" who enjoyed certain privileges. The "yoyas" are divided into male and female yoyas there being 18 of the former and six of the latter. The title and rights of the "yoya" descend strictly in primogeniture, the male "yoya" being solely in the male, and the female "yoya" in the female line. . . . ."

It seems that when King Mindon introduced the monopoly system, he confirmed the customary rights of the "yoya" families. The "Twinza-yo" under consideration is a female one, and the last owner was Ex-Queen Kyehmyin who died in January 1924, leaving a son and a grandson. There being thus no female descendants in the direct line, three collaterals have come forward with rival claims.

The following genealogical tree shows their relationship to the last "Twinza-yo."



From the above tree it will be noticed that the "yoya" descended from female to female in the direct line up to Ma O (No. 5). When Ma O died she left no descendants. So the "yoya" went to

(1) [1892-96] 2 U. B. R. 327.

Ex-Queen Kyehmin (No. 6). The succession through the elder sister Ma Tayok having become extinct it went to the senior female descendant of her brother U Shwe So who himself could not succeed. U Shwe So was a Minister during the reign of King Mindon and his official designation was 'Yenangyaung Ming Yi. He was dismissed when King Thibaw became King. But he lived up to a ripe age of 92. He married 14 wives: see Exs. C and D at pp. 119 & 120; among whom we are only concerned with three Ma Shan, Ma Cho, and Ma Thi Hla. There is clear proof that Ma Cho was his pwedat (official) wife i. e., a wife who was recognized by the King and who alone could attend Court functions. There is also reliable proof that Ma Thi Hla was the wife of the Mingyi and that Ma Kin Gale (respondent) is his legitimate daughter by that wife.

The lower Court has held :

"that the Ex-Queen's half-sister Ma Kin Gale (respondent) has a better claim to the "Yoya" than either the Ex-Queen's own brother's daughter Kin O Gyi (appellant) or her half-brother's daughter Kin Le, by applying the principle that the nearer excludes the more remote."

Kin Le has not appealed and so we need only consider the claims of the Ex-Queen's half-sister as against her full brother's daughter. For the appellant it is contended that the principles of Burmese Buddhist Law is not applicable to a case of succession to an Ayo, which is more of a claim to status than to property and which should be determined according to the custom to keep the office in the same family, i. e., a family of the same couple and their descendants.

The above contention is not strictly correct. It seems to us that in the first place we are following custom when we hold, as we must, that the "Ayo" should be succeeded only by a female, and that in the second place we have no alternative but to be guided by the principles of Burmese Buddhist Law in determining who is the nearest female heir. We agree that an "Ayo" (which gives the owner the right to apply for and get well-sites within the Burmese oil reserves) is in the nature of a hereditary office or estate. In S. 7, Vol. 1 of the Kinwun Mingyi's Digest, Manugye says :

"Two brothers and their families live together. If the hereditary office held by the elder was obtained by him through the exertions of his younger brother the latter shall succeed to it on his death. On the death of the younger brother, or on his inability to hold the office his nephew (son of his elder brother) shall succeed to it. If, however, he (younger brother) did nothing towards the acquirement of the office which was obtained by his elder brother's own endeavours, then the latter's son shall inherit it."

The above affords a principle for guidance. A hereditary office goes to a son ordinarily but a brother can oust that son if the office has been acquired through his exertions. From this it may be inferred that in the absence of a son the office would go to the younger brother. Applying this principle to the present hereditary right known as "Ayo" in the absence of a direct descendant it would devolve upon a collateral. Generally the "Ayo" is held by one person only and so in determining who is the best entitled among the collaterals we have no alternative but to be guided by the Dhammathats, unless there is an undisputed and ancient established custom to the contrary. Such a custom has not been established. Though the "Ayo" is female it is not disputed that when circumstances arise it may descend through a male, as it has already done in the case of the late holder Ex-Queen Kyehmyin. It only remains to consider the rival claims of the parties and to decide which is superior.

We have been referred to a decision of the late Maung Kin, J., in the case of *Taung Mro* v. *Aung Nyun* (2) where he held that "full-blood relations exclude half-blood relations." That was the personal view of the learned Judge. He observed:

"I can find no text which says that a person may share in the estate of his deceased half-brother along with the deceased's own or full brother."

That view appears to be too wide and has been doubted by Heald and Chari, JJ., in the case of *Maung Kyaw* v. *Maung Po Myit* (3). In both the cases the contest was not between full-blood brothers (or sisters) and half-blood brothers (or sisters) but was between more distant relations. In *Taung Mro's* case (2) the contest was between the deceased's elder half-sister's child and her younger full brother's grandchildren. In *Maung Kyaw's* case (3) the contest was between deceased's mother's half-

(2) Second Appeal No. 123 of 1926.
(3) A. I. R. 1925 Rang. 231=3 Rang. 86.

brother and half-sister on the one side and the deceased's father's full cousin on the other.

In the latter case the learned Judges decided the dispute by applying the principle that inheritance shall not ascend if it can possibly descend and that it must not ascend more than is necessary. The late May Oung, J., in his treatise on Buddhist Law observes:

"The Dhammathats are silent as to the respective claims of brothers and sisters of the whole blood and those of the half-blood and there does not seem to have been any decision of the superior Courts on the question whether when a person dies leaving a full-brother or sister and a half-brother or sister, the former excludes the latter, as in Hindu Law."

He further observes:

"But considering that the former relationship is closer it would perhaps be right to give it preference at least where the half-blood have divided."

In our opinion this view appears to be just and equitable and also appears to have been adopted. In the case of *Le Maung* v. *Ma Kwe*(4) decided by Twomey, C. J. and Robinson, J., the former in the course of his judgment observed:

"The learned District Judge is probably right in holding that the ruling in *Ma Hmin Bwin's* case may properly be applied in favour of brothers and sisters of the half-blood when there are no full-brothers or sisters."

This passage has been quoted with approval in the latter case of *Ma Gyi* v. *Ma Khin Saw* (5).

It has not been seriously disputed that if the Ex-Queen had left a full-sister that sister would have been her rightful successor. Instead of a full-sister she has left a daughter of a full-brother. It has been pointed out that succession can descend through a male as it has done in the case of the Ex-Queen. Ordinarily as the Ex-Queen left no direct descendants the "Ayo" would go to her full niece. The question is whether her half-sister's claim is superior in any sense. The lower Court has held that half-sister is nearer in degree of relationship than full-niece. This is doubtful. She can claim through U Shwe So only, whereas the full niece claims through both her grandfather U Shwe So and her grandmother Ma Cho who was admittedly the pwedat (official) wife among all his wives.

In relationship the parties seem to be equidistant but in other respects the appellant's claim appears to be superior, she being a descendant from a pwedet wife of U Shwe So through whom the "Ayo" descended and also being related to the last holder through that wife. We allow the appeal, set aside the decree of the District Court and pass a decree declaring that the appellant is the rightful successor to the "Ayo" with costs in both Courts (advocate's fee 10 gold mohurs.)

P.N./R.K. *Decree set aside.*

(4) [1920] 10 L. B. R. 107=56 I. C. 681=13 Bur. L. T. 3.

(5) A. I. R 1923 Rang. 124=11 L. B. R. 460.

A. I. R. 1930 Rangoon 150

HEALD, OFFG. C. J. AND OTTER, J.

U Ba Thein—In the matter of.

Civil Misc. Appln. No. 111 of 1929, Decided on 27th November 1929, from judgment of Heald, Offg. C. J. and Maung B and Mya Bu, JJ., D/- 6th September 1929, in Misc. Civil Case No. 181 of 1928.

Letters Patent (Rangoon), Cl. 8—Provisions of Civil P. C. not applicable.

The provisions of the Civil Procedure Code have no application whatever to orders made by virtue of Cl. 8 of Letters Patent and so where a High Court removes or suspends for reasonable cause advocates, pleaders or attorneys of the Court, the High Court has no power to grant a certificate that the case is a fit one for appeal to His Majesty in Council. [P 150 C 2; P 151 C 2]

Govt. Advocate—for the Crown.

Otter, J.—On the 6th September 1929, an order was made by a Full Bench of this Court directing that Maung Ba Thein, the applicant in this case, be struck off the roll of advocates of the Court. The applicant who appeared in person asks for a certificate that the case is a fit one for appeal to His Majesty in Council. It is unnecessary to recapitulate the facts of the case which appear fully in the judgment. It is said that this Court has power to grant such a certificate by virtue of O. 45, R. 3 read with Ss. 109 and 110, Civil P. C., read also with the Letters Patent constituting this Court. So far as the provisions of the Civil Procedure Code is concerned, we are of opinion that they have no application whatever to this proceeding. The order sought to be appealed against was made solely by virtue of Cl. 8, Letters Patent. This clause empowers the High Court to remove or suspend on reasonable cause advocates, pleaders or attorneys of the Court.

On 20th December 1928, notice was issued to the applicant to show cause why he should not be struck off the roll of advocates in consequence of certain charges. framed against him by the Chief Justice and then communicated to him. The applicant was further directed to file a written defence. That notice was complied with and a written defence was filed on 4th February 1929. The matter then came before a Bench of two Judges of the Court and on behalf of the applicant it was said that the matter should be referred to a tribunal of the Bar Council under the Bar Council's Act 1926. That Act came into force in Burma on 1st January 1929. The matter was so referred and the tribunal.made a written report on 29th. July 1929. On 22nd August 1929 an amended written defence was delivered and on 26th August the .applicant asked that the matter should go before a Full Bench. The application was granted and at the hearing the documents to which we have referred, together with the files of certain legal proceedings relevant to the charges against the applicant were before the Court. Both the applicant in person and also the Assistant Government Advocate appeared at the hearing and were heard.

The provisions of the Civil Procedure Code which are relied on by the applicant refer only, of course, to proceedings instituted or prosecuted under that Code and the applicant was not able to argue seriously that the proceedings under review fulfilled this requirement. No case upon the point was cited by the applicant, and it is clear in our view that the provisions of the Civil Procedure Code have no application at all to these proceedings. The matter was not a suit, there were no parties and there was no lis.

The proceedings were in the nature of a purely disciplinary enquiry with a view to the making of an order under clause 8 of the Letters Patent. If authority for this proposition is required it is to be found in Civil Miscellaneous Application No. 21 of 1906 of this Court where a similar application was refused by the Court, the Officiating Chief Justice describing:

"the procedure contemplated as being more like that of a criminal trial than the procedure in suits."

So far as the proceedings under review are concerned, we have no doubt therefore that the provisions of the Civil Procedure Code do not apply.

The applicant also contended that by virtue of the Letters Patent themselves we have the power suggested and he referred us in particular to Cl. 37. That clause provides for appeals to the Privy Council (1) in civil matters both from final judgments, decrees or order made on appeal and also (2) from certain final judgments etc., made in the exercise of original jurisdiction. Now it is plain that the order under review cannot be said to have been made "on appeal" Appellate jurisdiction is given to this Court in three main categories of cases: (i) appeals from single Judges exercising original jurisdiction, (ii) appeals from single Judges exercising appellate jurisdiction upon certificate and (iii) appeals from the inferior civil Courts of the province. The applicant's case cannot be said to fall within any of these categories. Nor can the order by any possibility be said to have been made in the exercise of original civil jurisdiction, either ordinary or extraordinary as provided for by Cls. 9, 10 and 11.

It is equally plain that the clause relating to appeals to the Privy Council in criminal cases cannot apply to this case. This is Cl. 39 and provides for appeals from judgments etc., of this Court in the exercise of its ordinary original criminal jurisdiction. That jurisdiction is local and is conferred by Cls. 21 and 22, Letters Patent and empowers the Court to try all persons before it in due course of law.

For these reasons we must come to the conclusion that we have no power to grant the certificate asked for either under the provisions of the Civil Procedure Code or the Letters Patent and the application must therefore be refused.

Heald Offg., C. J.—I concur.

V.B./R.K. *Application dismissed.*

A. I. R. 1930 Rangoon 152 (1)

HEALD, J.

Maung Mya—Appellant.

v.

Maung Kya Thi and *others*—Respondents.

Second Appeal No. 188 of 1929, Decided on 12th February 1930, against judgment of District Court, Minbu, in Civil Appeal No. 50-A of 1928.

Civil P. C., S. 2 (12)—Mesne profits cannot be ordered against possessory mortgagee till mortgage subsists—Civil P.C., O.20, R 12.

As long as mortgage subsists possession of a mortgagee who is in possession under a possessory mortgage is not wrongful and therefore mesne profits cannot be ordered against him : 3 *U. B. R.* 141, *Rel. on.* [P 152 C 2]

S. Ganguli—for Appellant.

Maung Ni—for Respondent.

Judgment.—On 27th May 1927 respondents instituted suit No. 5 of 1927 in the Sub-Divisional Court of Salin to redeem certain lands from appellant and on 26th July 1927 they obtained a preliminary decree for redemption. On 25th April 1928, they instituted the present suit to recover 400 as being the value of 200 baskets of paddy which as they allege represents the crops of the lands for the season, 1927-28. From their plaint in this suit, it appears that they obtained possession of the lands at some time in December 1927, but did not receive the crops, and that they claim that they were entitled to the crops or their value. Appellant said that the crops amounted to only 90 and not 200 baskets of paddy and that respondents had no right to recover them.

The trial Court in effect framed only one issue namely : "What was the amount of crops on the land" and finding that the crops amounted to only 90 baskets of paddy, as alleged by appellant gave respondents a decree for Rs. 60 as being the value of 30 baskets of paddy which the Judge regarded as representing the profits of the lands. Respondents appealed and the lower appellate Court held that they were entitled to recover Rs. 180 as representing the value of 90 baskets of paddy. Appellant comes to this Court in second appeal mainly on the ground that in law mesne profits cannot be recovered from a mortgagee who is in possession under a possessory mortgage.

It is clear that the suit as a suit for mesne profits was misconceived, since an essential element in the definition of mesne profits is "wrongful possession" and so long as the mortgage subsists, possession of a mortgagee who is in possession under a possessory mortgage is not "wrongful possession." I know of no authority for holding that in the circumstances such as those of this case respondents would be entitled to the crops. On the contrary it would appear from the case of *Gaw Ya* v. *Maung Talok* (1) that they had no such right. I therefore set aside the judgments and decrees of the lower Courts and dismiss the respondents' suit with costs for appellant throughout.

P.N./R.K. *Decree set aside.*

(1) [1919] 3 U. B, R. 141=53 I. C. 444.

A. I. R. 1930 Rangoon 152 (2)

DAS, J.

Kader Bi Bi—Applicant.

v

Mahomed Gani (*a*) *Ko Me*—Respondent.

Civil Revn. No. 209 of 1929, Decided on 14th January 1930, against order of Sub-Divisional Judge, Henzada, in Civil Regular Suit No. 11 of 1929.

Civil P. C., O. 9, R. 13—Scope.

Where no grounds are made out to set aside the ex parte decree, the Court has no jurisdiction to set it aside simply for the reason that the defendant engages a leading lawyer to contest the suit. [P 152 C 2]

P. K. Basu—for Applicant.

Tun Aung—for Respondent.

Judgment.—The petitioner obtained an ex parte decree against the respondent and he applied to the trial Court for setting it aside. The trial Court held that no grounds have been made out by the respondent, and that he was guilty of negligence, but set aside the ex parte decree because the respondent had engaged one of the leading lawyers of the local Bar, and, therefore, he ought to get a fair hearing. It is quite clear to me that, as the lower Court had held that no grounds had been made out to set aside the ex parte decree, it had no jurisdiction to set it aside, simply because the respondent had engaged a leading lawyer to contest the suit. I would, therefore, set aside the order of the trial Court, setting aside the ex parte decree, and ordering the case to be re-opened.

P.N./R.K. *Order set aside.*

A. I. R. 1930 Rangoon 153

MYA BU, J.

T. Sathi Reddy—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 1304 of 1929, Decided on 17th December 1929, against order of Dist. Magistrate, Rangoon, D/- 7th October 1929.

(a) Criminal P. C., Ss. 476 and 195—Complaint merely quoting S. 193, Penal Code but alleging fabrication of false evidence without any allegations of having given false evidence is no complaint for offence of intentionally giving false evidence.

It is absolutely necessary to give the particular false statements in a complaint for the offence of giving false evidence and therefore a complaint merely quoting S. 193, Penal Code, alleging fabrication of false evidence without any allegations of having given false evidence can in no sense be deemed to be a complaint for an offence of intentionally giving false evidence: *A. I. R.* 1925 *Rang.* 195; 32 *Mad.* 35; 26 *All.* 514; 35 *All.* 8, *Disting*; *A.I.R.* 1925 *Mad.* 609, *A.I.R.* 1925 *Cal.* 721 *Rel. on*: [P 155 C 1 2]

(b) Criminal P. C. S. 537—Want of complaint affects jurisdiction of Court and legality of trial and is not covered by S. 537.

The want of a complaint for a particular offence is quite a different thing from an error, omission or irregularity in the complaint. It affects the jurisdiction of the Court and the legality of the trial and the case does not fall within the provisions of S. 537. [P 155 C 2]

Bose, Venkatram De, Darwood and *Naidu*—for Appellant.

The Government Advocate—for the Crown.

Judgment.—The appellant T. Sathi Reddy one of the partners of the firm of K. C. V. Reddy & Co., labour contractors who have for some years procured labour on contract for the Port Commissioners and the B. I. S. N. Co., at Rangoon stands convicted and sentenced by the District Magistrate of Rangoon in Criminal Regular Trial No. 84 of 1929 under S. 193, I. P. C. The charge framed against the appellant was that he on or about 31st January 1929 when examined by Mr. Fischer, Income-tax Officer, intentionally gave false evidence with reference to the accounts of K. C. V. Reddy & Co. by stating:

> " All the thumb impressions in the two registers are those of maistries. None of the thumb impressions are those of coolies. "

The facts which led to the trial are as follows:

The Income-tax Officer commenced proceedings for the assessment of the firm by issuing a notice under S. 28 (2), Income-tax Act on 13th July 1928, calling on the firm to submit a return of income for the year 1927-1928. The return was furnished in two portions signed by K. C. V. Reddy, the senior partner which together showed a loss. The Income-tax Officer was not satisfied with the return and called for production of books of accounts. Certain books of accounts were produced among which there were the labour payment registers referred to in the charge. Certain other books' were obtained by the Income-tax department at the instance of the appellant.

It is the case for the prosecution that the labour payment registers contained not only the thumb impressions of the cooly maistries, but also a large number of thumb impressions of coolies purporting to be acknowledgements of receipt of payments which were never in fact made for labour. In compliance with the summons calling on the firm to appear to answer questions before the Income-tax Officer in regard to the firm's accounts the appellant appeared before Mr. Fischer and made certain statements in the course of which the appellant on 31st January 1929 stated to Mr. Fischer inter alia:

> " All the thumb impressions in the two registers are those of maistries. None of the thumb impressions are those of coolies. "

Subsequently Mr. Nicholas, Assistant Commissioner of Income-tax, Rangoon, on the report of Mr. Fischer directed the prosecution of the four partners of the firm of K. C. V. Reddy & Co., with the result that on 6th June 1929 a complaint was filed by Mr. Fischer in the Court of the District Magistrate. The complaint mentioned the names of the four partners as accused persons, the name of the present appellant being the third in the list.

The complaint stated inter alia that on 17th August 1928 and 17th November 1918, accused 3 together with an assistant in the firm produced certain books purporting to be correct books of the firm's accounts, that on 27th November 1928 other account books purporting to be a correct statement of the firm's account were obtained by the complainant at the instance of accused 3 from the Criminal Investigation Department; and that all the said account books were false to the knowledge of the accused and had been fabricated for the

purpose of income-tax and to support the false return. The complaint charged the accused:

(a) that between the dates 1st April 1927 and 27th August 1928, they fabricated accounts for income-tax purposes and thereby committed an offence under S. 193, I. P. C.

(b) that on 20th and 21st August 1928 they filed a false return of income and thereby committed an offence under S. 177, I. P. C. and

(c) that they having produced books of accounts which are false to their knowledge thereby committed an offence under S. 196, I. P. C.

By the complaint, Criminal Regular Trial No.59 of 1929 was instituted in the District Magistrate's Court. After recording evidence for the prosecution and examination of accused 4 the then District Magistrate on 19th August 1929 framed charges against accused 1 K.C.V. Reddy under Ss.193, 196 and 177, I. P. C. and discharged accused 2 and 4, V. D. Reddy and T. N. Reddy and recorded the following order in regard to accused 3, the present appellant:

"Against accused 3 Sathi Reddy I direct that a new proceeding be opened under the original complaint to enquire into an offence or offences under S. 193, I. P. C. in respect of the statements which he made to the Income-tax Officer pursuant to the return of income made by K. C. V. Reddy & Co., in August 1928 for the income-tax year 1927-28."

In consequence of this order, the Criminal Regular No. 84 of 1929 was opened against the appellant on the same day. Thereafter the District Magistrate who made the order was transferred and was succeeded by the District Magistrate before whom the case against the appellant was tried up to the very end. In the judgment the District Magistrate remarked that his predecessor had discharged the appellant in Criminal Regular No. 59 of 1929 and opened new proceedings against him. In view of this remark it is contended that the discharge of the appellant in Criminal Regular No. 59 of 1929 initiated on the complaint of 6th June 1929, necessitated a new complaint for the valid initiation of the new proceedings in Criminal Regular No. 84 of 1929. I do not think that the remark of the learned District Magistrate referred to above should be so literally construed for, it is clear from the wording of the order of 19th August 1929 expressly discharging accused 2 and 4 and ordering a new or separate proceeding against accused 3 that the order was never meant to operate as an order of discharge of accused 3 the present appellant. I therefore fail to see that there was any legal necessity for the filing of a new or a fresh complaint to initiate the proceeding in Criminal Regular No. 84 of 1929.

The further ground which has been taken up on behalf of the appellant is that as there was no complaint under S. 476, Criminal P. C. against the appellant for the offence of intentionally giving false evidence, the District Magistrate was incompetent to take cognizance of the offence in view of S. 195 (1), (b), Criminal P. C. The complaint filed by the Income-tax Officer on 6th June 1929 made no allegation regarding statements made by the appellant before the Income-tax Officer. With reference to S. 193, I. P. C. the complaint charged accused 4 that between dates 1st April 1927 and 27th August 1928 they fabricated account for income-tax purposes and thereby committed an offence under the section. It is urged on behalf of the Crown that this is sufficient to give the District Magistrate power to take cognizance of the offence for which the appellant was prosecuted in Criminal Regular No.84 of 1929. S.193, I. P. C. prescribes the punishment for the offence of intentionally giving false evidence which is defined by S. 191 and for the offence of fabricating false evidence which is defined by S. 192. The question for determination is whether a complaint charging an accused under S. 193, I. P. C. specifically for the offence of fabricating false evidence before the fabricated evidence was used in a judicial proceeding can be regarded as a complaint for the offence of giving false evidence in the judicial proceeding by reason of the fact that the section under which both offences are punishable is mentioned in the complaint. I have referred to two cases decided by single Judges of the Allahabad High Court. *Emperor* v. *Sundar Sarup* (1) and *Emperor* v. *Debi Prasad* (2). In the former where an Assistant Collector trying a rent suit came to the

(1) [1904] 26 All. 514=(1904) A. W. N. 90.
(2) [1913] 35 All. 8=17 I. C. 573=10 A. L. J. 361.

conclusion that the plaintiff has committed perjury and sent the record to the Collector of the district (who was also District Magistrate) for "starting a case under S. 193, I. P. C.," the Collector ordered:

"that a case under S. 193, I. P. C. be initiated against Sundar Sarup and made over for decision to a Magistrate, Ist Class,"

it was held that although the order of the Assistant Collector could not be regarded as an order under S. 476, Criminal P. C. it fell within the definition of a complaint. In the latter, a Munsiff being of opinion that a document filed in a case before him had been tampered with, communicated his suspicions to the District Judge, who thereupon wrote to the District Magistrate requesting him to take action in the matter. It was held that the letter of the District Judge to the District Magistrate amounted to a complaint within the meaning of S. 195 (1) (c), Criminal P. C.

It appears to me that in these cases, the basis on which the prosecution was respectively sought were manifest and there could have been no doubt as to whether the prosecution was to be for the offence of giving intentionally false evidence or for the offence of fabricating false evidence. These cases are therefore distinguishable from the present one in which the complaint specifically alleged the offence of fabrication of false evidence prior to the judicial proceeding in question. In *Kalyanji* v. *Ram Deen Lala* (3) where a complaint was made under S. 476, Criminal P. C. for offences under S. 193 and 196 I. P. C. and the complaint did not state what was the false evidence given by one of the persons accused, Wallace, J. pointed out that it was not for the Magistrate to fish about in order to find out what statements the complaining Court might have considered to be false and held that the complaint under S. 193, I. P. C. could not therefore stand.

A Bench of the Calcutta High Court has also ruled in *Kalisadhan Addya* v. *Nani Lall Hazra* (4) that it is absolutely necessary to assign a complaint made under S. 476 and 476 (b), the particular false statements alleged to constitute the offence under S. 193, I. P. C. I agree with this ruling. It is, however, not necessary for the purpose of the present case to go to the full extent of this ruling or that in *Kalyanji's* case. (3). But I have cited them to show that if it is necessary to give the particular false statements in a complaint for an offence of giving false evidence, a complaint merely quoting S. 193 but alleging fabrication of false evidence without any allegations of having given false evidence, can in no sense be deemed to be a complaint for an offence of intentionally giving false evidence.

The case is therefore one in which there was no complaint against the appellant for the offence of intentionally giving false evidence which the learned District Magistrate took cognizance of, and therefore the proceeding taken against the appellant in Criminal Regular No. 84 of 1929 was ultra vires and illegal. I have referred to the case of *Maung Shwe Phe* v. *Ma Me Hmoke* (5) in which it was held that where instead of making a formal complaint the Court ordered the prosecution of a party to the suit under the provisions of S. 476, Criminal P. C. and forwarded a copy of the order to the District Magistrate for necessary action, that the want of strict compliance with the provisions of the section by making a formal complaint was only a formal defect which did not vitiate the order. The ruling does not assist in establishing the legality of the proceeding now under consideration in which there is no order under S. 476, Criminal P. C., stating that the appellant had committed the offence of giving false evidence, to make up for the absence of a formal complaint for that offence.

Lastly, the counsel for the Crown invokes the aid of the provisions of S. 537, Criminal P. C. and urges that error, omission or irregularity in the complaint does not vitiate the proceeding unless such error, omission or irregularity has in fact occasioned a failure of justice. But, in my judgment, the want of a complaint for a particular offence is quite a different thing from an error, omission or irregularity in the complaint. There is no complaint in this case charging the appellant with the offence of intentionally giving false evidence and it affects the jurisdiction of the Court and the legality of the trial.

(3) A. I. R. 1925 Mad. 609=48 Mad. 395.

(4) A. I. R. 1925 Cal. 721=52 Cal. 478.

(5) A. I. R. 1925 Rang. 195=3 Rang. 48.

The case does not fall within the provisions of S. 537.

I have read the case of *V. C. Chidambaram Pillai* v. *Emperor* (6) laid before me by the learned counsel for the Crown but for reasons already stated I consider that it is inapplicable to the present case. The proceeding in Criminal Regular No. 84 of 1929 from which this appeal has arisen must be and it is hereby set aside as being ultra vires and illegal. From this it follows that the conviction and sentence passed on the appellant in that trial are set aside. I do not enter an order of acquittal but leave it open to the authorities concerned to lay a complaint as required by law for the prosecution of the appellant if they deem fit to do so.

P.N./R.K. *Proceeding set aside.*

(6) [1909] 32 Mad. 35=1 I. C. 36=9 Cr. L. J. 130.

A. I. R. 1930 Rangoon 156

BROWN, J.

Dhana Reddy—Accused—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 414-B of 1929, Decided on 25th October 1929.

(a) Criminal P. C., S. 403—Order discharging accused though not set aside by competent authority does not bar taking cognizance of same offence on fresh complaint.

An order dismissing a complaint or discharging an accused person does not operate as an acquittal under S. 403 and does not bar the taking cognizance of a fresh complaint of the same offence even though the order of dismissal or discharge has not been set aside by a competent authority: 28 *Cal.* 652; 29 *Cal.* 726 and 29 *Mad.* 126 (*F. B.*), *Rel. on.* [P 157 C 1]

(b) Criminal P. C., S. 202—Accused discharged—Fresh complaint of same offence —Magistrate in dealing with such complaint should proceed in manner laid down in S. 200 et seq.

If an accused is discharged and a fresh complaint is made for the same offence, the Magistrate in dealing with such complaint is bound to proceed in manner laid down in S.200et seq., that is after examining the complaint, and if necessary after a preliminary enquiry or local investigation to decide whether there is sufficient ground for proceeding. In coming to this decision he is bound to examine a proper discretion, and a discretion improperly exercised would be a ground for interference by a Court of revision: 1 *U. B. R. Cr. P.* 19, *Rel. on.* [P 157 C 2]

(c) Criminal P. C., S. 202—Accused discharged—Notice of fresh complaint of same offence is not necessary.

Where accused is discharged it is not necessary to give notice to him before a Magistrate takes cognizance of a fresh complaint of the same offence against him. [P 158 C 1]

Campagnac—for Applicant.

Gaunt—for the Crown.

Judgment.—On 6th June 1929 a complaint was filed by the Income-tax Officer, Rangoon, against four persons of whom the petitioner Dhana Reddy was one. The four accused were alleged to be members of a firm carrying on business as labour contractors at Rangoon and the charges against them were that they fabricated accounts for income-tax purposes and filed false returns of income and produced books of account which were false to their knowledge. The Magistrate took cognizance of the complaint and examined witnesses for the prosecution. On 19th June he charged accused 1, directed as regards accused 3 fresh proceedings would be taken, and discharged accused 2 and 4. Dhana Reddy was accused 2. No reasons were given by the Magistrate for his discharge of two of the accused. On 30th August, that is, eleven days after the order of discharge, the Income-tax Officer filed a fresh complaint against the petitioner. In that complaint he set forth that a previous complaint had been filed and that the accused had been discharged but alleged that he now had evidence to place before the Court which was not within his knowledge at the time of filing the complaint referred to. The Magistrate examined the complainant on oath and took cognizance of the complaint. The accused has now come to this Court against the order taking cognizance. The first ground taken is that the accused having been discharged by the District Magistrate the Magistrate was not competent to take cognizance of a fresh complaint against him. I do not understand the learned advocate for the petitioner seriously to press now the extreme view that the order of discharge was an absolute bar to the opening of fresh proceedings. Authority for such an extreme view can be found in some of the earlier cases decided by the High Courts of Calcutta and Madras. Thus, in the case of *Nilratan Sen* v. *Jogesh Chandra Bhattacharjee* (1), it was held that:

"where an original complaint is dismissed under S. 203, Criminal P. C., a fresh complaint on the same facts cannot be entertained so

(1) [1896] 23 Cal. 983=1 C. W. N. 57.

long as the order of dismissal is not set aside by a competent authority."

And this view of the law was approved by the High Court of Madras in the case of *Mahomed Abdul Mennan* v. *Panduranga Row* (2). But the decision in *Nilratan Sen's* case (1) has been clearly overruled by a Full Bench of the Calcutta High Court in the case of *Dwarka Nath Mondul* v. *Beni Madhab Banerjee* (3) followed by another Full Bench ruling in the case of *Mir Ahmad Hossein* v. *Mahomed Askari* (4). And the same view of the law has been taken by a Full Bench of the Madras High Court in the case of *Emperor* v. *Chinna Kaliappa Gounden* (5). In Burma the late Chief Court and the Judicial Commissioner of Upper Burma have taken the same view, and the Courts now appear to be practically unanimous in holding that an order dismissing a complaint or discharging an accused person does not operate as an acquittal under S. 403 and does not bar the taking cognizance of a fresh complaint of the same offence even though the order of dismissal or discharge has not been set aside in revision by a competent authority. There can, I think, be no doubt now that that is the correct view of the law, and it is not necessary for me to discuss the arguments which have led the various Courts to come to this decision. The contention before me really is that although the Magistrate had jurisdiction to entertain a complaint he should not in fact have done so without at first making a preliminary enquiry to satisfy himself that there was a good ground for making a complaint. Although there is no legal bar to the institution of fresh criminal proceedings against an accused person, who has been discharged, for the same offence as that with regard to which he has been discharged it is obvious that the Courts should be chary in taking cognizance of complaints in such cases; otherwise there would be nothing to prevent an accused person being harassed again and again with regard to one charge. In the case of *Mi The Kin* v. *Nga E Tha* (6) the learned Judicial Commissioner whilst holding that:

"the discharge of an accused person or the dismissal of a complaint is no bar to the institution of fresh proceedings otherwise than under S. 437, Criminal P. C."

pointed out:

"that in dealing with a complaint in such circumstances the Magistrate is bound to proceed in the manner laid down in Ss. 200 seq- that is, after examining the complainant, and if necessary, after a preliminary enquiry or local investigation, to decide whether there is sufficient ground for proceeding. In coming to this decision he is bound to exercise a proper discretion, and a discretion improperly exercised would be a ground for interference by a Court of revision."

I agree generally in these remarks. And as regards this aspect of the case, the only point to consider appears to be whether the exercise of the discretion of the Court to proceed without holding a preliminary enquiry is so clearly improper in the present case that the Magistrate should be ordered to hold such enquiry now, before taking further proceedings. The Magistrate who admitted the second complaint was not the same Magistrate as the Magistrate who discharged Dhana Reddy, and unfortunately, no reasons were given for the discharge in the order of discharge. When examined on oath as a complainant on the filing of this second complaint the complainant stated:

"the evidence I now propose to call was not available at the time I filed the first complaint."

If this statement is true it is impossible to say that the Magistrate exercised his discretion wrongly in taking cognizance of the complaint. I understand the fresh evidence referred to was the evidence of certain clerks who directly implicate the petitioner and who were not examined by the Court before he was discharged. These witnesses have since been examined by the Magistrate in the original case against K. C. V. Reddy. But beyond the statement of the complainant, the proceedings do not show that when cognizance was taken of the second complainant against Dhana Reddy the Magistrate had any material before him to show what these witnesses would state beyond what the complainant himself deposed to.

It has been suggested that as S. 437, Criminal P. C., now specifically prescribes that before an order of discharge is set aside the accused should have an opportunity of showing cause against

(2) [1905] 28 Mad. 255.
(3) [1901] 28 Cal. 652=5 C. W. N. 457 (F.B.).
(4) [1902] 29 Cal. 726=6 C. W. N. 633 (F.B.).
(5) [1906] 29 Mad. 126=16 M. L. J. 79.
(6) [1904-06] U. B. R. Cr. P. 19.

its being set aside the Magistrate ought to have issued notice to the accused before taking cognizance of the offence. This contention I am unable to uphold. There is no question here of setting aside an order of discharge. The prosecution do not contend that the discharge order was wrong. What they contend is that with the fresh evidence now available they can establish the guilt of the accused.

Section 202, Criminal P. C., gives a Magistrate power to hold a preliminary enquiry before taking cognizance of a complaint but does not ordinarily contemplate the accused taking part in that enquiry. I am unable to hold that there was any necessity to give notice to the accused before cognizance was taken. The Magistrate would perhaps have been better advised, had he taken some steps to satisfy himself that fresh evidence really would be forthcoming before taking cognizance. After careful consideration, however, I am not satisfied that there is sufficient reason now for interfering with the Magistrate's orders. I do not understand it to be disputed that certain fresh witnesses have, since the filing of the complaint in the present case, given evidence before the Magistrate in the original case against the accused 1 K. C. V. Reddy and that that evidence if believed would be evidence against the present applicant. And in deciding whether to take cognizance the Magistrate was justified in considering the fact that the complainant was a responsible official who had sworn before him that the fresh evidence he proposed to bring was not available when the first complaint was filed. There was in my opinion quite clearly no want of jurisdiction in the Magistrate when he took cognizance on account of the previous order of discharge, nor am I satisfied that there was such an improper use of his discretionary power as would in the circumstances justify the interference by this Court in revision at this stage.

The other objections taken to the action of the Magistrate as I understand them are :

(1) that the Income-tax Officer should, under the provisions of S. 476, Criminal P. C., have recorded a finding in writing before filing the complaint, and

(2) that the first complaint having failed the Income-tax Officer has become functus officio, and has no further power to file a fresh complaint.

In the first place it is to be noted that one of the charges brought against the petitioner is under the provisions of Ss. 417 and 511, I. P. C. So far as an offence under these sections is concerned S. 476, Criminal P. C, has no application. These objections can only be considered so far as the complaint under Ss. 193 and 196, I. P. C., is concerned. As regards the first of the two objections there is not sufficient material before me to say whether in fact a finding in writing has been recorded. As regards the second, no authority has been cited to me which justifies the view that the second complaint was incompetent. I do not propose, however, to discuss these two points any further or to come to any definite finding on them, because they seem to me to be points which should be raised first before the Magistrate. So far as I can discover no objection whatever has been taken as yet before the Magistrate on either of these two grounds. That being so, I do not consider that they should be dealt with in revision now. I therefore dismiss this application.

P.N./R.K. *Revision dismissed.*

A. I. R. 1930 Rangoon 158

BAGULEY, J.

U Ka Doe—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 439-B of 1929, Decided on 6th November 1929, from order of Seventh Addl. Magistrate, Tharrawaddy, in Criminal Regular No. 13 of 1928.

(a) Penal Code, S 405—Scope.

Section 405 refers only to moveable property: 23 *Cal.* 372; 6 *Bom. H. C. Cr.* 33 and 36 *Cal.* 758, *Foll.* [P 159 C 2]

(b) Penal Code, S. 20—Scope.

Standing teak trees must be held to be immovable property [P 159 C 2]

(c) Criminal P. C., S. 238—Persen having license to fell aule-nath at teak trees only but Range Officer marking growing trees and allowing them to be felled—Officer charged under S. 409, I. P. C., and found guilty under S. 409 or S. 427, I. P. C., and convicted—Alternative conviction is bad.

A person had a license to fell only aulenathat teak marked by a Forest Range Officer. But the Range Officer marked certain growing teak trees and allowed them to be felled by the

licensee. The Officer was charged under S. 409, I. P. C. The Magistrate found him guilty of an offence under S. 409, Penal Code or an offence under S. 427, I. P. C. and convicted him.

Held: that alternative conviction under S. 427, I. P. C. was bad inasmuch as mischeif is not a minor form of criminal breach of trust but is quite distinct from it, [P 159 C 2]

(d) Penal Code, S. 425—Scope.

Intention to cause wrongful loss or damage is an essential for the offence of mischief. [P 159 C 2]

a Han—for Applicant.

Baguley, J.—The applicant, U Ka Doe, is or was Forest Range Officer Sitkwin Range Tharrawaddy Forest Division. One Po Thi got a free grant for ten tons of aule-nathat teak timber for construction of a kyaung. The condition of the license was that he was permitted to fell ten tons of aule-nathat teak marked by Range Officer, Sitkwin, that is, U Ka Doe, in Sitkwin Unclassed Forest. The procedure was that first of all U Ka Doe had to mark the teak trees in order that the free liense-holder should fell them. After the trees were felled, the trunks were cut into logs and measured and the free hammer mark had to be put upon them. The Magistrate has found as a fact that instead of the teak trees so marked and felled being aule-nathat trees they were growing teak trees. He has charged U Ka Doe under S. 409, I. P. C.:

"That you on or about the month of Waso 1290 B. E., at Sitkwin, being a public servant in the employment of Government, namely a Forest Ranger, and in such capacity entrusted with certain property, to wit teak trees . . . . . committed criminal breach of trust in respect of the said property."

After this charge had been framed, the accused entered upon his defence and in the end the learned Magistrate found him guilty of an offence under S. 409, I. P. C., or an offence under S. 427, I. P. C. He then sentenced U Ka Doe to six months' rigorous imprisonment. On appeal to the Sessions Judge, the conviction was upheld, but the sentence was reduced to the term of imprisonment already undergone and a fine of Rs. 300 or in default three months' rigorous imprisonment. There were other accused in this case, but their fate is of no importance in the present matter.

The first point to be considered is whether the applicant could possibly have been convicted under S. 409, I.P.C. in connexion with standing teak trees The general current of authority is that S. 405, in which criminal breach of trust is defined, can only refer to moveable property: vide *Jugdawn Sinha* v. *Queen-Empress* (1), which followed *Reg.* v. *Girdhar Dharamdas* (2). The same opinion has also been expressed in *Queen-Empress* v. *Bhagu* (3) and *Durga Tewari* v. *Emperor* (4). In the last mentioned case, the accused was entrusted with a standing crop of paddy which he reaped as soon as it was ripe, but nevertheless it was held that S. 406 could not apply to his offence.

In the present case it is hardly necessary to decide whether a Range Officer is to be regarded as entrusted with the teak trees throughout the whole of his range or with dominion over those teak trees, for those teak trees must be held to be immovable property in the form in which they are entrusted to him and, therefore, he cannot be held to be guilty of criminal breach of trust in respect of them.

The alternative conviction under S. 427, I. P. C., I must also regard as bad. In the first place, there was not an alternative charge under S. 427 of mischief. The applicant has not been given any chance of defending himself with regard to the allegation of mischief. Mischief is not a minor form of criminal breach of trust. In fact the offence of mischief is quite distinct from criminal breach of trust and, most important of all, there is no allegation that Government has been put to any loss owing to the marking or cutting down of these teak trees, and the causing of wrongful loss or damage and intent to cause wrongful loss or damage is an essential for the offence of mischief.

It seems to me that the accused has been tried with the Magistrate's view at an entirely wrong angle. On the allegation which has been held to be proved, it would have been perfectly simple to have charged, him under the Forest Act and Rules, but for some reason which is not apparent the prosecution have chosen to take their stand on the Indian Penal Code. It is impossi-

(1) [1896] 23 Cal 372.
(2) 6 Bh. C. C. 33.
(3) Rat Un, Cr. C. 928.
(4) [1909] 36 Cal. 758=3 I. C. 189=10 Cr.L.J. 253.

ble, if I accept the facts put forward for the prosecution as proved, to convict the applicant under the Forest Act and Rules, because he has not been charged under these and has not been given any opportunity of putting up a defence which might meet a charge under the Forest Act. The applicant I am told, is an elderly man at the end of his service with the Forest Department and he has spent some time in jail and undoubtedly been put to a very great deal of expense in carrying this case through the Courts. It may be that he has been sufficiently punished for anything that he may have committed. I, therefore, set aside the conviction and sentence but make no order for a re-trial. The fine will be refunded. Whether further charges are brought under the Forest Act must lie with the authorities concerned.

P.N./R.K. *Conviction set aside.*

A. I. R. 1930 Rangoon 160

HEALD, J.

U Thawbita—Appellant.

v.

U Kandula—Respondent.

Second Appeal No. 327 of 1929, Decided on 29th January 1930, against decree of Dist. Judge, Amherst, in Civil Appeal No. 28 of 1929.

Buddhist Law (Burmese)—Ecclesiastical Law—Monk—Presiding monk of "Catudissa sanghika Monastery" has same powers as any other presiding monk.

The monk presiding over a "Catudissa Sanghika" monastery has exactly the same powers of control and management of his monastery and its precincts as the monk who presides over any other monastery. [P 161 C 1]

Tun Aung—for Appellant.

T. S. N. Chari—for Respondent.

Judgment.—The dispute in this case concerns a monastery, which was built nearly 60 years ago by the villagers of Kantho. U Meda was the first presiding monk and when he left the monastery about 50 years ago, U Oktama became presiding monk. The present appellant was a novice and a monk at the monastery under U Oktama, and on U Oktama's death he claimed to succeed him as presiding monk. The villagers or some of them disliked appellant and introduced a monk U Thumana from another monastery. The dispute between respondent and U Thumana as to which of them should be presiding monk was referred to the arbitration of three chief monks of a particular branch of the order to which the parties belonged, and an award was made, which recognized appellant as presiding monk of the monastery.

Appellant applied to the Court for the award to be filed, and made a decree of the Court, and it was duly filed, a decree being made to the effect that appellant was entitled to possession of the monastery with all its appurtenant properties. The decree of the Court of course bound only the parties to the reference, who were U Thumana, U Pyinnawa, U Thawbita, Kya Ye, and Ma Tok, the last two being laymen who claimed to be owners of the monastery, and as usually happens in such cases, the persons who were bound by the decree, or their supporters introduced into the monastery a person who was not bound by the decree, their intention being of course to defeat the execution of the decree. The person so introduced in this case was the respondent, U Kendala, who calls himself a visitor to the monastery and admits that he was introduced by the villagers in order to contest appellant's claim to be presiding monk.

He sues for a declaration that the monastery belongs to the whole order of monks by dedication, being what is known as "Catudisa Sanghika property" and that the decree in appellant's favour in the earlier suit is inoperative and invalid except as against the five persons who were named in it. Both the lower Courts have found on the evidence that the monastery was "Catudisa Sanghika property" and on that finding have held that appellant is not entitled to exclusive possession of the monastery and its appurtenant properties except as against the parties to the decree in the earlier proceedings.

Appellant appeals but I cannot go behind the concurrent findings of the lower Courts that the monastery is Catudisa Sanghika property and in any case I see no reason to doubt that it is now Sanghika property. But it seems to me clear that it does not follow from the fact that the monastery is Catudissa Sanghika property, that appellant as presiding monk, is not entitled to exclusive possession of it. Ordinarily the presiding monk is entitled to the full

control and management of his monastery and its precints whether it is pogalika or sangnika and I know of no authority for holding that if a monastery is "Catudissa Sanghika" the monk who presides over it has not exactly the same powers of control and management as the monk who presides over any other monastery. I, therefore, set aside that part of the lower Court's decree which declares that appellant is not entitled to exclusive possession of the monastery in suit and its appurtenant properties.

As the parties are monks I make no order for costs. I note for the information of the parties that in my opinion appellant's rights in the monastery are ordinary rights of a presiding monk in the monastery over which he presides, and, that, subject of course to any control which his ecclesiastical superiors may be entitled to exercise over him he has the ordinary powers of such a monk to exclude from his monastery any person to whose entering or remaining in his monastery he has a reasonable objection. So that if any person trespasses on his monastery he has the ordinary rights, criminal and civil of a person in possession of property on which a trespass is committed. The lower Court's orders for costs are set aside and there is no order for costs in any Court.

P.N./R.K. *Order accordingly.*

A. I. R. 1930 Rangoon 161 (1)

DAS, J.

Imperial Bank of India, Akyab — Applicant.

v.

A. M. K. Muthiya Chettyar and *another*—Respondents.

Civil Revn. No. 330 of 1929, Decided on 14th January 1930, against order of Sub-Divisional Judge, Akyab, D/- 13th August 1929.

Civil P. C., O. 21, R. 48—Pay or pension for month is due on last day of month and can be attached on last day.

Pay or pension for the month is due on the last day of the month even though it is not paid till the first of the next month and can be attached on the last day of the month. [P 161 C 2]

Clark—for Applicant.

Judgment.—The facts of the case are as follows:

The decree-holder had obtained a decree against one Shwe Gyaw, who was in receipt of a pension from the Imperial Bank of India, Akyab. He obtained a prohibitory order on the Bank to pay the amount into Court. This order was served on the Bank on 31st July 1929. The Bank contested the order on the ground that there was no money due to Shwe Gyaw by the Bank on 31st July, but that the money was only due on 1st August 1929, and that, therefore, the prohibitory order could not be complied with. I do not agree with this contention. The pension due to Shwe Gyaw was certainly due on 31st July 1929 and was attachable. It might be that the Bank did not pay the same till 1st August 1929, but that does not in any way affect the question whether the money was due on 31st July 1929 or not. I think that pay or pension for the month is certainly due on the last day of the month and can be attached on that day. The petition is therefore dismissed.

P.N./R.K. *Revision dismissed.*

A. I. R. 1930 Rangoon 161 (2)

CUNLIFFE AND CARR, JJ.

Ma Saw May—Appellant.

v.

Maung Htu Tha—Respondent.

Misc. Appeals Nos. 126 and 127 of 1929, Decided on 24th February 1930, from orders of District Judge, Pegu, in Civil Suits Nos. 14 and 15 of 1929.

Buddhist Law (Burmese) —Succession—Daughter of separated couple not maintaining filial relationship with father is not to be excluded from inheritance to father in absence of widow or other children.

The daughter of a separated couple who does not maintain filial relationship with her father is not excluded from inheritance in the absence of any widow or other children entitled to inherit. In such a case where the father has been living with her brother till his death the daughter is entitled to one-half share and the brother to the other half in the estate of the deceased. 2 *U. B. R.* 15, *Rel. on.* [P 162 C 2]

Kya Gaing—for Appellant.

Ba Han—for Respondent.

Judgment.—These appeals arose out of cross-objections for Letters of Administration to the estate of U Tha Gaing, deceased. The appellant claimed as the daughter of U Tha Gaing, while the respondent is his brother, with whom he had been living for many years before he died. It was alleged by

the respondent that U Tha Gaing divorced his second wife many years ago after living with her for about 10 months. It was after this divorce that the appellant was born. It is not denied that she is Tha Gaing's daughter. Tha Gaing did not marry again, and it is not suggested that Ma Tok married again. But it seems to be quite clear on the evidence that since before the birth of the appellant who is now 28 years of age, Tha Gaing lived in Ywathit, which is said to be a suburb of Pegu, while Ma Tok lived in the Zainganaing quarter of Pegu.

According to the respondent Tha Gaing never visited Ma Tok after their separation, and Ma Tok never visited Tha Gaing. He says also that from the time of her birth the appellant failed to maintain filial relations with Tha Gaing. The appellant alleged that there was no divorce, that although her mother and father lived separately, yet Tha Gaing frequently visited Ma Tok at Zainganaing, and stayed there with her on occasions for several days ; and also that Ma Tok used to visit Tha Gaing at Ywathit, though she admits that Ma Tok never slept there. She alleges further that after her mother's death she actually lived with Tha Gaing, at the house of her brother, the respondent for a number of years before her own marriage.

As far as direct evidence is concerned the evidence of divorce is certainly weak. All that the respondent Maung Htu Tha, can say about it is that Tha Gaing told him at the time of separation that he had divorced Ma Tok, and U Po Maung, witness 2 for the respondent says that Ma Tok was divorced 10 or 15 years before her death. He does not say how he knew about this divorce. It is, however, clearly proved on the evidence that the couple did separate and we agree with the District Judge in accepting the respondent's evidence that there was no relation between them after that. We accept also the District Judge's finding that the appellant's allegations are untrue and that she did not maintain filial relations with her father at all.

The question then is whether the appellant has any right to share in Tha Gaing's estate or not. The case seems to us to be on all fours with that of *Mi Nyo* v. *Mi Nyein Tha* (1) in which the learned Judicial Commissioner held that where the daughter of a divorced wife was born after the divorce and had not maintained filial relations with her father she was not excluded from inheritance, in the absence of any widow or other children entitled to inherit. He held further that in such a case where the father had been living with his sister the daughter was entitled to one-half share and the sister to the other half on the estate. That decision is directly applicable to the facts of the present case; and we have been unable to find any sufficient authority for differing from it. In our view therefore the District Judge was wrong in holding that the appellant had entirely forfeited her right to inherit and we are of opinion that she is entitled to one-half of the estate, the respondent Maung Htu Tha being entitled to the other half. But on this finding we can see no sufficient reason for interference with the order granting Letters of Administration. It is an undoubted fact that the deceased Tha Gaing had been living with Maung Htu Tha for many years, prior to his death and since Maung Htu Tha is entitled to a share in his estate and is therefore qualified equally with the appellant to obtain Letters of Administration, we consider that he is a proper person to have such letters in this case. We therefore dismiss the appeals with costs, three gold mohurs.

P.N./R.K. *Appeal dismissed.*

(1) [1904-06] 2 U. B. R. (Bud. Law Inheritance) 15.

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* A. I. R. 1930 Rangoon 162

MYA BU, J.

Maung Pu—Applicant.

v.

Ma Yit and *others*—Respondents.

Civil Misc. Appln. No. 44 of 1929, Decided on 25th November 1929, for review of judgment in Second Appeal No. 375 of 1928.

*** Civil P. C., O. 47, R. 1—Taking too strict view of title of suit and its prayer and overlooking substantial rights is good ground.**

Where a Court by taking too stringent a view of the title of the suit and its prayer overlooks the substantial rights of the party in its judgment which were sufficiently made clear in the pleadings and evidence, there is a good ground for review. [P 164 C 1

S. Ganguli—for Applicant.

J. C. Ghose—for Respondents.

Judgment.—This is an application for review of my judgment allowing the appeal by the present respondents in Civil Second Appeal No. 375 of 1928.

The present respondents are the wife and children of one Maung Aung Gya who died in July 1927. The applicant filed the suit against them in the Court of first instance styling the suit as one for specific performance of a contract to reconvey the land and prayed for a decree directing the defendants to reconvey the land in suit for the sum of 700 mentioned in the deed under which Maung Aung Gya acquired the land and to give possession thereof to the plaintsff. The deed in question is dated 21st April 1914 under which the land in suit was conveyed by the plaintiff to Maung Aung Gya. The deed is styled as one of outright sale for a consideration of 700 and is peculiarly worded in the main operative part which runs as follows:

> "The seller Maung Pu says to the vendee Maung Aung Gya, I do hereby sell to you for a consideration of 700 a piece of paddy land belonging to me . . . for you to work and enjoy the rents and profits of the same during your life time . . "The vendee says:" I will not hereafter sell, mortgage or transfer the said piece of paddy land to other people. If I wish to sell or mortgage the same, I will resell the same for the same amount of price to you tenderable under a registered deed . . ."

The suit was filed on 21st November 1927 roughly about 4 months after Maung Aung Gya's death. A few years before his death Maung Aung Gya made over the land to his two children the respondents Maung Ni and Ma Hnin apparently by way of gift which, however, was not by a registered instrument. The defendants in their written statements raised many grounds of defence and the respective contentions between the parties gave rise to five issues. The only ground of defence which remained material for the purposes of the second appeal was that the condition of resale incorporated in the sale deed was invalid under the provision of S. 10, T. P. Act. This question was involved in the first issue framed by the Court of the first instance which was the only material issue of law, issues 2,3 and 4 turned on questions of fact, while issue 5 related only to relief. The trial Court answered all the issues in favour of the plaintiff and gave him a decree directing the defendants to reconvey the land for 700 and deliver poseession of it to the plaintiff. The defendant's appeal to the lower appellate Court ended in its dismissal but on second appeal I held that the condition for resale was invalid and unenforceable in law and remarking that the suit was not one for recovery of land on account of Maung Aung Gya's death on the ground that what was sold to Maung Aung Gya was only an estate limited to the lifetime of Maung Aung Gya and that it was expressly and specifically a case in which the plaintiff based his claim on the alleged outright sale of the property claiming recovery by the payment of 700 in virtue of the condition of resale, I ordered that the suit be dismissed.

In support of the present application it has been urged that seeing that the sale by the plaintiff applicant to Maung Anng Gya was merely a sale of an estate limited to the lifetime of Maung Aung Gya the plaintiff applicant has an indefeasible right of recovery of the land after Maung Anng Gya's death and that therefore even in spite of the invalidity of the condition for resale the decree passed by the trial Court in favour of the plaintiff applicant should not have been disturbed. In other words the argument is that while the plaintiff applicant is entitled to recover possession of the land without any payment he should not have been disallowed to recover possession by payment of 700 to the defendant-respondent. On the other hand the learned advocate for the defendant respondents contends that there is no error apparent on the face of the record to justify a review and that in any event the contention that the deed conveyed merely an estate limited to the lifetime of Maung Aung Gya is untenable. He points out that Maung Aung Gya paid 700 while the land was not worth more than 1,000. The plaintiff deposed that this land had been leased to Maung Aung Gya for 180 baskets of paddy a year and that after having done so for 4 years Maung Aung Gya asked him to sell the land but that he refused to do so and sold the land to Maung Aung Gya for his lifetime only. There is therefore no improbability in the theory of the sale for Maung Aung Gya's lifetime only. If this is so the plaintiff appellant's right to recover the

land on the death of Maung Aung Gya should not have been overlooked but it is obvious that I took rather too stringent a view of the title of the suit and its prayer and thereby overlooked the need for doing substantial justice in the case.

I consider that there is a good ground for review and even according to my view of the effect of the deed as expressed in my judgment in the second appeal the defendant-respondents cannot be considered to be losers by the restoration of the decree of the trial Court in consequence of this view. For these reasons I allow this application and set aside the judgment and decree reviewed, the result being that the judgment and decree of this Court in Civil Second Appeal No. 375 of 1928 are hereby set aside and the decree of the Court of first instance in favour of the plaintiff applicant will be restored except as to costs. The plaintiff applicant will therefore get a decree in his favour directing the defendant respondents to reconvey the land in suit to the plaintiff applicant on the latter paying into Court to the credit of the defendant respondents a sum of 700 within 3 months. Because the mistake has been due mainly to the want of elucidation of the plaintiff's substantial rights in the plaint he will be deprived of the costs which he has incurred in all the Courts. Therefore each party will bear their own costs in all the Courts.

P.N./R.K. *Application allowed.*

* A. I. R. 1930 Rangoon 164

BAGULEY AND MYA BU, JJ.

(Hajee) Abdul Rahman—Appellant.

v.

A. B. Crisp and *others*—Respondents.

Appeal No. 10 of 1929, Decided on 17th June 1929, from decree of Dist. Judge, Mandalay, in Civil Suit No. 41 of 1928, D/- 31st December 1928.

(a) Court-fees Act, Sch. 2, Art. 17 (6)—Partition suit, by cosharer is possession of part of property—Appeal by defendant—Ad valorem court-fee is not necessary — Partition.

Since in a suit for partition by a cosharer claiming to be in possession of a part of the property court-fee of Rs. 10 and not ad valorem court-fee is payable, the defendant appellant in such a suit is also entitled to file his appeal on the same court-fee : 28 *All.* 340 ; 12 *C. W. N.* 37 ; 38 *Cal.* 681 ; 34 *All.* 184 ; 43 *Mad.* 396 ; 5 *Pat. L. J.* 540, *Foll.* ; 22 *C. W. N.* 669, *Dist.* [P 166 C 1]

(b) Court-fees Act, Sch. 1, Art. 1 — Appeal, principle of valuation in— Same as in original plaint.

The principle of valuing an appeal must be the same as the principle used in valuing the plaint in the original suit for the purpose of court-fees. [P 165 C 2]

*** (c) Court-fees Act, Sch. 2, Art. 17 (6)—Appeal in decree for partition by defendant in possession —Court-fee stamp of Rs. 10 is not always sufficient.**

Where in a suit for partition the defendant appeals from the decree for partition he is not entitled to stamp the appeal memorandum with Rs. 10, court-fee stamp simply on the ground that he is in possession of the property. [P 165 C 2]

K. C. Sanyal—for Appellant.

H. M. Lutter—for Respondents.

Baguley, J.—The appellant, Haji Abdul Rahman, had a decree against one M. F. Crisp. This decree was a personal one. There was a mill in Mandalay in which M. F. Crisp was living and which he was working. In execution of the decree, in as far back as 1922 the appellant attached that mill. Prolonged litigation ensued between the appellant and a firm known as Crisp and company. In Civil Regular Suit No. 189 of 1923 of the District Court, Mandalay, Crisp and Company, which then consisted of two partners, asked for a declaration that the property in question was not liable to attachment in execution of the decree against M. F. Crisp. In the end, in March 1925 a Bench of this Court dismissed the suit holding that M. F. Crisp had some interest (which was not defined) in the mill in question. In April 1925, the appellant returned to the attack once more and filed an application for execution of his decree by attachment and sale of the mill. The application for attachment is incorrect for it refers to the mill belonging to M. F. Crisp, which was not the case, a fact well known both to the appellant and to his advocate who had conducted the appeal in the declaration suit in the High Court. Nevertheless, no doubt relying upon the fact that the office of the District Judge of Mandalay had been held by many different Judges in rapid succession and therefore there was a likelihood of his successfully misleading the Court, the appellant puts the mill down as being the property of M. F. Crisp. An order for attachment was passed and the mill sold. Apparently some endorsement of the claim of Crisp and Company was made on the sale proclamation, but I

have been unable to trace the sale proclamation in the proceedings.

The decree-holder was the purchaser of the mill. Shortly afterwards, the decree-holder applied for possession, and the Judge issued an order for delivery under O. 21, R. 95. The Judge who had held the sale then vacated his office and another Judge took his place. Application was then made to him that the decree-holder was being obstructed by the judgment-debtor, and action was asked for under O. 21, R. 97. A fresh order for delivery of possession was issued and the bailiff was directed to remove the judgment-debtor if he refused to vacate. This brought Crisp and Company on the scene once more, and they pointed out to the Court that the mill was not as stated by the decree-holder the property of M. F. Crisp but of Crisp and Company and that M. F. Crisp personally had some share as yet not assertained, and also that this has been decreed by the High Court. They stated that M. F. Crisp was acting as their manager. On this being brought to the notice of the Court, the Judge suspended his order directing M. F. Crisp to be removed. However, by that time the mill building itself had been made over to Haji Abdul Rahman; and Crisp and Company through M. F. Crisp were in possession of the manager's house. The state of affairs in August 1926 is summed up in an order to be found in Civil Execution No. 24 of 1925 of the District Court of Mandalay. The next point appears to have been the filing of a suit (No. 28 of 1926) in which Crisp and Company sued Haji Abdul Rahman for a declaration as to what the interest of M. F. Crisp, which has been brought by Haji Abdul Rahaman, in the mill was. Ultimately in appeal to this Court the suit was dismissed because there was no prayer for consequential relief, and it was held that a prayer for consequential relief was necessary. After this, the suit from which the present appeal arises was filed. This is Civil Regular No. 41 of 1928 of the District Court, Mandalay. It is headed as being a suit:

"for partition of a saw-mill valued at Rs. 17,500 and damages Rs. 2,500 and it is stamped ad valorem."

The plaintiffs, Crisp and Company, prayed for a declaration that they are entitled to a six-sevenths share in the mill, for partition of the mill and in order for sale and they further sued for damages. The District Judge passed a decree declaring that the plaintiffs are entitled to a three-quarter share of the mill, and the suit for the damages was apparently dismissed, and an order was made that the mill be sold. Against this decree the present appeal has been filed.

The question now for the Court is whether the appeal has been properly stamped. It is stamped with a Rs. 10 court-fee stamp. The respondents claim that it should be stamped ad valorem. Mr. Sanyal for the appellant argued first of all that as he was in possession of the mill a suit for partition by him could be filed on a Rs. 10 stamp and therefore he files the appeal on the same stamp; but this argument is not seriously persisted in. It is clear that the principle of valuing an appeal must be the same as the principle used in valuing the original plaint for purpose of court-fees. Mr. Sanyal's next claim is that in any case the criginal plaint was overstamped, that the plaintiffs could have filed their suit on a Rs. 10 stamp, and therefore appears to be of more weight.

In *Wali-Ullah* v. *Durga Prasad* (1) the same point arose as to the correct stamp-fees payable on a suit for partition. On p. 341 it is stated:

"The lower appellate Court was of opinion that the suit was really a suit for partition and nothing more, and that in that case the court-fee was the fee of Rs. 10, which was duly paid. We also think that if the suit was merely a suit for partition this decision would be quite right. We also agree with the lower appellate Court that in determining what the court-fee should be, regard must be had to the allegations of the plaintiff in his plaint and to the relief sought, apart altogether from the evidence."

If we refer to the plaint we find that it is stated in para. 6:

"the plaintiffs claim that they have at least an undivided six-sevenths share and interest in the said Shwe-laung-nyun saw mill; and they have throughout been in possession thereof in their own right and interest."

This is very definite. Whether it is correct is rather more open to doubt. In fact it was admitted during the argument that the position at the present moment is still more or less where it was left by the District Court, Mandalay in 1926, namely, that the appellant

(1) [1906] 28 All. 340=3 A.L.J. 181=(1906) A.W.N. 38.

is in possession of the mill proper and the respondents are in possession of the manager's quarters. This being the case, both parties are in possession of part of the property to be partitioned, and this position is due to the fact they are joint owners. Had they not been joint owners, the District Court, Mandalay, would certainly have completely evicted M. F. Crisp, and with him Crisp and Co.

In *Bidhata Rai* v. *Ram Chariter Rai* (2) it is laid down :

"The plaintiff is entitled to maintain a suit for partition, if his possession to some part of the joint property is admitted or established, but if it is established that he is not in possession at all of any portion of the joint property, that there has been a complete ouster, he must sue for recovery of possession and partition and pay ad valorem court-fees upon a plaint appropriately framed for the purpose."

If this rule is good law then there can be no doubt that the plaintiffs could have filed the original suit on a Rs. 10 stamp. This case was followed in *Sasi Bhusan Beed* v. *Rai Yatindra Nath Chowdhury* (3) and the same principle was accepted in *Wali-Ullah's* case (1) and in *Tara Chand Mukerji* v. *Afzal Beg* (4) and by the High Court of Madras in *R. P. Gill* v. *L. Varadaraghavayya* (5) and by the High Court of Patna in the unofficially reported case of *Duki Singh* v. *Harihar Shah* (6). A somewhat different line is suggested by *Beni Madhab Sarkar* v. *Gobind Chandra Sarkar* (7) ; but in that case the suit for partition also included a suit for accounts and a somewhat different principle appears to have been employed.

I am therefore of opinion that the plaintiff on the face of their plaint and also on the admitted facts were in possession in part of the joint property. This position was due to the fact that they were joint owners but for which they would not have been evicted from possession altogether. They were therefore entitled to file their suit on a Rs. 10 court-fee stamp, and therefore the appellant is entitled to file the appeal on the same court-fees. I would therefore hold that the appeal is properly stamped.

Mya Bu, J.—I concur.

J.M./R.K. *Order accordingly.*

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* A. I. R. 1930 Rangoon 166

OTTER AND BAGULEY, JJ.

Pandit Bindraban Dinanath — Appellant.

v.

Official Receiver to C. T. A. R. A. Firm—Respondent.

Misc. Appeals Nos. 20 and 26 of 1929, Decided on 23rd December 1929, from order of Dist. Judge, Mandalay, in Civil Misc. No. 64 of 1927, D/- 19th January 1929.

(a) Provincial Insolvency Act, S. 43 (1)—Application for discharge not filed within time fixed—Adjudication must be annulled as section is mandatory—(*But see A.I.R.* 1928 *Pat.* 333 (*F.B*); *A. I. R.* 1930 *Mad.* 339 (*F.B.*); *A. I. R.* 1927 *All.* 418).

The provisions of S. 43 (1) are mandatory, there being no discretion to the Court to enlarge the time after the expiry of the period fixed by the Court for an application for an order of discharge. Unless the debtor applies for his discharge within the time fixed the adjudication must be annulled: Per *Reilly, J.* in 1930 *A.I.R. Mad.* 278, and *A. I. R.* 1925 *Pat.* 353 ; *Rel. on.* ; *A. I. R.* 1927 *Mad.* 175; *A. I. R.* 1924 *Cal.* 777; *A. I. R.* 1926 *Sind* 94 and *A.I.R.* 1924 *Mad.* 635, *not Appr.*; *A. I. R.* 1930 *Mad.* 278; *A. I. R.* 1927 *Rang.* 136, *Expl.* and *Dist.*, and *A. I. R.* 1928 *Lah.* 82, *Dist.* [P 169 C 1].

* **(b) Provincial Insolvency Act, S. 5—Powers under this section subject to specific provisions of the Act—Limited application to S. 43 (1).**

Since the powers given by S. 5, Provl. Insol. Act, are expressly subject to the provisions of the Act and the provisions of S. 43 (1) are mandatory, they must to that extent be limited: *A. I. R.* 1926 *Mad.* 942, *Foll.* and 17 *Cal.* 512, *Dist.* [P 168 C 1].

* **(c) Provincial Insolvency Act, S. 43 (1)—Application for discharge not made under S. 43 (1) within period fixed—Time cannot be extended under Civil P. C., S. 148**—(*But see A. I. R.* 1928 *Pat.* 333 (*F.B.*); *A. I. R.* 1930 *Mad.* 339 (*F.B.*) and *A. I. R.* 1927 *All.* 418).

Extension of time under S. 148, Civil P. C., cannot be granted in cases where the insolvent fails to apply for discharge within the time fixed by Court, since the provisions of S. 43 (1) are mandatory and the powers given by S. 5 are to that extent limited: *A. I. R.* 1926 *Mad.* 942, *Foll.* and 17 *Cal.* 512, *Dist.* [P 172 C 1].

Leach and *Sanyal*—for Appellant.

Lutter—for Respondent.

Judgment.—These are two appeals arising out of insolvency proceedings in the course of which by an order dated 22nd June 1927, the C. T. A. R. A.

(2) [1908] 12 C.W.N. 37=6 C.L.J. 651.

(3) [1911] 38 Cal. 681=10 I.C. 463=15 C.L.J. 443.

(4) [1912] 34 All. 184=13 I.C. 185=8 A.L.J. 1329.

(5) [1920] 43 Mad. 396=38 M.L.J. 92=11 M. L.W. 174=55 I.C. 517=(1920) M.W.N. 124.

(6) [1920] 5 Pat. L.J. 546=58 I C. 236=1 Pat. L.T. 595.

(7) [1918] 22 C.W.N. 669=46 I.C. 165.

Chettyar Firm were adjudicated insolvent by the District Court of Mandalay at the instance of one Judhishtir Day. The insolvency was a very large one and the proceedings are far from being completed. A number of important transfers by the firm have already been set aside as fraudulent and there are others, investigations as to the character of which are still pending. There are also a number of other substantial matters remaining to be dealt with.

By the order of adjudication the insolvent firm was ordered to apply for discharge on or before 22nd June 1928. On that date the case was called on but there was no appearance; and owing to the illness of the Judge who was unable to attend the Court that day an order was passed and subsequently signed as "seen" by the Judge, directing that the matter should be put up again on 25th June 1928. The matter was in fact dealt with on 26th June 1928. From the diary of that date it is clear that there was again no appearance, and as the learned Judge was of the opinion that the firm could not get a discharge even if applied for, he extended the time for such application until 21st December 1928, and ordered that the proprietor of the firm be so informed by registered post. On that day the matter again came before the same Judge, and again there was no appearance. The Judge seems to have been concerned with other matters arising out of the insolvency and passed no order upon the question of discharge.

From the diary order of 17th and 19th January 1929, it would appear that the successor of the learned Judge who had previously dealt with the matter had meanwhile consulted the Official Receiver, and although he was doubtful upon the point, he, on the latter date, made an order extending the period within which the insolvent firm should apply for discharge until 21st January 1930. No application was made on this day and on 25th March 1929, a petition by the present appellant (and another) for the annulment of the adjudication came before the Court, and on 27th March, an order passed refusing the annulment asked for and declining to alter the order of 19th January 1929, extending the time till 21st January 1930. The appeals before us relate to the orders of 19th January and 27th March 1929, respectively.

Sub-S. (1), S. 43, Provn. Insol. Act of 1920 is as follows:

"If the debtor does not appear on the day fixed for hearing his application for discharge or on such subsequent day as the Court may direct, or if the debtor does not apply for an order of discharge within the period specified by the Court, the order of adjudication shall be annulled, and the provisions of S. 37 shall apply accordingly."

By sub-S. (1), S. 41 of the Act, it is provided that:

"a debtor may, at any time after the order of adjudication and shall, within the period specified by the Court apply to the Court for an order of discharge. . . . ."

The words "and shall within the period specified by the Court," were inserted by the amending Act of 1920.

The main question, therefore, arising upon these appeals is whether in the event of an insolvent not applying for his discharge within the period originally specified, or subsequently extended upon an application made within that period, the adjudication must of necessity be annulled. In other words, we have to decide whether the provisions of sub-S. (1), S. 43 are mandatory or not. For the appellant it is suggested that the answer to this question should be in affirmative; for the respondent the contrary is contended. Before dealing with this matter two preliminary points may be disposed of.

On bahalf of the appellant it was suggested that the order of 19th January 1929, granting the further extension of time must be held to be inoperative inasmuch as it was made subsequent to 21st December 1928, the last day of the period of extension previously granted. It was said on behalf of the respondent that this proposition involved the hypothesis that the previous order of extension passed on 26th June 1928, was a valid order and that this could not be so, if the appellant is right for, it also was passed after the period of extension had expired. From an examination of the diary orders it would appear that it was intended to grant an extension until such time as the learned Judge was in a position to deal further with the matter, and if so, we think the order of 26th June was a valid order. If, however, this view be erroneous, we were asked that the contentions of the appellant should apply

equally to the last mentioned order, and we must be taken to have acceded to this request.

It was further suggested on behalf of the respondent that in considering this matter we are not confined to the provisions of the Provincial Insolvency Act, but that the respondent may pray in aid S. 148, Civil P. C. This provision gives a Court discretion to enlarge the period fixed for doing any act prescribed by the Code even though the period originally fixed may have expired. As an example said to be analogous to the present case the decision in *Badri Narain* v. *Sheo Koer* (1) was relied upon. Quite apart from the fact that this decision may be definitely distinguished on more than one ground we think that the answer to this point may be found in sub-S. (1), S. 5 of the Act, which provides that:

"Subject to the provisions of the Act the Court . . . . shall have the same powers . . . . as it has . . . . in the exercise of original civil jurisdiction"

But sub-S. (1), S. 43 (to which the exercise of the power given by S. 5 is expressed to be subject) is either mandatory or not. If it is, the powers given by S. 5 must be to that extent limited, see as to this *C. Veuugopalachariar* v. *Chunnilal Sowcar* (2), where it was held that S. 10 (2) of the Act provided a definite remedy and that therefore, O. 9, Civil P. C., could not be applied. On the other hand, if not, then it may be that a Court may act under S. 148, Civil P. C.

But whether the provision in question is mandatory or not is the substantial matter for our decision, and if we decide that it is not, the respondent may be entitled to succeed, but if we decide the contrary, the Civil Procedure Code cannot help him.

Upon the question of construction Mr. Leach on behalf of the appellant relied first of all upon the plain wording of the subsection under review, read together with Ss. 10 (2), 27 (2), 35, 37 and 41 of the Act. He says that the words "the order of adjudication shall be annulled" are plain and should be construed as they stand, and in their ordinary meaning.

Sub-S. (2), S. 10 (a new provision) makes it clear that an insolvent whose adjudication has been annulled owing to his failure to apply for his discharge is put under serious disabilities in respect of the presentation of a further insolvency petition. The object of this subsection, it appears to us, is to prevent a debtor who has obtained the protection of the Court, from thenceforward taking no further action in the matter and thus defeating the object of the Act.

Section 27, mainly a new section, makes it mandatory upon the Court to fix the time within which an application for discharge must be made, and provides that if sufficient cause is shown this period may be extended by the Court.

S. 35 (as recently amended) makes provision for annulment of adjudication by the Court either of its own motion or upon application by the receiver or by a creditor.

It is argued that all the above provisions go to show that the intention of the legislature was to restrict a debtor from prolonging the period within which he should apply for his discharge and that, therefore, although extension of this period are permitted, such extensions are not to be encouraged and that, therefore the relevant provisions are to be strictly interpreted.

Section 37 is relied upon on behalf of the appellant in order to meet a possible objection that the result of an order for annulment must be to restore the status quo ante adjudication or at least to put an end to the power of the Court to continue action already taken with regard to the property of the insolvent.

We have referred to S. 41 of the Act; from it, it is clear a debtor must apply for his discharge within the period specified by the Court, and as we pointed out extension can only be granted on sufficient cause being shown.

From a consideration, then, of the material provisions of the Act it seems to us that upon their plain wording it is somewhat difficult to argue that a Court has power after the expiry of the time specified, or any period of adjournment thereof, to further extend the time for the discharge application. The whole object appears to be to prevent prolonged periods of adjudication and to compel an insolvent to come before the Court, and thus render himself liable to

(1) [1890] 17 Cal. 512=17 I. A. 1=5 Sar. 493 (P.C.).

(2) A. I. R. 1926 Mad. 942=49 Mad. 935.

such orders or conditions as the Court may have power to pass both during the insolvency and also at the time when the final order is made. We would point out that, should it be in the interests of creditors to prolong the period of adjudication, either they or the Official Receiver may make an application for this purpose.

The whole question, however, is not without difficulty for the matter has been the the subject of decisions in other High Courts, and it will therefore be necessary to examine these with some particularity.

The first case in order of date relied upon on behalf of the appellant is *Ram Krishna Misra* v. *Ex parte* (3). This was a Bench decision and the head-note is:

"The provisions of S. 43 are mandatory there being no discretion in the Court to enlarge the time after the expiry of the period fixed by the Court for an application for an order of discharge.

It would appear from the report of this case that there had been no extension of time granted, but it seems to us that the same consideration should apply to applications made after the expiry of the extended period as to applications made after the expiry of the original period.

A similar case is *T. Chinnappa Reddi* v. *Thomasu Reddi* (4). In this case the insolvent was ordered to apply for his discharge within a year from the date of the adjudication. The time was subsequently extended. No application was made on behalf of the insolvent within the extended time, but some four months after the expiry of that time a creditor applied to annul the adjudication. Upon a report made by the Official Receiver that it was desirable to issue notice to the creditors before an order of annulment was passed the District Judge refused to annul the adjudication and extended the time for application for discharge. The insolvent took no action at all in the matter. In the course of his judgment Kumaraswami Sastri, J., says, at p. 841 of the report:

The question is whether the learned District Judge was right in extending the time on the report of the Official Receiver. It is argued for the appellant that the provisions of S. 43 are mandatory, that the Court has no power to extend the time after it has elapsed . . . . . . For the respondent it is contended that S. 43 is only directory and not mandatory, that it is open to any creditor or to the Official Receiver to apply for an extension of time even though the time has expired and that in the present case the Judge acted within his powers and in the exercise of sound discretion in extending the time."

The learned Judge then proceeded to review the relevant sections of the Provincial Insolvency Act, and remarked that there was a conflict of opinion upon the point. After examining a number of authorities, including a previous decision of the Madras High Court, viz., *Abbireddi* v. *Venkata Reddi* (5) the Court held the provision to be a mandatory provision. Among the cases considered by this Bench was *A.J.E. Abrahim* v. *Sookias* (6), to which it will be necessary later to refer.

So far as *Abbireddi's* case is concerned we need only say that the Bench of the Madras High Court refused to be bound by it, and does not find a place in any authorized report so far as we know.

The case of *Arunagiri Mudaliar* v. *Kandaswami Mudaliar* (7) was also referred to. There the two Judges differed upon the point. Krishnan, J., construed S. 43 of the Act in the light of the decision of the Privy Council in *Badri Narain's* case (1). We need only say that their Lordships in the latter case pointed out that the words in the provision under review gave the Court a discretion and moreover we prefer the view of Waller, J., (who dissented), for the reasons he has given.

On behalf of the respondent the case of *Abrahim* v. *Sookias* (6) was strongly relied upon. In that case an insolvent applied for an extension of the period fixed some three weeks after its expiry. He pleaded ignorance of the time fixed and an extension was granted purporting to be under S. 27 (2) of the Act. It will be seen that this case came up for decision before the cases to which we have had occasion to refer were decided and the learned Judges seem to have thought that the true meaning of S. 43 of the Act is that an order of adjudication must be at the instance of the opposite party or by the Court itself, and does not stand cancelled automatically on the expiry of the period. It had been suggested in argument that S. 148, Civil P. C., was applicable, but it does

(3) A. I. R. 1925 Pat. 355=4 Pat. 51.
(4) A. I. R. 1928 Mad. 265=51 Mad. 839.
(5) A. I. R. 1927 Mad. 175.
(6) A. I. R. 1924 Cal. 777=51 Cal. 337.
(7) A. I. R. 1924 Mad. 635.

not appear whether this provision influenced the Bench in their decision. We would observe, however, that it is not suggested on behalf of the appellant that the order of discharge should "stand annulled" at the expiry of the period in question, but that it is the duty of the Court to pass such an order after the conclusion of the period fixed or extended. In this connexion it seems to us that the Court should as a general rule pass such an order at the time the date for application for discharge is fixed to take effect after the expiry of the period.

The case of *Saligram* v. *Official Receiver*, *A. I. R.* 1926 *Sind* 94, was also referred to. In that case one of the learned Assistant Judicial Commissioners held that, although the provisions of S. 43 are mandatory, the period may be extended by reason of sub-S. (2), S. 27 of the Act until the insolvency proceedings have had time to be carried to completion. The other member of the Court was of opinion that the words "shall be annulled" in the provision under review are directory and discretionary and not mandatory. It is sufficient to say that the Court appears to have been much impressed by considerations of apparent expediency, and they relied upon the view of Krishnan, J., in the case of *Arunagiri Mudaliar* v. *Kandaswami Mudaliar* (7) to which we have referred.

Two other authorities must be mentioned. *Rup Singh* v. *Official Receiver*, (8). In that case the real point for decision was whether the Court has power to extend the period either on the application of the insolvent himself, or on the application of the creditors, or suo motu. In the course of his judgment the learned Judge considered whether the period specified by the Court must mean specified in the first instance and not as subsequently extended, and came to the conclusion that by reason of S. 27 (2) of the Act the period within which an application could be made must include any period of extension granted by virtue of this section. We need only say that we entirely agree with the view expressed. The learned Judge referred to the case of *K. K. S. A. R. A. Chettyar* v. *Mg Myat Tha* (9) a decision

(8) A. I. R. 1928 Lah. 82=10 Lah. 357.
(9) A. I. R. 1927 Rang. 136.

of a Bench of this High Court. The head-note in the Law Journal Report of this case is :

"The Court is not bound to annul the adjudication order if the insolvent fails to file his application for discharge by the date fixed by the Court, but may extend the time for filing the application upon good cause being shown. The Court has power to extend the time even after the expiry of the period of discharge."

It is clear to us that the last portion of the headnote as it stands is very misleading, for it is plain from the judgment of the learned Officiating Chief Justice that the application for extension was filed by the creditor before the expiry of the period fixed for the discharge application, and moreover that the Court considered the question of extension on the actual date fixed for the application for discharge. In our view there can be no doubt that this decision was correct, and moreover we think that had the application not been made, in the manner it in fact was the case might well have been otherwise decided.

The more recent case upon the question appears to be *Jethaji Peraji Firm* v. *Krishnayya* (10). It will be observed from the report that although the matter for our decision was discussed at length by both members of the Bench, yet no decision was necessary or arrived at upon the point. The head-note is :

On an annulment of adjudication under S. 43, Provl. Ins. Act, owing to the insolvent's failure to apply for his discharge, the insolvency proceedings do not necessarily come to an end and his property does not ipso facto revert to the insolvent. The Court may, in proper cases, vest it in the Official Receiver or other person as provided by S. 37 of the Act. And if before the annulment, the Official Receiver had applied to set aside a mortgage under S. 54 of the Act, as an act of fraudulent preference, he can prosecute the application after the annulment."

"Quaere, whether S. 43 is mandatory ?"

Venkatasubba Rao, J., commences to deal with the question which we have to decide at p. 655, of the report. He reviews all the cases to which we have referred, and says, at p. 656, that there is a conflict of authority on the point. Without giving his reasons however, he apparently would have arrived at a decision in the light of the case of *Badri Narain* v. *Sheo Koer* (1). We have already stated our reasons for distinguishing this authority. The other member of the Court, Reily, J., if he had had to decide the matter

(10) A. I. R. 1930 Mad. 278=52 Mad. 648.

would have arrived at the opposite conclusion. He says at p. 663 of the repor- when dealing with the case of *In re Lord Thurlow, ex parte Official Receiver* (11):

"it is one thing to provide that on a certain thing happening or not happening the next step shall be such and such; it is quite another thing to provide that, if a certain order of the Court is not carried out within a certain time a certain consequence shall follow. The latter provision is to my mind much more clearly mandatory than the former. It was very difficult to suggest any reasonable explanation why the words shall be annulled were used in S. 43, Provl. Ins. Act if something other than their plain meaning was intended, and it is not disputed that their plain meaning is mandatory."

Later, the learned Judge says:

"I am very averse to accepting suggestions which are not infrequently made in this Court when the plain language of a statute appears to lead in particular circumstances to inconvenient consequences, that the legislature had done its work carelesly and inefficiently and has not said what it meant or has said what it did not mean. On the contrary we have no right to depart from the plain meaning of a statute except for some compelling reason, and our view of what is convenient can seldom provide such a reason. In this instance the use of the words "shall be annulled" becomes more marked when we contrast it with the provision "may be annulled" in S. 41, Presidency Towns Insolvency Act. It would be extravagant to assume that when framing S. 43, Provl. Insol. Act the legislature has forgotten the wording of S 41, Presidency Towns Insolvency Act on the same subject, and, if the latter provision had not been entirely forgotten, the words "shall be annulled" in S. 43, Provincial Insolvency Act, can hardly have been chosen otherwise than advisedly and deliberately."

Later at p. 665 of the report in dealing with the question whether hardship can arise from a strict interpretation of the provision under review, he says:

"The annulment of his adjudication can inflict no such hardship on a debtor, as S. 10 (2), Provincial Insolvency Act, indicates that, if he has been prevented from making his application for discharge by some reasonable cause, the Court will permit him to present a new insolvency petition on the same facts as before. The hardship which the learned Advocate-General has pressed upon us is, hardship to the creditors or some of them, if the adjudication is annulled on account of the debtor's default, when it is clearly profitable to them that the realization and distribution of the debtor's assets should go on in the insolvency proceedings, or disastrous to them that his property should again vest in the debtor. But it is to prevent any such hardship that the legislature has by the terms of S. 43 made the provision of S. 37 applicable in such a case. It is not necessary, when the adjudication is annulled because the debtor has failed to apply for his discharge within the specified time, that his property should revert to him; it may be vested by the Court in some other person. In a case such as the present one the obvious course is that the Court should order the property to vest in the Official Receiver."

We have quoted at some length from this judgment, for we think, with respect, that it well expresses what is the true view upon the question.

There has been no doubt a conflict of authority upon the point, but we cannot help thinking that the authorities relied upon by the appellant represent the true view of the matter. As we have already indicated we do not think that the Court in the case of *Abrahim* v. *Sookias* (6) attached sufficient weight to what is apparently plain wording. We cannot approve the opinion of Krishnan, J., in *Arunagiri Mudaliar* v. *Kandaswamy Mudaliar* (7), who seems to have thought that the words under review are directory and not mandatory; and it is sufficient to say with regard to the case of *Saligram* v. *Official Receiver* (12) (reported in an unauthorized volume) that its authority is at least less than that of the Bench decision of the Patna and Madras High Courts relied upon by the appellant. Moreover one of the learned Assistant Judicial Commissioners in *Saligram's* case (12), was clearly of opinion that the words of S. 43 are mandatory. We agree with this view. The words seem to us to be in themselves precise and unambiguous, and if that is so no more is necessary than to expound them in their natural and ordinary sense; in such a case, the words themselves best declare the intention of the legislature: see *Income-tax Commissioner* v. *Chunilal* (13) what the intention of the legislature was seems to be evident from an examination of the provision of the statute to which we have referred. It is to be observed that the Act of 1920 was an amending Act; and we would again lay stress upon three of its provisions: Sub-S. (2) of S. 10 which is new places a debtor who has failed to apply for his discharge under a geat disability. This provision is clearly prohibited from presenting a further insolvency petition without leave. S. 41 of the Act lays down that

(11) [1895] 1 Q. B. 724=64 L. J. Q. B. 479=59 J. P. 309=2 Manson 158=43 W. R. 403 =72 L. T. 642.

(12) A. I. R. 1926 Sind 94.

(13) [1896] A. C. 534.

a debtor "shall" apply for his discharge "within the period specified by the Courts." The words we have quoted verbatim from this provision are new words and are clearly mandatory see: as to this the case of *Bhai Khan* v *Desraj Sha* (14), a decision to which one of us was a party. Moreover the whole of sub-S. (1), S 43, is new, and as was pointed out by Reilly, J., in the case of *Jethaji Peraji Firm* v. *Krishnayya* (10), these words can hardly be supposed to have any other than their natural meaning. We have no hesitation in holding therefore that the words in question are mandatory words. That being so, can it possibly be said that the respondent may pray in aid the general provisions of the Civil Procedure Code? We think not. It seems to us that as the statute lays down that if an act is not done within a specified period a certain consequence shall follow. This provision must be held to have been contemplated by and fell within the limiting words in S. 5 of that statute. As we have already pointed out, this was the view of the Bench of the Madras High Court in *C. Venugopala Chariar's* case (2). It is true that that decision related to the position after an annulment order under S. 43 had been passed; but the Court, being of the opinion that the words of sub-S. (1) of that section are clearly mandatory held that an insolvent in such a case must resort to the definite remedy prescribed by S. 10 (2) of the Act and cannot apply O. 9, Civil P. C. In our view, the intention of S. 5 of the Act was to import the general power and procedure provided by the Code except where these are inconsistent with particular express provisions in the Act itself.

It is true that the effect of our decision may be that certain creditors in the insolvency may suffer. but as we have pointed out, there is nothing in sub-S. (2), S. 27 of the Act to prevent a creditor from applying for an extension of time for discharge. Moreover as we have also indicated, upon an annulment, the property of a debtor shall in such a case vest in such person as the Court may appoint.

For these reasons therefore we hold that the order of 19th January and 27th March 1929, should be set aside, and the appeal must therefore be allowed with costs.

Advocate's fee to be 10 gold mohurs (5 gold mohurs on each appeal).

J.M./R.K. *Appeal allowed.*

(14) C.-Mice; Appeal No. 53 of 1925.

A. I. R. 1930 Rangoon 172

DAS, J.

Ma E Tin—Appellant.

v.

Ma Byaw and *others*—Respondents.

Second Appeal No. 436 of 1929, Decided on 17th January 1930, against decree of Dist. Court, Tharrawaddy, D/- 27th February 1929.

Specific Relief Act, S. 23 (c) — Ante-nuptial contract can be enforced.

A Burmese Buddhist can file a suit for specific performance of an ante-nuptial contract entered into by the parents of both sides: 32 *All.* 410 (*P.C.*); *A. I. R.* 1928 *Rang.* 286, *Rel. on.* [P 173 C 1]

Thein Maung—for Appellant.

Kalyanwalla—for Respondents.

Judgment.— The plaintiff-appellant filed a suit for specific performance of an ante-nuptial contract by which the parents of her husband agreed to give her 10 acres of land. The defence was that there was no such agreement. But both Courts have held that there was such an agreement, and the first Court gave a decree in favour of the plaintiff, but the lower appellate Court held that an agreement regarding five acres only had been proved and dismissed the plaintiff's suit regarding the other five acres. The plaintiff filed this appeal and the defendants also filed cross-objections to the decree of the lower appellate Court.

The first objection taken by the defendants is that, as the contract was made between the parents, the plaintiff could not file this suit. But this point of the right to file this suit was taken in a previous appeal filed in this Court and in *Ma E Tin* v. *Ma Byaw* (1) it held that the plaintiff could file this suit. However, this point may be considered to be settled by the Privy Council decision in the case of *Khwaja Mahomed Khan* v. *Husani Begum* (2), where their Lordships held that the common law doctrine embodied in the case of *Tweddle* v. *Atkinson* (3) did not,

(1) A. I. R. 1928 Rang. 286.
(2) [1910] 32 All. 410=7 I. C. 237=37 I. A. 152 (P.C.).
(3) [1861] 1 B. & S. 393.

apply to India, and that in India and among communities circumstanced as the Mahomedans, among whom marriages are contracted for minors by parents and guardians, it might occasion serious injustice if the common law doctrine was applied to agreements or arrangements entered into in connexion with such contracts.

There can therefore be no doubt that the plaintiff is entitled to file this suit, and the only question that now remains to be decided is whether the plaintiff has proved that defendant 1 and her husband had agreed to give her 10 acres of land or not.

I think there is overwhelming evidence on the record to prove that defendant 1 and her husband had agreed to give the plaintiff the two pieces of land, which she now claims. There is the evidence of the people who were present at the time of the making of the gift and of those who were informed of it immediately after. I therefore modify the decree of the lower appellate Court and direct that the defendants do convey free of incumbrance the two pieces of land mentioned in the plaint. The plaintiff will get her costs from respondent 1. I do not think that respondent 3 is entitled to any costs as her case was that she was not interested in the properties and that she need not have appeared in the case at all. Therefore the order passed by the lower appellate Court giving her costs will be set aside and the order of the trial Court regarding mesne profits is also restored.

P.N./R.K. *Decree modified.*

A. I. R. 1930 Rangoon 173

CUNLIFFE AND CARR, JJ.

Myingyan Municipal Committee—Appellants.

v.

Maung Po Nyun—Respondent.

Letters Patent Appeal No. 9 of 1929, Decided on 4th March 1930, from judgment in Special Second Appeal No. 270 of 1929.

(a) Contract Act, Ss. 129 and 130—Guarantee for servant's fidelity is not continuing—Still surety can recall guarantee when there is definite proof of misconduct on part of principal debtor.

A guarantee in the nature of a surety for the servant's fidelity cannot be held to be a continuing guarantee revocable under S. 130. Still in such a case of fidelity-guarantee, once exact information reaches the surety that the person for whom he has remained surety has been guilty of misconduct, the surety is entitled to recall the guarantee as against the creditor or the obligee in the bond. But this is an equitable relief and such a relief must be very strictly administered. The misconduct must be clearly proved at the time of revocation: *Lloyds* v. *Harper*, 16 *C. D.* 290; *A.I.R.* 1920 *P.C.* 35 and *Phillips* v. *Foxall* 7 *Q.B.* 681, *Rel. on.* [P 174 C 2; P 175 C 1]

(b) Contract Act, S. 129—Illustration (a)—Scope.

Illustration (a) to S. 129 is wrong as a statement of law. [P 174 C 2]

S. Ganguli—for Appellants.

Maung Ni—for Respondent.

Cunliffe, J.—This is a Letters Patent appeal. The Myingyan Municipal Committee, appellants before this Court sued the respondent, Maung Po Nyun, in the Township Court of Myingyan, on a guarantee mortgage bond for tho sum of Rs. 760-9-0. The Township Judge gave them a decree for Rs. 314-10-0. On appeal to the District Court the judgment was set aside and a mortgage decree for the full amount claimed was substituted. On appeal to this Court it was held that the guarantee in question was a "continuing guarantee" within the meaning of S. 130, Contract Act, and that such a guarantee could be and in fact was recalled by the respondent. The appeal was, therefore, allowed judgment being given for the respondent in both the lower Courts.

To turn to the particular facts, the Municipal Committee had appointed into their service a Tax Collector by name Maung Ba Khin. They were desirious of obtaining a bond for his good behaviour. Such a bond was executed by Maung Po Nyun. It recites, inter alia, that

"where as Maung Ba Khin has been appointed a whole time Tax Collector, the property described in the schedule is mortgaged for the purpose of in parts securing and indemnifying the municipality against all loss and damage up to Rs. 2,000 suffered by reason of Maung Ba Khin not duly accounting for the taxes collected by him from time to time."

Information afterwards reached Maung Po Nyun which induced him to withdraw this guarantee by written notice. This notice is Ex. I. It is not in dispute.

Ba Khin was subsequently convicted of embezzlement. The sole question before us, therefore is: "Was this a continuing guarantee revocable at will" within the meaning of Ss. 129 and 130, Contract Act,

Section 129 is in these terms:

"A guarantee which extends to a series of transactions is called a continuing guarantee."

Section 130 runs as follows:

"A continuing guarantee may at any time be revoked by the surety, as to future transactions, by notice to the creditor."

Section 127 defines the consideration for a guarantee."

"Anything done, or any promise made for the benefit of the principal debtor may be a sufficient consideration to the surety for giving the guarantee."

All contracts of guarantee are called collateral contracts. The main contract on which the guarantee here depended was the employment of Ba Khin by the municipality. The consideration for the guarantee was, therefore the continuation of Ba Khin in his office of Tax Collector. The question is: Did the guarantee extend to a series of transactions? Cases interpreting S. 130 are practically non-existent in British India. The Contract Act, however, is in reality a Code of English law and the difference between a continuing guarantee and a simple guarantee has long been settled in the English Courts. The test is the nature of the consideration. If it is fragmentary and divisible, supporting for example a running or a floating balance, the guarantee is continuing and revocable. If it is entire, supporting, say, the grant of lease or the fidelity of an employee, it is non-revocable: see the observations of Lush, L. J., in *Lloyds* v *Harper* (1), at p. 318.

This view was also taken by the Privy Council in *S. N. Sen* v. *The Bank of Bengal* (2), a Rangoon appeal concerned with the guarantee provided for the employment of a cashier in the Bank. At p. 185, Lord Shaw, said:

"Both Courts treating the transaction as one of guarantee held that it was not a continuing guarantee, and their Lordships think rightly. The words of the section are 'A guarantee which extends to a series of transactions is called a continuing guarantee.' There was no series of transactions here. It was one transaction, the appointment of Edward Stephen to a place of trust in the Bank. So long as he continued in that place the guarantee remained."

It is to be noted that in that case it was argued that the duties of a cashier in handling his employee's money from time to time amounted to a series of transactions within the meaning of S. 129. Part of the trouble in this case has arisen I think by reason of Illus. (a) attached to S. 129. That illustration runs as follows:

"*A*, in consideration that *B* will employ *C*, in collecting rents of *B's* zamindari, promises *B*, to be responsible, to the amount of Rs. 5,000 for the due collection and payment by *C*, of those rents. This is a continuing guarantee."

The illustrations to the Contract Act are, in my opinion, to be used as guides only and not as authoritative and binding declarations of the law. It is to be noted firstly that Illus. (a) is apparently not based upon any specific English case, such as the two subsequent illustrations are; whilst as a parallel to the facts of the case before us now, it is in direct conflict with the opinion expressed in the Privy Council judgment cited above. I have been unable to find any modern case in which a guarantee has been held to be a continuing one, which depends upon a main contract of employment between a master and a servant in the nature of a surety for the servant's fidelity. As mentioned above the only surviving cases of continuing guarantees are those in which a third party stands surety for the due discharge of a mercantile account or a floating balance between businessmen. I think that the illustration is wrong as a statement of law.

There is some authority to show, however, that in the case of a fidelity guarantee once exact information has reached the surety that the principal debtor has been guilty of misconduct or the position has completely changed the surety is entitled to recall the guarantee as against the creditor or, as he would be called in English Law, the obligee on the bond. For example, in the case of *Phillips* v. *Foxall* (3), Blackburn, J., as he then was, said, quoting the case of *Burgess* v. *Eve* (4) from the judgment of Malins V. C.:

"But if there is misconduct on the part of the person whose fidelity is guaranteed, for instance, if a man guarantees that a collecting clerk shall only account for all moneys received by him and that collecting clerk is found to have embezzled his employer's money, reason requires that the man who entered into the guarantee because he believed the person to be of good character, when he finds he is not so, and not to be trusted, should have the power of saying 'I now withdraw the guaran-

(1) [1881] 16 Ch. D. 290=50 L.J.Ch. 140=29 W.R. 452=43 L.T. 481.

(2) A.I.R. 1920 P.C. 35=47 I.A. 164 (P.C.).

(3) [1881] 7 Q.B. 681.

(4) [1872] 13 Eq. 450=41 L.J.Ch. 515=20 W.R. 311=26 L.T. 540.

tee I gave you; I give you full notice not to trust him any more.' Notwithstanding all that has been said, I am clearly of opinion that a person who has entered into such a guarantee and is therefore responsible for the person whose fidelity he has guaranteed has a right to withdraw that guarantee when that person has been proved guilty of dishonesty."

Quoting further from the judgment of Malins, V. C., Blackburn, J, said:

"My opinion is, and I have no hesitation in expressing it, that a person who gives a guarantee will have a right to say to the person taking it: 'You will continue at your own peril to employ the person on whose behalf I gave the guarantee' provided that the clerk or the other person has been guilty of embezzlement or gross misconduct or has turned out to be unworthy of the confidence reposed on him by the person giving the guarantee for him."

Lord Blackburn, however, was careful to say that this was a form of equitable relief and such a relief must of course be very strictly administered. I apprehend for instance that the misconduct must be clearly proved at the time of the revocation and we do not find that this is the case here. Examining the respondent's own evidence, in the Township Court we find he said; "I did not suspect him when I heard that he lost money"(he is referring to Ba Khin). And again, "I did not make any enquiry." And later, "I asked him" (that is, a man called Maung Ba Shin, the President of the Municipality)

"If he had received my application and he said he had passed orders. I got up and came back. I did not know how much money was lost. I heard that money was lost in the municipal office and not that Ba Khin had lost it. Nobody asked me to make good the amount. I did not know he lost the money. I did not suspect Ba Khin. I don't know whether Ba Khin or anybody else has made good the amount."

In these circumstances, I do not think that equitable relief can possibly be afforded to the respondent. The appeal will therefore be allowed with costs and the judgment of the District Court of Myingyan will be restored.

Carr, J.—I concur.

P.N./R.K. *Appeal allowed.*

A. I. R. 1930 Rangoon 175

DAS, J.

Ram Lingam Pillay—Appellant.

v.

Ma Loke Gale and *others* — Respondents.

Special Second Appeal No. 474 of 1929, Decided on 29th January 1930.

Civil P. C., O. 34, R. 1—Suit by mortgagee—Subsequent purchaser in possession not made party to the suit—He cannot be disturbed without suit against him — He cannot also sue for declaring himself to be absolute owner.

Where a suit by *M* on his mortgage in which *N*, who is in possession as subsequent purchaser, is not made a party, is decreed and the property sold, *N* cannot sue for a declaration that he is the absolute owner of the property and he is merely entitled to a declaration that the mortgage is not binding on him. His possession, however, cannot be disturbed by any one without filing a suit against him: 8 *L. B. R.* 266; *A. I. R.* 1921 *L. B.* 61, *Rel. on.* [P 175 C 2, P 176 C 1]

P. K. Basu—for Appellant.

B. K. P. Naidu—for Respondents.

Judgment.—It appears that certain property belonged to Ma Zan Byu, the mother of respondent 1. Ma Zan Byu had four children, namely Tun Nyo, Po Win, Po Lin and Ma Lok Gale. Po Lin died leaving a son by the name of Ba Sein. Ma Zan Byu and her son Po Win in her lifetime had mortgaged her properties to the firm of P.L.A.R.A. After Ma Zan Byu's death, three of her heirs namely Tun Nyo, Po Win and Ba Sein sold the properties to Maung Chit Saing, respondent 2 for Rs. 600 to pay off the mortgage, and other debts to the P. L. A. R A. firm by Ex. D on the same day Maung Chit Saing mortgaged the properties to respondent 3's firm. This was on 27th May 1925. Then on 25th June 1925, Maung Chit Saing and Po Win sold the suit piece of land to respondent 1 by Ex. B. Then respondent 3 firm filed a mortgage suit on the mortgage, but did not make repondent 1 a party to that suit. The mortgage properties were sold, and the appellant became the purchaser of the suit piece of land, among others. Then respondent 1 filed the present suit for a declaration that she was the absolute owner of the piece of land and that the mortgage decree and sale were not binding on her. The Court of the first instance dismissed her suit, but the lower appellate Court decreed it. The purchaser now files this present appeal.

Question 1 to consider is whether the plaintiff's suit in the present form lies or not. Admittedly the plaintiff is in possession of the suit piece of land and no one has disturbed her possession up to now. All that the plaintiff is entitled to is a declaration that the mortgage decree is not binding on her and that no one can disturb her possession without filing a suit against her. She

is not entitled to anything more. There is no doubt that the mortgage decree is not binding on her as she was not a party to the suit and her possession cannot be disturbed by anyone without filing a suit against her. There is nothing to prevent the purchaser, who has purchased the rights of the mortgagee from filing a suit against her on the mortgage and making her liable for the same. But before doing that, he cannot in any way disturb her possession.

It has been held in the case of *San Bwin* v. *A. N. K. Nagamutu* (1) that a person in possession who is not made a party to the suit, cannot be disturbed without a suit ageinst that person. This has also been held in the case of *S.P.S. Chetty Firm* v. *Maung Po Aung* (2). I agree with these decisions and they fully state the law on the subject. But at the same time, the plaintiff is not entitled to the declaration asked for in this suit. The best course would be to set aside the decree of the lower appellate Court and dismiss her suit. I make it clear that the plaintiff cannot be disturbed from her possession without a suit being filed against her. Each party will bear its own costs.

P.N./R.K. *Decree set aside.*

(1) [1915] 8 L.B.R. 266=30 I. C. 710=8 Bur. L.T. 261.
(2) A. I. R. 1921 L. B. 61=11 L.B.R. 119.

A. I. R. 1930 Rangoon 176

DAS, J.

Maung Ke—Appellant.

v.

Maung Sein Kho and *another*—Respondents.

Second Appeal No. 340 of 1929, Decided on 9th January 1930, against decree of Dist. Judge, Thaton, D/- 22nd March 1929.

(a) Buddhist Law (Burmese)—Inheritance —Land transferred by mother to daughter and her husband as their share of inheritance is their joint lettetpwa property though daughter's claim to land has not become due at time of transfer.

It is not that the land transferred by a mother to a daughter and her husband as their share of inheritance at the time when the mother is the sole heir to it can only be regarded as gift simply because daughter's claim has not become due. It can still be regarded as the inheritance of the daughter which becomes the joint lettetpwa of herself and her husband. [P 176 C 2; P 177 C 1]

(b) Buddhist Law (Burmese)—Inheritance —Lettetpwa property of couple how to be divided illustrated.

If a husband and wife each brings a child by previous marriage and there is also a child to them both and if the wife dies, of their joint lettetpwa property eight portions should be made of which five portions should go to the husband, two should go to the son of both and one should go to the atet sons : *A. I. R.* 1925 *Rang.* 120, *Ref.* [P 177 C 1]

Wellington—for Appellant.

Thet Tun and *Surty*—for Respondents.

Judgment.—It appears that Ko Tun and Ma Tun, a married couple, and three children namely, Maung Bwa, the eldest son, Ma Meik, the second child, and Ma Shwe Mi, the third child. Ma Meik first of all married Ko On and by him had a daughter, Ma Saw Yin, who was the first wife of the plaintiff (Mg Sein Kho). Ma Saw Yin, died about the year 1926 leaving a daughter named Ma Tin Pu. Ma Shwe Mi first of all married Ko Ke defendant 1. They had a child still alive. Afterwards Ma Shwe Mi died and then Ko Ke married Ma Meik as his second wife. Ko Ke and Ma Meik also had a child who is still alive. It appears that in the year 1907, Maung Bwa claimed his share of inheritance as the orasa son; that he was paid a sum Rs. 700 as his share; and that he executed a release in favour of Ma Tun. Both Courts have held that this sum of Rs.700 was paid by Ma Tun out of her own money. Then in the year 1911, Ma Tun transferred the land in suit to Ko Ke and Ma Meik as their share of inheritance. It is claimed by the plaintiff that Ma Meik got this land as her share of inheritance; and that it was, therefore, the inherited property of Ma Meik, and that therefore, under the authority of *Maung Paw Thit* v. *Ma E Yin* (1), that he is entitled to half a share of the land.

It is contended by defendant 1 that this land cannot be regarded as the inheritance of Ma Meik, because at the time Ma Tun transferred the land she was the sole heir and Ma Meik had no share at all in the land. The contention is that the transfer by Ma Tun to Maung Ke and Ma Meik can only be regarded as a gift by Ma Tun and becomes their joint property and cannot be regarded as the inheritance of Ma Meik. I am unable to hold that this land cannot be regarded as the inheritance of Ma Meik, because her claim had not become due

(1) A. I. R. 1925 Rang. 120=2 Rang. 521.

at that time. It can only be regarded as the joint lettetpwa of Maung Ke and Ma Meik.

It appears that on the death of Ma Meik there were four sets of heirs; first of all Maung Ke the husband, then the child of Maung Ke by his former wife, then the child of Ma Meik by her former husband; and then the child of Maung Ke and Ma Meik.

In *May Oung's* leading cases on Buddhist Law at p. 285 the distribution in a case like this is given. May Oung states as follows:

"A husband and wife have each brought a son (by previous marriage) and there is also a son to them both. If the wife dies, there are two laws of partition between the stepfather and the three sons.

(1) Of the deceased's payin four portions having been made, let the stepfather take one and the son brought by the wife three; if there is lettetpwa, having made eight portions, let the stepfather take five, and the son of both two, and the atet sons one."

In this case there is no payin property at all but the only property is the lettetpwa of the couple. According to this, therefore, Ko Ke takes five shares the child of Ko Ke and Ma Meik takes two shares, and the other two children one share, and the plaintiff is, therefore, only entitled to one-sixteenth share of the land and mesne profits in proportion. The decree of the lower Court is therefore set aside, and there will be a decree stating that the plaintiff is entitled to one-sixteenth share of the land in suit and proportionate share in the mesne profits. The appellant will get his costs in all Courts from the plaintiff.

P.N./R.K. *Decree set aside.*

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* A. I. R. 1930 Rangoon 177

HEALD AND MYA BU, JJ.

H. A. J. Gidney—Defendant—Appellant.

v.

Anglo Indian and Domiciled European Association and *another* —Plaintiffs—Respondents.

First Appeal No. 125 of 1929, Decided on 17th January 1930, from judgment of Rangoon High Court, D/- 30th April 1929, in Civil Suit No. 311 of 1927.

(a) Tort—Defamation — Suit — Unincorporated association cannot suffer damage by libel and cannot sue — Incorporated association also cannot sue in damages for injury done to members before its incorporation.

A federation as an unincorporated association cannot suffer damage by reason of the publication of a libel against it and therefore is not competent to sue for damage. Further though the federation is subsequently incorporated, still an incorporated association as such cannot sue for an injury done to its members before it is incorporated. *London Association for the Protection of Trade* v. *Greenlands Ltd.* (1916) 2 A. C. 15, *Rel. on.* [P 180 C 2]

***(b) Civil P.C. O. 1, R. 8 —No representative suit can lie when sole relief claimed is damages suffered by publication of a libel —Tort—Defamation—Publication.**

One member of an unincorporated association cannot sue in damages on behalf of the other members where all such members are alleged each to have suffered damage by reason of the publication of the same libel nor can he maintain such a suit on behalf of the incorporated association by subsequently getting it registered. *Jenkin's* v. *John Bull Ltd.* (1910) *the Times April* 20, *Foll.*; 11 *Cal.* 213; 9 *Cal.* 604; 19 *Bom.* 391 and 41 *Mad.* 124, *Ref.* [P 181 C 2]

(c) Tort—Defamation—Malice—In matters of libel law imputes malice from falsehood.

In matters of libel the law imputes malice from falsehood.

A person falsely said that a federation had in its membership a pre-ponderance of women and children and suggested that for the reason it would be extremely hazardous to allow matters of vital importance to the community to be left to its judgment. He also said falsely that about six ladies, two or three with babies in their laps and about ten girls and ten boys attended a meeting of its committee.

Held : that the statements constituted a libel of members of the federation as members. [P 181 C 2, P 182 C 1]

Leach—for Appellant.

E. Hay—for Respondents.

Heald, J. — There are two bodies which claim to represent the Anglo-Indian and Domiciled European community in Burma, namely a Branch of the "Anglo-Indian and Domiciled European Association of India and Burma" and the "Anglo-Indian and Domiciled European Federation (Burma)".

Early in January 1927 the present appellant, who is President of the "association," visited Rangoon and went to see respondent 2, who is President of the "Federation", at his residence. Respondent 2 refused to admit appellant to his residence but sent a message that he would see him in his office. Appellant went and saw the respondent 2 at his office and it was arranged that appellant should attend a meeting of the Provisional Committee of the "federation", the "federation" being at that time in course of

formation. Appellant attended a meeting of the Provisional Committee which was held the same evening. His object in attending the meeting was to persuade the members of the proposed Burma "Federation" to join the All-India " Association." It appears that appellant was disappointed at the Provisional Committee's reception of his advice, and respondent 2 says that as he left the place of the meeting he said that he was a very sad man and that it must now be war to the death.

The meeting of the Provisional Committee took place on 11th January 1927 and, before appellant arrived at the meeting, the report of the "federation" for the previous half year had been read and adopted. That report was published in February 1927 and in it appears the following passage.

Our critic,

It is claimed that systematic abuse is a creative force and if this be so the federation has certainly acheived immortality. The Burma Chronicle' persists in its inglorious function of chronic abuse. We do not desire to enter into any controversy with this petty and pitiable production of a dying and enfeabled body. We are satisfied that the many misstatements and inexactitudes, couched in immoderate language, which appear in this hectic publication contain their own refutation. Its irresponsible and scurrilous utterances mark the paper out to be an excellant example of rag journalism and the only guarantee for the circulation of such task is the fact of free distribution at the expense of communal funds. It is admitted that the "Burma Chronicle" is an organ of the Burma Branch of the Association."

On 28th March 1927 an account of an interview in which respondent 2 admittedly criticised appellant severely was published in the " Rangoon Times." On 28th May a letter written by appellant in reply to respondent 2's criticizms was published in the same paper. In that letter appellant said of respondent 2 that as President of the so-called Federation he undoubtedly over-estimated his position in the community and certainly magnified the influence he thought he wielded, that a man should know his own measure and keep it in mind and in all affairs great or small, that it was respondent 2 himself who had deliberately chosen to separate himself from the Anglo Indian and Domiciled European Association and to create an antagonistic and anti-association body, and that under such circumstances it was not only inconsistent but unreasonable of him to expect the Association to seek his advice. The letter went on to say :

"even though he claims numerical superiority for his ' Federation' in Rangoon, it would scarcely be judicious, indeed it would be extremely hazardous, to allow matters of such vital importance to the Community to be left to the judgment of a prepond-rance of women and children, opinions are judged from 'quality' of origin rather than 'quantity.' "

The Honorary Secretary of the "Federation" published a reply to this in the same newspaper on 30th April. He said that appellant alleged that women and children proponderated among the members of the Federation, that that allegation was not true, and that appellant must have a weak case when he had to resort to reckless statements of that kind.

Appellant replied with a letter which was published in the same newspaper on 17th May, and in which he said :

"While on a short visit to Burma early in January, I was invited by Mr. Campagnac to meet his council and which I naturally thought would be a representative gathering of the members of the Federation, to discuss the ways and means of a rapproachment between the Burma Federation and the Association. I was therefore not a little surprised to find present about 10 men including the President and Secretary three or four telegraphists whose only justification for being present appeared to be to tear me to pieces about an editorial that had appeared in the columns of the Anglo-Indian Review, two or three Cutoms men, three or four railway subordinates, about six ladies, two or three with babies in their laps, about 10 girls from 5 to 15 years of age and about 10 boys of similar ages. The conviction, rightly or wrongly, was established in my mind that if such a gathering were truly representative of the Federation it certainly would not and could not be in a position to consider and decide on a question of such vital importance to the community, as the rate of wages that should be accepted by our young men in the Army today. This is my apology and the reason for the statement that I made".

The " Federation" answered with a communication, which was published in the Rangoon Times of 27th May in which they said that there were present at the meeting 21 members of the Provisional Committee of whom only two were ladies, and that the only other persons present in the room where the meeting was held were a small girl aged three who was sitting beside her aunt, one of the members of the committee, and two young persons who had been playing tennis at the place where the meeting took place and who were not sitting at the table at which the meet-

ing was held. Apparently there were also present at the meeting two other members of the "Federation" who were not members of the Provision Committee.

At a special meeting of the Provisional Committee held on 19th May 19.7, which was called to consider appellant's letter of 17th May, it had been decided that the Chairman, that is respondent 2, be authorised to take against appellant such steps in the matter as he might be advised, and that the federation bears all costs incurred.

Early in June a notice was circulated to members of the council stating that in connexion with the legal proceedings against appellant technical difficulties had arisen over the non-registration of the "Federation" and that it was proposed that the Federation should be registered under the Societies Registration Act. Members of the council were asked to state whether they agreed to registration under that Act and with their approval the "Federation" was registered as a Literary, Scientific and Charitable Association" on 8th June 1927. On 15th June, at a meeting of the council respondent 2 as President was appointed to sue appellant on behalf of the "Federation."

On 18th June the suit out of which this appeal arises was instituted. In that suit the "Federation" suing in the name of its President, respondent 2 and respondent 2 suing in his personal capacity, claimed Rs. 3,000 jointly as damages for two alleged libels consisting in the publication of the words which I have cited above. The respondents said that the suggestion that the "Federation" enrolled children as members and that men were in a minority among the members was libellous, and that the suggestion that there were present at the meeting of the Provisional Committee about six ladies, two or three of whom had babies on their laps and about 20 young girls and boys was also libellous.

Appellant asked for further particulars as to the date of the registration of the "Federation," as to which of the respondents were alleged to have been libelled by the various statements and as to what amount of damages each of the respondents claimed. Further particulars are said to have been filed but we have been unable to find them on the record. Appellant then filed a written statement in which he said that the federation as a registered society was a different legal person from the federation as it existed at the time when the alleged libels were published, and that the federation as a registered society could not claim damages for a statement which was establisced before it came into existence, and which if it was libellous at all, libelled not the registered society but another person or other persons, that respondent 2 had no cause of action because no libel against him personally was alleged, and that the respondents were not entitled to make their separate claims in one suit. He admitted publication of the matter alleged to be libellous, but denied that it was libellous and said that it was fair comment and criticism on matter of public and communal interest. He pleaded that his conduct was neither malicious nor dishonest, that the suit was false and vaxatious, and that he was entitled to compensation against respondents for such a false and vexatious action.

The case went to trial on issues as to whether the "Federation" as such was entitled to sue, whether the words published by appellant were defamatory, whether those words were true in substance and in fact, whether they were used maliciously or without malice, whether they were used on privileged occasions, and as to the amount of damages, if any, to which either of the respondents was entitled. No issue was framed as to the right of the two respondents to join their separate claims in one suit because appellant rightly withdrew his pleading on that point.

The learned Judge who dealt with the case on the original side of this Court, said that there was no doubt that the words used by appellant implied that the "Federation" was composed of a preponderance of women and children and was therefore not entitled to be consulted in any serious matter, and holding that the statements made by appellant as to the persons who were present at the meeting were false to appellant's knowledge, came to the conclusion that he made those statements with the deliberate intention

of bringing both the respondents into contempt. He said that there was no question of privilege because when a person deliberately makes a false statement no question of privilege can possibly arise and malice is presumed. On the question whether the "Federation" as a registered society could sue for damages for a libel on the "Federation" before it was registered as a society he said that in his opinion it could sue, and on the question whether respondent 2 could sue, he said that there was no doubt that he could sue because he as well as the "Federation" had been libelled. He went on to say that substantial damages should be awarded because appellant had deliberately delayed the hearing of the suit and had filed a false defence by pleading truth when he knew that he could not possibly prove the truth of the statements, and in the result he gave a decree for Rs. 1,000 damages in favour of each of the respondents, with costs amounting to Rs. 981.

Appellant appeals on grounds that the learned Judge was mistaken in finding that the statements were false to appellant's knowledge and that he made them with the deliberate intention of bringing respondents into contempt, that the statements were made in good faith and on privileged occasions and were not defamatory, that the "Federation" as such was not entitled to sue, that respondent 2 personally had not been libelled and therefore was not entitled to sue, that the appellant had not deliberately delayed the proceedings and had not filed a false defence, that the damages awarded were excessive, and that the suit ought to have been dismissed with costs.

It will be convenient to deal first with the questions of law which arise in the case. Appellant's learned advocate says that an unincorporated association, such as the "Federation" admittedly was at the time when the alleged libels were published, cannot be libelled as an association, since it is not a legal person, and that the remedy of the members of such an association, if they were libelled is to sue personally. He alleges further that one member of such an association cannot be allowed to sue on behalf of the other members, and that the incorporation of the association after the publication of the libels does not enable the president of the incorporated association to sue on behalf of the association or of the other members of the association.

No direct authority for the first of these propositions has been cited, but it was suggested on high authority in the case of the *London Association for the Protection of Trade* v. *Greenlands Ltd.* (1) that an unincorporated association as such cannot be guilty of a libel because "as an entity it could neither publish nor authorise the publication of a libel," and it would seem to follow that as an entity it could not suffer damage by reason of a libel. I would therefore hold that the "Federation" as an unincorporated association, which it was at the time of the publication of the alleged libels, could not suffer damage and therefore could not sue.

The question whether the Federation's subsequent incorporation makes any difference to its right to sue, that is in effect whether an incorporated association, as such, can sue for an injury done to its members before it was incorpoerated, seems to me to admit of only one answer, namely that in such circumstances the incorporated body as such cannot sue.

It seems to me to follow the only action which can be taken in respect of a libel on an unincorporated association is a suit brought either by the individual members or on behalf of the individual members. No question arises in this case of an action brought by individual members and strictly speaking no question of an action brought by one member on behalf of other members arises, since the suit does not purport to be a suit brought under the provisions of R. 8, O. 1 and the permission of the Court which is necessary under that rule was not in fact sought in this suit. We have, however, been asked to consider the question whether or not respondent 2 could be allowed to sue on behalf of those members of the Federation who were members of the unincorporated association at the time of the publication of the alleged libels. Appellant relies on the dictum of Flet-

(1) [1916] 2 A. C. 15=85 L. J. K. B. 698=32 T. L. R. 281=114 L. T. 434.

other Moulton L. J. in the case of *Jenkins* v. *John Bull Ltd.* (2), where the learned Judge said :

"To my mind no representative action can lie where the sole relief sought is damages, because they have to be proved separately in the case of each plaintiff."

Respondents on the other hand rely on the wording of O. 1, R. 8 which says that :

"where there are numerous persons having the same interest in one suit one or more of such persons may with the permission of the Court sue in such suit on behalf of or for the benefit of all persons so interested."

The wording of this rule, if it applies to the case, raises the question whether or not all the persons who were members of the unincorporated "Federation" at the time of the publication of the alleged libels have "the same interest" in the suit. No Indian case where the suit has been based on libel has been cited before us, and we have been unable to find any. There are cases such as *Geeresbala* v. *Chunder Kant* (3) where one legatee under a will has been allowed to sue on behalf of himself and other legatees for discovery of the estate, or *Oriental Bank Corporation* v. *Govind* (4) where one creditor was allowed to sue on behalf of himself and the other creditors for a declaration that certain properties belonged to the estate of their debtor, who had died intestate, or *Ahmedbhoy* v. *Balkrishna* (5) where one raiyat was allowed to sue on behalf of himself and the other raiyats for a declaration of their general rights, or *Chidambaranatha* v. *Nallasiva* (6) where one disciple of a mutt was allowed to sue on his own behalf and on behalf of other disciples for a declaration that certain alienations of property in which as such disciples they had the same interest were invalid, but we know of no case in which one of a number of persons who are alleged each to have suffered damage by the publication of the same libel has been allowed to sue on his own behalf and on behalf of other such persons. The words "the same interest" are used in the English R. 9, O. 16 to which our R. 8, O. 1 corresponds, and in the absence of any material difference in the wording of the two rules and of any authority to the contrary in India, I am satisfied that we ought to accept the view taken in *Jenkins* v. *John Bull Ltd.* (2) and hold that respondent 2 was not entitled to sue either on behalf of the incorporated "Federation" as in fact he did, or on behalf of those members of the unincorporated "Federation" who were members at the time when the alleged libels were published.

On these findings it is unnecessary to consider whether or not the "Federation" as such or the members of the "Federation," who were members at the time of the publication of the alleged libels, suffered damage, and all that we need consider is whether the publication constituted a libel on respondent 2, and if so what measure of damages should be awarded. We shall be bound to consider whether or not the publication involved a separate libel on respondent 2 personally, as well as a libel on him as a member and as Chairman of the "Federation," and in assessing the measure of damages we shall be entitled to take into consideration the fact that respondent 2 was the Chairman of the "Federation" and so possibly more likely to be affected by a libel on the "Federation" than an ordinary member.

Appellant's learned advocate says that he does not dispute the evidence that at the meeting of the Provisional Committee which appellant attended there were present in addition to the male members of the committee only two ladies, who were members of the Committee and only one child and two young people, that is to say, he admits that appellant's statement that there were "about six ladies, two or three with babies in their laps, about ten girls from five to 15 years of age and about ten boys of similar ages" was false, but he denies that the falsehood was malicious. In matters of libel the law imputes malice from falsehood, and we have no difficulty in finding that in so far as the statements were false they were malicious.

What we have therefore is that appellant said falsely that the "Federation" had in its membership a preponderance of women and children and suggested that for that reason it would be extremely hazardous to allow matters

(2) [1910] The Times, April 20.
(3) [1885] 11 Cal. 213.
(4) [1883] 9 Cal. 604=13 C. L. R. 142.
(5) [1895] 19 Bom. 391.
(6) [1918] 41 Mad. 124=33 M. L. J. 357=42 I. C. 360=6 M. L. W. 666.

of vital importance to the Anglo Indian and Domiciled European Community to be left to its judgment, and that he also said falsely that about six ladies, two or three with babies in their laps, and about ten girls and ten boys attended a meeting of its committee.

I see no reason to doubt that those statements constituted a libel on the persons who were members of the "Federation" or of its committee and on respondent 2 as a member of the "Federation" and as Chairman of the committee at the time when the statements were published, but I fail to see how that they constituted a separate libel on respondent 2 in his personal capacity as distinct from his capacity as a member of the Federation and Chairman of its committee. What remains is for us to assess the damages which should be awarded to respondent 2 by reason of the libel on him as a member of the Federation and Chairman of its committee.

The libels were not in my opinion serious. I doubt if respondent 2's reputation, which is admittedly high and well established in Rangoon, could possibly in the opinion of right thinking men suffer any material damage because it was said of a representative association such as the "Federation" of which he was Chairman that it had a preponderance of woman and children among its members or that a number of women and children attended a meeting of its committee. Such libel as there was consists in the fact that appellant's opinion that the Federation was not fit to be entrusted with the judgment and decision in matters of vital importance to the Anglo-Indian and Domiciled European Community, was supported by a false statement of facts and was therefore not fair comment. The libels were little more than technical and in my opinion "nominal" as distinct from "contemptuous" damages, coupled with an award of costs, will suffice to indicate that in our view there was in fact a libel, that the imputation made therein were false, and that respondent 2 has cleared his character of any cloud that may have been cast on it by the libels.

I would therefore set aside the judgment and decree of the learned Judge on the original side of this Court and would dismiss the suit without order for costs so far as respondent 1 is concerned, and I would award to respondent 2 nominal damages of ten rupees with costs on that amount together with the special advocate's fee of Rs. 680 in the trial Court. I would direct that respondents bear appellant's costs in the appeal, advocate's fee to be 20 gold mohurs.

Mya Bu, J.—I concur.

P.N./R.K. *Order accordingly.*

A. I. R. 1930 Rangoon 182

BROWN, J.

U Po Thet and *another*—Appellants.

v.

Hauk Pat and *another*—Respondents.

Second Appeal No. 472 of 1929, Decided on 24th March 1930, from judgment of Dist. Judge, Pegu, in Civil Appeal No. 202 of 1928.

(a) Civil P. C., O. 41, R. 1—Court cannot dispense with copy of decree.

The appellate Court has no power to dispense with the production of the copy of the decree. [P 183 C 1]

(b) Limitation Act, S. 5—Persons misled by order of Court can claim benefit of S. 5.

Whether due care and attention have in fact been exercised in any particular case depends upon the circumstances of that case. [P 183 C 2]

An appeal was filed without copy of decree. The appellant had filed an affidavit to the effect that he had made an application for copy but could not get it as no decree was found in the proceedings. The appellate Court granted the application for dispensing with the copy and to prosecute the appeal without it. When the copy was filed, the appeal was time-barred and consequently dismissed.

Held, that in view of the steps taken by the appellant when he filed an appeal and the order of the Court dispensing with the copy, the appellant must be considered to have exercised due care and attention. [P 183 C 2]

Tun Aung for *Tun Maung*—for Appellants.

S. Ganguli—for Respondents.

Judgment.—The present appellants filed an appeal in the District Court of Pegu, on 3rd December 1928, against the judgment and decree of the Township Court of Kawa, dated 8th April 1928. At that time they filed their appeal no decree had been drawn up. They mentioned this in the memorandum of appeal and at the same time filed an application asking the Court to dispense with the production of a copy

of the decree. With this application they filed an affidavit by the appellant Maung Ba Than, in which he stated that he had made an application for a copy of the decree, but had been unable to obtain one, as no decree could be found in the proceedings.

Unfortunately the appellate proceedings of the District Court have been lost, and, although they have been partially reconstructed no copy of the diary of these proceedings is before me. It appears, however, from the final judgment passed by the Court that the District Judge, at the time the appeal was presented, allowed the application dispensing with a copy of the decree. What happened in the District Court after this is impossible to say. But the trial Court proceedings show that the decree of that Court was not actually signed until 8th June 1929, and the judgment of the District Court shows that a copy of this decree was filed in that Court on 22nd June. The District Court finally dismissed the appeal on the ground of limitation.

It is quite true that on 22nd June when the copy of the decree was filed, the appeal was long barred, unless the appellants were entitled to exclude the time between the original application for copy and the final passing of the decree. It is also true that under R. 1, O. 41, the District Court had no power to dispense with the production of a copy of the decree. It may be open to some doubt whether in the circumstances the appellant was entitled to count the time from the filing of his original application up to the date of the signing of the decree as time requisite for obtaining copies. It could be argued that it was open to the appellants to apply to the trial Court at a much earlier date to draw up a decree in accordance with the judgment. But, however this may be, and assuming for the purposes of the argument that the appeal was time-barred, I think, this is a case where the appeal should have been admitted under the provisions of S. 5, Lim. Act. There can be no question of the good faith of the appellants in this case. It is clear that they attempted to obtain a copy of the decree from the first, that they explained the position when they filed their appeal; and that they were given permission by the District Court to prosecute the appeal without a copy of the decree. It was not then unreasonable that they should think that no further action on their part was necessary and if they are late in filing the appeal, it is due to bonafide mistake on their part. It is true that to claim the benefit of the provisions of S. 5, Lim. Act, the appellants must shew that they exercised due care and attention. But whether due care and attention have in fact been exercised in any particular case depends upon the circumstances of that case, and in view of the steps taken by the appellants when they filed the appeal and the orders passed thereon by the Court, I do not think it reasonable to hold that they did not exercise due care and attention. They can reasonably claim that they were misled by the order of the Court.

What happened between the signing of the decree and the filing of its copy in the District Court, we do not know, as the diary of the District Court proceedings is missing. But the interval between the date of signing and the date of filing a copy in the District Court is only 16 days, and in the absence of anything to show exactly what took place, I do not consider that this should be considered an unreasonable interval. If then the appellants must be held to have filed the appeal after expiry of period of limitation prescribed therefor, I am of opinion that they showed sufficient cause for not filing the appeal within the period allowed. I am therefore of opinion that the appeal should not have been dismissed on the ground of limitation. I set aside the decree of the District Court and direct that the appeal in that Court be re-admitted and decided on its merits. In the circumstances, I pass no orders as to costs of this appeal. The appellants will be entitled to a refund of court-fees paid by them in the appeal in this Court.

P.N./R.K. *Decree set aside.*

A. I. R. 1930 Rangoon 184

HEALD AND OTTER, JJ.

U Zoe—Appellant.

v.

Ma Mya May—Respondent.

First Appeal No. 234 of 1929, Decided on 10th February 1930, from decision of Dist. Judge, Thaton, D/- 24th August, 1929, in Civil Execution No. 27 of 1928.

Transfer of Property Act, S. 19 — Land conveyed to trustee in trust for *A* during his life with direction to trustee to convey land after *A's* death to *R*—Right of *R* is vested and not contingent.

Certain lands were conveyed to a trustee in trust for *A* during his life with a direction to a trustee to pay certain amount to *A* out of profits of the lands and on his death to convey the lands to *R* provided that the trustee should at any time convey the lands to *R* if *A* should so desire.

Held : that the right of *R* under the settlement was more than an expectancy of succession and was a vested interest and not a mere contingent interest and could be attached and sold in execution of a decree against *R* : 31 *Bom.* 165 *Dist.* ; 40 *All.* 692 ; *A. I. R.* 1925 *All.* 389, *Expl.* [P 185 C 1]

Anklesaria—for Appellant.

Eunoose—for Respondent.

Heald, J. — The parties to the litigation are father and daughter. Under an award, which was made a decree of the Court, appellant was entitled to recover from respondent a sum of Rs. 19,562-8-0 in cash, and he applied for execution of the decree in respect of this sum by the attachment and and sale of respondent's right title and interest in certain lands under a settlement. Respondent took objection that her interest under the settlement was not liable to attachment by reason of the provisions of S. 60 (1) (m), Civil P. C., which says that an expectancy of succession by survivorship or other merely contingent or possible right or interest shall not be liable to attachment or sale in execution of a decree.

The lower Court said that under the settlement, respondent was not given any part of the estate during appellant's lifetime, that respondent might die before appellant, and that therefore respondent's right in the property were merely contingent and were not attachable. Under the settlement, the lands which are the subject matter of the application for attachment, together with certain other lands, were conveyed to a trustee in trust for appellant during his lile with a direction to the trustee to pay Rs. 2,000 a year to appellant out of the rents and profits of the land during appellant's lifetime and to apply the rest of the rents and profits during appellant's lifetime in paying off a mortgage on the lands, and on appellant's death to convey the lands to respondent, provided that the trustee should at any time convey the lands to respondent if appellant should so desire.

Appellant's learned advocate referred us to the cases of *K. C. Mukerjee* v. *Alinbai* (1), *Balwant Singh* v. *Joti Prasad* (2) and *Sunder Bibi* v. *Rajendra Narain Singh* (3). A perusal of the first of these cases shows that it is irrelevant. In the second case a Hindu adopted son, who by virtue of his adoption became sole heir to his adoptive father's estate, but whose adopted mother had under a settlement a life interest in that estate, purpoted to sell certain properties comprised in the estate, and the question was raised whether the transfer of his interest in that property was prohibited by the provisions of S. 6 (a), T. P. Act, which says that the chances of an heir-apparent succeeding to an estate cannot be transferred. The obvious answer to that question was that the adoptive son was not an heir-apparent but an actual heir since his father had died, and that his interest in his father's estate was not a chance of succession but actual ownership of the property, subject to the widow's right under the settlement. It appears therefore that the decision in that case does not go far towards supplying an answer to the question which arises in the present case. The third case was one in which under a compromise decree it was provided that a younger brother should hold certain properties for his life and that on his death the properties should pass absolutely to the elder brother or his heir. The question arose whether the rights of the elder brother in the property could be attached and brought to sale in execution of a decree against him and that it was

(1) [1911] 33 All. 414=9 I. C. 935=8 A. L. J. 199.

(2) [1918] 40 All. 692=47 I. C. 599=16 A. L. J. 765.

(3) A. I. R. 1925 All. 389=47 All. 496.

held that those rights were vested and not contingent and so were transferable and attachable and saleable in execution. Respondent's learned advocate has referred to the case of *Sumsuddin* v. *Abdul Husein* (4), where a daughter, who was one of three heirs-apparent of her father accepted from her father a sum of money representing her share of his estate and executed a deed whereby she purported to release to him all her "rights and claims" in respect of his estate, and it was held that, because she was merely an heir-apparent and, while her father was alive, had merely an expectation, the transfer of her supposed "rights and claims" was prohibited by S. 6 (a), T. P. Act and was invalid. It is difficult to see how the decision in that case helps towards the decision of the present case where respondent has what is admittedly a vested interest in the estate although she has no present right to obtain either the profits or the corpus.

It seems to me clear that the respondent's right under the settlement in this case is more than an expectancy of succession by survivorship and it is in fact admitted that she has a vested interest and not merely a contingent or possible right. It appears therefore that S. 60 (1) (m), of the Code does not apply to the case and as it is not suggested that there is any other provision of law which would prevent the attachment and sale of respondent's right in the lands, I would set aside the order of the lower Court and reject her objection to the attachment and sale of her interests in the lands.

I would, however, point out for appellant's benefit that the sale of such an interest is unsatisfactory and the appellant has at his disposal what may be a more satisfactory way of recovering the amount of the decree in his favour, namely by directing the trustee to convey to respondent specific holdings of land and then bringing those actual holding to sale in execution. I would set aside the judgment and final formal order of the trial Court and would dismiss respondent's objection to the execution without order for costs.

Otter, J.—I agree that the interest of the respondent is not within the provision of S. 60 (1) (m), Civil P. C., and that therefore the judgment and decree of the trial Court should be set aside and that the respondent's objection should be dismissed without costs.

P.N./R.K. *Decree set aside.*

(4) [1907] 31 Bom. 165=8 Bom. L. R. 781.

A. I. R. 1930 Rangoon 185

HEALD, OFFG. C. J. AND OTTER, J.

Maung Sein Gyi and *another*—Appellants.

v.

J. Maneckjee—Respondent.

First Appeal No. 87 of 1929, Decided on 29th November 1929.

Legal Practitioner—Where there is probability of embittering litigation and of mischief, legal practitioner should not be allowed to change sides.

P, a legal practitioner, acting for his client *S*, a vendor, sued to set aside an award made in respect of a dispute about conveyance and under instructions from *S* alleged that the agreement by vendee *M* to finance *S* which formed consideration for conveyance being left unperformed by vendee the award which in effect confirmed agreement which was the basis of conveyance was illegal and the conveyance was invalid. Subsequently *S* sued to set aside conveyance on grounds of undue influence, misrepresentation and inadequacy of or failure of consideration. In that suit *P* appeared on behalf of *M* and denied allegations of *S* and affirmed the validity of conveyance.

Held; that *P's* changing sides was bound to embitter litigation and be prejudicial to *S* and that there was a probability of mischief and consequently *P* ought not to appear for *M.*: *A. I. R.* 1917 *P. C.* 30 *Appr.*; 12 *Bom.* 91. [1910-13] 1 *U. B. R.* 50; *Ramkusen* v. *Ellis Munday*, 1912 1 *Ch. D.* 831, *Rel. on.*

[P 188 C 1]

Ba Si—for Appellants.

Leach for *P. D. Patel*—for Respondents.

Heald, Offg. C. J. — The appellant Sein Gyi, who is the applicant in the matwith which this order deals, has for several years been involved in litigation, civil and criminal, arising out of the death of one Po Thet and the succession to Po Thet's estate, Sein Gyi claiming to be an adoptive son of Po Thet. On 29th November 1924, as Sein Gyi was in need of funds for the purposes of the litigation, he and his wife Ma Saw Hla, the present second appellant, conveyed or purported to convey to the present respondent Maneckjee, half of Sein Gyi's share or supposed share in Po Thet's estate for a consideration of Rs. 70,000

the receipt of which amount they expressly acknowledged.

Sein Gyi instituted a suit for the administration of Po Thet's estate and in connexion with that suit engaged Mr. Patel, an advocate of this Court to represent him in this Court in a matter relating to the appointment of a receiver. He also engaged Mr. Patel to represent him in proceedings in this Court, the result of which was that he and his brother Po Chein were committed for trial on a charge of having murdered Po Thet. Two other claimants instituted a suit against Sein Gyi for a declaration that they were the sole heirs of Po Thet. A dispute arose between appellants and respondents about the agreement which led to the execution of the conveyance of 29th November 1924 and that dispute was referred to the arbitration of one Po Lu, a pleader. Meanwhile appellants, being in need of money, entered into an agreement with one Abdul Gany, whereby they undertook to convey to Gany a quarter share of Sein Gyi's interest in Po Thet's estate in consideration of Gany's financing them to the extent of Rs. 17,000 in respect of the litigation in the two suits mentioned above, and in the trial for murder. Gany engaged Mr. Patel, who had already been employed by appellants in the litigation, to appear for Sein Gyi in the two suits and to defend him in the criminal trial.

Soon after that agreement was made the award of the arbitrator in the matter of the conveyance in favour of the respondent was given. Under that award the agreement which resulted in the conveyance was affirmed, the arbitrator's decision being that respondent should get half of Sein Gyi's interest in the estate of Po Thet, but should settle Sein Gyi's disputes with Gany and Mr. Patel and with two other persons referred to as Chan Mya and "Chatie," the latter being Sein Gyi's own attorney, and if those disputes resulted in litigation, should bear the entire expenses resulting from that litigation and further should repay Sein Gyi a sum of Rs. 8,000 less such amounts as might already have been paid by respondent and should also bear the expenses of all further litigation incurred by appellants in connexion with Po Thet's estate and with any criminal trials in which Sein Gyi might be involved in connexion with that estate including the trial for murder which was then still pending. Shortly afterwards Sein Gyi through Mr. Patel filed a suit to set aside that award and it was set aside by consent on the 16th February 1927.

It appears from the award that at the time when the award was made Sein Gyi was already in dispute with Gany and Mr. Patel, and at the murder trial, he refused to allow Mr. Patel to represent him, while in his suit for the administration of Po Thet's estate he filed an affidavit in which he charged Mr. Patel with misconduct. That charge he subsequently withdrew unconditionally on the Court's threatening him with prosecution for swearing a false affidavit. He repudiated the agreement with Gany, with the result that Gany sued him and his wife on the agreement and obtained a decree declaring that he was entitled to a quarter share of Sein Gyi's inheritance from Po Thet, and he also refused to pay Mr. Patel his fees for his conduct of the proceedings in this Court prior to the agreement with Gany with the result that Mr. Patel sued him and obtained a decree in execution of which he had him arrested and confined in the civil jail. Appellants then sued respondent to set aside the conveyance, and Mr. Patel appeared for respondent.

Appellants objected to Mr. Patel's appearing for respondent on the ground that he had previously appeared for them in the various civil and criminal proceedings connected with Po Thet's death and estate, has filed on their behalf the suit to set aside the award which affirmed the conveyance and had been instructed by them to take steps to get the conveyance set aside. Mr. Patel denied that he had received any such instructions and the Judge said that as the application was made at a late stage of the case, only six days before the date fixed for the taking of evidence and as Mr. Patel had denied receiving instructions alleged, he declined to interfere with Mr. Patel's conducting the defence.

Appellants applied to this Court in revision, but the learned Judge who dealt with the application said that he did not think that any such application lay under S. 115, Civil P. C., and dis-

missed it. The suit has now been decided and the appellants have now come to this Court on appeal. They claim again that Mr. Patel ought not to be allowed to appear for respondent even in the appeal. They say that the award of the arbitrator was entirely in their favour and in effect that Mr. Patel dishonestly advised them to get it set aside, saying that he would get the conveyance in favour of respondent set aside also. I attach no weight to the suggestion of dishonesty on Mr. Patel's part but apart from that suggestion the position seems to be as follows :

In suit No. 59/26 Mr. Patel on behalf of appellants sued to set aside the award made in respect of the dispute which arose between the parties about the conveyance which is the subject matter of the present suit. In his plaint in that suit, Mr. Patel presumably, as a result of instructions given by or on behalf of Sein Gyi, alleged that the consideration was falsely stated in the conveyance, that the real consideration was not a cash payment of Rs. 70,000 but was an agreement on respondent's part to finance Sein Gyi in the litigation, that respondent had failed to perform his part of that agreement, that the award, which was made in respect of the dispute arising out of that failure and which in effect confirmed the agreement which was the basis of the conveyance, was illegally made and that the conveyance itself was invalid.

In the present suit No. 61 of 1926, in which appellants sued to set aside the conveyance on grounds of undue influence, misrepresentation, and inadequacy of or failure of consideration. Mr. Patel on behalf of respondent denies appellant's allegation and affirms the validity of the conveyance, and further pleads that in the administration suit Sein Gyi himself adopted the conveyance. It is clear therefore that Mr. Patel has changed sides and the question which is before us for decision is whether the circumstances are such that we ought to refuse to hear him on respondent's behalf in this appeal. Our discretion to refuse to hear Mr. Patel in the appeal was not questioned by the learned advocate who appeared for Mr. Patel, and it was for that reason presumably that no authorities were cited before us by either side. This Court has not had any rules of procedure similar to those which were in question in the case of *Srinivasa Rau* v. *Pitchai Pillai* (1) and *Veerappa Chettyar* v. *Sundaresa Sastrigal* (2), but there were certain other authorities which might well have been cited.

The practice of the Courts as regards legal practitioners changing sides was considered in Lower Burma in 1893 in the case of *Daniell, an Advocate* (3) where it was said following *Reg.* v. *Bezonji* (4) that the general result of the cases was that a legal practitioner after his dismissal without misconduct on his part or after the close of the business is at liberty to take sides against his former employer, provided always that he has no secrets to carry with him that can be used to his former client's prejudice, and that

"the Court will require a strong case to be made out as a ground for an order restraining a pleader from acting in a particular case."

A similar view was taken in 1910 in the Upper Burma case of *Mr.*—v. *Tin Byu U* (5), and in the English case of *Ramkusen* v. *Ellis Munday* (6) it was said that there is no general rule that a solicitor who has acted in a particular matter, whether before or after litigation has begun cannot act for the other party under any circumstances and that as a general rule the Court will not interfere unless there is a case where mischief is rightly anticipated. In the case last cited Fletcher Moulton L. J. said:

"I do not say that it is necessary to prove that there will be mischief because that is a thing which you cannot prove, but where there is such a probability of mischief that the Court feels that in its duty as holding the balance between the high standard of behaviour which it requires of its officers and the practical necessities of life, it ought to interfere (it is entitled to interfere) and say that a solicitor shall not act."

In the case of *M. L. Hira Devi* v. *Kunwar Digbijai Singh* (7), the Privy Council said :

"Their Lordships must express their complete assent to the observations of the learned Judge of the High Court on the impropriety of a legal practitioner who has acted for one party

(1) [1915] 38 Mad. 650 = 21 I. C. 629 = 25 M. L. J. 567.
(2) A. I. R. 1925 Mad. 1201=48 Mad. 676.
(3) [1893] P. J. 18.
(4) [1888] 12 Bom. 91.
(5) [1910 13] 1 U. B. R. 50=8 I. C. 1174=12 Cr. L. J. 57.
(6) [1912] 1 Ch. 831=81 L. J. Ch. J. 409=28 T. L. R. 326=106 L. T. 556.
(7) A. I. R. 1917 P. C. 80.

in a dispute such as there was in this case, acting for the other party in subsequent litigation between them relating to or arising out of that dispute. Such conduct is, to say the least of it, open to misconception and is likely to raise suspicion in the minds of the original client and to embitter subsequent litigation.".

Although the circumstances of the two cases are different, those remarks seem to me to be particularly applicable to the present case. The present litigation has undoubtedly been seriously embittered by Mr. Patel's changing sides and his conduct was prima facie likely to be prejudicial to appellants. There was a clear probability of mischief and in the circumstances of the case I am of opinion that Mr. Patel ought not to have appeared for respondent in the present suit. I would therefore refuse to allow Mr. Patel to appear for respondent in this appeal. In the circumstances of the case I would make no order for costs in respect of the hearing of this application.

Otter, J.—I agree with the judgment of my Lord that Mr. Patel should not appear for the respondent in this appeal. Mr. Patel had acted for the appellants (who are the applicants before us) in suit No. 59/26 wherein appellants asked that an award by an arbitration in a dispute in respect of a conveyance to the defendant of a half share in an estate of one U Po Thet should be set aside.

In that suit, a plea was filed by Mr. Patel on behalf of the appellants alleging that the respondent persuaded the appellants to execute a conveyance wherein the consideration was falsely stated. The appeal in respect of which the present application is made relates to the same conveyance which the appellants allege should be set aside on the ground inter alia of fraud and failure of consideration on the part of the respondent. Mr. Patel now appears on behalf of the latter and denies the fraud and failure of consideration alleged.

As he had previously upon instructions affirmed the allegation that the consideration was falsely stated it seems to me that Mr. Patel may well be in a position to make use of instructions obtained from the appellants when he made charges against the respondent almost identical with those which he now denies. Such a course it seems to me is at least open to misconception. While agreeing with my Lord that no weight should be attached to the suggestion of dishonesty on the part of Mr. Patel, I agree that he should not be allowed to take any further part in the appeal. I also agree with my Lord's order as to costs of this application.

P.N./R.K. *Order accordingly.*

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OTTER, J.

Krishna Sahoo and *one*—Appellants.

v.

Maung Po Than and *one*—Respondents.

Special Second Appeal No. 374 of 1929 Decided on 18th February 1930, from decree D/- 30 May 1929 of Dist. Judge of Myaungmya, in Civil Appeal No 24 of 1929.

(a) Civil P. C., O. 41, R. 23—Scope.

The District Court has the power to remand the case for the determination of a question of fact appearing to him to be essential to the right decision of the suit upon its merits. [P 189 C 1]

(b) Transfer of Property Act, S. 54—Written unregistered sale deed relating to immovable property of less than Rs. 100/- is admissible in evidence to prove nature of possession of vendee—Registration Act, Ss. 17 and 49.

Section 54, T. P. Act, which provides that a transfer of tangible immovable property of less value than Rs. 100 may be made either by registered instument or by delivery cannot be held as a matter of construction to have been inserted in S. 17, Registration Act. Therefore S. 49, Registration Act, does not apply to a written unregistered sale deed of immovable property of less than Rs. 100 and thus it is admissible in evidence to prove the nature of possession of vendee: *A. I. R.* 1921 *Mad.* 337; 29 *M.L.J.* 721, *Reviewed*; 38 *Mad.* 1158, *not Foll.* [P 190 C 1]

(c) Registration Act, S. 50—Scope.

A subsequent registered purchaser cannot avail himself of the registration of his deed against a prior unregistered purchase of which he has notice: 6 *Bom.* 515, *Foll.* [P 190 C 1]

Basu—for Appellants.

Wellington—for Respondents.

Judgment.—The appellants brought a suit in the Township Court of Myaungmya for recovery of possession of a house site and land. Their claim was based on a registered deed of sale in their favour dated 3rd November 1928 (Ex. A) whereby one Ma Mai Than and others sold the land to them. The respondents, who were in possession, contended that they had purchased the suit land some 12 years before for a sum of Rs. 40/- from Ma Mai Than and others

who had purpoted to sell the land to the appellants. At the first hearing in the Township Court an unregistered sale deed (Ex. 2) was tendered in evidence on behalf of the respondents, but rejected upon the ground that as the respondents chose to prove their purchase by the document they must fail, for the document was unregistered. The learned Township Judge came to this conclusionin view of the terms of S. 54, T. P. Act, which provides that a sale of tangible immovable property of the of the value of less than Rs. 100/- may be made either by a registered instrument or by delivery of the property. The learned Township Judge further held that as the terms of the sale had been reduced to writing, oral evidence of the contents of the document was inadmissible.

The learned District Judge on appeal to him by the present respondents took the view that, as S. 49, Registration Act read with S. 17 of that Act does not prohibit the reception as evidence of an unregistered document evidencing the the sale of immovable property of a value less than Rs. 100/-, Ex. 2 was admissible, and he relied on a number of authorities in support of that conclusion. Among these was *Rama Sahu* v *Gowro Ratho* (1). He therefore remanded the case to the lower Court for recording of evidence of execution of Ex. 2. This having been done, the matter came again before the learned District Judge and he came to the conclusion upon the further evidence recorded that the land in dispute was in fact sold by Ex. 2 in the manner contended for by the respondents. He therefore dismissed the suit and the appellants now appeal t this Court Mr. Basu, who appeared for the appellants, first argued that the order of remand for further evidence was wrongly made in view of the provisions of O. 41, Rr. 22 and 27 Civil P. C, Mr. Basu, however, abandoned this point, for, in my opinion it is plain that the District Court had the power to remand the case for the determination of a question of fact appearing to him to be essential to the right decision of the suit upon its merits.

It is argued, however, that Ex. 2 was in law inadmissible and reliance was placed upon certain authorities, the most important of which is the case of *Muthukaruppan Samban* v. *Mutu Samban* (2), which no doubt supports the view contended by Mr. Basu. I was not, however, referred to the later cases of *Narasimha Raju* v. *Bhupati Raju* (3), and *Rama Sahu* v. *Gowar Ratho* (1) though both these authorities are of importance on the point. The head-note of the latter case is as follows:

> "Section 49 of the Registration Act applies only to instruments which are required to be registered by S. 17 of that Act, and is not applicable to instruments which have to be registered under the provisions of the Transfer of Property Act. Hence, an unregistered lease for a period of less than one year, which is required to be registered under S. 107, T. P. Act, but not under S. 17, Regn. Act, is admissible in evidence to prove the nature of possession under the instrument."

This was a Full Bench decision and the previous authorities in the Madras High Court including the case of *Muthukaruppan Samban* v. *Muthu Samban* (2) to which I have just referred, and cases decided in other High Courts in India were discussed The difficulty, so far as sales of immovable property of a value less than Rs. 100/- are concerned, has arisen by reason of the provisions of S. 4, T. P. Act. This section says that paras. 2 and 3 of S. 54, T. P. Act shall be read as "supplementary" to the Registration Act, 1877. I have already stated that by para 3 of S. 54, T. P. Act a transfer of the suit property could have heen made either by a registered instrument or a delivery of the property. So, as was pointed out by Spencer J. in his order of reference to the Full Bench of the Madras High Court, no place is provided by that section for written but unregistered sale deeds of immovable property even in cases where the value is less than Rs. 100/-. The learned Judge also went on to say that in fact a purchaser in possession, who can prove an oral agreement, is better off than one who holds an unregistered agreement when his title is in question. In deciding the question which actually arose in that case, viz, as to the effect of S. 4, upon S. 107, T. P. Act (which provides that lease of immovable property for more than one year must be made only by a registered instrument) Wallis C. J, who delivered the judgment of the Full

(1) A. I. R. 1921 Mad. 337=44Mad. 55 (FB).

(2) [1915] 38 Mad 1158=27 M.L.J. 497=1 M L.W. 754=25 I C 772=1914 M.W.N. 768

(3) [1911] 29 M.L.J 721=31 I. C. 52=(1915) M W N 819.

Bench said at page 64 of the report All that S. 4 says is that S. 107 and other sections (including of course S. 54 of the Act);

"are to be read 'as supplemental to' he Registration Act. Supplemental' has been defined as meaning 'added to'. We think that if the legislature intended that that these provisions should be treated for all purposes as inserted in particular sections of the Registration Act it was for the legislature to say so. We are not prepared, as a matter of construction, to say that the provisions of S. 107, which says that a written instrument in order to have the effect of a lease for less than a year must be registered, must be taken to have been inserted in S. 17, if not, such a lease is not a document required by S. 17 to be registered and S. 49 can have no application to the case."

It seems to me that the reasoning cannot be improved upon and in the present case I am not prepared to hold as a matter of construction that S. 54, T. P. Act which provides that a transfer of tangible immovable property of less value than Rs. 100/- may be made either by registered instrument or by delivery must be taken to have been inserted in S. 17, Registration Act. It follows therefore that S. 49 of the Act does not apply and Ex. 2 in the present case was admissible to prove the nature of the possession of the respondents.

One further point was raised by Mr. Basu, viz. that by reason of the provisions of S. 50, Registration Act, the later registered document Ex. A should take effect as regards the suit property as against the unregistered document Ex. 2. The answer to this point is provided by an examination of the cases referred to in note (W 2) at P. 217 of Mulla's Registration Act. I need only refer to one only of these cases, viz. *Shivram* v. *Genu* (4), where it was held that a subsequent registered purchaser or mortgagee cannot avail himself of the registration of his deed against a prior unregistered purchase or mortgage of which he had notice. Now, in the present case, the respondents were in possession. It cannot well be argued, therefore, that the appellants did not have notice of their interest. See also the definition of notice' in S. 3, T. P. Act. I also observe that according to respondent 1 she told the appellants not to buy the land when she heard he was negotiating about it. Thus, quite apart from the provisions in S. 3, T. P. Act, there is direct evidence, which bearing in mind the view

(4) [1882] 6 Bom. 515.

apparently held by the trial Court as to the value of Ma Mai Than's testimony may well be accepted. There seem to me to be no merits whatever in this appeal, and for the reasons I have given the points of law argued for the appellants must fail. The appeal is therefore dismissed with costs.

P.N./R.K. *Appeal dismissed.*

* A. I. R. 1930 Rangoon 190

HEALD, AG. C. J. AND OTTER, J.

Ma San Nyun and *another* — Appellants.

v.

Maung Tint—Respondent.

First Appeal No. 151 of 1929, Decided on 7th April 1930, against decree of Dist. Judge, Pyapon, in Civil Regular Suit No. 36 of 1929.

(a) Buddhist Law (Burmese) —Succession —In property taken to later marriage, child of earlier marriage as heir to father takes 3/4th share and in jointly acquired property of later marriage 1/8th.

In the property taken to the later marriage, the child of the earlier marriage as an heir to his father is entitled to three quarters and the widow of the later marriage to a quarter, and in the jointly acquired property of the later marriage the child of the earlier marriage takes a 1/8th share, and the widow of the later marriage a 7/8 share: *A. I. R.* 1929 *Rang.* 253, *Foll.* [P 191 C 2]

*** (b) Civil P. C., O. 41, R. 33—Person suing claiming 3/4th as his share but Court allowing only 1/2—In appeal by other party person found entitled to 3/4th in view of change of law introduced subsequently by publication of ruling—High Court can correct lower Court's mistake of law though person has not appealed.**

Where a person brings a suit claming 3/4th as his share as an heir to his father and the Court allows only ½ and where in an appeal by the other party the person is found entitled to 3/4th as his share in view of the change in the law introduced by a ruling published subsequent to the decision by the lower Court; the High Court has power to correct lower Court's mistake of law even though the person has not appealed against lower Court's decision allowing him only ½ as his share: *A. I. R.* 1929 *Rang.* 253, *Ref.* [P 191 C 1]

Tha Kin—for Appellants.

Kyaw Din—for Respondent.

Judgment.—Appellants are the widow of one Maung Thaw and Maung Thaw's minor child by her, and respondent is a son of Maung Thaw by an earlier wife who was divorced by Maung Thaw. Respondent alleged that after his mother was divorced by Maung Thaw, he maintained filial relations with his

father, left a considerable estate consisting entirely of property acquired before his marriage with the first appellant and that he was entitled to a share of that property. In his first point, the share which he claimed was 5/8th, but in his second and third plaints he claimed 3/4ths. He sued for the administration of Maung Thaw's estate by the Court and for partition and possession of his share.

Appellants admitted that respondent was a son of Maung Thaw by an earlier wife, but said that when his mother was divorced he lived with his mother and did not maintain filial relations with his father so that he was not entitled to inherit any part of his father's estate. They also denied that all the properties left by Maung Thaw were properties which he brought to his marriage with appellant 1 and said that the 79·55 acres of land which they had sold to Ba Thaung and Ma Than, who by reason of this sale were also impleaded as defendants, were jointly acquired property of the marriage of Maung Thaw and the first appellant.

The trial Court found that respondent lived sometimes with his mother and sometimes with his father, that there was no severance of filial relations between him and his father, that, therefore, he was an heir of his father and that his share in the properties which his father took to the marriage with appellant 1 would be one half and his share in the jointly aqquired properties of his father's marriage with appellant 1 would be 1/8th. On these findings the learned Judge passed a preliminary administration decree declaring that respondent was heir of his father and was entitled to these shares of his estate, and ordering an account of the properties which Maung Thaw took to his marrige with appellant 1 and of the properties which were jointly acquired properties of that marriage, and also of the mesne profits and the debts of the estate, to be taken by a commissioner.

Appellants appeal against that preliminary decree on grounds that respondent was not an heir of his father because filial relationship between them had been severed, and that if he was an heir the shares awarded by the lower Court was wrong. They did not state what the right shares would be. On the evidence there is no room for doubt that respondent maintained filial relationship with his father. Appellant 1's own admissions are sufficien to establish this. The lower Court was, therefore, right in finding that respondent was an heir to his father.

The only question which remains for consideration is the matter of the shares to which respondent is entitled in the property taken by his father to the marriage with appellant 1 and in the jointly acquired property of the marriage of his father with appellant 1. The question of the shares to which the heirs in such a case are entitled was considered in the case of *Ma Nwe* v. *Ma Se Da* (1), where it was held that in the property taken to the later marriage the child of the earlier marriage was entitled to three quarters and the widow of the later marriage to a quarter, and that in the jointly acquired property of the later marriage the child of the earlier marriage takes a 1/8th share, and the widow of the later marriage a 7/8 share.

Appellants contend that because the respondent has not appealed against the lower Court's finding that his share in the property taken to the later marriage was half we are not entitled to hold in his favour that his share in that property is 3/4ths, but it is to be noted that the decision in *Ma Nwe's* case (1) was not published until September 1929, while the appeal in this case was filed in June 1929, and that in accordance with the decision in the case of *Ma Leik* v. *Ma Nwa* (2) which was overruled by the decision in *Ma Nwe's* case (1) respondent's share in that property would have been one half and not three fourths, and further that the share which the respondent actually claims in his plaint was 3/4ths, and in the circumstances we see no reason to believe that we have no power to correct the lower Court's mistake of law. We dismiss the appeal with costs, but modify the preliminary decree by substituting the words "three fourths" for the words "one half" in the decree.

P.N./R.K. *Decree modified.*

(1) A. I. R. 1929 Rang. 253=7 Rang. 578.
(2) [1 908] 4 L. B. R. 110.

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HEALD, AG. C. J. AND SEN, J.

Ma E Kyee—Appellant.

v.

Tan Chong Kee and *others*— Respondents.

Civil Misc. Appeals Nos. 142 and 146 of 1929, Decided on 1st April 1930 against decree of High Court, on original side, in Civil Regular Nos. 92 and 82 of 1928.

(a) Buddhist Law (Burmese) — Applicability—Mere fact that Chinese Buddhist observes certain observances of Burmese Buddhist does not show that he has abandoned his form of Buddhism.

The fact that a Chinese Buddhist who is a Mahayanist or a Buddhist of the broad school observes certain of the observances of the narrow school to which Burmese Buddhist belong, does not go far towards showing that he has abandoned his own form of Buddhism and has adopted the narrower form which is followed by the Burmese: 8 *Rang.* 57, *Ref. to.* [P 193 C 1]

(b) Buddhist Law (Burmese)—Will.

A Chinese Buddhist is entitled to make a will: *A.I.R.* 1925 *P. C.* 29, *Foll.* [P 193 C 1]

Darwood—for Appellant.

Leach—for Respondents.

Judgment.—On 6th December 1927, the present appellant Ma E Kyi, claiming to be the widow of one Tan Khwan Heng, whom she described as "a half Chinese Buddhist" and who died in Rangoon on 12th October 1927, applied for letters of administration of Tan Khwan Hong's estate. In her application the only relatives of Tan Khwan Hong's whom she mentioned were her own three children by him. In the affidavit which she filed along with her application she described herself also as a "half Chinese Buddhist."

On 9th January 1928, the present respondents claiming to be the executors of the will of Tan Khwan Hong, whom they alleged to have been a "Chinese Confucian" applied for probate of his will. The two cases were heard together, the evidence in both being recorded in suit No. 82 of 1928, on the original side of this Court, which was the record based on respondents' application.

In reply to that application Ma E Kyi filed an objection in which she alleged that Tan Khwan Hong "observed the Burmese Buddhist religion" that he was subject to the Burmese Buddhist Law, that under that law he had no power to make a will, and that therefore the will propounded by the respondents was void. She did not deny that Tan Khwan Hong made the will, but she said that she had no knowledge of the circumstances of the execution of the will and did not admit that the will was valid as an act of the deceased while of sound and free mind and full testamentary capacity.

In answer to Ma E Kyi's application for letters, respondents denied that she was legally married Tan Khwan Hong and said that Tan Khwan Hong was a Chinese Confucian and that his estate was not governed by the Burmese Buddhist Law. The learned Judge on the original side framed issues as to what law governs the estate of Tan Khwan Hong, whether Tan Khwan Hong executed the will, if so, whether the will was void by reason of mental incapacity or any other cause and whether Ma E Kyi was in law the widow of the deceased. On these issues the learned Judge found that Tan Khwan Hong lived and died a Chinese Buddhist, that he made the will which respondents propounded when he was in possession of his faculties and was of disposing mind, that the will was valid, and that Ma E Kyi was not a legally married wife of Tan Khwan Hong, but was only a concubine. He granted probate of the will to respondents and dismissed Ma E Kyi's application for letters. Ma E Kyi appeals against the order dismissing her application for letters, and she and her children by Tan Khwan Hong appeal against the grant of probate to respondents.

The memorandum of appeal prolix and argumentative and of inordinate length, but the grounds which were intended to be raised seem to be that the learned Judge was wrong in finding that Ma E Kyi was not the legal wife of Tan Khwan Hong, that he ought not to have allowed respondents' advocate to withdraw his admission that she was Tan Khwan Hong's widow, that he ought to have held that Tan Khwan Hong was a Burmese Buddhist and to have applied Burmese Buddhist Law to his estate, that therefore he ought to have found that Tan Khwan Hong was not entitled to make a will, that he ought to have given Ma E Kyi's advocate a further opportunity of addressing him on points of law, that he ought to

have demanded more substantial security from respondents, and that he ought not to have made an order for special costs. The learned advocate who argued the appeal in this Court has expressly admitted before us that there are only two material questions now in issue, namely whether Tan Khwan Hong followed the Burmese Buddhist religion as distinguished from the Chinese Buddhist religion, and whether Ma E Kyi was his lawful wife.

On the first of these questions we have no hesitation in finding that it was not proved that Tan Khwan Hong was a Burmese Buddhist. He was admittedly the son of a Chinese, he followed the mode of life and the customs ordinarily followed by the Chinese. There is therefore some presumption that so far as he was a Buddhist he was a Chinese Buddhist and not a Burmese Buddhist. The acts on which the allegation that he was a Burmese Buddhist are based are such as will be found in most of the cases regarding the religion of Chinese in Burma: vide the case of *Phan Tiyok* v. *Lim Kyin Kauk* (1), and the cases mentioned therein, and the fact that a Chinese Buddhist, who is a Mahayanist or a Buddhist of the broad school observes certain of the observances of the narrow school to which Burmese Buddhist belong does not in our opinion go far towards showing that he has abandoned his own form of Buddhism and has adopted the narrower form which is followed by the Burmese.

We are satisfied on the evidence that to the extent that Tan Khwan Hong was a Buddhist, he was a Chinese Buddhist, and not a Burmese Buddhist, and there can be no doubt that a Chinese Buddhist is entitled to make a will or as their Lordships of the Privy Council put it in the case of *Maung Due* v. *Haung Shein* (2) "is allowed to test."

It is not denied that Tan Khwan Hong did in fact make a will, which respondents have propounded, and nothing which would invalidate that will, except Tan Khwan Hong's alleged adoption of the Burmese Buddhist form of religion is now alleged. We have held that Tan Khwan Hong did not adopt the Burmese Buddhist form of religion but was a Chinese Buddhist, or a Chinese who professed Buddhism as one of his religions. In these circumstances, there is nothing to invalidate the will. The learned Judge was therefore in our opinion entitled to grant probate of the will, and we see no reason to interfere with his orders granting probate to respondents and refusing letters to Ma E Kyi.

But we are not satisfied that it was necessary for the learned Judge to go further and to decide whether or not Ma E Kyi was Tan Khwan Hong's legal wife. We are of opinion that the question will be more suitably decided if it should become necessary to decide it, in a regular suit, properly framed for that purpose, and therefore we set aside the learned Judge's finding that Ma E Kyi was not Tan Khwan Hong's wife. As for the learned Judge's order for special costs, in view of the time which the hearing of the case took, we are not disposed to interfere. As for the suggestion that the security given by respondents is inadequate we note that security for Rs. 60,000 has been given, and we see no reason to interfere with the discretion of the learned Judge in the matter of security. We confirm the learned Judge's orders granting probate to respondents, and dismissing Ma E Kyi's application for letters and therefore we dismiss both the appeals, but in the circumstances of the case we direct that each party bear its own costs in this Court.

P.N./R.K. *Appeal dismissed.*

(1) A. I. R. 1930 Rang. 81=8 Rang. 57 (F.B.).
(2) A. I. R. 1925 P. C. 29=3 Rang. 29=52 I. A. 73 (P.C.).

* A. I. R. 1930 Rangoon 193

CUNLIFFE, J.

Abdul Quadeer—Plaintiff.

v.

Watson and Sons Ltd.—Defendants.

Civil Regular Suit No. 175 of 1928, Decided on 6th January 1930.

*** (a) Contract Act, S. 74—Object of parties to hire purchase agreement is not necessarily to enter into contract of sale but to enter into contract of bailment — Word penalty in S 74 means separate payment—Retaking of chattel and retention of moneys already paid under seizure clause in hire purchase agreement is not separate or extraneous payment and does not amount to penalty within the meaning of S. 74.**

The object of the parties to a hire purchase agreement is not necessarily to enter into a contract of sale but to enter into a contract of bailment. Underlying the bailment and ancillary to it is an incomplete agreement to

purchase. It is incomplete because the bailee may return the chattel to the bailor and provided the hire is properly furnished and the chattel is in a reasonable condition, may terminate the contract and divest himself of any further responsibility. The word penalty in S. 74 means only a separate payment. In the case of hire purchase agreement the retaking of chattel and the retention of moneys already paid, under seizure clause which provides for doing so in case default is made in due payments of instalments, cannot be regarded as separate or extraneous payments imposed upon the normal terms of a contract. Therefore the seizure clause in a hire purchase agreement, however, severe in its terms is not a stipulation by way of penalty within the meaning of S. 74 : *A. I. R.* 1929 *Rang.* 368, *not Foll. Helby* v. *Matthews*, (1895) *A.C.* 471 *Considered.*; *Gramer* v. *Giles*, (1883) 1 *Cab. & El.* 151 ; *Sterne* v. *Beck*, 1 *Deg. J. & S.* 595, *Rel. on.* [P 195 C 2, P 196 C 2]

(b) Contract Act, S. 74—Panalty—Meaning explained.

The word penalty is intended to embody the English equitable doctrine with regard to liquidated damages and penalties : *Wallis* v. *Smith*, (1882) 21 *Ch. D.* 243, *Ref.* [P 196 C 2, P 197 C 1]

P. B. Sen—for Plaintiff.

Paget—for Defendants.

Judgment.—This case presents no difficulty on the facts. The legal position, however, is not quite straightforward. The nominal plaintiff is a Mohamedan minor, by name Abdul Quadeer. The substantive plaintiff is his elder brother, S. A. Aziz, who represents him as his next friend. The case arises out of a dispute concerning the hire purchase agreement of a motor lorry. The agreement is in very common form. It contains a seizure clause. It also contains a clause by which the hirer can return the motor lorry at any time provided it is in good running order and the instalments have been duly paid. There is a further proviso in the agreement that the hirer, if seizure has been made, shall not be entitled to any allowance or set off for previous payments.

Abdul Aziz obtained a motor chassis in the name of Quadeer in April 1927. It was a "Bean" chassis, and the total price mentioned in the agreement was Rs. 4,750. Messrs. Watson, the defendants, were the owners of the chassis. Various payments were made during April consisting of Rs. 100, Rs. 1,450 (which included a deposit), and another payment in June of Rs. 312. Azis is a man who gains his living by carting bricks from a relative's brickyard. It was for this purpose that he obtained the chassis. By arrangement with the defendants, he took the chassis away and had a body put on it. The complete lorry started work in May 1927, and went on working up to 19th June. It was finally taken back by the defendants under their seizure clause on 22nd July 1927. The instalments have not been paid up to date. Aziz experienced wheel trouble with the lorry, there was trouble with the tyres. There was trouble with the bolt holes and the hubs of the wheels and slight trouble with wheel rims, consisting of cracks. He sues the defendants for Rs. 2,988 as damages for breach of contract in that the lorry supplied to him was from the beginning defective. The defendants' case has always been that the lorry was continuously overloaded.

The whole of the evidence in this case induces me to think the defendants are right in their contention. I was not at all struck by the demeanour of Aziz in the witness box. He appeared to me to be shifty and undependable. Nor was I impressed by his posing before the defendants as his younger brother, receiving letters in his name (when suited him), and signing his brother's name to all his own letters. To my mind, the very nature of the damage raises a presumption of overloading. I am unable to see why a defective hub, bolt hole or a crack in the rim of a wheel should produce a burst in the wall of a tyre, provided the main wheel structure remains intact : but I can easily understand how such damage can be produced by overloading, with too great pressure applied from above. No trouble was experienced in the engine or in the rest of the chassis. No independent survey was ever made to show that the wheels of the lorry were unfit for the ordinary cartage and haulage work. Aziz is a man without any mechanical knowledge. Doubtless, he can drive a lorry. as many other people in Rangoon can ; but he has brought no evidence before me to show that he has any real experience in the appropriate weights for a lorry, or that any adequate supervision was conducted in relation to the cooly loading of his brick contract. He relied very strongly upon a letter written by the representative of the "Bean" Motor Company in Calcutta, who visited Rangoon and made an examination at

Messrs. Watson. The etter in question is Ex. U. It affects me very little. In my view, that letter is merely an attempt to justify his firm's cars and does not proceed from any exact knowledge of the mechanical possibilities or condition of the lorry in suit. The evidence of Messrs. Watson's shows that the writer of the letter was a salesman and not a motor engineer.

I am bound to say that I prefer the defendants' evidence. It was certainly no more exact than the plaintiff's but far more convincing. It appears that the lorry was being constantly brought to their workshops or place of business for overhaul. The same complaint and no other was always being made and the same answer being given, "You are overloading the truck." One suspects that the defendants are so often in a similar position. They sell a motor vehicle to a member of the public who knows nothing about the proper management of such a thing and in a very short time, through misuse, the car is in a damaged condition. It was impossible to disregard the attitude of the defendant firm's witnesses, who throughout expressed no surprise at the plaintiff's evidence. Indeed, after the lorry has been taken back they quietly repaired it and sold it again to an up-country contractor who experienced no trouble with it at all. No legal action would have been taken by the defendants had this claim not been brought. Taking this view of the facts, I need not deal with the argument on the plaintiff's behalf based on an alleged warranty. I may say, however, that there is no implied warranty with a fully specified and named article such as a "Bean" motor chassis.

For the plaintiff, however, very great reliance was placed upon the case of *Maung Ba Oh* v. *The Motor House Co. Ltd.* (1). That is a decision of Brown J's. *Maung* Ba *Oh's* case (1) was also in relation to a hire purchase agreement for a motor truck. The terms of the agreement were more or less similar to the terms of the agreement before me now. In the course of his judgment, the learned judge made use of the following observations :

"Now the agreement in the present case is on the face of it an agreement to hire with an option of purchase, but, as pointed out in the Upper Burma Case of *Singer Manufacturing Company* v. *Elahi Khan* (2), at p. 294, in construing a contract, it is of course the duty of the Courts to look not merely at the surface and form but also into the heart of the matter and to ascertain its true meaning and the actual intention of the parties."

After quoting this passage from the Upper Burma Ruling with approval, Brown, J. went on to say :

"Although the agreement is in form one of hire, the object of the parties in drawing up the agreement was to enter into a contract for sale, providing at the same time security to the seller for due payment of the purchase price."

Holding this view of the law of hire purchase, the learned Judge, still relying on *Singer Manufacturing Company* v. *Elahi Khan* (2), proceeded to put the provisions of S. 74, Contract Act, into force in favour of the plaintiff. He held that the seizure clause in the agreement was a penalty within the meaning of that section. He used these words :

"The penaly provided in case of default by the purchaser is clearly in the highest degree inequitable. In my opinion, the provisions of Cl, 3 amount to a stipulation by way of penalty that the Courts can and ought to relieve against under the provisions of S. 74, Contract Act."

I think the learned Judge is under a misapprehension as to the legal nature of true hire purchase agreements. The object of parties to such agreements is not necessarily to enter into a contract of sale but to enter into a contract of bailment, the old contract of hire bailment, known to Roman law as the "locatio conductio rei." Underlying the bailment and ancillary to it is an incomplete agreement to purchase. It is incomplete because at any time the bailee may return the chattel to the bailor, and, provided the hire has been properly furnished and the chattel is in a reasonable condition, may terminate the contract and divest himself of any further responsibility.

The general law on this subject was exhaustively discussed in the leading case of *Helby* v. *Matthews* (3), a unanimous decision of the House of Lords dealing with the hire purchase of a piano. Lord Herschel in delivering judgment said :

"Brewster (the hirer) was to obtain possession of the piano and to be entitled to its use so long as he paid the plaintiff the stipulated

(1) A. I. R. 1929 Rang. 968=7 Rang. 431.

(2) [1892-96] 2 U. B. R. 291.

(3) [1895] A. C. 471=64 L, J. Q. B. 465=60 J. P. 20=43 W. R. 561=72 L. T. 841.

sum of ten shillings and six pence monthly and he was bound to make these monthly payments so long as he retained possession of the piano. If he continued to make them at the appointed time for a period of three years, the piano was to become his property, but he might at any time return it and upon doing so would no longer be liable to make any further payment beyond the monthly sum then due."

Lord MacNaghten concurred. Inter alia he said :

"The contract as it seems to me on the part of the dealear was a contract of hiring coupled with a conditional contract or undertaking to sell. On the part of the customer, it was a contract of hiring only until the time came for making the last payment. It may be that at the inception of the transaction both parties expected that the agreement would run its full course and that the piano would change hands in the end. But an expectation, however confident and however well founded, does not amount to an agreement and even an agreement between two parties operative only during the pleasure of one is no agreement on his part at law."

So, too, Lord Watson, who remarked :

"These stipulations (referring to the terms of the hire purchase contract) in my opinion constitute neither more nor less that a contract of hiring terminable at the will of the hirer, coupled with this condition in his favour that if he shall elect to retain it until he has made 36 monthly payments as they fall due, the piano is then to become his property. The only obligation which is laid upon him is to pay the stipulated monthly hire so long as he chooses to keep the piano. In other words, he is at liberty to determine the contract in the usual way by returning the thing hired to its owner. He is under no obligation to purchase or to pay price for it. There is no purchase and no agreement for purchase until the hirer actually exercises the option given to him."

Noting incidentally that the *Singer Manufacturing Company's* case was afterwards overruled in terms by the case of *Ma Gyi* v. *Po Shwe* (4), I have now to consider whether I can follow the learned judge in holding that the seizure clause in a hire purchase agreement is a "stipulation by way of a penalty" within the meaning of S. 74, Contract Act. The material portion of S. 74 runs as follows :

"When a contract has been broken, if a sum is nemed in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss in proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or as the case may be, the penalty stipulated for."

I am strongly of the opinion that a seizure clause in a hire purchase agreement, however severe its terms, is not a stipulation amounting to a penalty within the meaning of this section. None of the official illustrations to the section in the least resemble a seizure clause and every illustration and every decided case which has been held to involve a penalty or a stipulation by way of a penalty (apart from the *Singer Manufacturing Company's* case and Brown, J's decision) have this common factor, that the agreed compensation consists of some specified extraneous payment either in money or in kind, to be furnished by the party responsible for the breach. The same factor, of course, applies to liquidated damages. Surely the retaking of a chattel and the retention of moneys already paid for its hire, even including a deposit, is a very long way removed from an extra payment super imposed upon the normal terms of a contract, payable by way of an agreed penalty or damages after the contract has been broken ? If this form of equitable relief is to be encouraged under the section, I cannot see, on principle, why a tenant who has defaulted in his rent or has broken some restrictive covenant in his lease should not resist forfeiture and claim some repayment of his back rent from his landlord.

It may be remarked also that although the word "penalty" is nowhere defined in the Contract Act, yet the very wording of the section suggests a separate payment and nothing else. Otherwise, I am at a loss to understand what the words

"not exceeding the amount so named or as the case may be the penalty stipulated for"

can possibly mean.

It is further to be remarked that the word "penalty" was not originally included in the Act at all. It was inserted by an amendment which came into force in the year 1899. It is claimed by the learned editors of the fifth edition of the Text Book to the Act that the amended section

"boldly cuts the most troublesome knot in the common law doctrine of damages."

Whether it does or not, and the number of conflicting decisions endeavouring to interpret the meaning of the section make the assertion extremely doubtful, it was obviously intended to embody the English equitable doctrine with

(4) [1914] 7 L. B. R. 298=24 I. C. 161=7 Bur. L. T. 222.

regard to liquidated damages and penalties. The leading English case in that regard is *Wallis* v. *Smith* (5) where Jessel M. R. summed up the principles which actuate the Courts of Chancery in differentiating between the two forms of agreed damage. In his judgment the Master of the Rolls dealt entirely with stipulated money payments to be made after the breach has taken place. I see no reason therefore why the term "penalty" should be extended to mean anything else.

Returning to the English Law as to hire purchase agreements there are two decisions, *Cramor* v. *Giles* (6) and *Sterne* v. *Beck* (7), which appear to lay down that equity will never relieve against a seizure clause where hire purchase is concerned. As these two reports are not available to me. I am unable to set out the "ratio decidendi" of the two cases. I suspect, however, that it is based upon some such reason as Jessel, M. R. advanced in *Wallis* v. *Smith* (5). "It is of the utmost importance," he said:

"in contracts between adults, persons not under disability and at arms length, that the Courts should maintain the performance of the contract according to the intention of the parties and not overrule any clearly expressed intention on the ground that Judges know the business of the people better than they do themselves."

For these reasons, there will be no judgment for the defendants on the claim; and on the set-off for Rs. 624; and costs in their favour on the ad valorem scale for the first day and at the rate of seven gold mohurs for the rest of the hearing.

P.N./R.K. *Order accordingly.*

(5) [1882] 21 Ch. D. 243=47 L. T. 389.
(6) [1883] 1 Cab. & El. 151.
(7) [1863] 1 Deg. J. & S. 595=2 N. R. 346=11 W. R. 791=32 L. J. Ch. 682=8 L. T. 588.

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RUTLEDGE, C. J., AND BROWN, J.

Ma Kyin Ain—Appellant.

v.

A. R. M. A. L. A. Chettyar Firm and *three others*—Respondents.

First Appeal No. 129 of 1929, Decided on 29th January 1930.

(a) Civil P. C., S. 11—Two mortgages, one for Rs. 35,000 and other for Rs. 20,000 over same property—Mortgagee admitting having received Rs. 48,000 from Insurance Company which sum was less than alleged to be due by mortgagor on policy—Mortgagee sued on smaller mortgage and got a decree—Subsequent suit by mortgagor for accounts is not res judicata.

A person held two mortgages one for Rs. 35,000 and the other for Rs. 20,000 over the same property. The mortgagee admitted having received Rs. 48,000 from Insurance Company which sum was less than the sum alleged by the mortgagor to be due on the policy. The mortgagee sued on the smaller mortgage and got a decree. Subsequently the mortgagor sued for accounts.

Held: that the latter suit was not barred by res judicata as it was impossible to say that in the suit on the smaller mortgage an adjustment of accounts on the larger mortgage might and ought to have been in issue between the parties and the whole matter in issue in the subsequent suit could be decided in the earlier suit on the smaller mortgage : 16 *Cal.* 682 and 30 *All.* 36, *Dist.* [P 198 C 2]

(b) Limitation Act, Arts. 62 and 120—Property mortgaged destroyed by fire and mortgagee receiving certain sum from Insurance Company — Suit by mortgagor against mortgagee for accounts is governed by Art. 120 and not by Art. 62.

Article 62 contemplates a suit in which the plaintiff is entitled to obtain the whole of the money received as soon as it is received. Where a mortgagor receives a certain sum from Insurance Company, the property mortgaged being destroyed by fire, a suit for accounts by mortgagor is governed by Art. 120 and not by Art. 62 inasmuch as the mortgagee has a lien on the moneys he received and is entitled to retain those moneys until his mortgage is satisfied. [P 199 C 1]

Myin Thein—for Appellant.

Doctor—for Respondent 1.

Judgment.—On 29th August 1929 the appellant Ma Kyin Ain with respondents 2 to 4 mortgaged certain properties to respondent 1 for a debt of Rs. 20,000. There was a prior mortgage on the same properties for Rs. 35,000 between the same parties. During the existence of the mortgage some of the properties mortgaged were destroyed by fire, and the mortgagee, respondent 1, obtained a sum of money from the Insurance Company on account of the fire. The mortgagee admits receiving Rs. 40,000 on this account. A futher sum of Rs. 8,500 was also received by the mortgagee on another insurance.

In Civil Reglular No. 22 of 1925, the mortgagee brought a suit on the mortgage of Rs. 20,000 and obtained a decree. The appellant is attempting in another suit to set aside this decree, but for the purposes of this appeal the decree must be held to be binding on her. She has filed the present suit in the District Court of Pegu for accounts. She states in her plaint that in March 1928, she asked the defendant for accounts but that he refused to give them

to her. Respondent 1 took two preliminary objections: (i) that the suit was barred by the principle of res judicata, and (ii) that it was barred by limitation. On these grounds alone the suit has been dismissed, the merits of the case not having been considered. The plaintiff has appealed against this decree. The previous suit which is not connected with the present suit is Civil Regular No. 22 of 1925. That was, as already noted, a suit on the Rs. 20,000 mortgage, and the other and larger mortgage did not form the subject matter of that suit. The learned trial Judge has relied on a decision by their Lordships of the Privy Council in the case of *Mahabir Prasad Singh* v. *Macnaghten* (1). In that case the mortgagee obtained a decree on the mortgage and purchased the mortgaged property in execution of the decree. It appears that during the continuation of the mortgage the mortgagee was in possession of the mortgaged property as lessee of the mortgagor. In the mortgage suit the mortgagors alleged a specific agreement that the rents were to be set off against the mortgage debt. This agreement they failed to prove and no allowance was made for these rents in settling the mortgage decree and actually the mortgagors in a separate suit obtained a decree for rents. After the sale of the property to the mortgagee the mortgagors brought a suit to set aside the sale on the ground that the rents ought to have been accounted for in the mortgage suit. It was held that that was a matter which could have been raised in the mortgage suit itself and that this suit was res judicata.

We are unable to see how the decision in *Mahabir Prasad Singh's* case (1) is relevant to the present case. In that case, in the second suit the plaintiffs sought, in effect, the reopening of the whole of the mortgage suit. It was not suggested that as a result of the mortgage suit they could not separately sue for the rents due and in actual fact they did sue and obtain a decree for those rents. We cannot see that this suit is any authority for holding that the whole of the matter of accounts between the parties in the present case should have been raised in the mortgage suit, and that as it was not raised the appellant could not subsequently sue for accounts.

The next case relied on by the appellant is the case of *Kashi Pershad* v. *Bajrang Pershad* (2). In that case the mortgagor had obtained a decree for redemption and paid what was found by the decree to be due from him. It was held that he could not subsequently sue for the profits received by the mortgagee whilst in possession. Clearly in suing for redemption the amount that the plaintiff would have to pay would be the amount due on the mortgage less any credit he is entitled to be allowed thereto on account of the profits realised by the mortgagee. The amount of those profits was clearly an amount which required to be settled in the redemption suit. It is impossible to hold that to be the case here. According to the plaintiff the amount due on the first policy of insurance was Rs. 70,000. The respondent Chettyar admits obtaining Rs. 40,000 only plus a subsequent sum of Rs. 8,500. But this sum of Rs. 48,500 is far in excess of the amount of the mortgage which has been sued on. The mortgagee had a lien on this money not only for the mortgage debt which has been sued for but also for the other and larger mortgage debt. It is impossible to say that in the suit on the smaller mortgage an adjustment of accounts on the larger mortgage might and ought to have been in issue between the parties. If this finding were correct then, if the mortgagee were successful in realising his mortgage debt out of the mortgaged properties which were not destroyed by fire, the result would be that he would hold the whole of this Rs. 48,500/- and no other claim for it could be made by the appellant. It seems clear to us that the whole of the matter now in issue in the present suit could not possibly have been decided in the earlier mortgage suit. Whether the plaintiff is entitled to file a suit in this form without asking for redemption of the larger mortgage is another matter but it is not on this ground that the suit has been dismissed. Nor can we hold that the trial Judge was right in

(1) [1889] 16 Cal. 682=16 I. A. 107=5 Sar. 345 (P.C.).

(2) [1907] 30 All. 36=4 A. L. J. 763=(1907) A. W. N. 281.

finding that the suit was barred by limitation. In his view the suit was a suit under Art 62, Sch. 2, Lim. Act. That article refers to a suit for money payable by the defendant to the plaintiff for money received by the defendant to the plaintiff's use and the period of limitation begins to run when the money is received. It clearly, therefore, contemplates a suit in which the plaintiff is entitled to obtain the whole of the money received as soon as it is received. That is not the case here. Admittedly the respondent has a lien on the moneys he received and was entitled to retain those moneys until his mortgages were satisfied. No other article of the Limitation Act has been suggested to us as being applicable, and it seems to us that the proper article would be Art. 120 which has been held to be generally applicable, in the case of suits for an account. The suit was filed less than six years after the money was received by the respondent, and, therefore, could not be barred by limitation. We do not express any opinion as to whether the suit as it stands is maintainable without suing for redemption of the outstanding mortgage or mortgages. That point has not yet been considered by the trial Court which has dismissed the suit solely on the two grounds we have dealt with.

We set aside the decree of the trial Court dismissing the suit and direct that the suit be re-admitted to the file of that Court. The appellant has been allowed to appeal in forma pauperis so that no question of a refund of Court-fees to which she would otherwise be entitled arises. The respondent will pay the costs incurred by the appellant in this appeal.

P.N./R.K *Decree set aside.*

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OTTER, J.

U Pannawa—Applicant.

v.

Sayadaw U Aindaka—Respondent.

Civil Revn. No. 412 of 1929, Decided on 27th January 1930.

Buddhist Law (Burmese) — Ecclesiastical Law—Rangoon Small Cause Courts Act (7 of 1920), Ss. 12, 13 and 14.

Where a presiding pongyi has permitted another pongyi to reside in his kyaung and where the permission to reside has been determined the former is competent to evict the latter and the suit to evict can be tried by the Rangoon Small Cause Court: *A. I. R.* 1930 *Rang.* 29; (1892-1896) 2 *U. B. R.* 78: (1910-1913) *U. B. R.* 183 and (1897-1901) 2 *U. B. R.* 45, *Dist.*; (1892-1896) 2 *U. B. R.* 72 and (1908) 2 U. *B. R.* 1 *Rel. on.* [P 200 C 2]

Kyaw Din—for Applicant.

J. B. Sanyal—for Respondent.

Judgment.—In this case, the applicant who is a pongyi, had an order of ejectment passed against him in the Court of the Small Causes, Rangoon, at the instance of the respondent. The learned Judge came to the conclusion upon the evidence that the applicant was residing in a pongyi kyaung with the permission of the respondent, and that the latter had withdrawn this permission. It is the case for the respondent that he was at all material times the presiding monk in the kyaungdaik in question and also that he holds letters of administration to the estate of a man called U Zawta, the original donor of the kyaung. A pongyi called U Mayama, however, was called and he said that he had the permission of a pongyi called U Raindama to stay in the kyaung, and there is no doubt that until about six months ago, when he died the latter pongyi was the presiding monk. Another pongyi who also obtained permission from U Raindama to live in the kyaung stated that he was now living in the kyaung with the permission of the donor.

The question for me therefore is whether upon these facts the decision of the learned Judge of the Court of Small Causes was according to law. It was argued in this Court that he had no jurisdiction to entertain the suit, but there appears to be no fouudation for this suggestion. No authority was quoted in support of it, and a reference to Ss. 12, 13 and 14, Rangoon Small Cause Courts Act (Burma Act 7 of 1920) affords no support to the contention. It was also said that there was no satisfactory proof that the permission to reside in the kyaung had been determined and that such proof was necessary. This is correct: see S. 17 of the Act), but I agree with the learned Judge in the lower Court that the permission given was in fact determined. There was sufficient evidence to support this suggestion.

It was further argued that as a matter of Burmese Buddhist Law the res-

pondent was not entitled to the order made. Certain authorities were referred to, and it is conceded that the facts in those cases have little or no relation to those in the present case. The most recent case to which my attention was called is the case of *U Ahdeiksa* v. *Ma San Me* (1). The short facts of that case were that the original lay founder of a kyaung sued to eject the defendant, who had been permitted to live in the kyaung, and who appears to have succeeded the pongyi to whom the kyaung had been originally given and who had presided therein. It was held by a single Judge of this Court that while S. 116, Evidence Act, operates to estop a licensee from denying his licensor's title, it does not make a license revocable under all circumstances, and that the founder of a kyaung who put a pongyi in possession thereof must prove his right to evict the pongyi. This view may well be correct. But it seems clear that a presiding pongyi who has permitted another pongyi to reside in his kyaung is in a very different position from that of a lay donor of a kyaung and a pongyi installed by him there. To hold that the former could turn out the latter at will involves the proposition that the kyaung remained the absolute property of the donor for all time.

There has been no cases where the rights of donors of kyaung to evict persons placed by them therein or their successors have been in question. I need only refer to two of them viz., *Maung Talok* v. *Ma Kun* (2) and *Nga Po Thin* v. *U The Hla* (3). There is no doubt that the rights of the donors in these circumstances depend upon the nature of the original gift of the kyaung. It is also true that property in a properly dedicated kyaung cannot be regarded as an ordinary piece of immovable property which can be dealt with according to the ordinary principles of civil law, but the case under review is different and the rights of pongyis inter se only are under consideration.

Mention was made of the case of *U Thanwaya* v. *U Kethaya* (4). This was a suit brought in a civil Court by a pongyi to eject another pongyi from a monastery in accordance with a decision purporting to be that of the Thathanabaing, the head of the important council of priests. In a contest regarding the jurisdiction and authority of the plaintiff pongyi the civil Court reversed the decision of the Thathanabaing. It was held (and this case has since been followed in later cases) that it was not shown that the authority of the Thathanabaing could be recognized by the civil Courts. It seems to me that all these cases have little bearing upon the matter for my consideration and I only refer to them for it was said that by analogy I could hold that the lower Court had no jurisdiction and that in any event the permission to reside could not be revoked. It is plain, however, from a consideration of the last mentioned authority and of other cases, in particular the case of *Tezenda* v. *Teza* (5) that the rights of a pongyi placed in authority to eject a pongyi subject to that authority has always been recognized by the ecclesiastical authorities in Burma. This is obviously only a reasonable state of affairs for there must be some person placed in authority over the interior affairs of a monastery, and so far as I can see this has never been in question.

I think the applicant was subject to such an authority. I know moreover of no reason for holding that the Court of Small Causes has no jurisdiction. It is true that I find that it has not been held that a civil Court cannot interfere with the proceedings of the Burmese Buddhist ecclesiastical authorities so long as they keep within their jurisdiction and do not act contrary to law: see also as to this *Tuza* v. *Pyinna* (6). But orders of the Thathanabaing clearly can be enforced by the civil Courts: see *Shin Kuthala* v. *Shin Sanda* (7). That being so, there seems no reason to withhold the support of the civil Court to proper orders issued to persons in authority in circumstance such as the present. That being so, I cannot interfere in revision and the application therefore, fails and is dismissed with costs.

P.N./R.K. *Revision dismissed.*

(1) A. I. R. 1930 Rang. 29=7 Rang. 617.
(2) [1892-1896] 2 U. B. R. 78.
(3) [1913] 1 U. B. R. 183=23 I. C. 157=7 Bur. L. T. 27.
(4) [1897-1901] 2 U. B. R. 45.
(5) [1892-1896] 2 U. B. R. 72.
(6) [1892-1896] 2 U. B. R. 56.
(7) [1909] 2 U. B. R. Bur. Law Ecclesiastical 1.

A. I. R. 1930 Rangoon 201

BAGULEY, J.

K. C. V. Reddy

v.

Emperor.

Criminal Appeal No. 1305 of 1929, Decided on 14th November 1929, from order of Dist. Magistrate Rangoon, in Criminal Regular Trial No. 59 of 1929.

(a) Criminal P. C., Ss. 195 and 476—Examination on oath of Income-tax Officer making complaint regarding false return is unnecessary.

When an Income-tax officer makes a complaint under S. 476, in respect of a false return his examination on oath as an ordinary complainant is unnecessary and is a mere superfluity [P 202 C 2]

(b) Criminal P. C., Ss. 476 and 476 (b)—Recording of finding under S. 476 is discretionary — Mere fact that complaint is made gives right of appeal under S. 476 (b).

It is discretionary with the Income-tax officer making a complaint in respect of false return to record a finding that he is of opinion that an offence referred to in S. 195 is committed. Under S. 476 (b), the mere fact that a complaint has been filed opens the way to an appeal. An appeal can be filed as soon as the complaint is made and the appeal would be not against the finding but against the filing of the complaint. [P 203 C 1]

(c) Criminal P. C., S. 537—Charge vague—But accused and his counsel knowing real nature of charge and no failure of justice—Vagueness of charge is cured by S. 537—Criminal Trial.

When the charge is on the face of it meaningless and ununderstandable, but where the accused and his counsel know the nature of the offence the accused is charged with, and no failure of justice has resulted the vagueness or incomprehensibility of the charge is cured by S. 537. [P 205 C 2, P 206 C 1]

Delanville and *Gregory*—for Appellant.

Gaunt (*Offg. Govt Advocate*)—for the Crown.

Judgment.—The appellant, K. C. V. Reddy, has been convicted under two charges under S. 193 I. P. C., and S. 177, I.P.C. On the first charge, he was sentenced to three months' rigorous imprisonment and a fine of Rs. 16,000, and on the second charge he was sentenced to three months' rigorous imprisonment and a fine of Rs. 1,000, or in default two months' rigorous imprisonment, the sentences of imprisonment to run concurrently. Against this conviction he now appeals. The facts that gave rise to the prosecution are as follows : K. C. V. Reddy is the senior member of a partnership which for several years has held a contract for the supply of labour both to the Port Trust for wharf coolies and also to the British India Steam Navigation Company for the supply of coolies for working on their ships. For many years the Income-tax Department paid no attention to the accounts kept by the firm, but assessed them to income-tax arbitrarily, guessing the profits as being 10 per cent of the total payments from these two bodies. For the year 1927-28, however, they appear to have wished to proceed on a more exact basis and they called upon the firm to furnish a return of income for the past twelve months in the usual form. A return was furnished in two portions because the constitution of the partnership had changed in the course of the year. The two returns together showed a loss for the year of between Rs. 25,000 and Rs. 26,000 The Income-tax Department were not satisfied with this return and called for the production of books. Some books were sent to the office and then in consequence of what came out in what have been referred to in this case as the Port Trust defamation cases, an enquiry was instituted by the Criminal Investigation Department with the result that many further books were seized. These books are now before the Court and no dispute has been made to the allegation that they are books kept up by the firm. In the end, the Income-tax Department decided that the business so far from being run at a loss had been run at a very large profit and an arbitrary assessment was made by the Income-tax Department upon which the firm has been assessed to income-tax. In addition to this, the present appellant together with his other partners was prosecuted. At first there were four persons accused but in the course of the trial, proceedings against three of them were dropped or transferred to other cases and charges were framed against the present appellant alone.

In this appeal, questions of law have been raised and also questions of fact. I will first deal with the law points. The first objection on legal grounds can be easily dealt with. The appellant has been sentenced to three months' rigorous imprisonment and a fine of Rs. 1,000 or in default two months' rigorous imp-

risonment under S. 177, I. P. C. S. 177, I. P. C., consists of two paragraphs and it is obvious that he has been convicted under para. i. Under this paragraph only simple imprisonment may be imposed and the maximum sentence is six months. Consequently, the sentence of three month's rigorous imprisonment could at worst be only three months' simple imprisonment and the maximum substantive term of imprisonment under the paragraph being six months the maximum sentence of imprisonment in default of payment of fine is six weeks. The Crown did not contest this portion of the appeal.

The next ground of appeal is that the procedure of the Income-tax Officer in filing the complaint was irregular and this irregularity completely vitiates the proceedings. Under S. 195, Criminal P. C., these offences could only be dealt with on the complaint of the public servant concerned and S. 476, Criminal P. C., prescribes how that complaint is to be initiated. It is not contested that the Income-tax Officer in an enquiry of this nature is acting as a revenue Court, and S. 476, omitting the unnecessary words, runs as follows :

"When any Revenue Court is of opinion that it is expedient in the interests of justice that an enquiry should be made into any offence referred to in S. 195, sub-S. (1), Cl. (b) or (c) which appears to have been committed in or in relation to a proceeding in that Court, such Court may, after such preliminary enquiry, if any, as it thinks necessary, record a finding to that effect and make a complaint thereof in writing signed by the presiding officer of the Court and shall forward the same to a Magistrate, etc."

In the present case, the Income-tax Officer concerned was Mr. F. C. Fischer. When he had satisfied himself that an offence or offences had been committed, he first of all, as was required by the Income-tax Act, communicated with the Assistant Commissioner of Income-tax and received directions from him that the firm should be proceeded against under S. 52, Income-tax Act, that being the section which has to be called into play when anybody files a false return for income-tax purposes. Having got this direction, he filed a complaint direct to the District Magistrate, Rangoon, appeared before him and was examined on oath as an ordinary complainant. This examination on oath was unnecessary, because, when a public servant files a complaint under this section, it is not necessary that he should be examined on oath like an ordinary complainant, but this examination on oath being a mere superfluity it is impossible to hold that the appellant was in any way injuriously affected by it, and, therefore, this examination on oath may be disregarded. Complaint, however, is made that there is no finding recorded by the Income-tax Officer that it is expedient in the interests of justice that an enquiry should be made and that there was no preliminary enquiry, and that by the absence of these two things the appellant has been injuriously affected. As regards the preliminary enquiry, it is obvious from the wording of S. 476 that no preliminary enquiry is necessary for the section itself refers to "such preliminary enquiry, if any, as it thinks necessary."

That other omission requires more consideration. It is argued that as there is no finding recorded that further enquiry is expedient in the interests of justice, the appellant was deprived of his right of appeal which he would get from S. 476-B, Criminal P. C. It is said that unless and until a finding has been recorded, he could not possibly file an appeal because there was nothing to appeal against. A close scrutiny of S. 476-B, however, does not appear to show that it is necessary for a finding to be recorded in writing in order that an appeal may be filed. S. 476-B, omitting the unnecessary words, states :

"Any person on whose application any revenue Court has refused to make a complaint under S. 476 or against whom such a complaint has been made, may appeal to a Court to which such former Court is subordinate, and the superior Court may thereupon direct the withdrawal of the complaint."

This does not say that an appeal has to be filed against the finding. The mere fact that a complaint has been made opens the way to an appeal under this section, and on the wording of S. 476-B it seems that the appeal could be filed as soon as the accused became aware of the fact that a complaint had been filed. Another point which has to be noticed is this, that S. 476, Criminal P. C., does not state that if the Court finds that further enquiry is expedient it shall record a finding that further enquiry is necessary in the interests of justice. The word used is "may." In

Sohoni's Criminal Procedure Code, an extract is given from the proceedings of the Select Committee which revised this section, and they draw attention to the fact that they have substituted the word "may" for "shall; and when a "shall" is altered into a "may," the deduction which is usually made from this change is that whatever it was said shall be done before was compulsory, whereas the alteration of "shall" to "may" makes the action discretionary. If, however, there were any doubt in the matter one has to see whether by any chance the accused has been injuriously affected by the irregularity in the procedure. In this case, what is complained of is that the appellant owing to there being no finding recorded lost his right of appeal. As I have said, in my opinion he did not lose the right of appeal. He could have filed an appeal as soon as the complaint had been filed and his appeal would have been not against the finding but against the filing of the complaint. The Court to which he would have to appeal would be the Court to which appeals ordinarily lie from the revenue Court which filed the complaint. The Income-tax Officer when examining the return made for the purpose of income-tax was subordinate, in that appeals from his decisions would lie to the Assistant Commissioner of Income-tax. The Assistant Commissioner of Income-tax as it happened was the same officer who directed the Income-tax Officer to file the complaint, so that the appellant, had he lost a right of appeal, lost the right of appealing to the officer who was really directing his prosecution. It is somewhat strange that this should be the result of reading together the various Acts which appertain to this case, but that is the result. His appeal would lie to the same officer under whose orders the Income-tax tax Officer was acting when he filed the complaint. This right of appeal certainly appears to be of practically no value.

Only one case has been quoted to me on that point on behalf of the appellant *Kalisadhan Addya* v. *Nani Lal Hazra* (1), but this does not appear to me to be directly to the point, and I do not think it necessary to deal with the various rulings put forward on behalf of the Crown, as the point appears to me to be sufficiently clear in this particular instance. I am unable to agree that the appellant has been in any way injuriously affected by the failure to record a finding to the effect that it was expedient in the interests of justice that further enquiry should be made and I must hold this law point against the appellant.

(1) A. I. R. 1925 Cal. 721=52 Cal. 478.

The next point is with regard to the charge. This case, as I have said, started with four accused persons, all the four partners of the firm. It was begun before Mr. Collis, then District Magistrate, Rangoon. He recorded a certain amount of evidence and then he was succeeded in his office by Mr. Martin, who recorded the rest of the examination-in-chief and examined the accused. Then he framed charges against the present appellant on 19th August 1929. The case came up for hearing again on 22nd August but on that date Mr. Martin was already under orders to make over charge of his post and he took no further action. The case was called the next day when it was dealt with by Mr. Collis, who had again become District Magistrate, Rangoon. He notes that a de novo trial was not claimed. He then proceeded with the further cross-examination of the prosecution witnesses. He further examined the accused, heard the defence witnesses, and, after hearing counsel on both sides, passed orders. The actual wording of the charge framed is as follows:

(I only quote the first head of the charge because the appellant has been acquitted on the second head and there is no complaint of any ambiguity about the third head.)

"That you, K. C. V. Reddy, in August 1928, fabricated false evidence for the purpose of being used in a judicial proceeding, to wit, income-tax return of K. C. V. Reddy & Co. for the year 1927-1928.

The wording of this charge is most unfortunate, because when closely examined, it does not seem to mean anything at all. The charge literally is one of fabricating false evidence to be used in a judicial proceeding, to wit, in the income-tax return. An income-tax return is not a judicial proceeding and therefore on the face of it the charge is more or less meaningless. If the idea was that the false evidence referred to was the income-tax return itself, then the first head of the charge overlaps the

third head of the charge, because the third head deals with the making of a false return for the purpose of income-tax and again there would be no point in the first head of the charge. One would naturally have expected counsel for the accused when this charge was framed to have objected and said at once that his client was being charged with something entirely meaningless. No objection was raised at this time. It may have been that the charge had not been carefully studied at the moment it was framed. This, as I have said, was on 19th August. By the time 22nd August came when appellant's counsel should have been ready to cross-examine the prosecution witnesses, he certainly should have studied the charge to see exactly the points which he had to bring out in cross-examination. Apparently he did not do so. Had he done so, it was his duty to object on the next day when a new Magistrate took up the case again. If the objection had been made and disallowed, he could at once have claimed a de novo trial, and a de novo trial would have rendered necessary the framing of a new charge, and the new Magistrate most probably would have preferred to frame a charge in his own words which would have been more comprehensible. Again no objection of this kind was raised, but the appellant's counsel cross-examined Mr. Fischer with a view to elucidating exactly what the charge was based upon and he got this information from Mr. Fischer. The case went on further and it was not until appellant's counsel was actually addressing the Court at the close of the case that he professed his inability to understand the charge and urged that his client did not know what charge he was meeting. I am told by the Bar that when at this late stage he raised the objection he was told that he must be held to know perfectly well what the whole case was about and that S. 537, Criminal P. C., would cure any defect in the charge. S. 537 provides thet "no finding, sentence or order . . . shall be reserved on appeal" on account of :

"any error, omission or irregularity in the . . charge . . . unless such error, omission or irregularity has in fact occasioned a failure of justice."

It is perfectly clear and must have been known to all the parties concerned in the trial of this case that the appellant was being charged with making a false income-tax return and with fabricating false evidence for the purpose of being used in a judicial proceeding, namely, the enquiry by the Income-tax Officer into this income-tax return. As I have said, the documents before the Court were the income-tax return itself and the books kept by the firm. The business of this firm was a large one. The total receipts from the Port Commissioners and British India Steam Navigation Company were in the neighbourhood of six lakhs of rupees per annum and naturally a business of this kind requires a considerable amount of account keeping. The income-tax return was based presumably on the ordinary ledgers and cash books. These ledgers and cash books have not been mentioned before me, but what have been dealt with at considerable length are the books from which the ledgers and cash books were compiled. (The judgment then dealt with Exs F. and G. marked as "wharf coolies payments books Exs. J., the Daily Labour Register Ex. S. series, small blank note books containing names of ships, maistris' names, hours of work etc and Ex. T. the books with counter-oils and proceeded.)"

The allegation made on behalf of the Crown is that the firm was engaged in swelling their expenses for income-tax purposes in order to show a reduced profit or as it happens in this particular case, an absolute loss instead of profit. They say that the procedure was that the books showed payments to maistries for work which they never performed and the maistries themselves were dummies. One witness Velegala Veera Reddy (P. W. 14) gives a whole series of names which he says were dummies, many of them are not maistries at all. The allegation is that when the Daily Labour Register had been entered up with the names of maistries actually employed ; some of these dummies were added to the names of the maistries who actually worked and corresponding charges were placed in the book. The Coolies Payments book was written up from the Daily Labour Register and consequently these dummy names would appear again in the Coolies Payments book. The sums entered against the dummy names would be added into the total expenses

and from there would find their way into the main books of account of the firm. To account for these dummy names in the Daily Labour Register, false books of the Ex. S series were made up, and to correspond with them a false series of the Ex. T books were also made. In all 40 Ex S books have been produced, of which 39 are said to be false, S-to S-39, and one only Ex S 40 genuine, Exs- S 39 S 40 overlap as regards dates and show some striking divergencies, there being more names of maistries mployed in S. 39 than there are in Ex S-40, and Ex. S-40 is said to be the true book. In the genuine Ex. T book, all of them have the counterfoils written through a carbon sheet, while on the other hand the false Ex. T books are all written directly in pencil and have no serial numbers; whereas all the carbon Ex. T books have serial numbers. It is said by one of the witnesses that this was done to save time in writing up the false Ex. T books, and the absence of any serial number is also striking. It would be of importance for the genuine Ex. T books to have serial numbers entered because then at the fortnightly settlement when any maistry came for payment with his bundle of foils they could be quickly checked against the corresponding counterfoils remaining in the books, which would no doubt be preserved in the office for purposes of checking.

It will thus be seen that supposing the Daily Labour Register had been doctored in this manner and corresponding series of Ex S books and Ex. T counterfoil books had been prepared to support it, the next step would be to transfer the dummy names to the wharf coolies payment book. This would be all right so far as genuine maistries were concerned. They would get their money and duly sign or put their thumb marks on the corresponding receipt stamp. But for the dummy maistries, there would be no one to sign a receipt. The allegation is that various odd men were picked up to come and put their thumb marks in acknowledgment of receipt of the money.

Having set out the facts in this manner all of which were before the Court and had been made clear at latest by the time the prosecution witnesses had been cross-examined, it is perfectly certain that the appellant or at any rate his counsel must have known exactly what offence he was being charged with. In fact, when Mr. Fischer was recalled for cross-examination after the framing of the charge for the last time, the question was put to him to which he gave the following answer :

"Another book I would rely on is the thumb impression books (Exs. F, G and J.) They are important. The case is based on these and the Ex. S series. I do not know who put the thumb impressions. . . . ."

With that answer given to him on 4th September the appellant's counsel must have known that his client was being charged with producing a false income-tax return and fabricating false evidence to support that return which would have to be used at the judicial proceeding, namely, the enquiry by the Income-tax Officer into the income-tax return of K. C. V. Reddy & Co. I am unable to accept the contention that the defence were wandering in a fog all the way through the case. Even when arguing this appeal, learned counsel suggested that his client even then did not know what the charge meant, and it was not until he was replying to the reply of the Assistant Government Advocate that he then put forward the theory that the word "in" occurring in the phrase "to wit, in the income-tax return" was a type error due to the Magisteate beginning to write the word "income-tax" before the word "the". It seems to me quite possible that Mr. Martin when framing this charge had not got a thorough grip of the case, and it was contended that if this Magistrate thought one thing and the accused thought another he was liable to suffer an injustice. But this really in my opinion is not to the point. The actual trial of the present appellant must be held to have begun with the framing of the charge. Up to that point there were four accused in the dock and the investigation was to a certain extent preliminary. It was after the framing of the charge that the real trial began with a further cross-examination of the prosecution witnesses, and whatever may have been in Mr. Martin's brain at the time he framed the charge, what really matters is what Mr. Collis thought the charge meant when he dealt with it. If he was thinking of the

charge on the same lines as the accused was and has convicted him of an offence on which he was actually engaged in defending himself, there can be no plea of a failure of justice, and S. 537, Criminal P. C., will cure the vagueness or incomprehensibility of the charge. As soon as Mr. Fischer had been recalled for further cross-examination and had told the appellant's counsel exactly the books on which a charge was based, the appellant had no further grounds for pleading that he did not know what charge he was called upon to meet. It would, I must say, have been much better if Mr. Collis, when his attention was drawn to the wording of the charge in the appellant's counsel's final speech, had re-drafted that charge to make it apply exactly to the facts of the case. He could have done so then as the trial was not complete and it would have been better to have done that than to have adopted the slightly strained interpretation that he has placed upon it in his judgment, in which he regards the income-tax return itself as being a summary of the fabricated accounts and therefore fabricated.

It would have been much better to have cleared the air by pointing out that the income-taxreturn was not evidence but was simply the basis on which the judicial proceeding was founded and that the evidence which the accused was charged with having fabricated was the actual books produced to support that income-tax return at the judicial proceeding held by the Income-tax Officer. As I have said, the appellant's counsel was very late in raising the objection which should have been raised directly the charge was framed by Mr. Martin or which should have been raised when Mr. Collis took charge of the case again, and if that objection had been unsuccessful, he still had the remedy of a de novo trial. Instead of that, he preferred to hold his peace and then try and score a technical success at the last moment. It is true that counsel for an accused has no duty except to his client, but even a prosecution is entitled to fair play and to produce this point at the very last moment in the hope that it might be overruled and thereby the accused might get a technical victory in his appeal is not in my opinion treating the prosecution fairly. (After discussing evidence, his Lordship proceeded). The appellant puts up no active defence. His one plea is that he knew nothing of what was going on; that throughout practically the whole of 1927-28 the business was in the hands of his partners; that in the middle of 1928 he was busy with his litigations, which apparently consisted of the Port Trust Defamation cases and the Port Trust Bribery enquiry; and that he signed some papers blank and knew nothing about the rest. In fact he says he was a mere nominal figure-head and a dummy. He blames impartially his partners and his clerks. He does not profess to name anybody in particular. He just says it must have been one or the other. It will be noted, however, that the first question put to him in his examination was:

"It is said that you are the principal partner of K. C. V. Reddy & Co., Labour Contractors" and his answer was "Yes, I am the first partner."

It is in evidence that he is the man who has worked up the business to its present position. He was originally the chief member of the partnership. The contracts were obtained by him. His name is the only one to appear in the firm name, and although there is an arrangement of dividing up the profits of the partnership in certain fractions, he, as the leader of the partnership gets a special payment of Rs. 250 a month. It is true that although the deed of partnership says he gets this as Managing Partner the payment was continued to him even when he was away in India and it appears to have been to a certain extent in the nature of a payment for the goodwill of the use of his name. A man does not get Rs. 250 a month for the use of his name unless he is either a really leading man in his particular line of business or else he has a title or some dignity which the remaining partners of the firm think will bring lustre and profit to the firm. The appellant does not come under the second category, therefore he must come under the first. Except when he was in India he was never anything in the nature of a sleeping partner like one of the men originally accused with him, who was proved to be illiterate and fully occupied with

a business of his own at a mill on the other side of the river. The appellant was undoubtedly a working partner. As regards his allegation that the clerks wrote these things down, with his implication that they must thereby have swindled him and his other partners, I need only mention that the total which appears in these dummy names is very considerable indeed. In fact it is worked out at something like 30 per cent. of the gross receipts of the business. A businessman who has worked himself up in the business on a large scale may perhaps, when his head is full of big schemes lose his grip on the details and thereby allow his clerks to swindle him with regard to a few petty sums, but no man who has carried on business and made a big success of it has ever done so while allowing his clerks to swindle him out of 30 per cent. of his gross receipts, the suggestion that his fellow partners were swindling him seems quite unacceptable. The present working partner appears to be Dana Reddy and if he were the man who was engaged in feathering his own nest out of the firm's money it would seem exceedingly unnecessary for him to do what he appears from the evidence to have done, and that is to double cross his partners and try and get this contract for himself. There is evidence that Dhana Reddy went behind his partners and tried to get the contract for himself. Why should he do so, if he were absorbing all the profits of the business and a bit more?

If the books are true and the labour contracting business resulted in a loss of Rs. 25,000 or so in a year, it would be a cause of wonderment as to why there has been such competition to get the contract and why the present appellant the moment his contract with the Port Commissioners had come to an end did not close down. As it is, he says that the contract has been extended six months at a time and surely he would not have taken an extension of a losing business merely to oblige the Port Commissioners.

Another argument which was put forward for the appellant is that he really had no further interest in this business, because he was so heavily indebted to the other partners that all his share of the profits would be taken by them to pay his debts. Undoubtedly the man is in debts. There is one letter on the record showing that he signed promissory notes to the extent of more than a quarter of a lakh in July 1928 and until those had been paid off there is little doubt that he did not stand to get any cash profit out of the firm. Still he was interested in getting these debts paid off and there can be no doubt whatsoever that he was interested to show that as much profit as possible was being made out of the business in order that he should get his liabilities discharged as quickly as possible.

With regard to the actual signing of the income-tax return he says he signed it without looking at it. Had this been the case, he cannot be said to have signed it, believing it on any substantial ground to be true, and a man who signs a document which is false and which he does not believe to be true is as liable as though he had made a deliberately false statement. This when he is bound by law to say the truth.

Another point raised was that the appellant could not be found guilty of fabrication of false evidence, because there is no proof, in fact no serious suggestion, that he actually wrote up any of the books or registers that are the subject matter of the trial. That he did not do so is quite clear but this is one of the cases to which the maxim "*Qui facit per aliemim facit per se*" applies. So far as the Cooly Payments Book and the Daily Labour Register are concerned it is more a matter of making the books false, than of making false book. There is little or no evidence as to whose hand wrote the books, and there were many people who put their thumb marks to the cooly payments book, and many of these latter put their marks bonafide in acknowledgment of actual sums of money actually paid to them, and yet they were engaged in helping to make a false book. These books were made false owing to a system which was applied to them. I doubt that it was the brain of the appellant that devised that system, but it would never have been applied without his direct approval and orders, and for that reason I would hold that it was the appellant, possibly alone, possibly with the aid and connivance of his partners and others, who caused the books

to become false books and therefore, as a principal party fabricated false evidence.

To sum up, we have here in the appellant a man who in the past has been the successful head of a big business. He sends in a demonstrably false return of income to the Income-tax Office. He does not say that he had any reason to suppose it was true when he signed it. He says he signed it blindly. He was bound to furnish information on the subject to a public servant as such. The information which he furnished showed that the business was running at a loss, whereas it was undoubtedly running at a profit. Had he merely given a wrong figure for the profit it might have been argued successfully that he had not got all the books before him at the time he signed it but he had reasonable grounds for thinking that the profit was what he stated. As it was, when the return was put up to him showing a loss of a quarter of a lakh, he must have had reason to believe it to be false because he had been enjoying profits from that business. Then we have, with regard to the first charge, the fact that when this income-tax return was put in there was in the office a complete set of books which were false in material particulars and which must have been deliberately manufactured to dovetail into each other. He says he knew nothing about this. He trusted the cashier and the cashier must have let him down. He says that none of the partners ever checked the books. This is not the way, particularly in this country, in which successful businesses are built up and it is against human nature and particularly against the nature of this particular class of Indian. These books were evidence intended to be used to support the false income-tax return and therefore I hold that the appellant was correctly convicted under S. 193, I. P. C., and under S. 177, I. P. C.

I was particularly addressed on the question of sentence. The learned Magistrate in addition to imprisonment sentenced the appellant to a fine of Rs. 16,000. The sum is a somewhat peculiar one and no reasons were given as to how it was arrived at. In a connected case, however, the same Magistrate gave his reasons as to why he fixed on that sum. It was that in his opinion the correct assessment which the income-tax authorities might have put upon the appellant was Rs. 16,000 and as they were entitled under the Income-tax Act as a penalty to exact double the assessment, he fined the appellant the amount which the Income-tax Department might have mulcted him as a penal assessment. I am not altogether in favour of the criminal Courts being used to assist in the collection of revenue. If the income-tax authorities had wanted a penal assessment, they could have done it themselves and I think in a case of this nature the Courts might well confine themselves to inflicting a penalty of imprisonment, if they think that is necessary, together with making the accused contribute reasonably towards the costs of his own prosecution. In this country there is no power to direct that an accused be made to pay the costs of the prosecution and so the Courts must make an estimate themselves. In this matter I understand that the fees of the Government Advocate were paid by the Department. The actual costs of the trial, the witnesses' expenses, investigation by the Criminal Investigation Department, etc., were, I presume, paid by the Local Government.

I therefore confirm the convictions and direct that the appellant do suffer on the first charge three months' rigorous imprisonment and pay a fine of Rs. 10,000 or in default a further nine months' rigorous imprisonment, and on the second charge I direct that he suffer three months' simple imprisonment, the substantive sentences to run concurrently. I inflict no fine with regard to the second charge. Of the fine, if realized, half will be paid to the Income-tax Department as compensation towards their share of the costs of the prosecution.

P.N./R.K. *Convictions confirmed.*

A. I. R. 1930 Rangoon 209

BROWN, J.

Hatin and *another*—Appellant.

v.

Osi Ulla and *another*—Respondents.

Second Appeal No. 343 of 1929, Decided on 3rd February 1930 against decree of Dist. Judge, Akyab, D/- 7th March 1929.

(a) Limitation Act, S. 12—If applicant does not appear on the date on which he is told copy of decree would be ready, further delay cannot be considered to be time required for obtaining copies.

If the applicant does not appear and apply for the copy on the date on which, he is told, the copy of the decree would be ready, any further delay is due to his own default and that period cannot be considered to be time requisite for obtaining the copy unless there are some special reasons why the applicant could not obtain the copies on the day on which they were ready. [P 209 C 2]

(b) Limitation Act, S. 5—Error of advocate is sufficient cause if bona fide i. e., inspite of due care and attention.

Though an error on the part of an advocate might be sufficient cause within the meaning of S. 5 the mistake or error must be a bona fide one, that is, it must have been made in spite of due care and attention having been exercised. Where the advocate does not himself consider the matter and accepts the statement of his clerk that 8 days are allowed for obtaining copies of decree and does not examine the paper himself to see whether the statement was correct, he cannot be said to have exercised due care and attention: *A.I.R.* 1924 *Rang.* 148, *Foll.* [P 210 C 1]

Sein Tun Aung—for Appellants.

N. C. Sen—for Respondents.

Judgment.—The sole question for decision at present is whether this appeal should be rejected as time barred. The decree appealed against is dated 7th March 1929. Copies of judgment and decree were applied for on 8th May and copies were ready for delivery on 10th May. The appellants are, therefore, entitled to an allowence of three days as the time requisite for obtaining copies of the judgment and decree. The last day on which the appeal should have been filed was, therefore, 8th June. It was actually filed on 12th June and was four days late.

It has been suggested before me that the appellants are entitled to exclude the whole period occupied in obtaining copies up to the actual date on which copies were obtained. Although copies were ready in the present case on 10th May they were not actually delivered to the applicants until the 15th. If these extra five days were allowed the appeal would be within time. I think, however, it is clear that these five days cannot be excluded under S. 12, Lim. Act.

Under R. 7, Copying Rules, published at p. 72, Burma Courts Manual when the final application for copies is received the authorised officer is required to enter on the lower part of the application which is returned to the applicant, the time when the copy will be ready. If the applicant does not appear and apply for the copy on that date, any further delay is clearly due to his own default and that period could not be considered to be time requisite for obtaining the copy. There might, of course, in a particular case be special reasons why the applicant for copies could not obtain his copies on the day on which they were ready. But no such special reason is alleged in this case.

It is for the appellants to show that they are entitled to exclude these five days, and they have entirely failed to do so.

I must, therefore, hold that the appeal was barred by limitation.

The question then remains whether the appellants have shown sufficient cause for admitting the appeal after the period allowed by law within the meaning of S. 5, Lim. Act.

The reason for the delay is explained in an affidavit sworn to by the clerk of the learned advocate of the appellants. The deponent states that the advocate had a case at Pegu on 4th June 1929 and attended office on 5th June, suffering from an attack of cold. He then asked the deponent what was the latest date for presenting the appeal. The deponent replied 5th June 1929. The advocate then asked the deponent how many days were allowed for obtaining copy of the decree. The deponent replied that eight days were allowed: and that limitation would expire on 13th June. The advocate then returned home. The deponent was always under the impression that the time requisite for obtaining copies included the period between the date of readiness of the copy and the date of the delivery of the same to the applicant.

It was held in the case of *Tin Tin Nyo* v. *Maung Ba Saing* (1), that though

(1) A.I.R. 1924 Rang. 148=1 Rang. 504.

an error on the part of an advocate might be sufficient cause within the meaning of S. 5, Lim. Act, the mistake or error must be a bona fide one, and that, it means that it must have been made in spite of due care and attention having been exercised.

I do not see how it is possible to maintain that due care and attention was exercised in the present case. It is not alleged that the advocate himself ever considered the matter. He accepted the statement of his clerk that eight days were allowed for obtaining copies and did not examine the papers himself to see whether that statement was correct. Had he examined the matter himself he would have discovered the mistake, or at least have discovered that it was extremely doubtful whether more than three days would be held allowable as the time requisite for obtaining copies. It is to be noted that no application for copies was made in this case until more than two months after judgment had been delivered. The appeal had already been kept until close on the time of expiry of the period of limitation. There is no suggestion, of course, in this case that the advocate or anyone else had any ulterior motive in not filing the appeal before. But I find myself unable to hold that the mistake as to the time admissible was made after the exercise of due care and attention. The result is that the appeal must be dismissed as time barred. The respondents will be allowed their costs, advocate's fees two gold mohurs.

P.N./R.K. *Appeal dismissed.*

A. I. R. 1930 Rangoon 210

BROWN, J.

Ma Thein Tin—Appellant.

v.

Maung Po Thon—Respondent.

Second Appeal No. 508 of 1929, Decided on 25th March 1930, against decree of Dist. Judge, Thayetmyo, in Civil Appeal No. 24-T of 1929.

Buddhist Law (Burmese) — Marriage — Consent of parties is essential to constitute legal marriage.

To constitute a marriage under the Burmese Budhist Law no special ceremony is necessary. But the essential re quirement is the consent of parties. [P 210 C 2]

P in a suit for restitution of conjugal rights against *T* brought evidence to the effect that his parents negotiated with the parents of *T* for the marriage and had given them certain presents. A marriage ceremony took place without the presence of *P* and *T* according to the custom of the locality. *T* never received *P* afterwards and repudiated the marriage on the same day.

Held : that in the circumstances of the case no consent could be presumed and the marriage could not be regarded as legally binding. [P 210 C 2]

Myint Thein—for Appellant.

Surty—for Respondent.

Judgment. — The plaintiff respondent Maung Po Thon sued the defendant-appellant Ma Thein Yin for restitution of conjugal rights. The appellant denied that the parties had ever been married, and the sole question was whether there was a legal marriage or not. The plaintiff brought evidence to the effect that his parents had negotiated with the parents of the appellant for the marriage, and had given them certain presents. A ceremony was arranged for and took place, but at this ceremony neither the bride nor the bridegroom was present. The ceremony took place in the morning but admittedly Ma Thein Tin never received the plaintiff afterwards and repudiated the marriage that same day. The trial Court held that no marriage had been proved. The District Court held that the marriage had been proved and granted a decree.

In my opinion the plaintiff entirely failed to prove the marriage. To constitute a marriage under the Burmese Buddhist Law no special ceremony is necessary. But the first and foremost essential requirement is the consent of parties. Here there is no evidence whatsoever of the consent to the marriage on the part of Ma Thein Tin and it is in my opinion impossible in the circumstances to presume that consent, as the District Judge has done. A marriage ceremony without the presence of the principal parties is somewhat unusual. It appears that such a ceremony is the custom in the locality where the parties live, but there is no evidence of any case where a marriage has been held to be binding simply on account of such ceremony where the parties have afterwards not lived together as husband and wife, and one of the parties has always repudiated it afterwards. The respondent entirely failed to prove consent to the marriage on the part of the appellant which is

the first essential to constitute a marriage amongst the Burmese Buddhists. I set aside the decree of the District Court and restore that of the trial Court dismissing the plaintiff respondent's suit. The plaintiff-respondent will pay the costs of the defendant-appellant throughout.

P.N./R.K. *Decree set aside.*

A. I. R. 1930 Rangoon 211 (1)

HEALD, J.

Ma Zabeda and *others*—Applicants.

v.

Ibrar Ali—Respondent.

Civil Revn. No. 333 of 1929, Decided on 10th March 1930, from order of Dist. Judge, Akyab D/- 10th August 1929, in Civil Misc. No. 92 of 1929.

Religious Endowment—Suit by trustee for recovery of wakf property — Court cannot permit trustee to raise money by mortgage of the property.

During the pendency of a suit brought by a trustee of a wakf for recovery of possession of property, the Court has no jurisdiction to grant permission to mortgage the whole property which is subject-matter of the suit or part of it for raising funds for litigation. [P 211 C 1, 2]

M. I. Khan—for Applicants.

N. N. Burjojee—for Respondent.

Judgment.—In Civil Regular Suit No. 17 of 1928 Nazir Ahmed, one of the two trustees of a wakf (or alleged wakf) sued the present applicants and certain others to recover certain properties which he alleged to be subject to the wakf. Nazir Ahmed died and respondent, as being the other trustee of the wakf, allowed to continue the suit on condition that he paid the proper court-fees, Nazir Ahmed having been allowed to sue as a pauper. The court-fees have been paid and the suit is pending.

Respondent has applied to the Court for permission to mortgage or sell property, which he alleges to be subject to the wakf and which is part of the subject-matter of the suit, in order to raise a sum of Rs. 5,000 for the purposes of the suit, and the Court has given him permission to raise a sum of Rs. 5,000 by mortgaging the whole or part of the wakf estate in order to provide himself with funds to litigate for recovery of possession. Applicants ask me to set aside that order in revision on the ground that the properties which respondent claims are not subject to the alleged wakf. I know of no provision of law under which such permission could be given, and none has been brought to my notice. It would appear therefore that the order was made without jurisdiction. The order is therefore set aside and respondent will pay appellant's costs, advocate's fee to be 2 gold mohurs.

P.N./R.K. *Revision allowed.*

A. I. R. 1930 Rangoon 211 (2)

MYA BU AND HEALD, JJ.

U. Min Din and *another* — Appellants.

v.

Maung Shwe Hta and *others* — Respondents.

Letters Patent Appeal No. 100 of 1929, Decided on 7th February 1930, against decree in Civil Second Appeal No. 189 of 1928, reported in *A. I. R.* 1929 *Rang.* 112.

(a) Buddhist Law (Burmese) — Husband and wife—Sale by wife while husband in jail for meeting expenses incurred in matters of mutual interest binds husband: *A. I. R.* 1929 *Rang.* 112 *Reversed.*

A sale by a Burmese Buddhist wife of family land for meeting the expenses in defending her husband involved in a criminal charge, and for payment of license fees due by the husband in respect of a fishery, while the husband is undergoing a term of imprisonment in jail, binds the husband's interest also, since the sale was brought about to meet the expenses incurred in matters of mutual interest: **A. I. R. 1929 Rang. 112, Reversed** *A. I. R.* 1927 *Rang.* 209, *Rel. on*; (1872-92) *L. B. R.* 578. and *A. I. R.* 1929 *Rang.* 129; *Ref.* [P 213 C 1]

S. R. Chowdry and *S. Ganguli* — for Appellants.

P. K. Basu—for Respondent.

Mya Bu, J.—This is an appeal under Cl. 13 of the Letters Patent from the decision of a single Judge of this Court in a civil second appeal under S. 100, Civil P. C., arising out of a suit instituted by the present respondent 1 Maung Shwe Hta against the other respondents and the appellants. The main facts connected with the case are not in dispute. The paddy land in suit was once the joint property of Maung Shwe Hta and his wife Ma Sin, the present respondent 8.

On 28th March 1908, Maung Shwe Hta and Ma Sin mortgaged it for Rs. 600 with interest, to Daw Hmo, her son-in-law Maung Tha Hlaing and her daughter Ma Se Mi under a registered

deed (Ex. B). On 6th April 1911 Maung Shwe Hta was convicted of dacoity and sentenced to suffer 10 year's transportation. On 1st May 1911, his wife Ma Sin and her brother-in-law Maung Tun Nyein, the present respondent 9 executed a registered deed of sale (Ex. E) conveying the land in suit outright to Maung Tha Hlaing one of the mortgagees. In 1916, Daw Hmo, Maung Tin Hlaing, and Ma Se Mi mortgaged the land together with other properties to U Min Din, the present appellant 1 and again to his sister Ma Shin the present appellant 2. In August, 1919, Maung Shwe Hta returned from the Andamans, and somehow or other he got back possession of the land and has been in possession of it ever since. In 1923, U Min Din and Ma Shin obtained mortgage decrees against the present respondents 2 to 7 as legal representatives of the three deceased mortgagors and brought the mortgaged properties including the land in suit to sale in 1923. On 12th April 1924, the present respondent 3 Maung Thein, son of Maung Tha Hlaing, and Ma Se Mi purporting to act on behalf of his younger brother and sister Maung Thein Zan and Ma Ma Gyi the present respondents 4 and 5 who were then minors, executed a registered deed of sale (Ex. D) by which the land in suit was conveyed in favour of Maung Shwe Hta, Ma Sin and the present respondent 10 Maung Pan Gaing. U Min Din became the purchaser of the land in suit at the sale held in pursuance of his mortgage decree on 7th November 1925 and took out a delivery warrant on 8th February 1926.

Maung Shwe Hta's case is that the sale made by Ma Sin and Maung Tun Nyein on 1st May 1911, was void as it had been brought about by undue influence exerted by one of his mortgagees and that in any event it was not binding on him. Both the Court of the first instance and the Court of first appeal held that no undue influence was proved and that the sale of the suit land effected by Ma Sin after Shwe Hta's transportation in favour of Maung Tha Hlaing was valid. Maung Shwe Hta however was successful in his second appeal in which it was held that on the principle laid down in *Ma Thu* v. *Ma Bu* (1) and affirmed in *Ma Paing* v. *Maung Shwe Hpaw* (2) the sale without the consent of Maung Shwe Hta of the land was inoperative and invalid.

On behalf of U Min Din and Ma Shin it was contended before us that in the circumstances of the case the principle propounded in those cases if properly applied affirmed the validity of the sale to Maung Tha Hlaing, on 1st May 1911, although it was executed by Ma Sin alone in the absence of her husband Maung Shwe Hta. In my opinion this contention must be upheld. "Ex. C" recites :

"as Ko Tun Nyein and her sister-in-law Ma Sin are in need of money to be used for the license and the case in connexion with Maung Shwe Hta they offer to sell etc. etc."

In the evidence of Maung Tun Nyein it is clear that this recital meant that Ma Sin and Tun Nyein sold the land for the purpose of meeting the expenses incurred in defending Shwe Hta in the dacoity case and in paying the fishery license fees due by Shwe Hta. It is therefore obvious that the sale was not a transaction brought about for the benefit of Ma Sin, but it was brought about to meet the expenses incurred in matters of mutual interest to Maung Shwe Hta and Ma Sin, who being a Burmese Buddhist couple, were partners in respect of the land in suit as pointed out in *Ma Paing*'s case (2) in which it was also held that either the husband or the wife or both may represent the partnership in dealing with third persons. There is no doubt that the ruling in *Ma Paing*'s case (2) affirmed the conclusions at which the learned Judicial Commissioner who decided the case of *Ma Thu* v. *Ma Bu* (1) arrived. These conclusions appear at p. 582 and are expressed as follows :

"The conclusion to which I have come is that the status created by a Burmese marriage does not give the husband a power of selling the joint property of himself and his wife except under circumstances in which it can be said that he is acting as her agent. What those circumstances may be is a question of proof in each case. It cannot be disputed that in many instances the husband manages the business of the family with the assent of his wife express or implied and where this is the case sale effected by him will bind her."

(1) [1872-92] L.B. R. 578.
(2) A. I. R. 1927 Rang. 209=5 Rang. 296 (F. B.).

In his judgment in the *Ma Paing's* (2) case the learned Chief Justice observed:

"the partnership assets are liable in respect of all partnership debts and either partner can bind his co-partner in respect of any contract or agreement necessary for and usually done in connexion with such a partnership."

In the later Full Bench case of *U Po O* v. *Ma Tok Gyi* (3) where it was held that a deed of gift executed by a Burmese Buddhist husband without his wife's consent of part of the joint property to the marriage is wholly void the learned Chief Justice emphasized his observation in *Ma Paing's* case (2).

The circumstances under which the sale to Maung Tha Hlaing was brought about give rise in my opinion to an irresistible inference that Ma Sin was representing the partnership in that transaction. The sale was therefore binding on her husband Maung Shwe Hta in its entirety.

It has not been contended before us on behalf of Shwe Hta or any of the other respondents that on the evidence Maung Shwe Hta succeeded in proving his charge of undue influence, but I would point out that on the evidence and the materials on the record the lower Courts were quite right in holding that no undue influence was proved. In the result I would allow this appeal and setting aside the judgment and decree of this Court in second appeal restore those of the lower appellate Court including the lower appellate Court's order directing an enquiry and a fresh order for costs in the trial Court. The present respondent 1 Shwe Hta should pay the present appellant's costs in all three appeals and the other parties should pay their own costs throughout.

Separate costs should not be allowed for the present appellants in any Court.

Heald, J.—I agree.

J.M./R.K. *Appeal allowed.*

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(3) A. I. R. 1929 Rang. 129=7 Rang. 374 (F. B.).

*** A. I. R. 1930 Rangoon 213**

OTTER AND HEALD, JJ.

Daw Ohn Bwin—Appellant.

v.

U. Ba and *another*—Respondents.

First Appeal No. 206 of 1929, Decided on 18th February 1930, from order of Dist. Judge, Pyapon, in Civil Execution No. 451 of 1927.

*** Civil P. C., S. 11 Explanation (4)—Scope,**

Explanation 4 to S. 11 applies to execution proceedings: 11 *I. A.* 37; *A. I. R.* 1922 *Pat.* 289; *A. I. R.* 1925 *P. C.* 55, *Cons.*: 37 *All.* 589, *Dist.* [P 216 *C* I]

S. Ganguli—for Appellant.

Maung—for Respondents.

Otter, J.—In Civil Regular Suit No. 9 of 1926, in the District Court of Pyapon the respondents obtained a decree against a woman called Ma Seik Kaung and others for possession of certain land and mill premises. In the course of that suit, Ma Seik Kaung was permitted to remain in possession of the mill upon her giving security in an amount of 10,000 in favour of the Judge of the Court, giving certain immovable properties belonging to her as security for Ma Seik Kaung duly performing and satisfying any order which might be made against her. Ma Seik Kaung made default in her rent and after respondents had obtained the decree in that suit they applied under S. 145 (e), Civil P. C. to the Court in Civil Execution No. 45 of that Court for process as against the appellant as surety under the security bond. The Court held that the respondents were entitled to bring the properties given as security to sale without filing a suit upon the bond. This judgment was upheld upon appeal to this Court as also was the judgment and decree in the suit against Ma Seik Kaung and others to which I referred.

In the petition for sale, the respondent alleged that as the appellant had failed to pay the amount of 10,000 decreed as against Ma Seik Kaung and others and the appellant having become liable as surety and having failed to pay the said amount of 10,000 process should issue as against the property furnished by way of security.

The written objection of the appellant stated only that the application was not maintainable in law and said that the application should be

stayed pending the disposal of the appeal arising out of the civil suit to which we have referred. The execution was in fact stayed pending the disposal of this appeal and the case came before the Court on 10th May 1929. The appellant was represented by an advocate and the case was postponed for hearing as to the maintainability of the objection "and other points." On 6th July 1929, advocates both for the respondents and also for the appellant were heard and on 15th August 1929 orders were passed to the effect that the execution should be proceeded with. Thus it will be seen that there was a direct allegation that the appellant was liable in an amount of 10,000 upon the bond. The importance of this is that the order of 15th August 1929 having been confirmed on appeal ; the case having been sent back so that the execution would be proceeded with, it was then objected by the appellant that she was not liable upon the bond at all. and inter alia that if she was liable it was for some smaller amount. The learned District Judge held that he could not consider these objections on the ground that it had already been decided in the previous execution proceedings that the appellant was liable to the extent of 10,000 and moreover that this Court had upheld this decision. The question therefore is whether the District Judge should have heard and determined the objections of the appellant. It was argued that Expl. 4,S. 11, Civil P. C., should not be extended to execution proceedings and that an order made in execution proproceedings should not have the force of res judicata unless the point raised in the subsequent proceedings was actually raised in the former proceedings and decided. We were referred to certain authorities on this point, viz.: *Kalyan Singh* v. *Jagan Prasad* (1) *Prithi Mahton* v. *Jamshad Khan* (2) *Phul Chand* v. *Kanhaiya Lal* (3).

In the first of these cases a judgment-debtor in execution proceedings neglected to object to inclusion of an amount for interest on the costs of the suit. Various amounts were paid in execution

(1) [1916] 37 All. 589=30 I. C. 523=13A. L. J. 828.

(2) A. I. R. 1922 Pat. 289=1. Pat. 593.

(3) A. I. R. 1922 All. 247=44. All. 130.

and finally the situation was that, if the decree-holder was not to get interest on costs the decree was more than satisfied if on the other hand he was to get interest upon costs there would still remain something due to him. Thus the question for the Court in that case was whether the judgment-debtor, having neglected to take exception to the inclusion in the account of interest on costs was prevented from saying in subsequent execution proceedings that the decree had been satisfied. The Court thought that as the legislature had not in terms made all the provisions of S. 11 of the Code (including of course the explanations) applicable to execution proceedings the judgment-debtor was not precluded from raising the question as to his liability for interest upon the costs of the suit. It is clear therefore, that the facts of that case are very different from these under review for the objection which the appellant did not raise but now seeks to rely on goes to the root of her liability and moreover the question as to interest on costs was comparatively unimportant.

In the second case a Bench of the Patna High Court followed the Allahabad decision to which we have just referred and the learned Chief Justice said :

> " . . . . . although the doctrine laid down in S. 11, Civil P. C., relating to res judicata may be applied and rightly applied in certain proceedings in execution arising out of same judgment so as to put an end to litigation and may possibly be applied in certain cases where separate suits have been brought raising points which have already been decided in execution cases fought between the same parties still I do not think that the special rules laid down in the explanations to that section which go beyond the ordinary doctrine of res judicata ought to be applied generally in execution cases,"

In that case land had been put up to sale in execution of a decree for rent obtained by the landlord against his tenant. Proceedings under O. 21, R. 90, Civil P. C., to set aside the sale were brought by an alleged previous transferee of the property. No point in these proceedings was taken by the decree-holder that the holding was not transferable. It should be stated that apparently only a portion of the property had been transferred. These proceedings were successful and the sale was

ordered to be set aside. In a subsequent suit brought by the decree-holder for confirmation of possession of the property the decree-holder pleaded that the property was not and had not been capable of transfer. There can be no doubt that the learned Chief Justice was impressed by the fact that the whole of the property was not included in the transfer for he seems to have been of the opinion that the decree-holder may have thought that such a transfer would have been binding against him if his tenant the judgment-debtor was still in possession of part of the property and for this reason might not have taken the objection that the property was not transferable.

It is clear that it was because there appeared to the Court that there was good reason for the failure to raise in the execution proceedings the point sought to be raised in the suit that it was allowed to be there raised. If that had not been so he would (we think) have arrived at a different conclusion for he went on to approve the ratio-decidendi in the case of *Kalyan Singh* v. *Jagan Prasad* (1).

Although, therefore, it is true that the remarks of the Chief Justice can be relied upon on behalf of the appellant in the present case the actual decision was that the point not raised in the execution proceedings was barred in the subsequent suit by the doctrine of res judicata. With regard to the expression of opinion by the learned Chief Justice to the effect that the special rules laid down in the explanation to S. 11 go beyond the ordinary doctrine of res judicata I would refer to the case of *Fateh Singh* v. *Jagannath Bakhsh Singh* (4) In that case the plaintiff had unsuccessfully applied to amend his plaint and his suit had been subsequently dismissed It was held by the Privy Council that he was debarred from raising in a separate suit the matter contained in the amendment previously asked for. Part of the head note is :

"*held* : that the suit was barred by res judicata under the Civil Procedure Code, S. 11, Expl. 4."

This, it seems. was a strong ease and it does not seem to have been suggested that the rules contained in the explanation travel outside the principles relating to res judicata as laid down in S. 11. In the third case, the matter was again considered by the Allahabad High Court and the case of *Kalyan Singh* v. *Jagan Sing* (1) was considered. Wallach, J., differed from the other member of the Court upon the point for our consideration and held that though the question might have been raised in the former preceedings it was not so raised and the explanations to S. 11 could not be applied to proceedings in execution. The facts were that in an application for execution proceedings adecree-holder did not ask for an adjudication as to whether certain persons were members of a firm and an application by these persons for removal of attachment was granted. Subsequently in an application to execute the decree against them it was held that they were liable. As I have indicated, Wallach. J., held that they were prevented by the explanation to S. 11, Civil P. C., from subsequently raising the question whether these persons were in fact members of the firm. He seems to have thought that the explainti ons to S. 11, Civil P. C., cannot be applied to proceedings in execution.

Upon this question there is ample authority that the provisions of S. 11 of the Code do apply to execution proceedings: see especially as to this the decision of the Judicial Committee of the Privy Council in *Ramkripal Shukul* v. *Mt. Rup Kuari* (5). where a Judge having decided in the course of execution proceedings that a decree according to its true construction awarded future mesne profits, it was held that such decision having been or become final was binding upon the parties and could not in a later stage of the execution proceeding be set aside.

It will be seen therefore that this Court is bound to hold that S. 11 does apply to execution proceedings. That being so are we to hold that the explanations do not apply ? There appears to be no decision of the Privy Council on this question. But this committee has held in unmistakeable terms that Expln. 4 may bar as res judicata matters which might and ought to have been set up in a former suit. The committee has also held that the section itself applies to execution pro-

(4) A. I. R. 1925 P. C.55=47 All.158=27 O. C. 333=52 I. A. 100 (P.C.).
(5) [1884] 6 All. 279=11 I. A. 37 (P. C.).

ceedings. Are we not driven therefore to the further conclusion that the explanations also apply to execution proceedings? The Privy Council must have taken to have held that the explanation forms part of and is to be read with the section: see p. 162, of the Allahabad report in the case of *Fateh Singh* (4). I need not therefore consider the objection which formerly might have been made, viz. that it is impossible to "hear and finally decide a matter which was not specifically raised on either side but was only constructively raised."

Upon the facts there appears to be no injustice to the appellant. She was represented by an advocate. The matters alleged against her were clearly set out in the petition and the question whether she was liable in the sum of Rs. 10,000 was directly raised in the petition. The appellant, however, chose to content herself with a general plea that in law it should be held that the application was not maintainable. So far as can be seen there can be no possible reason why the matters now sought to be raised were not then put forward. For these reasons I feel bound to hold that the application is now barred by the doctrine of res judicata as contained in S. 11, Expln. 4 of the Code, and the appeal must be dismissed with costs. Advocate's fee to be five gold mohurs.

Heald, J.—I agree that in the circumstances of this case appellant cannot be allowed to question the finding that 10,000 was due by her on the bond. I would dismiss the appeal with costs advocate's fee in this Court to be 5 gold mohurs.

P.N./R.K. *Appeal dismissed.*

A. I. R. 1930 Rangoon 216

HEALD, AG. C. J. AND SEN, J.

Mahomed Eshak Bhiyat—Appellant.

v.

Sari Chandra Bose and *another*—Respondents.

Civil Misc. Appeal No. 94 of 1929, Decided on 1st April 1930, from order on original side in Civil Regular Suit No. 100 of 1928, D/- 8th May 1929.

(a) Letters Patent (Rangoon), Cl. 10 — Contract to sell dried prawns on commission in Rangoon — Selling agent, *M*, having office in Calcutta and Head Office in Rangoon—Principal trading in Bengal—Prawns to be delivered to *M* in Calcutta—*M* to make advances against their value at Calcutta—*M* to ship prawns to Rangoon through his agent at Calcutta — *M* to pay proceeds of prawns after deducting commission charges and advances, etc.— Suit in Rangoon to recover balance of advances made in Calcutta in excess of net value of prawns — Money held payable in Calcutta under the terms of contract.

M who had an office in Calcutta but whose head office was in Rangoon entered into an agreement to act as selling agent in Rangoon for *S* to sell dried prawns from Bengal on commission basis. *S* was merchant trading in Bengal and was to deliver prawns to *M* at his office in Calcutta. *M* at his Calcutta office was to make advances to *S* against the value of prawns so delivered. *M* by his Calcutta manager was to ship the prawns to Rangoon. *M* at Rangoon was to sell the prawns for *S* on commission and that *M* was to pay *S* the proceeds of the sale of the prawns, less advances, commission and charges. *M* sued to recover a balance of advances made by him in Calcutta in excess of the value of prawns when sold, in Rangoon.

Held: that in the present case no payments by *S* to *M* were contemplated by the contract. *M* was to pay advances to *S* in Calcutta and was to pay *S* the balance of the sale proceeds also presumably in Calcutta. As the amounts were expressly made payable in the agreement they were certainly payable in Calcutta, the reasonable inference also would be that accounts were to be settled in Calcutta and if any amount should be found payable to *M* it should be payable to him in Calcutta just as amounts payable by him to *S* were payable in Calcutta. Calcutta Court had, therefore, jurisdiction to try the suit: *A. I. R.* 1927 *P. C.* 156, *Dist.* [P 217 C 2; P 218 C 1]

(b) Civil P. C., S. 20 — Suit on contract can be instituted where contract is to be performed.

A suit on a contract may be instituted in a Court within whose jurisdiction the contract was to be performed: *A. I. R.* 1924 *Rang.* 2, *Rel. on.* [P 218 C 1]

Doctor—for Appellant.

Auzam—for Respondent 1.

Heald, Ag. C. J. — Appellant, who has an office in Calcutta but whose head office is in Rangoon, sells dried prawns from Bengal on commission in Rangoon. It is common ground that under the agreement between the parties appellant was to act as selling agent in Rangoon for respondents, that respondents, who were merchants trading at Khaliskhali in Bengal were to deliver prawns to appellant at appellant's office in Calcutta, that appellant at his Calcutta office was to make advances to respondents against the value of prawns so delivered, that appellant by his Calcutta Manager was to ship the prawns to Rangoon, that appellant at Rangoon was to sell the prawns

for respondents on commission, and that appellant was to pay respondents the proceeds of the sale of the prawns, less advances, commission and charges. Appellant sued to recover a balance of advances made by him in Calcutta in excess of the net value of the prawns when sold in Rangoon.

He applied under Cl. 10, Letters Patent of this Court for leave to institute his suit in Rangoon on the original side of this Court on the ground that his cause of action had arisen in part within the local limits of the jurisdiction of this Court and the learned Judge, before whom that application was placed for preliminary orders, granted leave subject to objection by the respondents. The suit was accordingly instituted on the original side of this Court, and respondent 1, who alone contested the suit, pleaded that this Court had no jurisdiction because no part of the cause of action had arisen within the local limits of its jurisdiction.

The learned Judge, before whom the case came on for hearing, framed a preliminary issue and on that issue said :

"Simply because the goods were sent to Rangoon for sale does not in any way make any part of the cause of action arise in Rangoon. Here the contract was entered into in Calcutta, the money was paid in Calcutta, the goods were delivered in Calcutta, and the accounts were rendered in Calcutta. I therefore hold that the whole cause of action arose in Calcutta."

He accordingly ordered the plaint to be returned for presentation to the proper Court. Appellant appeals against that judgment and alleges that the learned Judge was mistaken in thinking that all the accounts of the business were rendered to respondents by his Calcutta manager. He contends that because the business which was the object of the contract was to be done in Rangoon, and because the profit or loss was to be made in Rangoon, and because his commission was to be earned in Rangoon, his cause of action arose at least in part within the jurisdiction of this Court.

His learned advocate relies very strongly on the case of *Soniram Jeetmull* v. *R. D. Tata and Co.* (1) in which Soniram, who carried on business in Calcutta undertook to introduce to Tata constituents on whose behalf Tata, as a commission agent, was to buy or sell grain in Rangoon, and in consideration of Soniram's undertaking to make good any undisputed claim which Tata might lose owing to such constitutents' failing or suspending payment Tata agreed to pay Soniram a quarter of the commission which he should earn on business introduced by Soniram. Certain constituents introduced by Soniram failed to pay and Tata obtained decrees against them. Tata then sued Soniram in Rangoon on his guarantee. A question was raised as to the jurisdiction of the Rangoon Court to entertain the suit, and their Lordships of the Privy Council held that the suit was rightly instituted in Rangoon, because the part of the contract relating to payment was performable by Soniram in Rangoon. Their Lordships said :

"It is quite true the contract does not say where Messrs. (Soniram) Jeetmull are to pay, but it does say by implication which is indisputable that they are to pay Messrs. Tata, Sons & Co., and it follows that they must pay where that firm is . . . . . . In respect of the whole of this business it is not disputed that the business transactions, out of which the outstanding debts arose, took place in Rangoon, and for this purpose the branch of Messrs Tata, Sons & Co., there, were the Messrs. Tata, Sons & Co., concerned."

Appellant's learned advocate contends that on the authority of that case we are bound to hold that because the amount claimed by appellant is payable, if his claim is established, to him it is payable in Rangoon and therefore this Court has jurisdiction, but I do not think that this argument is sound. In the present case no payments by respondents to appellant were contemplated by the contract. Appellant was to pay advances to respondents in Calcutta and was to pay to respondents the balance of the sale proceeds, also presumably in Calcutta. If the business had proceeded on the lines contemplated by the agreement there would have been no question of any payments by respondents to appellant. Appellant's case is that by reason of advances made by him in excess in Calcutta there is a balance in his favour recoverable from respondents, and he claims to recover that balance in Rangoon.

The amounts which were expressly made payable under the agreement were certainly payable in Calcutta and it seems to me to be a reasonable inference that accounts were to be settled there

(1) A.I.R. 1927 P.C. 156=5 Rang. 451=54 I. A 265 (P.C.).

and that if any amount should be found payable to appellant it should be payable to him in Calcutta just as amounts payable by him to respondents were payable in Cacutta. It was an inference from the terms of the contract to the effect that the money was payable in Rangoon which was the basis of the decision of their Lordships of the Privy Council in the case cited, and on a similar inference from the terms of the contract in this case I would find that the money alleged to be due to appellant is payable, if it is payable at all, in Calcutta. It follows from this that the Calcutta Court would have jurisdiction but it does not necessarily follow that the Rangoon Court would not have jurisdiction.

The question of local jurisdiction in cases of contract was considered by a Bench of this Court in the case of *Jupiter General Insurance Co. Ltd.* v. *Abdul Aziz* (2) and it was there said that the provisions of S. 20, Civil P. C., which says that suits may be instituted in Courts within the local limits of whose jurisdiction the cause of action wholly or in part arises, means in the case of a suit on a contract that the suit may be instituted in a Court within whose local jurisdiction the contract was to be performed. It is arguable that in the present case, which is a suit on a contract, a material part of the cause of action arose in Rangoon, where the business which was the object of the contract was to be done, but as I have no doubt that the Calcutta Court has jurisdiction and I consider it doubtful whether or not this Court can entertain the suit, I see no reason to interfere with the judgment of the learned Judge on the original side, which amounts to a refusal of leave under Cl. 10, Letters Patent. I would accordingly dismiss the appeal with costs, advocate's fees in this Court to be two gold mohurs.

Sen, J—I concur.

R.K. *Appeal dismissed.*

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(2) A.I.R. 1924 Rang. 2=1 Rang. 231 (F.B.).

A. I. R. 1930 Rangoon 218

HEALD, AG. C. J. AND OTTER, J.

Ma San and *others*—Appellants.

v.

Ma Chit Su and *others*—Respondents.

First Appeal No. 213 of 1928, Decided on 17th March 1930, preferred against decree of District Court Insein in Civil Regular Suit No. 5 of 1928, D/- 13th August 1928.

(a) Buddhist Law—Chinese—Applicability—Father Chinese, and mother Burmese—Person asserting that son was Buddhist must establish the same.

Where a person's father is of a pure Chinese blood and his mother a Burmese woman and he makes offerings of rice to images of Buddha in his own house, in view of the admitted nationality of the father of such person, party alleging that he was Burmese Buddhist must establish his contention. [P 219 C 2]

(b) Buddhist Law—Chinese—Succession—Son of Chinaman from Burmese woman becoming Burmese in dress and habits—Chinese worship and funeral rites retained—Wife's name not included in conveyances—Chinese customs held to have been retained.

A person who was the son of a Chinese father but of a Burmese mother became to some extent Burmese in his dress and habits, but as to his worship and funeral rites at all material times he was a Chinese Buddhist. He never included his wife's name in conveyances. *Held*: the Chinese customs were retained. [P 220 C 1, 2]

(c) Buddhist law—Chinese—Heirs must obtain letters of administration—Succession Act (1925), S. 212.

Where the deceased is a Chinese Buddhist and not a Burmese Buddhist, the heirs of such a person must obtain letters of administration before a final decree in their favour can be given: *A. I. R.* 1930 *Rang.* 81, *Rel. on.* [P 221 C 1]

(d) Succession Act (1925), S. 213—Letters of administration not obtained prior to suit—Court can still grant conditional decree on obtaining letters of administration.

Although the necessary letters of administration have not been obtained before the commencement of a suit, the Court may grant a conditional decree and the defect may be remedied by suspending the operation of the decree which would be passed until letters have been obtained: 38 *Cal.* 327 (*P. C.*), *Rel. on.* [P 221 C 1]

(e) Benami—Person's name inserted in conveyance—Person alleging that he is not the real owner must prove the same.

Where properties are purchased in the joint names of two persons and it is alleged that the properties belong to only one of them and the name of the other was inserted merely to enable to present the deeds for registration the party alleging must prove that the other was not a joint owner: *A.I.R.* 1926 *P.C.* 77 and *A.I.R.* 1928 *Rang,* 220, *Rel. on.* [P 221 C 2]

Leach—for Appellants.

K. C. Bose—for Respondents.

Otter, J.—The appellants had a suit brought against them by the respondents claiming inter alia a declaration that they, as heirs of one Maung Ba Aung, deceased, are entitled to a half share in certain lands and for possession after partition, for a decree that they are entitled to a share in certain debts due to Maung Ba Aung, for an account and for mesne profits. Respondent 1 was the third and last wife of Maung Ba Aung; the respondents 2 and 3 are his children by his first and second wives respectively; respondent 4 is his daughter by respondent 1.

Appellant 1 is the sister of Maung Ba Aung and she had been the wife of a man called U Taikka, deceased, and appellant 2 and 3 are her children by him; appellant 4 is the brother of Maung Ba Aung, and appellant 5 is the wife of appellant 4.

Maung Ba Aung was the son of a Chinaman and respondent 1 his wife, is a Burmese Buddhist.

The issues framed by the learned District Judge were:

1 Was Maung Ba Aung a Chinese or a Burmese?

2 Was Maung Ba Aung a Bddhist or a Confucian?

3 Is the suit maintainable without a grant of letters of administration?

4 Are defendants liable to account?

5 What is the law of succession governing his estate?

6 What did his estate consist of?

7 Did U Taikka and defendant 4 dispossess plaintiffs of the property mentioned in schedule A attached to the plaint?

8 Did defendant 4 remove the mortgage deeds mentioned in schedule B and items 1 and 2 of schedule D from Maung Ba Aung's house and deliver them to U Taikka and defendant 1 as alleged in paras 4 and 6 of the plaint?

9 Was the property mentioned in schedule C the absolute property of Maung Ba Aung?

10 Did defendant 4 and U Taikka collect the rent on the contract mentioned in item 3 of schedule D? If so, how much was it?

The first two issues were decided in favour of the respondents and may be considered together. It will thus be seen that the first question for us is as to the status of Maung Ba Aung. It is said on behalf of the appellants that he was at his death a Chinese Buddhist and that therefore in view of the decision of the majority of the Full Bench in *Phan Tiyok* v. *Lim. Kyin Kauk* (1) the provisions of the Succession Act apply to his estate; whereas, on behalf of the respondents, it is said that he died a Burmese Buddhist and that therefore the law applicable is the Burmese Buddhist Law.

Before examining the issues relating to the properties claimed by the respondents, it will be well therefore to dispose of this matter. As *Phan Tiyok* v. *Lim Kyin Kauk* (1) was decided since the decision now under appeal, it is necessary first of all to see exactly what it was that was laid down in that case. The question propounded to the Full Bench was:

"Does Burmese Buddhist law govern the succession to the estate of a Chinese Buddhist born in China but who was domiciled and died in Burma?

The decision of the five Judges composing the Court was unanimous that this question should be answered in the negative. But on the further question as to what law is so applicable, the four members of the Court held that the Succession Act (or its principles) apply.

The reasoning underlying the judgment of the majority of the Court was that a Chinese Buddhist cannot be held to be a "Buddhist" within the meaning of S. 13, Burma Laws Act and the Succession Act. It was admitted in argument in the lower Court, and in this Court, that Maung Ba Aung was a Buddhist and therefore the only question for us is whether he must be said to have been at his death a Chinese Buddhist or a Burmese Buddhist. Upon this matter, of course, it must be considered whether he had abandoned the particular form of Buddhism peculiar to Chinamen, and had embraced Burmese Buddhism, and evidence as to any change in secular customs and habits is also relevant. It is admitted that Maung Ba Aung's father was of pure Chinese blood, but his mother was a Burmese woman. It was also said that he made offerings of rice to images of Buddha in his own house. The respondents asserted, however, that he was a Burmese Buddhist, but in view of the admitted nationality of the father of Maung Ba Aung, we think that the onus was upon them to establish this contention. On their behalf the important facts relied on upon this point were that Maung Ba Aung dressed as a Burman, that he shinbyued his sons, that he himself wasshinbyued and that he visited pagodas and zayats. It was

(1) A. I. R. 1930 Rang. 81=8 Rang. 57 (F.B.).

also admitted that Ba Aung once stayed as a novice in a phongyi kyung for three days, and he apparently traded as Ko Ba Aung and not under his Chinese name Htain Shu (or Su).

On behalf of the appellants it was in evidence that Ba Aung was sent to China after his father's death, that there was a Chinese altar in his house, that once a year he visited the graveyard of his parents, that he visited the Chinese Temple twice a year, that he had a Chinese funeral and was buried in a Chinese shaped coffin. There is no doubt that the rights and ceremonies connected with his funeral were Chinese in character. The evidence as to his religion substantially is that he was Buddhist, but that he also revered Can Su (Confucius).

His Chinese name was How Htain Shu (or Su) but little can be deduced from this fact alone, and there is scarcely any evidence as to what he was usually called. It will be seen, therefore, that the evidence chiefly related to secular matters and so far as the respondents are concerned there was little testimony as to the form of Buddhism observed by Maung Ba Aung.

Maung Ba Aung was living with his wife when he died and the suggestion therefore that the arrangements for the burial were Chinese in character owing to the interference of his brother, appellant 4, carries little weight. It is admitted, however, that it was at his brother's request that the Chinese clan were invited to attend the funeral to perform Chinese rites. We observe, however, that it was admitted by P. W. 5 that Ma Chit Su and her children wore the usual Chinese mourning clothes at his funeral. Moreover, the evidence of P. W. 7 was at least not in favour of the respondents' case on this point, and it was even suggested he should be treated as hostile. P. W. 9 also would not say that Maung Ba Aung did not observe Chinese religious customs. The evidence for the respondents on this part of the case we regard as weak, and though the matter is not entirely free from doubt, we are inclined to think that it was not established that Maung Ba Aung abandoned his nationality or religion. He became to some extent Burmese in his dress and habits, but in essentials, especially in view of the facts proved as to his worship and funeral rites, the evidence seems to point to the fact that at all material times he must be said to have been a Chinese Buddhist. Upon this question, we bear in mind the fact that according to respondent 4 neither he nor his brother Maung Ba Aung ever included their wives' names in conveyances. This certainly points to the retention of Chinese customs.

We also regard the evidence of Si Mar (D. W. 17) as important. He is an elder of the Chinese Temple at Akban. He stated that Maung Ba Aung was also one of the elders and he gave details as to visits of the latter to the temple and also to the burial place of his father. The matter is by no means easy of determination. The learned District Judge recorded a finding on the first two issues that the deceased man was a "Sino-Burmese half-caste of Burmese domicile and a Buddhist." The religious aspect of the matter was then of less importance and the learned District Judge merely finds that the deceased man was a Buddhist.

Upon the whole we are of opinion that although in certain details Ba Aung was perhaps as much a Burman as a Chinaman, yet especially from the religious point of view, we are not satisfied that the deceased abandoned his father's form of religion. That being so, the decision of the majority of the Court to which we have referred must apply. Upon this, it was said by Mr. K. C. Bose, who appeared for the respondents, that as the judgment of at least two of the majority members of the Court contained expressions which would seem to mean that they would apply the "principles" of the Succession Act to such a case and not the Act itself, the Succession Act as a whole cannot apply here. We do not agree. There can be no distinction, so far as the effect of any particular case is concerned, between applying the Act itself and applying its principles (so far as they relate to succession) as being the law of justice, equity and good conscience. The only distinction which can be made is that it is one thing to apply the provisions of an Act because upon a particular view of the law they do apply, and another is to apply the

principles of an Act because no other Act in fact does apply. The practical effect, however, must be the same. That being so, and as was argued by Mr. Leach for the appellants S. 212, Succession Act, must apply. Sub-S. (1) of this section is as follows :

"No right to any part of the property of a person who has died intestate can be established in any Court of justice unless letters of administration have first been granted by a Court of competent jurisdicsion."

It is said, therefore, that as no letters of administration have in fact been taken out in the present case the suit is not maintainable. The answer to this contention appears to us to be found upon a consideration of the case of *Chandra Kishore Roy* v. *Prasanna Kumari Dasi* (2). From a consideration of this authority, it is clear that in a similar case decided under S. 187 of the Act of 1865 (corresponding to S. 213 of the present Act) although the necessary probate of the will had not been obtained before the commencement of the suit, yet as the section had been complied with by the obtaining of probate before the decree in the suit, the Court was fully competent to deal with the matter. It seems to us that the principle of that decision should be held to apply to the present case. It is true, however, that letters of administration have not been granted to the respondents, but we are of opinion that as we now have seisin of the matter in appeal, the defect may be remedied by suspending the operation of any decree which we pass until letters have been obtained. Issues 3 and 5 are thus answered.

It will be seen that we have now disposed of issues 1, 2, 3 and 5 as framed by the lower Court. The remaining issues, with the exception of issue 4 may be dealt with together. The property of Maung Ba Aung about which this dispute centres is set out in certain schedules annexed to the plaint. We are only concerned now with some of the items in these, for the remainder have been decreed in favour of the appellants and no cross-appeal has been filed. It will be convenient to deal separately with each of the groups of items still in dispute.

(2) [1911] 38 Cal. 327=9 I. C. 122=38 I. A. 7 (P.C.).

Schedule A, items 1 to 4.

The respondents' contention is that Ba Aung had a half share in these pieces of land. The title deeds show that these four items were purchased in the joint names of U Taikka and Ba Aung, but it is said on behalf of the appellants that these lands were the sole property of U Taikka and that the name of Ba Aung was inserted merely to enable to present the deeds for registration. The burden of proof therefore lies heavily upon them : see as to this *Mg Po Kin and one* v. *Mg. Po Shein* (3) and also *Mg. Kyaw Pe* v. *Mg. Kyi* (4). (His Lordship then discussed evidence and proceeded.)

Answers are provided to the questions for our decision upon issues 6, 7 and 8 : we agree, however, that it was not proved that the articles removed were delivered to U Taikka and appellant 1. Issues 9 and 10 are not now in dispute. With regard to issue 4 we agree with the judgment of the District Judge so far as it relates to matters now under appeal, viz., schedule A, items 1 to 4 ; schedule B ; schedule D, items 1, 2 and 3 ; and we agree that the respondents are entitled to a decree in the form directed by him so far as these matters are concerned. The decree in respect of issue 8 will be against appellant 4. We also agree with the directions of the District Judge as to the appointment of the receiver, the taking of accounts and the appointment of a commissioner. The appeal must be dismissed and the appellants will pay to the respondents the costs of the appeal. The order passed by the District Judge will stand. Advocate's fees in this Court to be based on a valuation of Rs. 11,837.

Heald, Ag. C. J.—I agree that Ba Aung or How Htain Shu was a "Chinese Buddhist" and not a "Burmese Buddhist" and that therefore respondents must obtain letters of administration before a final decree in their favour can be given. I agree with my learned brother's finding on all the issues of fact and I concur in his order dismissing the appeal with costs, advocate's fees in this Court to be based on a valuation of Rs. 11,837. I note for the information of the trial Court that a final decree in the suit must not be

(3) A. I. R. 1926 P. C. 77=4 Rang. 518 (P.C.).
(4) A. I. R. 1928 Rang. 220=6 Rang. 203.

made until respondents or some of them have obtained letters of administration.

R.K. *Order accordingly.*

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HEALD, AG. C. J. AND OTTER, J.

Maung Sein Done—Appellant.

v.

Ma Pan Nyun, and *others*—Respondents.

First Appeal No. 296 of 1928, Decided on 1st April 1930, against decree of Dist. Court, Pyapon in Civil Regular No. 26 of 1927, D/- 10th December 1928.

Buddhist Law (Chinese)—Succession — Chinaman dying leaving two sons and two daughters and their mother, Burmese lady —Mother dying after 16 years—One daughter claiming her share in her mother's estate—Mother contended to have died as Chinese Buddhist—Succession Act held applicable in that case—Daughter held entitled to her one-fourth share under Succession Act if mother was Chinese or under Burmese Buddhist Law if she died as Burmese Buddhist.

One *C* a Chinaman died in 1902 leaving behind him two sons *P* and *D*, two daughters *S*, *N* and their mother *M* a Burmese lady. *M* died in 1918. *S* then sued in 1919 to recover her share of *M's* estate. But her suit was dismissed as *M's* estate was held to have been governed by Chinese Customary Law. *N* subsequently brought a suit like that of *S* in 1927 for her share in *M's* estate. It was contended that *M* died as a Chinese Buddhist and hence did not inherit anything from her husband and that *M* was in possession from 1902 to 1918 on behalf of her two sons, and hence *N* was not entitled to any share.

Held: (1) whether *M* was a Burmese Buddhist or a Chinese Buddhist or Confucian, *N's* share under Burmese Buddhist Law was the same, that is one-fourth. [P 223 C 2]

(2) the argument that *M* was not entitled to inherit and was in possession on behalf of the two sons was based on the supposition that the Chinese Customary Law applied to *C's* estate, but in fact the Succession Act applied, and, therefore, even if the estate were *C's* estate the four children would still share equally in the property: *A. I. R.* 1930 *Rang.* 81 (*F.B.*), *Considered* and *Applied*. [P 223 C 2]

Leach—for Appellant.

Kyaw Din aod *Doctor* — for Respondents.

Judgment.—This appeal relates to the same estate as the reported case of *Ma Sein* v. *Ma Pan Nyun* (1) and the parties are the same being the children of a Chinese, Chan Sit Shan, by his Burmese wife, Ma Myit. Sit Shan had also a Chinese wife and a child by her and he and the Chinese wife are said to have adopted a son, but the Chinese wife and these two children are said to have received a share of Sit Shan's estate when Sit Shan died and they do not appear as claimants in this case. Sit Shan died in 1902 and at that time his son Sit Paung is said to have been about 16 years of age, and the younger son Sein Done to have been about nine. The Burmese wife Ma Myit died in 1918 and at that time the two sons would be about 32 and 25 years of age respectively.

In the earlier case, which was instituted in 1919, Ma Sein sued her brothers, Sit Paung and Sein Done and her sister, Ma Pan Nyun, to recover her share of Ma Myit's estate. Her suit was dismissed on the ground that Ma Myit had adopted the Chinese form of the Buddhist religion, so that the law which applied to her estate was the "Chinese Customary Law" under which the widow does not inherit if there are children and daughters do not inherit if there are sons.

In the present suit Ma Pan Nyun makes a claim similar to that which her sister made in the earlier suit. She was doubtless influenced by the decision of this Court in the case of *Ma Yin Mya* v. *Tan Yauk Pu* (2), but since that decision merely applied Burmese Buddhist Law to a marriage between a Chinaman and a Burmese woman, as being the lex loci contractus and as such governing the formal requisites and the validity of such a marriage, it seems unlikely that it would have helped her.

But recently there has been another decision, namely, *Phan Tiyok* v. *Lim Kyin Kauk* (3) which may affect Ma Pan Nyun's position because the decision in it was that the Succession Act applies to the estate of "Chinese Buddhists."

Ma Pan Nyun's case (1) in the present suit is that her mother was a Burman Buddhist, so that Burmese Buddhist Law applied to her estate, and she claims administration of the estate by the Court and partition and possession of her share which she alleges to be one-fourth. She says that she joins

(1) A. I. R. 1924 Rang. 219=2 Rang. 94.

(2) A. I. R. 1927 Rang. 265=5 Rang. 406 (F.B.).

(3) A. I. R. 1930 Rang. 81=8 Rang. 57 (F.B.).

her sister Ma Sein as a formal defendant, in the same way as her sister joined her in the earlier suit.

Ma Sein admitted all Ma Pan Nyun's allegations, and claimed that the estate should be administered by the Court and that she should be given a one-fourth share of it. That claim is clearly open to serious question.

Sit Paung, who is said to have quarrelled with his brother Sein Done and to be making common cause with his sister against Sein Done, did not contest the suit.

Sein Done denied that the mother Ma Myit died a Burmese Buddhist and said that she died a Chinese Buddhist. He also denied that Ma Myit left any estate, the allegation being that under the Chinese Customary Law she would not inherit anything from her husband Sit Shan and that Sit Shan's estate would belong entirely to the two sons. He said that on Sit Shan's death there was a partition of estate according to "Chinese Buddhist Law," meaning presumably Chinese Customary Law, and that the shares of the two sons, who were then minors, were entrusted to Ma Myit. He pleaded that *Ma Pan Nyun's* case (1) was res judicata by reason of the decisions on the various issues raised in Ma Sein's case, to which Ma Pan Nyun was a party.

The Court framed a preliminary issue as to whether or not the subject matter of the suit was res judicata and in its order on that issue, although it held that the matter was not res judicata, it dismissed Ma Pan Nyun's suit on the ground that on the law stated in Ma Sein's case Ma Pan Nyun had no cause of action.

There was an appeal, First Appeal No. 9 of 1928, in *Ma Pan Nyun* v. *Mg. Sit Phaung* (4) and a Bench, (not a single Judge as represented in the official report) decided that the principles of res judicata did not apply and that it was open to Ma Pan Nyun to show that the decision in the earlier suit as to her mother's religion was mistaken. The suit was accordingly remanded to be tried out on the merits.

The lower Court then framed issues as to whether Ma Myit became a Chinese Buddhist at the time of her marriage to Sit Shan, whether she died a Chinese Buddhist or a Burmese Buddhist, what law governed her estate, whether she left any estate and if so what estate, and what were the respective shares of the parties.

The Court found that Ma Myit did not become a Chinese Buddhist at the time of her marriage to Sit Shan, that she was a Burmese Buddhist when she died, and that Burmese Buddhist Law applied to her estate, and it passed a preliminary decree for administration of the estate by the Court.

Sein Done appeals on grounds that the trial Court was wrong in finding that Ma Myit did not become a Chinese Buddhist, and should have held that Chinese Customary Law applied to her estate so that he and Sit Paung were the sole heirs, and neither Ma Sein nor Ma Pan Nyun could inherit anything. Neither side impugns the correctness of the decision of the Bench on the preliminary issue.

Since the appeal was filed the case of *Phan Tiyok* v. *Lim Kyin Kauk* (3), already mentioned, has been decided, and if that case was rightly decided, as we must assume it to have been, then Ma Pan Nyun is an heir of her mother whether the mother was a Burmese Buddhist as she alleges or a Chinese Buddhist or Confucian as Sein Done alleges, and her share whether under Burmese Buddhist Law or under the Succession Act, would be the same, namely, one-fourth.

But appellant's learned advocate contends that Ma Myit must be regarded as having been in possession of the estate from the time of Sit Shan's death in 1902 to the time of her own death in 1918 on account of her two sons. This argument is based on the supposition that Chinese Customary Law applied to Sit Shan's estate, but in fact the Succession Act applied and, therefore, even if the estate under consideration were Sit Shan's estate the four children would still share equally in the property which now represent that estate.

It is clear that the preliminary decree for administration of the estate by the Court was rightly given, and that the appeal must be dismissed. Appellant will pay Ma Pan Nyun's costs on the valuation of the appeal, and the respondent Ma Sein will bear her own costs.

R.K./D.D. *Appeal dismissed.*

(4) A. I. R. 1928 Rang. 315=6 Rang. 575.

A. I. R. 1930 Rangoon 224

CARR AND CUNLIFFE, JJ.

E. M. Chettiar Firm—Applicant.

v.

Commissioner of Income-tax—Respondent.

Civil Misc. Appln. No. 148 of 1929, Decided on 19th March 1930.

Income-tax Act S. 66—Act makes no provision as to whether appellate officer should state grounds for his conclusions—Decision on finding of fact—High Court has no jurisdiction whether reasons are stated or not.

The Act gives no directions as to whether the officer deciding an appeal must set out fully the considerations which have led him to a certain decision. It is a matter of propriety rather than of law and is a matter in which the High Court has no business to interfere. The High Court has no jurisdiction to consider the findings of fact arrived at by an Income-tax authority and it is immaterial whether the grounds stated for those findings are sound or not sound or whether no reasons at all have been stated. [P 225 C 2]

Faucar—for Applicant.

Eggar—for Respondent.

Cunliffe, J.—This is an application for mandamus against the Commissioner of Income-tax, Rangoon, under S. 66 (3), Income-tax Act. The petitioners the E. M. Chetty concern of Moulmein, require the Commissioner to state a case in law by reason of a direction given by a Bench of this Court in an earlier reference between the same parties reported in *Commr. of Income-tax v. E. M. Chettiar Firm* (1).

The petitioners were assessed for the year 1925/26 and on appeal from the Income-tax Officer, the Assistant Commissioner of Income-tax enhanced their assessment by a very considerable amount. The Commissioner confirmed this enhancement and the petitioners then, on a reference made by him to this Court, sought the opinion of the Bench on five points of law. Their success was not conspicuous, but on the fourth question placed before the Court the Bench showed them some indulgence. On p. 642 (*of 7 Rang.*) of the aforementioned report, the judgment said:

"Our answer to question 4, therefore, is that if the enhancement of the Assistant Commissioner is based on materials from which he could reasonably conclude, though only as a rough estimate, that two lakhs of rupees was the income of the Moulmein business, then the enhancement was legal; if, on the other hand, the enhancement was wholly arbitrary and based on no materials, it was illegal. In view of this answer, the proper course for the Commissioner to adopt will be to call upon the Assistant Commissioner to give the grounds on which he based his assessment and the Commissioner as an appellate tribunal can then consider whether the enhancement is justified on these materials. If in his opinion there were materials on which the Assistant Commissioner could arrive at the enhanced figures, there is an end of the matter, since there is no further appeal and we cannot enter into questions of fact, namely, as to the sufficiency of those materials for the conclusion arrived at."

Acting on this direction of the Bench, the Commissioner called upon the Assistant Commissioner to give his reasons in detail for the enhancement of the assessment. The Assistant Commissioner did so in a report and the petitioners were heard on the consideration of this report by the Commissioner. The report was upheld and the order of the Commissioner approving the enhancement is before us as an exhibit marked "C". It is a very short order and merely finds as a fact that there were ample materials on which the Assistant Commissioner could arrive at the conclusions he did in relation to the increase in petitioners' liability.

On the petitioners asking for a reference to this Court from the Commissioner on various points of law alleged to have arisen under his confirming order, the Commissioner refused to admit their petition, as in his view it did not arise from an order under S. 31 or S. 32 of the Act. He used these words:

"The order against which it is directed is a revisional order passed in pursuance of the High Court's order under S. 66 (5) of the Act."

It is thus that a petition for mandamus reaches us.

It was argued on behalf of the petitioners that this hearing before the Commissioner was not a revision but an appeal by reason of the language stated above from the Bench judgment. It was further contended that in all appeals the appellate tribunal has a duty to consider fully the matters before it and to give reasons for coming to any conclusion. It was also argued before us that the Bench's action in referring back to the Commissioner and its direction that the Assistant Commissioner should give his detailed reasons for enhancing the assessment was action taken under sub-S. (4), S. 66. Sub-S. (4) runs as follows:

(1) A. I. R. 1930 Rang. 4=7 Rang. 635 (S. B.)

"If the High Court is not satisfied that the statements in a case referred under this section are sufficient to enable it to determine the question raised thereby, the Court may refer the case back to the Commissioner by whom it was stated to make such additions thereto or alterations therein as the Court may direct in that behalf."

On the other hand, it will be seen from the Commissioner's letter to the petitioners refusing to state a case in the present proceedings that he took the view that the action of the Bench was not taken under sub-S. (4), but under sub-S. (5). Sub-S. (5) runs as follows:

"The High Court upon the hearing of any such case shall decide the questions of law raised thereby, and shall deliver its judgment thereon containing the grounds on which such decision is founded, and shall send to the Commissioner by whom the case was stated a copy of such judgment under the seal of the Court and the signature of the Registrar and the Commissioner shall dispose of the case accordingly, or, if the case arose on a reference from any Income-tax authority subordinate to him, shall forward a copy of such judgment to such authority who shall dispose of the case conformably to such judgment."

The language employed in the judgment of the Bench is not altogether clear, but in my opinion the intention of the Bench is quite easy to appreciate. The words, for example, "If in his opinion" (that is, the Commissioner's opinion):

"there were materials on which the Assistant could arrive at the enhanced figure, there is an end of the matter, since there is no further appeal and we cannot enter into questions of fact."

show a plain indication that the petitioners are precluded from further appeal.

Although the circumstances of the case are a little out of the ordinary, I think the Bench intended to proceed under sub-S. (5), S. 66, and not under sub-S. (4). The Commissioner was wrong in heading his confirmation as a revision; it was in reality a referred appeal without further recourse to this Court but that is of little consequence.

The whole difficulty has arisen owing to the initial action of the petitioners in suppressing the proper material on which the officers of Government could arrive at a fair assessment. In my view the present application should be dismissed with costs in favour of the Crown, seven gold mohurs.

1930 R/29 & 30

Carr, J.—I concur in the decision proposed.

I am clearly of opinion that the Commissioner of Income-tax was wrong in basing his refusal of a reference on the ground that his finding was one arrived at in revision. S. 66 (5) of the Act requires the Commissioner to "dispose of the case" in accordance with the judgment of the Court. Here "the case" can mean only the case out of which the reference arose, in this instance the appeal before the Commissioner. When, therefore, the Commissioner proceeded to consider and decide the question of fact which he had previously left undecided and which the Court said that he ought to decide he was proceeding in the appeal. The decision at which he arrived was such as not to affect his original final order in the appeal, but had his decision been different it would have become necessary to re-open the whole appeal and to pass a fresh final order in it.

But that is merely a technical question and when we come to consider the merits I am equally clearly of opinion that there was no question of law which the Commissioner could have referred or which this Court can require him to refer. The whole burden of the petitioners' complaint is in fact that the Commissioner has not set out in detail the grounds on which he held that there were ample materials on which the Assistant Commissioner's assessment could be based. It is contended that on general principles it is the duty of an officer deciding an appeal to set out fully the considerations which have led him to his decision. But the Act itself gives no directions on the subject and it seems to me, therefore, a matter of propriety rather than of law, and thus a matter with which this High Court has no concern. Let us suppose, for example, that the Commissioner had set out in detail his reasons for arriving at this finding of fact, and that the petitioner had based his present application on a contention that those reasons were inadequate and unsound. It would be quite clear then that, the question being one of fact, the Court could not have considered the reasons set out. The Court has no jurisdiction to consider the findings of fact arrived at by an Income-tax authority and it is im-

material whether the grounds stated for those findings are sound or unsound or whether no reasons at all have been stated. Thus no question of law arises and the Court has no jurisdiction in the matter.

R.K. *Application dismissed.*

A. I. R. 1930 Rangoon 226

BAGULEY, J.

Maung Ko—Applicant.

v.

Maung Set—Respondent.

Criminal Revn. No. 103-B of 1929, Decided on 21st August 1929, from order of First Addl. Special Power Magistrate, Mandalay, D/- 22nd March 1929.

Criminal P. C., Ss. 203, 200 and 202—Magistrate examining complainant and then dismissing complaint under S. 203 on result of previously made police enquiry—His order dismissing complaint is against procedure and cannot be sustained.

Under the Criminal P. C., unless the Magistrate dismisses complaint at once after perusing the complaint itself and the examination of the complainant made on oath, he is bound either to issue process against the accused or else to hold an enquiry himself under S. 202 or direct an enquiry to be held under the section. When a Magistrate examines the complainant and then dismisses the complaint under S. 203 on the result of a previously made police enquiry, the order dismissing is incorrect as there is no provision in the Code for this being done. [P 227 C 1]

Sanyal—for Applicant.

Basu—for Respondent.

Judgment.—The applicant Maung Ko filed a complaint before the First Additional Magistrate, Mandalay, charging the respondent with the dacoity. The Magistrate examined him on oath; having done so instead of proceeding along recognized lines, he recorded a diary order: "Inform D. S. P. and call for police papers. For further orders on 19th March." On 19th March he noted that he had received the police papers but had not gone through them and the case was put off to 22nd March. On 22nd March he passed orders, professing to act under S. 203, Criminal P. C. The applicant then applied in revision to the District Magistrate against the order of dismissal. The diary order signed by some officer for the District Magistrate runs: "Call for proceedings and put up on 27th June 1929." Apparently it was not put up on that date but on the next day 28th June 1929 the District Magistrate recorded a diary order.

"I too have seen the police papers. I consider the action taken by the First Additional Magistrate to be correct. The application for an order for further enquiry under S. 436, Criminal P. C., is summarily dismissed."

Apparently neither the applicant nor his advocate was given an opportunity of being heard. Against this order the applicant now comes to this Court in revision.

The Criminal Procedure Code is quite clear with regard to what has to be done when a complaint is filed before a Magistrate under S. 200. The first thing the Magistrate has to do is to examine the complainant on oath and the substance of the examination must be reduced into writing and it must be signed by the complainant and also by the Magistrate. This was done in the present case. S. 200 would not apply to this case. The next section is 202. This authorises a Magistrate after the complainant has been examined, to postpone the issue of process for compelling the attendance of the person complained against and either enquire into the case himself or direct enquiry or an investigation by any Magistrate subordinate to him, or by a police officer, or by such person as he thinks fit. The Magistrate in this case did not take any action under S. 202. The next step is under S. 203; the Magistrate may dismiss the complaint after considering the statement on oath, if any, of the complainant and the result of the investigation on enquiry if any under S. 202, if there is in his judgment no sufficient ground for proceeding. It appears therefore that a complaint can be dismissed under S. 203, if the Magistrate is satisfied that there is no sufficient ground for proceeding, after considering the statement on oath of the complainant and the result of the investigation or enquiry, if any under section 202. As I have said no action was taken under S. 202, and therefore, the Magistrate had only the complaint and the statement of the complainant on oath to consider. So far as I can discover there is no provision in the Code which authorizes a Magistrate to send for the result of a previously made enquiry and dismiss the complaint on that. There is a case quoted in "Sohoni's" Code of Criminal Procedure, to which I am unable to refer, which is summed up as follows:

The reasons for dismissing a complaint should be passed on inferences of fact arising from or disclosed by

(1) The complaint,

(2) The sworn statement of the complainant and,

(3) The investigation, if any, made under S. 202.

This provides a wide field; anything outside it is extra judicial and must be discarded.

The same rule is laid down in *Dr. H. P. Sandyal* v. *Kungeshwar Misra* (1) and in *Umar Ali* v. *Safer Ali* (2) it is laid down:

"He is bound to examine the complainant and then can either issue summons to the accused or order an enquiry under S. 202, or dismiss the complaint under S. 203."

In the present case, the Magistrate examined the complainant and then dismissed the complaint professedly under S. 203, on the result of a previously made police enquiry. There is no provision for this being done. So far as I am aware, under the Criminal P. C. unless he dismissed the complaint at once after perusing the complaint itself and the examination of the complainant made on oath, he was bound either to issue process againt the accused or else to hold an enquiry himself under S. 202, or direct an enquiry to be held under the section. I therefore, set aside the order of discharge passed by the First Additional Magistrate, and direct that the complaint be properly dealt with on the lines laid down in the code by such other special power Magistrate as the District Magistrate may transfer the case to for disposal.

P.N./R.K. *Order set aside.*

(1) [1912] 16 C. W. N. 143=13 I. C. 781=13 Cr. L. J. 125.

(2) [1886] 13 Cal. 334.

A. I. R. 1930 Rangoon 227

CARR AND BROWN, JJ.

Jas Bahadur Thapa—Accused — Appellant.

v.

Emperor—Opposite Party.

Criminal Appeals No. 1374 and 1375 of 1929, Decided on 27th November 1929.

Evidence Act, S. 25—Police Officer acting also as Magistrate — Confession to him is illegal.

An Assistant Superintendent having all the powers of a District Superintendent of Police cannot cease to be a police officer simply because he is also a Magistrate and is acting in that capacity and therefore confession made to him is inadmissible in evidence: 7 *Bur. L. R.* 100 and 1 *Cal.* 207, *Rel. on.* [P 228 C 1]

Bomanji—for Appellant.

Tun Byu—for the Crown.

Judgment.—The two appellants, Jas Bahadur Thapa and Jasimaya, have been sentenced to death for the murder of one Surjiman Lama. The evidence against the appellants consisted in part of direct evidence and in part of a retracted confession of the appellant Jas Bahadur Thapa. This confession was admitted apparently without question in the Sessions Court but it is now urged that it was inadmissible. The confession was made to U Tun Pe, who is described in the record as the Superintendent to the Pakokku Hill Tracts. It appears from the Civil List that U Tun Pe's correct designation is Assistant Superintendent, that he exercises the powers of Additional District Magistrate and that he is also an Assistant Commandant of Military Police. The contention is that at the time of the recording of the confession U Tun Pe was a police officer and that the confession was therefore inadmissible under the provisions of S. 25, Evidence Act. In the committal proceedings U Tun Pe himself stated that he was District Superintendent of the Pakokku Hill Tracts Police. No evidence on this point was taken in the Sessions Court, but in a Police Department Notification No. 196, dated 22nd October 1912, appearing at Part 1 of the Burma Gazette at p. 756 for the year 1912 the Assistant Commandant of the Military Police in the Pakokku Hill Tracts was empowered with all the powers of a District Superintendent of Police under the Police Act, 1861. We have not been able to find any precise definition of the words "police officer." In the case of *The Queen* v. *Hurribole Chunder Ghose* (1), a confession was made to a Deputy Commissioner of Police who was also a Magistrate and Justice of the Peace and who took the confession in his magisterial capacity. It was argued in that case that the term "police officer" did not include a Deputy Commissioner of Police, but this objection was overruled. On p. 215 of the judgment Garth, C. J., remarks:

"in construing S. 25, Evidence Act of 1872, I consider that the term 'police officer' should be read not in any strict technical sense, but according to its more comprehensive

(1) [1876] 1 Cal. 207.

and popular meaning. In common parlance and amongst the generality of people, the Commissioner and Deputy Commissioner of Police are understood to be officers of police, or in other words 'police officers,' quite as much as the more ordinary members of the force ; and, although in the case of a gentleman in Mr. Lambert's position, there would not be, of course, the same danger of a confession being extorted from a prisoner by any undue means, there is no doubt that Mr. Lambert's official character, and the very place where he sits as Deputy Commissioner, is not without its terrors in the eyes of an accused person ; and I think it better in construing a section such as S. 25, which was intended as a wholesome protection to the accused, to construe it in its widest and most popular signification."

It was held that, although the officer recording the confession in that case was also a Magistrate, nevertheless a confession made to him was inadmissible. No other official report of any case directly bearing on this point has been cited to us. According to the unofficial report, in the case of *Nwe Ka* & 2 v. *Emperor* (2), the question whether a confession made to a Magistrate who was also a police officer was admissible in evidence was considered, but no definite decision on that point was arrived at. It would not seem to have been disputed in that case that the District Superintendent of Police was a police officer within the meaning of S. 25. That the term "police officer" is not ordinarily confined only to subordinate officers in the police force is clear from the provisions of S. 14 (4), Criminal P. C., which says :

"No power shall be conferred under this section to any police officer below the grade of Assistant District Superintendent."

We do not think it could be disputed that a District Superintendent of Police is ordinarily regarded as a police officer and that a confession made to him in the ordinary way would be barred under the provisions of the Evidence Act. From the Police Department Notification we have referred to it is clear that U Tun Pe had all the powers of a District Superintendent of Police and he must, therefore, be held to have been a police officer at the time he recorded the confession. That being so we are of opinion that the objection raised in this case by the appellants must be upheld. S. 25 is very explicit in its terms and lays down definitely that no confession made to a police officer shall be proved as against a person accused of any offence. In the case of prohibition against admission of a confession made while in custody of a police officer under S. 26 there is a special exception if that confession is made in the immediate presence of a Magistrate ; but there is no such exception in the provisions of S. 25. In the case of *The Queen* v. *Hurribole Chunder Ghose* (1), which we have already referred to, Pontifex, J., remarks at p. 218 of the judgment :

"There are cases in which a person holding high judicial office has control over and is the nominal head of the police in his district"

and he indicates that in such a case he would hold that a confession made to such an officer could be admitted. But a District Superintendent of Police is clearly more than a nominal head of the Police in the district. He is the actual head of the Police and he cannot cease to be a police officer simply because he is also a Magistrate and is acting in that capacity. We are confirmed in this view by the provisions of S. 164, Criminal P. C., which lays down that :

"Any Presidency Magistrate . . . . may if he is not a police officer record any statement or confession made to him."

The section, therefore, clearly contemplates the possibility of an officer holding the dual position of police officer and Magistrate, and the powers of recording confessions are in no case given to such officer. We are of opinion, therefore, that the confession in this case was made to a police officer within the meaning of S. 25, Evidence Act, and that it was therefore inadmissible in evidence. (Here their Lordships discussed the evidence of two boys and concluded as follows). The result is that we allow these appeals, set aside the convictions of the two appellants and direct that they be acquitted and released so far as this case is concerned.

P.N./R.K. *Convictions set aside.*

(2) 7 Bur. L.R. 100.

** A. I. R. 1930 Rangoon 228
Full Bench

PAGE, C. J., CARR AND CUNLIFFE, JJ.

(*Shakoor*) *Abdul Ganny*—Appellant.

v.

Mrs. I. M. Russell—Respondent.

Civil Ref. 3 of 1930, Decided on 9th June 1930 against decree of Dist. Judge, Insein, in Civil Appeal No. 47 of 1929.

** (a) **Rangoon High Court Rules of Procedure, R. 9 (2)—R. 9 (2) is ultra vires—Limitation Act, Art. 168.**

Rule 9 (2), Appellate Side Rules of Procedure of the Rangoon High Court is ultra vires in so far as it prescribes a period of limitation less than that prescribed in Art. 168, Limitation Act : 6 *Rang.* 302, *Diss. from.* : (*Case law, Referred.*) [P 230 C 1]

* (b) **Limitation Act—(Per** *Page, C. J.*)—**Law of limitation is adjective law — (Per** *Carr, J.*)—**Law of limitation so far as it extinguishes right is substantive law.**

Per *Page, C. J.*—The law of limitation, in so far as it prescribes the period within which litigants are entitled to pursue in the civil Courts the remedy in which the law provides for the redress of grievances is a part of the adjective law. [P 230 C 2]

Per *Carr, J.*—The law of limitation is something more than mere adjective law and much more than merely rules of procedure. The effect of the law of limitation is to extinguish after the prescribed period a legal right. The law of contract gives the party a right of suit on a contract. But the law of limitation then adds that this right of suit shall cease to exist after a certain period. The result of the two laws together is to create a right of suit available for a certain time. It may be that after the time has elapsed the party has still a moral right to a relief. But it is no longer a legal one. Thus the law of limitation is just as much substantive law as is the law of contract. [P 232 C 1]

(c) **Limitation Act, Art. 168 — Dismissal for default before hearing for non-payment of process is dismissal for non-prosecution—Art. 168 applies—Civil P. C., O. 41, R. 18.**

There is no distinction in principle or substance between an appeal dismissed on the day fixed for the hearing for default in payment of process fee under O. 41, R. 18 and an appeal dismissed before the hearing for default in payment of process fee or of the costs of preparing the paper book. They stand upon the same footing and cannot be differentiated and an application to restore an appeal in the one case is ejusdem generis with similar applications in the other cases. In each instance the appeal is dismissed for want of prosecution and to an application to restore any such appeals Art. 168, Lim. Act, applies : (*Case law Referred.*) [P 231 C 2 ; P 231 C 1]

* (d) **Civil P. C., S. 122—Limitation for proceedings fixed by Limitation Act—High Court cannot vary it.**

The High Courts are not entitled by rules to abrogate or vary the period of limitation set out in the Limitation Act, in respect of proceedings to which the provisions of Limitation Act, apply. [P 234 C 2]

(e) **Limitation Act, S. 29 (2) — (Per** *Cunliffe, J.*) — **High Court rules under Letters Patent or Civil P. C., are not special or local law.**

The rules made by High Court under its Letters Patent or by virtue of the Civil Procedure Code will not amount to a special or local law. High Court rules approximate closely to bye-laws which can be altered at will. They are subordinate and domestic enactments ; they must be intra vires of the power from which they are derived and any other power pari materia. [P 234 C 2 ; P 235 C 1]

P. N. Bhattacharya—for Applicant.

Order of Reference

Carr, J.—This is an application under R. 9 (2), Appellate Side Rules of Procedure of this Court to restore to the file an appeal struck off under R. 9 (1) for default of payment of process fees.

The application was not made within the eight days allowed by sub-R. (2) and if that rule is intra vires I am in my opinion precluded from considering the application. But it is contended that, in so far as it prescribes a time limit different from that provided in Art. 168, Lim. Act, the rule is ultra vires.

I think that this contention deserves consideration. The power given to this Court by S. 122, Civil P. C., by the Letters Patent and by S. 108, Government of India Act, is merely the power to regulate its procedure by rules and orders : *Ma Than* v. *Mg Ba Gyaw* (1). R. 9 (1) is in my view within that power, since whether an appeal is struck off by the Deputy Registrar for default of payment of process fees, or has to be laid before a Judge to be struck off is merely a matter of procedure. But Art. 168, Limitation Act, allows an appellant whose appeal has been dismissed for want of prosecution 30 days within which to apply for its re-admission. Dismissal for want of prosecution includes "striking off for non-payment of proces fees" and the restoration of an appeal to the file is the same thing as its re-admission. It would seem therefore that R. 9 (2) operates to reduce the period of limitation allowed by Art. 168, Lim. Act.

It has been held in *Chunilal Jethabhai* v. *Barot Dayabhai Amulak* (2) and in *Narsingh Sahai* v. *Sheo Prasad* (3) both Full Bench cases, that the High Court has no power by any rule that it may make to alter the period of limitation prescribed by the Limitation Act.

As the question touches the validity of the rules of this Court it is of considerable importance. I therefore refer the following question for decision by a

(1) A.I.R. 1926 Rang. 1=93 I.C. 124=3 Rang. 546 (F.B.).

(2) [1908] 32 Bom. 14=9 Bom. L.R. 1138.

(3) [1918] 40 All. 1=42 I.C. 855 (F.B.).

Bench or by a Full Bench as the Chief Justice may order :

"Is R. 9 (2), Appellate Side Rules of Procedure of this Court ultra vires in so far as it prescribes a period of limitation less than that prescribed in Art. 168, Sch. 1, Lim. Act ?"

Opinion

Page, C. J.—The order of reference is as follows :

"Is R. 9 (2) of the Appellate Side rules of procedure of this Court ultra vires in so far as it prescribes a period of limitation less than that prescribed in Art. 168, Sch. 1, Lim. Act ?"

On 6th January 1930, a memorandum of appeal was filed on behalf of the appellant in special civil second appeal No. 8 of 1930. On 8th January the appeal was admitted and on 9th January an order was passed by the Deputy Registrar that the process fees for the issue of notice to the respondent of the date fixed for the hearing be paid before 17th January, and the case duly appeared in the cause list marked in that sense. On 17th January, as the process fees had not been paid, and there was no appearance by the appellant to show cause why an extension of time should be granted, the appeal was struck off by the Deputy Registrar in default of payment of the process fees under R. 9 (1), O. 52. R. 9 was made by the High Court on 12th February 1929, pursuant to the powers with which it was invested under S. 122, Civil P. C. (Act 5 of 1908) and Cl. 35, Letters Patent of 1922. It was as follows :

"9 (1). Process fees for the issue of notice or notices of the date of hearing to the respondent or respondents shall be deposited within seven days from the date of the order directing such notice or notices to issue. In default of payment thereof within the time allowed, the Deputy Registrar shall strike off the appeal or application for non-payment of process fees, unless for good cause shown, he grants an extension of time. An endorsement over the signature of the Deputy Registrar, to the effect that the appeal or application has been struck off under this rule, shall be made on the memorandum of appeal or application.

(2). On the application made within eight days of the date of the order of the Deputy Registrar, of the appellant or applicant and on sufficient grounds being shown to his satisfaction, a Judge may order an appeal or application struck off the file under this rule to be restored to the file, as of the date on which it was originally filed.

(3). When an appeal or application is struck off the file under this rule, the appellant or applicant shall be at liberty subject to the law of the limitation to present a fresh appeal or application in the same matter.

On 14th February, the appellant applied to the High Court for an order that the said appeal be restored to the file as of the date on which it was originally filed. On 10th March, Carr, J., after hearing the learned advocate for the appellant, ordered that the question above set out be referred to a Full Bench of the Court, upon the ground that whereas under R. 9 (2) an "application for the restoration of an appeal that had been struck off by the Deputy Registrar under R. 9 (1) must be "made within eight days of the date of the order of the Deputy Registrar" under Art. 168, Sch. 1, Lim. Act (9 of 1908), the time within which an application "for the re-admission of an appeal dismissed for want of prosecution" is to be made is 30 days from the date of the dismissal and if Art. 168 was applicable to R. 9 being a rule of procedure made by the High Court, the issue arose whether R. 9 (2) was not ultra vires, in so far as it purported to vary the period of limitation for such an application prescribed under Art. 168, Lim. Act.

Now, as I apprehend the matter, in enacting the Code of the Civil Procedure the legislature was minded to create a body of rules by which the procedure of the Courts in British India normally should be regulated; but it is recognized that the conditions under which civil proceedings are undertaken might not be invariable, and under Ss. 122 to 129, Civil P. C., and their respective Letters Patent, the High Courts are invested with power to make rules to regulate their own procedure and that of the civil Courts subject to their superintendence as therein provided. In considering the meaning of the term "procedure" in this connexion the distinction between prescription and limitation is to be borne in mind. The law of limitation, in so far as it prescribes the period within which litigants are entitled to pursue in the civil Courts the remedies which the law provides for the redress of grievances is part of the adjective law. It restricts remedies not substantive rights, and as Sir Richard Couch pointed out in *Hari Nath Chatterjee* v. *Mathura Mohan Goswami* (4):

"The intention of the law of limitation is not to give a right where there is not one but

(4) [1894] 21 Cal. 8=20 I. A. 183=6 Sar. 334 (P.C.).

to interpose a bar after a certain period to a suit to enforce an existing right."

In my opinion Art. 168 relates to matters of procedure, and if the subject were free from authority, I should hold, having regard to the object and effect of the enactments investing the High Court with the rule-making powers to regulate their procedure, that the High Courts subject to the conditions therein contained have jurisdiction to prescribe by rules of Court, the period of time within which applications in civil proceedings must be taken, as being rules made for the purpose of regulating their own procedure and the procedure of the civil Courts subject to their superintendence, notwithstanding that the effect of the rules may be to vary or alter the periods of limitation prescribed in the Limitation Act: see per Coutts-Trotter, C. J., in Civil Revision Petition No. 956 of 1914, where his Lordship observed:

"I am quite clear that the articles of the Act limiting applications of this nature (that is, an application to set aside an ex parte decree) which are almost entirely interlocutory deal clearly with matters of procedure."

In the present state of the authorities however it must be taken, I think, that the High Courts are not entitled by rules to abrogate or vary the periods of limitation set out in the Limitation Act, in respect of proceedings to which the provisions of the Limitation Act apply. *Haji Hussain* v. *Nur Mahomed* (5), *Chunni Lal Jethabhai* v. *Barot Dahyabhai Amulk* (2), *Narsingh Sahai* v. *Sheo Prasad* (3) and *Jijibhoy N. Surty* v. *T. S. Chettyar* (6), in which case it was not contended that S. 12, Lim. Act, did not apply to the application then under consideration, the only point at issue being whether in the circumstances prevailing in that case the time occupied in obtaining a copy of the decree was "requisite" within the meaning of that term in S. 12. It follows that, if Art. 168 is applicable to an application to restore an appeal under R. 9 (2), in so far as R. 9 (2) purports to vary the period within which such an application must be made under Art. 168 the rule is ultra vires.

The question that falls for determination in this reference therefore is whether Art. 168 applies to an application under R. 9 (2) to restore an appeal dismissed for default in payment of process fees under R. 9 (1).

In *Ramhari Sahu* v. *Madan Mohan Mitter* (7) it was held that the Limitation Act did not apply to an application to re-admit an appeal dismissed under a rule of the High Court for default in payment of the costs of preparing the paper book for the appeal. In that case their Lordships observed:

"We have come to the conclusion that this application should be regarded as one under R. 17 of the rules of this Court rather than one under S. 558. Taking it as such we are of opinion that it is not barred by the law of limitation, which does not apply to such an application."

If the decision in *Ramhari Sahu's* case (7) is good law, it is an authority in favour of the view that R. 9 (2) is not ultra vires.

Now, in so far as the learned Judges in that case laid down that the law of limitation does not apply to rules of the High Court the judgment is in consonance with what I conceive to have been the intention of the legislature in granting rule-making powers to the High Court and I should be disposed to follow it in the present case, if I felt myself at liberty to do so. Art. 168, however, makes no reference to the Civil Procedure Code or to any other Act: see per Lord Phillimore in *Jijibhoy N. Surty* v. *T. S. Chettyar* (6) and while it may be taken, I think that Art. 168 would apply only to applications to re-admit appeals dismissed for want of prosecution as provided or contemplated by the Code of Civil Procedure: *Lakhmimoni Dassi* v. *Dwijendra Nath* (8), *Wadia Gardhy and Co.* v. *Purshotam Sivji* (9), and *Narendra Lal Khan* v. *Tarubala Dassi* (10). I cannot discern any distinction in principle or substance between an appeal dismissed on the day fixed for the hearing for default in payment of process fees under O. 41, R. 18 and an appeal dismissed before the hearing for default in payment of process fees, or of the costs of preparing the paper book. They stand upon the same footing and cannot be differentiated and an application to restore an appeal in the one case is ejus-

(5) [1904] 28 Bom. 643=6 Bom. L. R. 920.

(6) A. I. R. 1923 P. C. 103=103 I. C. 1=55 I. A. 161=3 Rang. 302 (P.C.).

(7) [1896] 23 Cal. 339.

(8) [1919] 46 Cal. 249=51 I. C. 941.

(9) [1908] 32 Bom. 1=9 Bom. L. R. 508.

(10) A. I. R. 1921 Cal. 67=66 I. C. 209=48 Cal. 817.

dem generis with similar applications in the other cases. In each instance the appeal is dismissed for want of prosecution, and to an application to restore any such appeals, in my opinion the period of limitation prescribed under Art. 168, Lim. Act, must be held to apply.

In *Ramhari Sahu* v. *Mudan Mohan Mitter* (7) the ratio decidendi is not apparent, and the learned Judges did not state the grounds upon which their judgment was based. In my opinion the law was not correctly stated by the learned Judges who decided *Ramhari Sahu's* case (7), and with all due respect I am of opinion that that case ought not to be followed. For these reasons, I would answer the question propounded in the affirmative and remand the proceeding to be determined according to law.

Carr, J.—I have had the advantage of reading the judgment of the learned Chief Justice. I agree with the first conclusion arrived at by him namely that if Art. 168, Lim. Act is applicable to an application to restore an appeal under R. 9 (2) of the appellate side rules of procedure then that rule is ultra vires in so far as it purports to vary the period prescribed by Art. 168.

But I would not base this conclusion solely on authority. In my view the law of limitation whether as applied to suits or as to appeals or applications is something more than mere adjective law and much more than merely rules of procedure. The effect of the law of limitation is to extinguish after the prescribed period a legal right. The law of contract for example, gives a party a right of suit on a contract, but the law of limitation then adds that this right of suit shall cease to exist after a certain period. The result of the two laws together is to create a right of suit available for a certain time. It may be that after that time has elapsed the party still has a moral right to relief, but it is a right which cannot be enforced in a Court of law and therefore is no longer a legal right. Thus considered the law of limitation is in my opinion just as much a substantive law as is the law of contract.

And I can see no distinction in this respect between suits on the one hand and appeal and applications on the other. Coutts-Trotter, J. in *Sennimali Goundan* v. *Palani Goundan* (11) (I refer to this case although it is not published in the authorized reports for the reason that it was fully referred to in the next case I shall mention), draws a distinction between the rules of limitations applicable to suits and those applicable to applications and hold that in the latter case they deal only with matters of procedure.

This matter came before a Full Bench of the Madras High Court in *Krishna chariar* v. *Srirenjammal* (12), in which the question was whether a rule of that High Court applying S. 5, Lim. Act to applications under O. 9, R. 13, Civil P. C., was intra vires. Coutts-Trotter, J., had held in the first case mentioned that the rule was intra vires for the reason above stated, and the question was referred to the Full Bench on a difference of opinion between the two Judges of the Bench. Krishnan, J., doubted the correctness of the view taken by Coutts-Trotter, J., and was of the opinion that if a rule of limitation in respect of an application was a mere rule of procedure then the rules of limitation applicable to suits must also be mere rules of procedure. Coutts-Trotter, C. J., in his judgment adhered to his former opinion but said that the strongest ground on which the rule in question could be supported was that S. 5, Lim. Act itself contemplates that it may be extended to other applications, than those enumerated "by or under any enactment for the time being in force" and it was mainly on that ground that the Full Bench held the rule to be intra vires. That being so I cannot look upon this case as running counter to the authorities cited in my order of reference and by the learned Chief Justice. I note however that Wallace, J. in his judgment suggested that the insertion by the legislature in O, 22, R. 9, Civil P. C., suggested that it was regarded as a matter of procedure. This argument seems to me unsound. R. 63, O. 21 expressly gives the unsuccessful party to the enquiry under R. 58 the right to file a suit for a declaration and it seems to me impossible to argue that this is a mere rule of procedure because

(11) [1916] 32 I. C. 975.
(12) A. I. R. 1925 Mad. 14=30 I. C. 877=47 Mad. 824 (F.B.).

it happens to be in the Code of Civil Procedure.

I may also refer to the fact that in *Krishnasami Pani Kendar* v. *Ramasami Chettyar* (13) their Lordships of the Privy Council said that the admission of an appeal after the period of limitation has expired deprives the respondent of a valuable right by putting in peril the finality of the order in his favour. They have made similar remarks in other cases but it is not necessary to cite them. I am very clearly of opinion independently of the authorities to that effect, that a High Court has no power to alter by rule any period of limitation prescribed in the Limitation Act. I am, however also of opinion that when the High Court by rule gives a a right of application for which no period of limitation is already prescribed, the Court may also fix the period within which that right must be exercised.

The important question, therefore, is whether Art. 168 does in fact apply to an application under the rule under discussion.

There is a long and consistent series of decisions that Art. 178, Lim. Act, 1877, is applicable only to applications under the Civil Procedure Code, or applications of a nature contemplated by that Code. That was equivalent to Art. 181 of the present Act and is in its terms generally similar to Art. 168, so that a reasoning which is applicable to the one is equally applicable to the other. The first case in which I find this clearly laid down is *Bai Manik Bai* v. *Manekji Kavasji* (14) which dates back to 1880. There have since been many decisions in the same sense, and the only one that I can find to the contrary is *Chand Monee Dasya* v. *Santo Monee Dasya* (15) in which it was held that Art. 178, Lim. Act, governed an application under the Bengal Tenancy Act. The contest between the parties was as to whether Art. 166 or Art. 178 applied and the question whether the Act applied at all was neither raised nor discussed. This case must therefore be ruled out as an authority. Since the course of decisions mentioned commenced the Limitation Act has been re-enacted in 1908, and no change was then made which would in any way affect the authority of these decisions.

I think that it must be held, on authority, that the articles in the Third Division of the First Schedule to the Limitation Act, apply only to applications under the Civil Procedure Code and applications ejusdem generis. But the question then arises whether the application contemplated by the rule under consideration is not an application under the Civil Procedure Code and in my opinion it is. Although in my order of reference I referred to the rule as being in "The appellate side rules of procedure of this Court" and though that description, is so far as it goes correct, I ought to have added that this Court has expressly made these rules as O. 52, Civil P. C. There are certain authorities to the effect that the Limitation Act does not apply to applications made under rules of the Court. Of these three *Lakshmimoni Dassi* v. *Dwijendra Nath* (8), *Wadia Gandhy & Co.* v. *Fershotam Sivji* (9) and *Narendra Lal Khan* v. *Jambala Dassi* (10), refer to applications by an attorney against his client for payment of his costs. Such applications are provided for by rules made by the High Courts concerned, and in my view they are applications not of a nature contemplated by the Code of Civil Procedure. I think that for that reason these decisions are of no help in the present case.

Buta v. *Rattan Singh* (16) was a decision that an appeal fixed for hearing under Ss. 551/587 of the then Civil P. C., (corresponding to O. 41, R. 11 of the present Code) could not be dismissed for default if the appellant failed to appear. I note that the legislature has nullified the effect of this ruling by adding sub-R. (2) to the rule referred to. It was further held that Art. 168, Lim. Act, did not apply to an application to restore an appeal so dismissed. No reasons for this decision were given, and with all respect this is not an authority to which I can attach any weight.

There remains *Ramhari Sahu* v. *Madan Mohan Mitter* (7). In this case the application was for the restoration of an appeal which had been dismissed for default in consequence of the failure

(13) A. I. R. 1917 P. C. 179=43 I. C. 493=45 I. A. 25=41 Mad. 412 (P. C.).

(14) [1883] 7 Bom. 213.

(15) [1897] 24 Cal. 707=1 C. W. N. 534.

(16) [1882] 76 P. R. 1882.

of the appellant to deposit the necessary costs of the preparation of a paper book in accordance with R. 17 of the High Court Rules. The case was first dealt with by a single Judge who held that the application was one under S. 558, Civil P. C. (new O. 41, R. 19) and that it was time barred under Art. 168, Lim. Act. It was held by a Full Bench that a single Judge had no jurisdiction and the matter was re-heard by two Judges, who remarked in their judgment (p. 346) that an order dismissing an appeal under R. 17 for default

"operates no doubt as an order dismissing an appeal for default of prosecution under the Civil P. C., and an application for restoration of the appeal may possibly be regarded as an application under S. 558 of the Code."

But finally they said (p. 347):

"On hearing the point fully argued and after full consideration we have come to the conclusion that this application should be regarded as one under R. 17 of the rules of the Court rather than one under S. 558. Taking it as such we are of opinion that it is not barred by the law of limitation, which does not apply to such an application."

No other reasons were given for their decision and for that reason I do not think it is a decision which must be followed by this Court. It does not appear to have been overruled, but I have found no later decision affirming it.

I do not, therefore, feel myself in any way constrained by authority on the final question to be decided, and my view is that our R. 9 (1) has in fact been placed by this Court in O. 52, Civil P.C., that it is a rule of a nature similar to other provisions of the Code; that the striking off an appeal under this rule is in fact the same thing as the dismissal of an appeal for want of prosecution, and that therefore an application under R. 9 (2) for the restoring of an appeal to the file is an application "for the re-admission of an appeal dismissed for want of prosecution." The words last quoted are the words of Art. 168, Lim. Act, so that the application clearly comes within the scope of that Act, and as I have found earlier in this judgment this Court has no power to vary the terms of the limitation therein fixed. For these reasons I would answer the question referred in the affirmative.

Cunliffe, J.—I am of the same opinion. In my view High Courts are not permitted by their rules to abrogate or vary the periods of limitation set out in the Limitation Act in respect of proceedings to which that Act applies.

The powers of the High Court to make rules are derived from the provisions of its Letters Patent and from Ss. 122 to 129, Civil P. C. I think that when an appeal is dismissed by the Registrar under R. 9, sub-R, (1) of our appellate side rules for the non-payment of process fees it is dismissed for want of prosecution. I further think that an application to restore such an appeal is an application for the re-admission of an appeal dismissed for want of prosecution. I further think that an application to restore within the meaning of Art. 168, Lim. Act.

The Limitation Act is a general statute. In its preamble these words occur:

"Whereas it is expedient to consolidate and amend the law relating to the limitation of suits, appeals, and certain applications to Courts."

In its preliminary section it is laid down by sub-S. (2) that

"the Act itself extends to the whole of British India,"

By the Limitation (Amendment Act) Act of 1922, S. 29 of the old Act was altered. The first portion of sub-S. (2), S. 29 now reads as follows:

"Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed therefor by Sch. 1, the provisions of S. 3 shall apply as if such period were prescribed therefor in that schedule."

and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by a special or local law certain provisions are made.

The cumulative effect produced on my mind by these three passages from the statute is that as far as applications to Courts are concerned, they are all for the purposes of limitation, covered by the Act, unless made under some special or local law.

The period of limitation laid down in the rule of our High Court rules is different from that laid down in Art. 168, Sch. 1, Lim. Act. The question therefore seems to me to be whether the rules made by a High Court under its Letters Patent and by virtue of the Civil Procedure Code amount to a special or local law. In my opinion they do not. I think that the expression "special or local law" cannot possibly be applied to rules under the Letters Patent of a

High Court. The Letters Patent themselves constitute neither a special nor a local law. They are a charter from the Crown. The Civil Procedure Code is a general law in pari materia with the Limitation Act.

In my opinion High Court rules approximate closely to bye-laws. They can be altered at will. They can be canvassed. They are subordinate and domestic enactments. They must be intra vires of the power from which they derive any other power pari materia. I have never understood *Ramhari Sahu's* case (7). I do not know on what principle it is decided. As both my lord and my brother Carr observe, no reasons for the decision are given in the judgment. I decline to follow it. I apprehend its value to be utilitarian rather than legal. For these reasons I think our answer to the reference should be in the affirmative.

M.N./R.K. *Reference answered.*

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* A. I. R. 1930 Rangoon 235

DAS, J.

Maung Po Hlaing—Appellant.

v.

Ma Phee and *others*—Respondents.

Second Appeal No. 65 of 1930, Decided on 26th May 1930, from decree of Dist. Judge, Pyapon, in Civil Appeal No. 119 of 1929.

*** Limitation Act, S. 5—Mistake of Court is sufficient excuse.**

Before an appeal is admitted, it is the duty of the Court to see that all the papers that should be filed have been filed before the Court. Where an appeal is filed without a copy of the decree and the Court instead of bringing the omission to the notice of appellant admits the appeal, it cannot subsequently dismiss the appeal on the ground that it had not been filed in time and the appellant should not suffer for the fault of the Court in not discovering his mistake in time. [P 235 C 2]

S. Ganguli—for Appellant.

Chan Tun Aung—for Respondents.

Judgment.—In this matter, the appellant filed his appeal before the lower appellate Court on 11th October 1929, the judgment of the trial Court having been passed on 5th October 1929. At that time the appellant had thought that the trial Court has not signed any decree as his suit had been dismissed on a preliminary point. But the fact remains that he had not filed a copy of the decree when he filed his appeal. His appeal was admitted on 5th November 1929, by the Additional District Judge, the Judge not having discovered at the time that the copy of the decree had not been filed. Before an appeal is admitted it is the duty of the Court to see that all the papers that should be filed have been filed before the Court. If the Court had noticed the omission that a copy of the decree had not been filed it could have brought that fact to the notice of the appellant, and there was ample time for the appellant to get a copy of the decree and file the same before the Court ; but instead of doing that, the Court admitted the appeal and it was fixed for hearing and after several adjournments the appeal was heard by the Additional District Judge on 6th December and it was fixed for judgment on 9th December 1929. On 9th December 1929, the Additional District Judge discovered that a copy of the decree had not been filed with the appeal, and then the appellant's advocate asked for time to consider, and 19th December was fixed for further consideration of the case.

On 19th December a copy of the decree was filed, and the Judge proceeded to dismiss the appeal on the ground that the appeal had not been filed in time, because a copy of the decree had not been filed with the judgment. This fact should have been noticed when the appeal was filed and when the appeal was admitted. I do not think it was proper for the lower appellate Court to dismiss the appeal, because a copy of the decree had not been filed when the appeal was filed. I think there is sufficient excuse for the appellant in this case, and he should not suffer for the fault of the Court in not discovering his mistake in time. I would, therefore, set aside the judgment of the lower appellate Court and remand the case to the lower appellate Court for decision on the merits. Costs of this appeal will abide by the decision of the lower appellate Court.

P.N./R.K. *Case remanded.*

A. I. R. 1930 Rangoon 236

CARR AND OTTER, JJ.

Ramprasad Lohar—Appellant.

v.

Ramjee Marwari and *others*—Respondents.

Civil Misc. Appeal No. 173 of 1929, Decided on 27th May 1930, from order of Dist. Judge, Insein, D/- 14th September 1929, in Civil Misc. No. 120 of 1929.

(a) Provincial Insolvency Act—Court cannot, at the time of adjudicatiag person as insolvent, require him to pay certain amount into Court.

There is no provision in the Act empowering the Court at the time of adjudicating a person an insolvent to pass an order requiring him to pay certain amount into Court in payment of his debts. [P 236 C 1]

(b) Provincial Insolvency Act, S. 41—Court refusing insolvent his discharge and also directing him to pay certain amount till he had paid all his debts—His order is illegal.

There is no provision for the adding of any other order to an order refusing a dicharge under S. 41 (2) (a). S. 41 (2) (b) permits suspension of a discharge for a specified time only. Therefore where the Court refuses an insolvent his discharge and at the same time directs him to pay certain amount to the receiver until he had paid all his debts, his order is illegal. [P 236 C 2]

S. M. Bose—for Appellant.

Judgment.—The appellant is a blacksmith in the employ of the Burma Railways, his pay being Rs. 106 per mensem. We understand that his employ is regular but that if on occasions he misses a day's work he is not paid for that day. On the other hand he says himself that he does overtime work and sometimes draws as much as Rs. 40 or Rs. 50 a month for such work. He is thus in receipt of a good income, which should leave a good surplus above his living expenses, even allowing his own claim that the nature of his work requires that he should have sustaining food. His pay is subject to a deduction of Rs. 18 per mensem for Provident Fund and we are told house rent. Even so his net income is probably considerably over Rs. 100 per mensem. On 28th December 1928, he filed an application in insolvency scheduling his total debts at Rs. 2,480 and on 19th January 1929 he was adjudicated insolvent.

At that time the Judge ordered him to pay Rs. 55 monthly into Court. We are unable to find any provision in the Provincial Insolvency Act empowering the Court to pass such an order. However the appellant did not object and for seven months he made the payments regularly. Then he applied for his discharge. The Judge refused his discharge and at the same time directed him to pay Rs. 70 per mensem to the Receiver until he had paid his debts in full. Against that order the present appeal is laid.

In our view the order is again illegal since it does not comply with the terms of S. 41, Provl. Insol. Act. S. 42 (3) provides that the powers of suspending and of attaching conditions to an insolvent's discharge may be exercised concurrently, but there is no provision for the adding of any other order to an order refusing a discharge under S. 41 (2) (a).

We think that the Judge was right in his view that the appellant should be required to pay his debts in full, and that he is not entitled to consideration on the ground that part of his liability is as surety and not a principal. We have only his word for this, and even if it is true it is clear that he entered into obligations recklessly and without having at the time of contracting them any reasonable expectation of being able to pay them in a reasonable time, and we should think that he is thus brought under the terms of S. 42 (1) (d).

It seems to us also that the Judge fixed at a somewhat high rate the monthly payments to be made by the appellant. He may perhaps be able to pay at that rate, but we are not entirely satisfied that he is. He seems, however, to have been able to pay at the rate of Rs. 55 per mensem without difficulty and we think that that rate is reasonable. The most satisfactory form of order in this case would be to suspend the appellant's discharge until he has paid his debts in full by regular monthly instalments, but S. 41 (2) (b) permits only of suspension of the discharge for a "specified time," and to combine such a suspension with the importation of conditions under sub-S. 2 (b) might result in difficult complications in the future. We shall therefore grant a conditional discharge under S. 41 (2) (c). We allow the appeal and set aside the order of the District Court and instead grant the appellant an order of discharge subject to the condition that he shall pay regularly every month to the Receiver the sum of Rs. 55 out of

his earnings, until his liabilities shall be discharged. There has been no appearance for the creditors and there will be no order as to costs.

P.N./R.K. *Appeal allowed.*

A. I. R. 1930 Rangoon 237

CUNLIFFE AND CARR, JJ.

Maung Tin—Appellant.

v.

Ma Yu and *others*—Respondents.

First Appeals Nos. 277 and 278 of 1928, Decided on 18th March 1930, against decree of District Court, Hanthawaddy, in Suit No. 1 of 1926.

(a) Civil P. C., O. 41, R. 33—Pending administration suit *X* applying to be made defendant as adopted son of deceased—Trial Court by interlocutory order holding adoption unproved—*X* appealing but appeal dismissed as premature—Preliminary decree passed—Other parties, but not *X*, appealing against it—*X's* previous appeal cannot be treated as cross-objection in this appeal—Nor could finding against him be reversed under O. 41, R. 33.

Pending a suit for administration of the estate of the deceased, *X* applied to be made a defendant claiming to be the adopted son of the deceased. The trial Court held in an interlocutory order that the adoption was unproved. *X* appealed against this order but this appeal was dismissed as premature. On preliminary decree being passed, other parties appealed against it but *X* did not; nor did he submit any cross-objection when he was joined as respondent in the appeal by the other parties.

Held: that the memorandum of his previous appeal could not be dealt with as his cross-objection in this appeal.

Held further: that under the circumstances it was not possible to reverse the finding against him, under O. 41, R. 33, in the absence of a cross-objection from him. [P 238 C 2]

(b) Buddhist Law (Burmese)—Succession—S. 308 of Kinwun Mingyi's Digest applies on analogy to cases where division is to be between brothers and sisters of husband and nephews and nieces of wife.

The rule in S. 308 of the Kinwun Mingyi's Digest contemplates in the absence of other nearer relatives a division between the brothers of the parents of the deceased couple. But the rule should be applied on analogy to a case where the division is to be between brothers and sisters of the husband and nephews and nieces of the wife: 8 *L.-B. R.* 197, *Foll.* [P 239 C 1]

(c) Buddhist Law (Burmese)—Succession—Relatives of both husband and wife to whom rule in S. 308 of Kinwun Mingyi's Digest applies succeed to half interest possessed by each of them irrespective of nearness of relatives on one side as against those on other.

The conception of the husband and wife as one person is a somewhat artificial one and is opposed to the general spirit of the Burmese Buddhist Law and the relatives of both the husband and of the wife to whom the rule given in S. 308 of Kinwun Mingyi's Digest is applicable should be regarded as succeeding to the half interest which each of them possesses in the estate irrespective of the nearness of the relatives on one side as against those on the other: 2 *U. B. R.* (1904-06) *Buddhist Law Inheri* 7; and *A. I. R.* 1923 *Rang.* 136, *Dist.* [P 239 C 2]

(d) Buddhist Law (Burmese)—Succession.

The division of the deceased's estate between his nephews and nieces is to be per capita and not per stirpes: *A. I. R.* 1924 *Rang.* 73; *A. I. R.* 1928 *Rang.* 67 and *A. I. R.* 1930 *Rang.* 59, *Rel. on.* [P 239 C 2]

Kirkwood—for Appellant.

Burjorjee, Anklesaria, Tun Tin, and *Tun Byu*—for Respondents.

Judgment.—These appeals arise out of a suit for administration of the estate of Daw Lai Mai and U Po Toke, a Burmese Buddhist couple who died. Daw Lal Mai on 28th June 1918, and U Po Toke later, on 3rd July 1918. They left no children or direct descendants, and their parents were dead. At the time of the deaths of the couple the nearest relatives surviving were, on U Po Toke's side nephews and nieces, and on Daw Lai Mai's side one sister and two brothers. These three have all died since and on both sides there have been other deaths and assignments of interest which are unnecessary to set out in these appeals. It will suffice to say that the parties now before the Court are the representatives-in-interest of U Po Toke's nephews and nieces and of Daw Lai Mai's sister and brothers. The District Court decided, applying the rule given in S. 308, Vol. 1 of the Kinwun Mingyi's Digest of Burmese Buddhist Law, that the joint estate of the couple should be shared equally between the relatives of U Po Toke on one side and those of Daw Lai Mai on the other. In appeal No. 278 the appellants are the relatives of Daw Lai Mai, and their claim is that, on the well-recognized rule of Buddhist law that the nearer excludes the more remote, the estate devolved on the sister and brothers of Daw Lai Mai to the exclusion of the nephews and nieces of U Po Toke. In appeal No. 277 the parties are those who claim through the relations of U Po Toke's side and the contention in this appeal is simply that the share of the estate which goes to U Po Toke's relatives should be divided between his nephews and nieces alive at the time

of his death per capita and not per stirpes as the District Court has decided it should be divided.

Before dealing with the questions set out above, it is necessary to refer to another party, Maung Po Tu, who applied to be joined as a defendant in the original suit claiming to be a Keittima adopted son of the deceased couple. The question of his adoption was considered by the District Judge in an interlocutory order on 16th January 1928, when he found that Po Tu's adoption was not proved. Po Tu apppealed against this in Civil Miscellaneous Appeal 54 of 1928, which was dismissed on the ground that the appeal was premature. A preliminary decree for administration was passed on 1st September 1928, and on 12th December Po Tu filed an application for leave to appeal against that decree as a pauper, in Civil Miscellaneous Application No. 173 of 1928. This application was beyond time, but he was given an opportunity of being heard but did not appear, and his application was rejected on 16th January 1929. Meanwhile on 22nd December 1928, Po Tu had filed an application to be added as a respondent in Civil First Appeal 278, and this application was granted by a Bench of this Court. In that application Po Tu prayed that the record of Civil Miscellaneous Appeal 24/28 be "read as part of the proceedings in this appeal." After he was joined as a respondent, he did not file any cross objection to the decree. He did nothing until 4th December 1929, when he filed a petition claiming in effect that Civil Miscellaneous Appeal 24/28 should be regarded as a cross-objection in this appeal and asking that the appeal should first be heard on the question whether his adoption was proved. When the appeals came up for hearing objection was taken to Po Tu's right to be heard on the question of his adoption, and after hearing the advocates on this point we held that he was not so entitled and dismissed him from the appeal, reserving our reasons to be given more fully in this judgment.

These reasons are as follows:

Had Po Tu's claim to be a Keittima son of the deceased couple been found proved Po Tu would have been the sole heir to their estate to the exclusion of all the other parties to these appeals But when the District Court had found that his adoption was not proved, it had to address itself to the mode of division of the estate between the relatives of U Po Toke and Daw Lai Mai, and it is against its decision on this question that these appeals have been made. Whatever the decision of this Court on that question may be it cannot in any way affect Po Tu and therefore we are clearly of opinion that Po Tu has not an interest in Appeal No. 278 within the meaning of R. 20, O. 41, Civil P. C. What Po Tu wishes to agitate now is an entirely different question. It was open to him to appeal from the preliminary decree and to claim in his appeal that his adoption should have been found to be proved. He did not file any such appeal, nor did he appeal against the decision on that point by way of cross-objection as he may have been entitled to do after he had got himself joined as a respondent in Appeal No. 278. We are entirely unable to accept the suggestion in his petition of 4th December 1929, that his memorandum of appeal in Civil Miscellaneous No. 24 of 1928 should be dealt with as a cross objection in this appeal. That Miscellaneous Appeal has been dismissed long ago before the preliminary decree now appealed against was passed. It has been urged in Po Tu's favour that even without a cross-objection we could reverse the finding against him under R. 33, O. 41. This contention also we are unable to accept. We do not consider that the rule applies in the circumstances such as those set out above. It was for these reasons that we dismissed Maung Po Tu from the appeal.

We now come to Appeal No. 278, which is the more important of the two, since should that appeal succeed none of the parties to No. 277 would be entitled to share in the estate at all and it would be unnecessary to decide that appeal. The parties seem to be in entire agreement that the case is one to which the rule given in S. 308, Kinwun Mingyi's Digest is applicable. Directly we think that that rule does not apply. It is a rule for the division of the estate between the more remote relatives of the deceased couple when they have left no descendants, no parents and no other heirs. The other heirs in the absence of descendants and parents would be the brothers and sisters, or the des-

cendants of brothers and sisters. The rule contemplates in the absence of all such heirs a division between the brothers and sisters of the parents of the deceased couple. We know of no rule in the dhammathats which provides exactly for the case now before us; but in the case of *Ma Ein* v. *Tin Nga* (1) at p. 201 of the report, Twomey, J. remarked on the curious fact that the dhammathats did not provide any rule for such a case as the present, and added that in a case such as the present one it would seem reasonable to deal with estates by analogy in the same manner as that provided by S. 308. That appears to be the view of the the learned advocates for the parties, and it appears to us also as a reasonable view. We propose, therefore, to deal with the case on the analogy of the rule given in S. 308 of the Digest and more particularly in S. 56 of Book 10 of the Manugye Dhammathat.

The rule, however, does not supply any answer to the question now raised in appeal No. 278, nor have we been able to find any case in which this question has actually been decided. In *Ma Kadu* v. *Ma Jon* (2), there was a contest between a sister of the husband and a first cousin of the mother of the wife. But that was an application for Letters of Administration and all that was decided was that the sister of the husband was entitled to share. The learned Judicial Commissioner expressly refused to consider whether she excluded from inheritance the opposite party who was a more remote relation of the wife. In *Ma Pwas Oh* v. *Ma Lay* (3), the contest was between the mother and brothers of the wife on the one side and the stepmother and half brother of the husband on the other. But here again, the question whether the nearer relatives excluded the more remote was not decided. It was held that the interval between the deaths the wife and of the husband was too great to allow the application of the rule now under consideration.

Were we dealing with the estate of one person alone there can be no doubt that his nephews and nieces would be excluded from the inheritance by his brothers and sisters. If we are to consider the husband and wife as one person then the same rule should be applied, but unless we can consider them in this light, we do not think that this rule of exclusion should be extended to this case. The conception of the husband and wife as one person is a somewhat artificial one and is in our opinion, opposed to the general spirit of the Burmese Buddhist Law, and we think that the general meaning of the rule is that in cases to which it applies the relatives of both the husband and of the wife should be regarded as succeeding to the half interest which each of them possesses, in the estate irrespective of the nearness of the relatives on one side as against those on the other. We are unable therefore to allow the contention of the appellants in appeal No. 278.

Coming now to appeal No. 277, as we have said above, the question is only as to the division between the nephews and nieces of U Po Toke of their half share of the estate. The District Judge has divided this share between them per stirpes, regarding them as entitled to inherit by representation of their deceased parents. It is claimed by the appellants that the distribution should be per capita. In this question the following cases are relevant. In *Maung Po Thu Daw* v. *Maung Po Than* (4), the question was considered in regard to grandchildren when the only heirs were the grandchildren, and it was held by a Full Bench that the grandchildren in such circumstances were heirs in their own right and that each took an equal share. This principle was applied to first cousins of the deceased in *Maung Ba Gon* v. *Ma Pwa Thit* (5). And in the very recent case of *Ma Kin* v. *Maung Po Myint* (6) it was applied to nephews and nieces. We think that these decisions are sufficient to conclude the question in favour of the contention of the appellants in this appeal.

On these findings Civil First Appeal No. 277 of 1928 is dismissed with costs. Civil First Appeal No. 277 of 1928 is allowed and the judgment and decree of the District Court are modified as

(1) [1915] 8 L.B.R. 197=30 I.C. 594.
(2) [1904-03] 2 U. B. R. Buddhist Law 7.
(3) A. I. R. 1923 Rang. 136=11 L. B. R. 376.
(4) A. I. R. 1924 Rang. 73=83 I. C. 10=1 Rang. 316 (F.B).
(5) A. I. R. 1928 Rang. 67=107 I. C. 167=5 Rang. 747.
(6) A. I. R. 1930 Rang. 59=121 I. C. 808=7 Rang. 811.

follows: The half share of the estate of the deceased couple allotted to the heirs claiming through U Po Toke will be divided equally between (1) Maung Tin, (2) Ma Mya, (3) Ma Yu and (4) Yeo Boon Pong, assignee of the interest of Ma Swa (deceased). In the circumstances of the case we direct costs in this appeal to be paid out of the half share in the estate to which the parties to this appeal are jointly entitled.

S.N./R.K. *Order accordingly.*

A. I. R. 1930 Rangoon 240

SEN AND HEALD, JJ.

Fatima Bee Bee and *another*— Appellants.

v.

M. A. Gaffoor—Respondent.

First Appeal No. 181 of 1929, Decided on 28th April 1930, against decree of original side in Civil Regular Suit No. 352 of 1927.

Administration — Suit for—Official Referee can consider accounts of money due to estate by agent appointed in deceased's lifetime.

In an administration suit, the Official Referee has power to go into the accounts of losses alleged to have been caused to the estate, and money alleged to have been due to the estate, by an agent appointed by the deceased in his lifetime: 6 *L. B. R.* 34, *Rel. on.* [P 241 C 1]

J. C. Ray—for Appellants.

M. A. Rauf—for Respondent.

Heald, J.—Appellant 1 and the respondent are the children of one Ma Pi, a Sunni Mahomedan, who died in Rangoon in October 1929. Appellant 2 is appellant 1's husband. Respondent sued for administration of the estate by the Court and by consent a preliminary administration decree was made and the Official Referee was directed to take the usual accounts. Before the Official Referee a question arose as to whether he could go into the account of losses alleged to have been caused to the estate and moneys alleged to have been due to the estate by respondent during Ma Pi's lifetime. This question arose by reason of the following facts: Ma Pi had lived with respondent for many years and had allowed him to manage her estate. In 1920 she gave him a power-of-attorney, but in 1923 she left him and went to live with appellants and in 1924 she cancelled the power which she had given to him and gave a power to appellant 2 instead. Appellant accused respondent of waste and misappropriation during the period of his agency.

The Official Referree framed an issue as to whether or not he could go into the account of losses caused and moneys owing by respondent to the estate, and came to the conclusion that he could not because respondent ceased to be agent of the deceased in February 1924, and appellant had made no claim against him until they made it in the suit which was not instituted until May 1927, so that the claims would be barred under Arts. 89 and 90, Sch. 1, Lim. Act, those articles prescribing a period of limitation of three years for suits by a principal against his agent for moveable property not accounted for or for neglect or misconduct.

Objection to the Official Referee's finding on this point was taken before the Judge who said that in his opinion a defence of this character ought to have been the subject of a separate action, but that the agreed reference must cure the irregularity of dealing with it in the administration suit. He went on to say that he did not agree with the Official Referee's application of Art. 89, because it was not possible for the Official Referee to import into an administration suit the period of limitation which is laid down for a suit of a different character. The learned Judge said that in his opinion the article which applied was Art. 120, which provides a period of limitation of six years for suits for which no period of limitation is provided elsewhere, and which has been applied to administration suits. He therefore remanded the case to the Official Referee for an investigation to be made into the allegations in relation to respondent's dealings with his mother's property as set out in appellant 2's written statement.

The Official Referee then recorded a finding that two sums of Rs. 559-8-0 and 453 should be debited against respondent's share of the estate. When the Official Referee's amended report came before the Court the learned Judge said that appellants had made an attempt to convert the administration suit into a suit against respondent for an account of his agency, and held that they were not entitled to go into the

matter of respondent's agency at all. He therefore refused to consider the amended report and confirmed the original report.

Appellants appeal on grounds that they were entitled to show that certain moneys ought to be debited to respondent's share, that the law of limitation does not apply to accounts arising between parties to an administration suit, that because the parties were coheirs and co-owners of the estate no question of limitation could arise until one of the coheirs set up a claim adverse to the others, and that costs should not have been given against them personally.

In my opinion the learned Judge was mistaken in refusing to consider the Official Referee's amended report. I know of nothing in law to prevent the taking of such accounts as those with which that report deals in an administration suit, and nothing which would prevent it has been brought to our notice. The case of *Momein Bee Bee* v. *Ariff Ebrahim Malim* (1) and the cases cited therein seem to me to be good authority for the taking of such accounts, and therefore I would set aside the judgment and decree which are under appeal and would remand the case to be dealt with according to law, that is, for a consideration of the Official Referee's amended report and of the objections thereto, and for a final decree in the suit. The costs of the hearing of this Court should abide the final orders in the suit in respect of costs; advocate's fee to be five gold mohurs. A certificate for the refund of the court-fee paid on the memorandum of appeal should issue to appellants.

Sen, J.—I concur.

S.N./R.K. *Case remanded.*

(1) [1912] 6 L. B. R. 34=14 I. C. 508.

A. I. R. 1930 Rangoon 241

ORMISTON, J.

Maung Hla Maung and *another*—Appellants.

v.

Ma Hnin Dauk and *others*—Respondents.

Special Second Appeal No. 483 of 1929, Decided on 13th February 1930.

Court-fees Act, Sch. 2, Art. 11 — Appeal from order under S. 144, Civil P. C.—Ad valorem court-fee is payable—Civil P.C., S. 144.

An application for restitution consequent on a decree of an appellate Court is not an application to execute that decree. Hence appeal from an order passed under S. 144, Civil P. C., is not an appeal from an order passed under S. 47 of that Code. Consequently Local Government, Financial Department Notification No. 41, limiting the court-fee chargeable in appeals under S. 47 to amount chargeable under Court-fees Act, Sch. 2 and Art. 11, does not apply to such an appeal and ad valorem court-fee is payable in the case of an appeal from order under S. 144 : 30 *I. C.* 680 ; *A. I. R.* 1922 *All.* 223; *A.I.R.* 1925 *Pat.* 1 ; *A. I. R.* 1925 *All.* 137 and 39 *I.C.* 640, *Ref.* [P 242 C 2;P 243 C 2]

Kirkwood—for Appellants.

Judgment.—The Sub Divisional Court of Pyapon passed an order under S. 144, Civil P. C., directing the appellants to make restitution to the respondents. The District Court, on appeal by the appellants, varied the order. From the order of the District Court this appeal has been preferred. Sch. 2, Art. 11, Court-fces Act, provides for a court-fee of Rs. 2 on a memorandum of appeal when the appeal is not from a decree or an order having the force of decree. Under the Local Government Financial Department Notification 41, dated 19th September 1921, the fee chargeable on appeals from the orders under S. 47, Civil P. C., 1908, is limited to the amount chargeable under Art. 11. The appellants have stamped their memorandum with a court-fee label of Rs. 2. The question whether an ad valorem court-fee should not be paid on the memorandum was referred to the Taxing Master under S. 5, Court-fees Act. The Taxing Master heard counsel for the appellants and passed an order under the same section referring the matter to the final decision of Chari, J. Counsel for the appellants intimated that he did not wish to argue the matter before the Judge. Chari, J., being ill, the Chief Justice has directed me to dispose of the reference.

By S. 2 (2) of the Code a decree is deemed to include the determination of any question within S. 47 or S. 144. S. 47 relates inter alia to questions arising between the parties to the suit relating to the execution of the decree. The notification does not apply in terms to appeals from orders under S. 144. It can only apply if such an order is also an order under S. 47. The question, therefore, is whether a proceeding under S. 144 is a proceeding in execution. S. 144 of the Code of 1908 corresponds to

S. 583 of the Code of 1882, and S. 47 of the Code of 1908 to S. 244 of the Code of 1882. The balance of authority under the old Code was that an application for restitution was a proceeding under S. 244. S. 144 of the new Code, however, differs so radically from the section which it replaces that I do not consider that the older authorities are of service.

In *Madan Mohan Dey* v. *Nogendra Nath Dey* (1) the question arose on a court-fee reference. There was a notification prescribing a fee of Rs. 2 on appeals from orders under Cl. (c), S. 240 of the old Code. That notification by virtue of S. 157 of the new Code had effect as if it had reference to S. 47. It was held that Rs. 2 was the proper fee. In a very short order Chatterjea, J., held that:

"the Court, in making restitution has to execute the decree of reversal (which necessarily carries with it the right to restitution even though the decree may be silent as to such restitution), in order to give effect to the reversal of the decree. That being so, an order under S. 144 comes under S. 47 (1)."

The Chief Court of Lower Burma and the High Courts of Allahabad and Patna have held that an application under S. 144 is not an application to execute a decree. In *Asha Bi Bi* v. *Nuruddin* (2), the question arose on a point of limitation. If the application was to execute a decree Art. 182, Lim. Act, applied; otherwise Art. 181. Young, J., held that Art. 181 applied. He pointed to the radical changes which had been made by the new Code. The restitution section in the new Code is placed in Part 11 which deals with miscellaneous matter, whereas before it had been placed in Chap. 12, which dealt with appeals. Its connexion with the reversing decree is not so obviously close as it was before, and the argument that it is an execution of that decree is weaker. S. 583 of the old Code was the section which provided how the decree on appeal was to be executed. In the new Code Ss. 37 and and 38 provide how appellate Court decrees are to be executed and are placed in the chapter dealing with execution. S. 583 dealt chiefly with execution and referred to persons entitled "under a decree" to a benefit. In S. 144 these words are omitted and there is not a word about execution. The learned Judge came to the conclusion that where the decree does not expressly order restitution, any person (whether a party or not), may make an application on which the Court may pass an order, and that such an application is not an application to execute the decree. Consequently Art. 181 applied.

In *Jiva Ram* v. *Nand Ram* (3), the question was whether S. 141 (which does not apply to proceedings relating to the execution of a decree), applies to proceedings under S. 144. It was held that it does apply, the reason being that a proceeding under S. 144 is not a proceeding relating to the execution of a decree. Emphasis was laid on the difference between the wording of that section and of S. 583 of the old Code. The same opinion was expressed in *Brijlal* v. *Damodar Das* (4).

In *Balmakand Marwari* v. *Basanta Kumari Dasi* (5) it was held by a majority of a Full Bench of the Patna High Court that Art. 181, Lim. Act, and not Art. 182, applies to an order under S. 144, the ground being that an order under that section is, by virtue of the definition in S. 2 (2) itself a decree and capable of execution as such, and is not an order in execution.

In *Baijnath Das* v. *Balmakand* (6) the question came up on a reference under S. 5. Court-fees Act. Under a notification of the Governor-General in Council the court-fee payable on appeals from orders under S. 47 had been specially reduced to Rs. 2, but no similar reduction had been made in the case of appeals from orders under S. 144. It was held that an application under S. 144 is one which carries out the appellate Court's decree, but that it does not directly execute it; all that it does is to undo an execution wrongly granted by the Court below. Consequently an ad valorem fee was payable.

It thus appears that the preponderance of judicial opinion is that an application for restitution consequent

(1) [1917] 39 I. C. 640.

(2) [1915] 8 L. B. R. 252=30 I. C. 680.

(3) A. I. R. 1922 All. 228=66 I.C. 144=44 All. 407.

(4) A. I. R. 1922 All. 238=66 I. C. 545=44 All. 555.

(5) A. I. R. 1925 Pat. 1=78 I. C. 200=3 Pat. 371 (F.B.).

(6) A. I. R. 1925 All. 137=82 I. C. 321=47 All. 98.

on a decree of an appellate Court is not an application to execute that decree. I am of the opinion that this is the correct view. Under S. 583 of the old Code a party entitled to a benefit (by way of restitution or otherwise), under an appellate decree had to apply to the Court which passed the decree against which the appeal had been preferred, and the Court was bound to execute the decree passed in appeal. Under that section, as is pointed out by Mulla in his commentary on the Code (Edn. 8 at p. 339), the principle adopted was that the restitution should be such as would, as far as might be, place the parties in the position they would have occupied but for the decree appealed from. For the purpose of making such restitution the Court could make any order, including orders for the refund of costs, and for the payment of interest, damages, compensation and mesne profits as were properly consequential on the variation of reversal of its decree. S. 144 reproduces the case-law which had grown up round the old S. 583, but all reference to execution of the appellate Court's decree is now omitted.

The inference would appear to be that the legislature intended to resolve the doubt which had arisen under the old section and that proceedings under S. 144 should not be regarded as proceedings in execution. Apart from this, the argument that in granting restitution the Court is really executing the decree of the appellate Court, is I think met by Das, J., in the *Patna* case *Balmakand Marwari* v. *Basanta Kumari Dasi* (5) at pp. 383 to 385 of the report. He asks (of course in reference to S. 583 of the old Code) upon what is the jurisdiction to order the respondent to pay interest to the appellant on a decretal sum taken in execution founded? The answer is, not by reason of any direction, express or implied, contained in the appellate decree, but on the inherent jurisdiction of the Court based on the recognition of the duty which it owes to suitors to see that no injury is done to them by its acts. I would also refer to the remarks of Kulwant Sahay, J., on pp. 398 and 399 of the report of the same case. After observing that, if an application for restitution be treated as an application for execution, there is no necessity for S. 144, because such matters had already been provided for in S. 47, he says:

> "To my mind, S. 47 deals with questions relating to execution of decrees which properly may be treated as applications in execution, while S. 144 deals with questions which do not come strictly within the meaning of execution of a decree but which are analogous to it, namely applications for relief consequent upon a decree being set aside."

With these remarks I am in entire concurrence.

I am of the opinion that a proceeding under S. 144 is not a question arising between the parties in execution of a decree, and that an appeal from an order passed under that section is not an appeal from an order under S. 47. It follows that an ad valorem court-fee is payable.

The land in respect of which the mesne profits are payable measures 18 acres. The Sub-Divisional Court estimated a profit of 15 baskets per acre and held that the market rate was Rs. 200 per 100 baskets. He, therefore, awarded mesne profits for two years at Rs. 1,100. The District Court awarded the same sum less Rs. 90 paid for land revenue. The appellants in their grounds of appeal say that the land is not worth more than between five and six baskets per acre. It is thus not possible from the materials on the record to say exactly what is the amount of mesne profits which the applicants claim, should have been awarded. They should be required to value the appeal and pay the difference between the amount of the court-fee calculated ad valorem on their valuation and the sum of Rs. 2 already paid.

P.N./R.K. *Order accordingly.*

* A. I. R. 1930 Rangoon 243

SEN AND HEALD, JJ.

Po Htin Maung—Appellant.

v.

Saw Hla Pru—Respondent.

First Appeal No. 239 of 1929, Decided on 29th April 1930, against decree of original side in Civil Regular No. 209 of 1929, D/- 22nd August 1929.

(a) Negotiable Instruments Act, S. 8 — Benamidar can sue.

Benamidar is a holder within the meaning of S. 8 and is entitled to sue on promissory-note: 30 *Mad.* 88 (*F. B.*); 2 *C. W. N.* 286 *A. I. R.* 1922 *All.* 70 and 5 *L. B. R.* 198, *Rel. on.* [P 244 C 2]

(b) Legal Practitioner—Fees — Attorney is not entitled to any donation.

It is a well recognized rule of law that an attorney is not entitled to any donation irrespective of his just and legitimate costs, during the subsistence of the relationship with his clients: 29 *Cal.* 595, *Cons.* [P 245 C 1]

✲ **(c) Legal Practitioners Act (1926), S. 4 —Advocate's fee—Taxation Rules of Rangoon High Court, Rr. 13, 31 (Proviso), 54 and 3 (2)—Rr. 13, 31 (Proviso), 54 are governed by R. 3 — Advocate can sue for his fees.**

Rules 13, 31 (proviso), 54 are governed by R. 3. An advocate is not precluded from suing for his fees. If it is alleged that the advocate gave bad advice which constituted negligence in his duties and partial failure of consideration, as the part of the consideration which is said to have failed is not ascertainable in money without collateral enquiry, such defence cannot be put up in the suit and the defendant's remedy is by separate suit: 4 *L. B. R.* 55 (*F. B.*), *Rel. on.* [P 245 C 2]

Hay and *Tun Aung Gyaw* — for Appellant.

Foucar—for Respondent.

Sen, J. — The respondent filed two suits in the original side of this Court, Civil Regular No. 265 of 1925 and Civil Regular No. 266 of 1925 against his wife for restitution of conjugal rights and for an injunction. These were followed by a suit by the wife for a divorce, Civil Regular No. 337 of 1925. For these three suits respondent engaged Mr. Halkar, and Mr. Burjorjee and later Mr. Hla Tun Pru, advocates of this Court. After some bargaining respondent agreed to pay Mr. Hla Tun Pru a lump sum of Rs. 2,000 for his fees. As respondent was not then in a position to pay the fees in cash, he on 12th April 1926, executed the promissory note in suit in favour of Hla Tun Pru in payment of his fees. The three suits were consolidated and were compromised in the course of the trial. By that compromise respondent's wife obtained a divorce and respondent was declared entitled to a one-third share of the properties inherited by his wife. Thereafter, the respondent as a result of this compromise had to file a further suit against his wife and her coheirs for his share in the properties inherited by his wife during their coverture. For this suit also respondent engaged Mr. Hla Tun Pru and executed promissory notes in his favour in payment of his fees. This suit also ended in a compromise, as a result of which respondent received about Rs. 1,20,500. Mr. Hla Tun Pru being unable to realize his fees and not desiring, as is suggested, to figure as a litigant endorsed the suit promissory note to one M. A. Surty on 15th January 1929. Surty having failed in his endeavours to realize anything on this promissory note endorsed it to the appellant on 9th April 1929. The appellant then filed the present suit against the respondent for recovery of the principal and interest due on the endorsed promissory note.

Respondent while admitting execution pleaded that the promissory note was executed by him in favour of Mr. Hla Tun Pru in respect of advocate's fees in carrying out work which the said Hla Tun Pru performed unsatisfactorily and that Hla Tun Pru as an advocate could not sue for his fees and could not in any case recover more than a reasonable fee. He also denied that either of the endorsements were for valuable consideration and averred that the appellant was merely a benamidar of Hla Tun Pru, of whose defective title he was aware.

The learned Judge held it established that both Surty and appellant were mere benamidars for Hla Tun Pru and that no consideration was paid by them. He further held that Hla Tun Pru as an advocate was incapacitated from suing on the promissory note in suit, as he had not the slightest doubt that it was given for his fees, and that assuming that he had a right to sue for his fees he could only recover his taxed costs. He consequently dismissed the suit with costs. It is settled law that a benamidar is a holder within the meaning of S. 8, Negotiable Instruments Act, and is entitled to sue: *Subba Narayana Vathiyar* v. *Ramaswami Aiyer* (1), *Sarat Chandra Dutt* v. *Kedar Nath Das* (2), *Reoti Lal* v. *Manna Kunwar* (3) and *Ramzan Ali* v. *Vellasami Pillai* (4). The fact of the appellant having made an allegation in his plaint that he was a holder for value cannot stand in his way to recover on the promissory note, if he is, as the trial Judge has found, only a holder, unless Hla Tun Pru was incapacitated from suing. It is conceded by the advocate for the respondent, and we think rightly, that Hla Tun Pru as an advocate is not precluded from suing for his fees. In the case of *A. P. Pennell* v. *J.*

(1) [1907] 30 Mad. 88 (F.B.).
(2) [1898] 2 C.W.N. 286.
(3) A.I.R. 1922 All. 70=65 I.C. 785=44 All. 290.
(4) [1909] 5 L.B.R. 198=3 I.C. 967.

A. Harrison (5), it was held that an advocate of the Chief Court was entitled to recover his fees by suit and that the fact that he was a member of the English Bar did not preclude him from suing for his fees.

It is urged, however, that Hla Tun Pru though entitled to sue for his fees, could not recover more than would be allowed to him upon taxation by the Taxing Master. The learned counsel for the respondent cited the case of *Brojonath Mullick* v. *Luchimoni Dasee* (6). But there it is definitely held that the consideration for the promissory note, upon which the attorney had sued, was a reward, and in the special circumstances of that case the taxing officer was directed to enquire what was the work done by the attorney and what was his just and fair professional remuneration. It is a well-recognized rule of law that an attorney is not entitled to any donation irrespective of his just and legitimate costs during the subsistence of the relationship. In the present case there is no question of donation whatever. The promissory note in suit represents a lump sum fee settled at the time of the engagement.

In support of his contention counsel for respondent further referred us to R. 3, Cl. (2), R. 13, proviso to R. 31, and R. 54 of the taxation rules of this Court. Counsel for appellant contended that the words "on the application of any party chargeable with the bill" in Cl. (3), R. 3 of the Taxation Rules mean that party who is liable to pay the costs of his adversary under the decree and that R. 13 recognizes lump sum fees. S. 29, Legal Practitioners Act, 1879, provided that where a suit was brought to enforce any agreement entered into by a pleader in respect of his fees, the Court may reduce the amount or order his proper fee to be ascertained, if the agreement were not proved to be fair and reasonable. A reference to S. 38 of the same Act shows that the provisions of S. 29 did not apply to advocates. Ss. 28 to 31, Legal Practitioners Act, 1879, have been repealed by the Legal Practitioners Act, 1926. S. 4 of this Act enables a legal practitioner to institute and maintain legal proceedings for the recovery of any fee due to him for professional services under an agreement entered into by him with his client. Under S. 2 of the same Act the term "Legal Practitioner" includes an advocate. It may be noted that S.27, Legal Practitioners Act, 1879, empowered High Courts to fix and regulate the fee payable by any party in respect of the fees of his adversary's advocate, pleader, etc. S. 16, Bar Councils Act, 1926, reads as follows:

> "The High Court shall make rules for fixing and regulating by taxation or otherwise the fees payable as costs by any party in respect of his adversary's advocate upon all proceedings in the High Court or any Court subordinate thereto."

There thus appears to be considerable force in the interpretation which, counsel for appellant desires, is to place upon R. 3, Cl. (2), Taxation Rules, and in our opinion R. 13 (old R. 14), the proviso to R. 31 and R. 54 of the Taxation Rules are all governed by R. 3.

In the view we take of the case it is unnecessary to decide whether in a suitable case the Court may not enquire into the reasonableness of the advocate's claim. In the present case the fees do not appear to be excessive for the work contemplated. Respondent himself stated in cross-examination that he would not say the sum was too big, if his advocate had done his work properly, but his case was that the advocate gave him bad advice, and bungled the compromise and drew up an unsatisfactory deed of compromise. He further stated he had signed the compromise petition because Mr. Halkar said he had 30 years' experience and Mr. Burjorjee strongly advised him to compromise. On this point the trial Judge considered that on respondent's own admission there was no such negligence on Hla Tun Pru's part as to constitute partial failure of consideration, even if respondent was permitted to plead it in defence. Even if the alleged bad advice constituted negligence and partial failure of consideration we are in entire agreement with the trial Judge that, as the part of the consideration which is said to have failed is not ascertainable in money without collateral enquiry this defence cannot be set up in the present suit, and respondent's remedy is by a separate suit. As is well known the fees agreed upon in this province are generally lump sum fees and irrespective of the scale of fees allowed by the Court against the adver-

(5) [1918] 4 L.B.R. 55 (F.B.).
(6) [1902] 29 Cal. 595=6 C.W.N. 816.

sary. We, therefore, hold that Hla Tun Pru, if he had personally sued upon the promissory note, would have been entitled to recover the whole amount, and that consequently appellant as holder thereof is entitled to a decree.

We set aside the judgment and decree of the original side of this Court, and order that the respondent do pay the plaintiff the sum of Rs. 2,720 with further interest upon the principal sum of Rs. 2,000 at 1 per cent per mensem from the date of the institution of the suit up to the date of the decree and thereafter until realization at the court-rate with costs in both Courts.

Heald, J.—I concur.

P.N./R.K. *Decree set aside.*

A. I. R. 1930 Rangoon 246 (1)

CAR AND OTTER, JJ.

Daw Soe and *others*—Appellants.

v.

Ko Pu—Respondent.

First Appeal No. 31 of 1930, Decided on 19th May 1930.

Court-fees Act, S. 11— Court-fee is payable on future mesne profits.

A court-fee is payable on future mesne profits but it can only be exacted after the amount has been ascertained by enquiry: *A.I.R.* 1926 *Pat.* 218 at *p.* 377, *Foll.* [P 246 C 2]

R. C. Banerjee—for Respondent.

Carr, J.—The plaintiff sued for possession of certain property and for mesne profits up to the date of delivery of possession to him. He valued his claim for mesne profits at Rs. 1,100 being the mesne profits for one year. He obtained a decree for possession and for Rs. 855 being mesne profits for the year 1290 B. E. Nothing was said about future mesne profits. The defendants appealed and the plaintiff has filed a cross-objection in which he claimed that the mesne profits for 1290 B. E. should be Rs. 1,100 and again asks for a decree for mesne profits up to the date of delivery of possession. He has stamped his cross-objection on Rs. 245 being the difference between the Rs. 1,100 claimed and the Rs. 855 awarded on account of the year 1290 B. E. The Deputy Registrar has called upon him to pay court-fees on the amount estimated as mesne profits to be awarded and the case comes before us on his objection to this order. It may be argued in favour of the Deputy Registrar's order that the year 1291 B. E. is now completed and therefore the amount of mesne profits claimed for that period can be estimated. On the other hand there can be no doubt that it is impossible to estimate the profits for a period which still remains to be determined.

It has been held in some High Courts that no court-fee is payable at all at any time on a claim for mesne profits subsequent to the institution of the suit. On this see *Ramkrishna Bhikaji* v. *Bhima Bhai* (1), *Maiden* v. *Janakiramayya* (2), *Bunwari Lal* v. *Sheo Sunkar Misser* (3). But this view has not met with general acceptance. The question has been exhaustively discussed in *Ramgulam Sahu* v. *Chintaman Singh* (4) by a Full Bench of three Judges, and the conclusion arrived at was that:

> "a court-fee is payable on future mesne profits but it can only be exacted after the amount has been ascertained by enquiry: Dawson Miller, C. J., at p. 377 of the report."

This seems to us to be the correct view and I would hold therefore that the memorandum of cross-objections now before us is sufficiently stamped and that no further court-fee can be exacted at this stage.

Otter, J.—I agree that no further court-fees are payable now.

P.N./R.K. *Order accordingly.*

(1) [1890] 15 Bom. 416.
(2) [1898] 21 Mad. 371.
(3) [1909] 1 I. C. 570.
(4) A. I. R. 1926 Pat. 218=93 I. C. 939=5 Pat. 361 (F. B.).

A. I. R. 1930 Rangoon 246 (2)

HEALD, AG. C. J., AND SEN, J.

P. L. R. M. S. Ramanathan Chettyar—Appellant.

v.

Ma Ma Gun—Respondent.

First Appeal No. 220 of 1929, Decided on 28th April 1930, against decree of original side in Civil Regular Suit No. 128 of 1929.

Transfer of Property Act, S. 78 — Failure to obtain title-deeds by first mortgagee is not necesarily "gross neglect"

Failure to obtain possession of title-deeds by a first mortgagee at the time when the property was mortgaged to him cannot be held necessarily to amount to "gross neglect" as would postpone him to a second mortgagee under the provisions of S. 78: 31 *Mad.* 7, *Rel. on.*

Hewett v. *Loosemore*; 68 *E. R.* 586; 15 *Mad.* 268; *A. I. R.* 1926 *Rang.* 195 and *A. I. R.* 1929 *Rang.* 65, *Dist.* [P. 247 C 1]

S. C. Das—for Appellant.

W. A. Moore—for Respondent.

Heald, Ag. C. J.—On 21st May 1923, one Ma Thin Za mortgaged certain properties to the present respondent Ma Ma Gun by registered deed (Ex. E.). On 9th June 1924 the same Ma Thin Za mortgaged the same properties to appellant by registered deed (Ex. 1.). In suit No. 608 of 1927 of the original side of this Court appellant sued Ma Thin Za on his mortgage and he obtained a preliminary decree for sale, Ma Thin Za not contesting the suit. In that suit respondent filed an application that the property, if sold, should be sold subject to her mortgage, and by consent it was ordered: (1) that an entry be made in the sale proclamation to the effect that she claimed a mortgage over the property and that appellant denied her mortgage and also denied that if it existed it had priority over his: and (2) that the property be sold subject to respondent's mortgage "whatever it may be." Subsequently appellant obtained a final decree for sale of the property but the property has not yet been sold.

In Suit No. 128 of 1929 of the original side of this Court respondent sued Ma Thin Za on her mortgage and impleaded appellant as being a subsequent mortgagee. Ma Thin Za admitted the mortgage and did not contest the suit. Appellant denied that Ma Thin Za had ever mortgaged the property to respondent. He said that at the time of her alleged mortgage Ma Thin Za had no title to the property, and that by reason of that latches she was postponed to him.

The learned Judge on the original side found it proved that Ma Thin Za did mortgage whatever interest she had in the property to respondent, that she subsequently mortgaged that same interest to appellant, and that respondent's failure to obtain possession of the title-deeds at the time when the property was mortgaged to her was not such "gross neglect" as would postpone her to appellant under the provision of S. 78, T. P. Act.

His learned advocate has referred us to the English case of *Hewett* v. *Loosemore* (1), but that case deals with a different state of law, and so far as it is relevant seems to us to be against the learned advocate's contention. He has referred us also to *Shan Manu Mull* v. *Madras Building Co.* (2), but the part of that decision on which he relied was not entirely accepted in *Rangasami Naiker* v. *Annamlai* (3) where it was suggested that each case must be decided on its own particular facts. The cases of *A. L. R. M. Chettyar* v. *L. P. R. Chettyar* (4) and *V. E. A. R. M. Chettyar Firm* v. *A. K. R. M. M. K. Chettyar Firm* (5), which he also cited do not seem to us to go so far as the learned advocate desires us to go in this case, and we are not satisfied that the respondent in this case was guilty of "gross negligence." We therefore dismiss the appeal with costs.

Sen, J.—I concur.

S.N./R.K. *Appeal dismissed.*

(1) 68 E. R. 586.
(2) [1892] 15 Mad. 268=2 M. L. J. 95.
(3) [1908] 31 Mad. 7=17 M. L. J. 499.
(4) A. I. R. 1926 Rang. 195=98 I. C. 19=4 Rang. 232.
(5) A. I. R. 1928 Rang. 65=116 I. C. 475=7 Rang. 28.

A. I. R. 1930 Rangoon 247

HEALD AND SEN, JJ.

Lakhmichand Srinivas—Appellant.

v.

M. V. E. V. R M. Chettyar—Respondent.

First Appeal No. 222 of 1929, Decided on 30th April 1930, from order of Ormiston, J., D/- 15th August 1929, in Civil Regular No. 149 of 1929.

Civil P. C., O. 21, R. 43 — Attachment under O. 21, R. 43, which has been once removed cannot be held to be restored by mere force of decree in decree-holder's suit for declaration that property belonged to judgment-debtor.

The seizure and custody of property which has been released from seizure and custody and delivered to the possession of a person who is not an officer of the Court cannot be restored or maintained by the mere force of an order of the Court allowing the decree-holder's suit for declaration that the property belongs to the judgment-debtor. A fresh seizure and custody are necessary for the attachment and until such fresh seizure and custody have taken place, there can be no attachment under O. 21, R. 43. [P 248 C 2]

P. K. Basu—for Appellant.

S. M. Bose—for Respondent.

Heald, J.—In suit No. 22 of 1928 of the original side of this Court, the pre-

sent respondent attached a motor car R. 9123, as being the property of Abdul Aziz Khan, who was the defendant in respondent's suit. The car is said to have been attached in the possession of Abdul Aziz Khan. One Ameena applied for removal of the attachment and the Court made an order that on her executing a bond giving the car as security for the amount of respondent's decree the attachment should be removed and the car should be delivered to her. Ameena executed the necessary bond and the attachment was removed, the car being delivered to Ameena. Respondent sued for a declaration that the car belonged to Abdul Aziz Khan and succeeded in his suit. He then applied for the re-attachment of the car and an order for its re-attachment was made on 4th September 1928. Appellant applied for the removal of attachment on the ground that he bought the car from Ameena on 3rd September 1928. His application was dismissed and the suit which he subsequently filed under O. 21, R. 63 has also been dismissed, the Court holding that the attachment which was removed on Ameena's application was restored by the decree in respondent's suit, and that, therefore, the sale of the car to appellant was void by reason of the provisions of S. 64 of the Code.

Appellant appeals on the ground that he was a purchaser in good faith from an ostensible owner, and that, therefore by virtue of Excep. 1 to S. 108, Contract Act, he has a good title to the car, that because the car was not in the custody of the attaching officer, or of one of his subordinates there was no attachment at the time when he bought the car, and that in the circumstances of the case the order for special costs was unjustifiable.

It is certain that the order of the Court on Ameena's application put an end to the attachment, and the question which arises for consideration is whether or not the learned Judge on the original side was right in holding that the order passed in respondent's suit had the effect of restoring the attachment which had been removed. The learned Judge said that it was clear law for which there was no need to cite authority that the effect of a decree in a suit under O. 21, R. 63 is to set aside the order releasing the attachment and to maintain the attachment already made. He took this proposition of law from a commentary on the Code, but if he had referred to the cases cited in support of it, he would have found that none of them dealt with the case of an attachment under O. 21, R. 43. All except one dealt with attachment of immovable property and the one exception dealt with an attachment of a debt. The conditions of the attachment of immovable property and of debts are different from those of the attachment of moveable property under O. 21, R. 43. Under that rule the attachment must be made by actual seizure, and the attaching officer must keep the property in his own custody or in the custody of one of his subordinates. The seizure and custody of property which has been released from seizure and custody and has been delivered to the possession and custody of a person who is not an officer of the Court cannot in my opinion be restored or "maintained" by the mere force of an order of the Court. A fresh seizure and custody are necessary for the attachment, and until such fresh seizure and custody have taken place, there can be no attachment under O. 21, R. 43.

I am of opinion, therefore, that the learned Judge on the original side was mistaken in holding that the attachment under O. 21, R. 43, which had been removed, was restored by the mere force of the decree in respondent's suit, and that the transfer of the car by Ameena to appellant was void under S. 64 of the Code. I would, therefore, set aside the judgment and decree of the learned Judge on the original side, including the order for special costs, and I would remand the suit for trial on the merits, the costs of the hearing in this Court to abide the final order in the suit in respect of costs.

Sen, J.—I concur.

P.N./R.K. *Case remanded.*

* A. I. R. 1930 Rangoon 249
Full Bench

RUTLEDGE, C. J. AND BROWN AND ORMISTON, JJ.

Commissioner of Income-tax—Referee.
v.
K. K. C. T. Chettyar Firm—Assessee.

Civil Ref. No. 1 of 1930, Decided on 28th February 1930, by Commissioner of Income-tax.

***(a) Income-tax Act, S. 10 (2) (3)—Money lent by partner in addition to initial capital at reasonable rate of interest and used as capital expenditure—Interest paid on such loan must be deducted.**

It is a question of fact in each case whether the further advance made by a partner over and above the capital agreed to be paid in by him is really a loan or an increase of his capital in the business made with the consent of the other partners. Where a partner as a partner genuinely lends money, beyond the initial capital, to the partnership at an agreed reasonable rate of interest and the money is used for capital expenditure, the interest paid by the partnership to him in the year of assessment must be deducted in computing the profits or gains of the partnership as provided by S. 10 (2) (3): *A. I. R.* 1924 *All.* 137, *Dist.*; *A. I. R.* 1928 *Mad.* 923 (*S. B.*), *Appr.* [P 251 C 1, P 252 C 1]

(b) Income-tax Act, S. 10 (2) (3)—Interest paid to partner on his loan does not depend on earning of profits.

In the case of a firm the payment of interest made by partnership to a partner on loans advanced by him cannot be held to be in any way dependent on the earning of profits. [P 253 C 1]

A. Eggar—for Commissioner.
Foucar—for Assessee.

Ormiston, J.—This is a reference by the Commissioner of Income-tax under S. 66 (2), Indian Income-tax Act, 1922. The K. K. C. T. Chettyar firm consists of two partners. The partnership deed, dated 9th July 1926, recites that the parties as partners have been carrying on business chiefly in money-lending for about a decade in Mogul Street, Rangoon, under the style of K. K. C. T.,

"each party holding one half-share in the partnership and contributing equal share of capital amounting to Rs. 27,500 in all."

Clause 3 sets out that the partners resolve:

(a) that the partnership is to continue up to January 1928, and thereafter as long as they desire to continue in partnership either in the same equal shares or otherwise;

(b) to embark on business other than money-lending as may from time to time be expressly agreed upon, and

(c) "also each of us to invest as deposit on fixed or temporary loans such moneys as we may command at such rates of interest between the partnership on the one hand and each of us on the other, and such deposits or loans shall have nothing to do with the capital invested and be treated exactly on the same footing as any borrowing from strangers."

The natural construction of sub-Cl. (c) is that it should be read as if after the words

"at such rates of interest between the partnership on the one hand and each of us on the other"

the words "as may be agreed upon" had been inserted. An excellent reason for entering into a writing partnership agreement would be that thereby the partners could secure the advantage of being a registered firm.

For the year 1928-29 (during which the provisions of this instrument were in force), the Income-tax Officer assessed the firm on an income of Rs. 80,302. An item of Rs. 26,017-0-3 made up of two sums of Rs. 8,369-1-9 and Rs. 17,647-14-6 is shown in the firm's accounts as paid to the first and second partners respectively as interest on investments standing in their names in its books. The firm claimed that this item should be treated as an allowance under S. 10 (2) (3) of the Act as being the amount of interest paid

"in respect of capital borrowed for the purposes of the business, where the payment of interest thereon is not in any way dependent on the earning of profits."

The Income-tax Officer held that the item was interest on the "surplus capital of the partner" and was not admissible as an allowance under S. 10 (2) (3). The firm appealed to the Assistant Commissioner who, acting under S. 31, confirmed the assessment. The firm applied to the Commissioner under section 66 (2) for a reference to the Court of a question of law arising out of the order. The Commissioner refused to refer the question in the form asked for by the firm. He referred two questions:

(1) Whether the Commissioner of Income-tax is entitled to hold in this case that the investments in the firm in the name of the partners do not represent a genuine borrowing of capital by the firm?

(2) If the Commissioner cannot so hold, is the sum of Rs. 26,017-0-3 credited to the partners in the firm's accounts as interest on capital borrowed from the partners an admissible deduction under S. 10 (2) (3), Income-tax Act?

The Income-tax Officer found that the money employed by the firm in its

business was Rs. 11,45,800 made up as follows:

	Rs.
Shop capital ...	27,500
Investments in the name of 1st partner ...	86,000
Investments in the name of 2nd partner ...	1,82,000
Loans from banks in Madras...	4,00,000
Loans from banks in Rangoon.	3,00,000
Other liabilities ...	1,50,000
Total ...	11,45,800

The Commissioner has come to the conclusion that the investments in question are not genuine borrowings of capital by the firm, and this for three reasons. In the first place he points to the very small amount of shop capital and is of the opinion that it is a merely nominal sum having no relation whatever to the business done by the firm. He argues that, if it is not open to the Income-tax Department to find that this sum of Rs. 27,500, which represents only 1/40 of the capital used in the business is a nominal sum, it would be possible for any firm to contend that the whole of its capital with the exception of a rupee or two is borrowed. He next observes that there is no document, such as a promissory note, evidencing the loan and says that, it being the firm's contention that the loans by the partners were on the same footing as loans by strangers, he does not see why promissory notes were not executed as they would have been if the money had been borrowed from strangers. His third reason is that on such a small nominal capital the firm would not be able to raise Rs. 7,00,000 from the bank, unless it could show that the partners had much more than Rs. 27,500 invested in bank.

Assuming that the investments are genuine borrowings, the Commissioner is of the opinion that the item in question is disallowable since it does not fulfil the conditions prescribed in S. 10 (2) (3). His view is that in the case of a firm the payment of interest to partners is dependent on the earning of profits in every case since if there are no profits the only fund out of which the interest can come is the partner's own capital. In the case of a dissolution, he says, this would lead to the absurdity of a partner paying interest out of his own capital. In the present case the interest claimed is almost as great as the shop capital. A loss in one year would wipe out the whole of the shop capital. If the interest on the investments is to be paid at all, it must, he says come from the partners' pockets and in that case the result would be that a partner would have to forgo the amount of the interest on his advances corresponding to his share in the firm— in this case a half.

The Commissioner has made the present reference in view of an assumed conflict between decisions of the Allahabad and Madras High Courts. Mr. Foucar put forward an argument, based on S. 66 (2) of the Act, that in a reference to the Court under that subsection, it is not open to the Commissioner to come to any finding of fact, and that the only facts which the Court is entitled to consider are those found by the Assistant Commissioner who decided the appeal under S. 31. In my opinion it is not necessary to do more than refer to this contention, for in the present instance the case as stated by the Commissioner affords ample materials for answering the question referred by him.

That a partner may make advances to his firm independent of his share in the capital thereof is clear law and is not in dispute: see Lindley on Partnership, Edn. 9, pp. 407, 478).

In re, Lalla Mal Hardeo Das (1), a firm claimed that interest paid on account of money advanced by the partners for the purposes of the business should be reckoned as an allowance under S. 10 (2) (3). The partnership deed (Cl. 13), provided that

"whatever capital be needed for the joint business of the firm it will be paid in by the shareholders according to their shares."

The Assistant Commissioner who examined the book of the firm reported that the money in respect of which the interest was charged in the account was not really

"capital borrowed for the purposes of the business,"

but represented only an advance of capital by the partner. The question referred was:

"is the sum paid as interest to a partner for capital put in to a firm an allowance admissible under S. 10 (2) (3) ?

(1) A. I. R. 1924 All. 137=75 I. C. 339=46 All. 1.

The answer was :

"No; such interest represents merely an assignment of a part of the net profit for the year in favour of partners who are regarded as entitled to such assignment by reason of special advances of capital made by them in the course of the year "

The learned Judges went on to observe that the question whether there has been an advance of capital by particular partners or a bona fide borrowing of money by the firm in which the lender happens to be a partner must be treated as one of fact in every case. This case is of little assistance, for Cl. 13 of the partnership deed amply supported the Commissioner's finding that the money in respect of which the interest was paid was not capital borrowed but represented only an advance of capital. *Commissioners of Income-tax. Madras* v. *Subramanian Chettiar* (2) is directly in point. The head-note is as follows :

"Where a partner as partner genuinely lends money beyond the initial capital to the partnership at an agreed reasonable rate of interest and the money is used for capital expenditure, the interest paid by the partnership to him in the year of assessment must be deducted in computing the profits or gains of the partnership as provided by S. 10 (2) (3) of the Indian Income-tax Act."

The facts are similar to those in the present reference. There was a partnership deed between two Chettyars according to the terms of which three-fourths of the agreed initial capital of Rs.21,000 was contributed by the senior partner and one-fourth by the junior partner. They were to share the profit and loss in same proportions. The document also contemplated that if necessary, further sums might be contributed by either party towards the additional capital of the business and that interest should be charged upon it. The Commissioners found that the senior partner advanced a sum of Rs. 4,01,251 as additional capital in parts at various times and that the junior contributed comparatively a very small sum. The amount of interest on the senior partner's advances was Rs. 40,757, and that on those of the junior partner Rs. 78. The firm claimed deduction of these two items under S. 10 (2) (3). The Assistant Commissioner held that the whole of the additional sums anvanced by the partners must be regarded really as the capital of the firm. On appeal the Commissioner in his order conceded that a partner may sometimes occupy a dual capacity, that is he may lend a definite sum of money on a formal document, in which case it would be regarded as a loan, but he was of the opinion that in the case before him the sums advanced by the partners must be regarded, not as loans, but as "surplus capital."

The vakil for the Commissioner argued that, though a partner may make a loan to the partnership, he cannot lend capital to it and that additional capital required for the purposes of the partnership can be borrowed only from outsiders, in other words, that though capital can be borrowed from outsiders, it cannot be borrowed from a partner. Dealing with this argument, Coutts-Trotter, C. J., and Ramesam, J., who delivered the leading judgment, observed that the subclause itself did not contain any limitation as to the person from whom capital was to be borrowed and that once it is conceded that a partner can lend money just like any other third person, it is difficult to see why he cannot lend capital also. They went on to say :

"The Commissioner seems to think that if a sum of money is deposited with the partnership temporarily for reasons unconnected with the business, it is a loan, but if it is invested for a much longer time than the business required it, the initial capital being insufficient, then it becomes surplus capital and not a loan. All sums lent to the partnership are loans, whoever the parties are and whatever the purpose for which they are lent. After being borrowed if they are used like capital they become borrowed capital."

In the case before them they held that the Commissioner himself having found that the sums were capital, there being no doubt that it was borrowed from the partners, S. 10 (2) (3) applied. The learned Judges then remarked on certain findings of fact by the Commissioner. The first was that the sums in question were not capital within the meaning of the sub-clause. This finding, they said, was based on facts which were common ground plus certain supposed legal principles for which there was no authority :

"Whenever a sum is borrowed and it is afterwards used for capital expenditure, it is not open to the Commissioner to find that it is not borrowed capital as there is no such principle of law as is contended before us on behalf of the Commissioner."

(2) A. I. R. 1928 Mad. 923=110 I. C. 889=51 Mad. 787 (S. B.).

They made similar observations about the finding that from the beginning the initial capital was nominal and that from the beginning additional capital was intended. As to this they said that under the deed a partner was not bound to advance any additional capital but that if he did so he was to get interest. It was not, therefore, open to ignore the difference between the characteristics of initial capital and of so-called surplus capital. The fact that a large business was contemplated for which the small initial capital would not be enough and additional capital would, therefore, be required had no bearing on the legal aspect of the question, additional capital having different incidents from initial capital. A further reason why it was not open to regard additional capital as really initial capital was that a difference between the amounts contributed by the partners would have no bearing on the proportion in which the profits are taken :

"The Commissioner's findings being based on misconceptions of law cannot be accepted as findings of fact binding upon us."

On the question whether interest paid on the advances can be said to be "in any way dependent on the earning of profits" they said that S. 10 (2) (iii) applies if interest is payable whether profits are earned or not.

Wallace, J., agreed with this judgment, the case being one where on the facts found there was a genuine borrowing of capital at the prevailing market rate of interest. He made the reservation that in other cases it might not fall to be decided as a point of fact whether the alleged borrowing of capital was not a genuine loan but a mere device to evade the Act. He instanced the extreme case of a partnership with a nominal capital when the partners lend additional capital at a fancy rate of interest obviously designed to absorb all probable profits and thus enable them to submit a nil profits return. Beasley, J., also agreed and made the same reservation.

Tiruvenkata Acharyar, J., in a concurring judgment, said that it is a question of fact in each case whether the further advance made by a partner over and above the capital agreed to be put in by him is really a loan or an increase of his capital in the business made with the consent of the other partners. In the case under reference, he observed, the question referred treated the advances as loans made by the partner to the firm for being utilized as capital and there seemed to be no ground for questioning that fact.

On the first question referred Mr. Eggar contends that the test to be applied is that suggested by Wallace, J., whether the alleged borrowing is a genuine loan or a mere device to evade the Act. He says that in the partnership agreement in the case under reference the rate of interest to be paid on advances is left to the discretion of the partners and that it is open to them from time to time to vary the rate after the advance has been made. The natural construction of the agreement, is that, inasmuch as borrowing from partners is to be on the same footing as borrowing from outsiders, the rate of interest is to be fixed at the time the loan is taken and should not vary from that agreed upon during its currency. There is no suggestion in the reference to show that exorbitant interest has been charged or that the rate of interest originally agreed has been varied during the currency of the loans. The reference rather assumes the contrary.

I myself, however, am of the opinion that the more correct view is that of Coutts-Trotter, C. J., and Ramesam, J., with the qualification, implied in their judgment and expressed in that of Tiruvenkata Acharyar, J., that the question is whether a further advance by a partner is intended to be a loan or as an increase of his capital in the business. There is nothing to prevent a genuine business being carried on with a nominal capital, the vast bulk of the capital being advanced by outsiders. If it be conceded that a partner may lend capital to the firm, what difference in law does it make that the vast bulk of the capital is advanced by the partners themselves ? Mr. Eggar has cited a number of authorities to show that a partner cannot recover a debt due to himself from the firm without suing for an account. For the purpose of this reference it is unnecessary to express an opinion on the point. If there is a liability by the firm to a partner the manner in which it is to be enforced is immaterial. If in any year there is a loss the part-

ners individually are under an obligation to put the firm in funds to pay the creditors and amongst the creditors are the individual partners who have made advances.

I now turn to the so-called finding of fact by the Commissioner. To it the observations of the Madras High Court in relation to the findings of the Commissioner in the case before it are applicable. I have already dealt with the Commissioner's finding so far as it is based on the extreme case cited by him. I would only add that it is legitimate for partners to arrange the terms on which they will carry on business as they think proper. If it is thought inexpedient that they should have such liberty the matter is one for interference by the legislature. The fact of the liability of a firm to its members is a fact entirely independent of the mode of proof of each liability or whether it is secured and, if so, in what manner. The Commissioner's finding that the banks would not lend Rs. 7,00,000 to a firm which had only a capital of Rs. 27,500 is a mere speculation. A more probable speculation is that banks look to the credit of the individual partners rather than to the capital of the firm.

On the second question referred my view is that the payment of interest is in no way dependent on the earning of profits. I am unable to follow the reasoning of the Commissioner. It by no means follows that if there are no profits the only sum out of which the interest can come is the partner's own capital. For whether he has capital or not he is liable to put the partnership in sufficient funds to pay the interest. If he has no capital left he must find the money from other sources. A simple illustration will make the position clear. Supposing that *A* and *B* are partners in equal shares. *A* lends the partnership Rs. 1,00,000, the interest on which is Rs. 10,000, and *B* lends it Rs. 50,000, the interest on which is Rs. 5,000. If there is a loss the partners between them have to pay the partnership Rs. 15,000. Each partner pays Rs. 7,500. *A* receives back Rs, 10,000 and *B* receives back Rs. 5,000. This shows that the interest does not depend on the profits.

My answer to the questions referred is as follows :

(1) The Commissioner of Income-tax is not entitled to hold in this case that the investments in the firm in the names of the partners do not represent a genuine borrowing of the firm.

(2) The sum of Rs 26,017-0-3 credited to the partners in the firm's accounts as interest on capital borrowed from the partners is an admissible deduction under S. 10 (2) (3), Income-tax Act.

I would order the Commissioner to pay to the K. K. C. T. Chettyar Firm the costs of the reference. Advocates' fee 10 gold mohurs.

Rutledge, C. J.—I agree.

Brown, J.—I agree. There may be cases in which advances are made in the form of loans in such a manner and under such circumstances as to show that it was not the intention to treat these advances as loans, and in which it could be held that the advances were not really loans at all. But in the facts of the present case as stated there are no indications which would justify such a finding. There is no allegation here that the loans were not made at fixed rates of interest, or that there is anything abnormal in the manner in which the interest is paid. The advances must therefore be treated as loans, and the provisions of S. 10 (2) (3) of the Act must be held to apply.

P.N./R.K. *Reference answered.*

A. I. R. 1930 Rangoon 253

CARR, J.

Emperor

v.

Nga Po Win—Accused—Respondent.

Criminal Appeals Nos. 1504 and 1505 of 1929, Decided on 6th January 1930.

(a) Burma Village Act, S. 28—S. 28 does not apply where Magistrate takes cognizance of offence of his own motion under Criminal P. C., S. 190 (1) (c).

The terms of S. 28, Burma Village Act, must be strictly construed. The section applies only to the entertainment of a complaint and does not impose any restriction upon the prosecution of a headman if the prosecution is instituted otherwise than on complaint. It does not, therefore, apply to a case in which a Magistrate of his own motion takes cognizance of an offence under the provisions of S. 190 (1) (c), Criminal P. C. [P 254 C 1, 2]

(b) Criminal P. C., S. 190 — Proceedings of enquiry into certain unauthorized horse-races submitted to Deputy Commissioner — Latter can take cognizance of offences in his capacity of District Magistrate.

Where the Township and Sub-Divisional Officers enquire into certain unauthorized horse

races and submit the proceedings to the Deputy Commissioner who on considering the report records an order in his capacity as District Magistrate, taking cognizance of offences, the latter has jurisdiction to take cognizance of offences in a manner he did : 43 *Mad.* 709, *Rel. on*; 37 *Cal.* 221, *Cons.* [P 255 C 1]

Lambert—for the Crown.

Paul—for Respondent.

Judgment.—On two different days in February and March last unauthorized horse races were held at a village in the Henzada District. This matter was enquired into by the Township and SubDivisionalOfficers whose proceedings were submitted to the Deputy Commissioner. On considering their reports the Deputy Commissioner recorded an order in his capacity as District Magistrate taking cognizance of the two offences and sending them to another Magistrate for trial. The present respondent was one of the persons thus prosecuted and in both cases he was convicted by the trying Magistrate. On appeal to the Sessions Court the convictions of the respondent were set aside and he was acquitted on the ground that the prosecution of the respondent, who was a village headman, could not be instituted except with the sanction of the Deputy Commissioner under S. 28, Burma Village Act. The Sessions Judge held that the procedure adopted by the Deputy Commissioner and District Magistrate was incorrect, and that the proper course would have been for the Deputy Commissioner to sanction the prosecution of the headman. The Local Government now appeals against these orders of acquittal.

In the cirumstances above described I should be inclined to hold that, if S. 28, Village Act, were applicable in the present case, the procedure adopted by the Deputy Commissioner in his dual capacity as Deputy Commissioner and District Magistrate was a sufficient compliance with the requirements of that section. But I do not think it necessary to go into this question more fully, for, in my opinion, from the terms of S. 28, that section is not applicable at all in the present case.

The section reads:

"No complaint against a headman or member of a village committee or rural policeman of any act or omission punishable under this Act shall be entertained by any Court unless the prosecution is instituted by order of, or under authority from the Deputy Commissioner".

The terms of this section must be strictly construed, and on such a construction it is clear that the section applies only to the entertainment of a complaint and does not impose any restriction upon the prosecution of a headman if the prosecution is instituted otherwise than on complaint. It does not, therefore, apply to a case in which a Magistrate of his own motion takes cognizance of an offence under the provisions of S. 190 (1) (c), Criminal P. C. The Sessions Judge was, therefore, clearly wrong in allowing the appeals of the respondent on the ground given by him.

For the respondent it has been urged: firstly, that on the evidence the conviction of the respondent was not justified: and, secondly, that the District Magistrate has no power under S. 190 (1) (c) Criminal P. C., to take cognizance of an offence on information received by him in a different official capacity. In support of this second proposition I have been referred to the case of *Lakhi Narayan Ghose* v. *Emperor* (1). In that case it was held by one Judge of the Calcutta High Court that a Magistrate who has received information in another public capacity cannot act on it in his capacity of a Magistrate and initiate criminal proceedings under S. 190 (1) (c), Criminal P. C. The learned Judge came to this finding following the case of *Thakur Pershad Singh* v. *Emperor* (2), in which he himself and another learned Judge had come to a similar decision. It may be noted that in this latter case the Judges said that by his action in that particular case the Magistrate was practically making himself a Judge in his own case. But in the case of *Lakhi Narayan Ghose* v. *Emperor* (1), the other Judge Carnduff, J. was not prepared to accept this decision. He pointed out that the decision clearly went beyond the terms of the Criminal Procedure Code. This view has also been taken by the Madras High Court in the case of *Sundarasan* v. *Emperor* (3).

I agree with the view taken by the learned Judges in this last case that the effect of the earlier Calcutta decision would be to add to the terms of S. 190,

(1) [1910] 37 Cal. 221=11 Cr. L. J. 305=6 I. C. 276.

(2) [1906] 10 C. W. N. 775=3 Cr. L. J. 473.

(3) [1920] 43 Mad. 709=55 I. C. 684=21 Cr. L. J. 348.

Criminal P. C., provisions which cannot be found therein. In my view, the District Magistrate had jurisdiction to take cognizance of the offences disclosed in the present cases. As regards the facts, it is true that the Sessions Judge has not come to any definite finding as to whether it was or was not proved that the respondent committed the offences of which he had been convicted. The case should now, I think, go back to the Sessions Judge in order that he may decide the appeals on the fact. I allow these appeals, set aside the orders of acquittal passed in favour of the respondent, Nga Po Win, and remand the appeals of the respondent to the Sessions Court for determination on their merits.

P.N./R.K. *Case remanded.*

A. I. R. 1930 Rangoon 255

BROWN, J.

A. M. K. M. Chettyar Firm— for Appellant.

v.

A. K. M. L. Chettyar Firm and *others* —Respondents.

Special Second Appeal No. 331 of 1929, Decided on 27th January 1930, against decree of Dist. Judge, Bassein, D/- 2nd April 1929.

(a) Transfer of Property Act, S. 84—Mortgagor asking mortgagee to accept mortgage money—Mortgagee refusing—There was valid tender though money was not actually offered and interest would stop from such tender.

Where the mortgagor asks the mortgagee to accept the mortgage money, and the mortgagee refuses to accept it, there is a valid tender although money would not be actually offered for the practice of the Courts is not to require a party to make a formal tender where from the facts stated in the bill or from the evidence it appears the tender would have been a mere form and the party to whom it was made would have refused the money. Hence under S. 84 no interest on the mortgage is chargeable from the date when the mortgagor asks to accept mortgage money: *A. I. R.* 1923 *P. C.* 26, *Foll.* [P 256 C 2]

(b) Transfer of Property Act, S. 84—Subsequent mortgagee redeeming prior mortgage can take advantage of tender of mortgage money made by mortgagor to prior mortgagee.

Subsequent mortgagee seeking to redeem prior mortgage can take advantage of a tender of mortgage money made under S. 84 to the first mortgagee and so would not be liable to pay interest from the date of such tender. [P 257 C 1]

S. N. Sen—for Appellant.

A. H. L. Leach and *Sanyal* for *B. K. B. Naidu*—for Respondents.

Judgment.— The property in suit was first of all mortgaged to the respondent Chettyar Firm by respondents 2 and 3. On 8th February 1928 the property was again mortgaged to the appellant firm. The appellant firm has sued as puisne mortgagee to redeem the first mortgage. They claim that a legal tender of the amount due under that mortgage to the mortgagee was made on 8th February 1928, and that they are entitled, therefore, to redeem on payment of the money due on the mortmortgage on that date without paying any further interest. The respondent firm denies that a legal tender was made and claims that interest must be paid up to date. The trial Court held that the tender of the money due had been proved, and gave the plaintiff-appellant a decree in accordance with the claim in their plaint. The District Court set aside this decree in appeal in and passed a preliminary decree for redemption allowing interest up to the date of payment. The plaintiff firm has appealed against this decree.

The agent of the appellant firm Kumarrappa Chettyar, says that the mortgage was made to him on 8th February 1928. At the same time the mortgagor, Ko Po Dwe, took a loan of Rs. 700 on a promissory note, and the total sum advanced was Rs. 2,700. Later on Ko Po Dwe told him that he had made a tender to the defendant 1 firm of the money due to that firm but that the tender had been refused. Two days later he said that a further tender had been refused and a lawyer's notice had been sent to the firm. After this a deposit of the amount alleged to be due on the mortgage was made in the Township Court but this amount has subsequently been withdrawn as the Township Court had no jurisdiction to accept such a deposit. Negotiations for settlement of this mortgage then took place in the presence of one Parabat, a pleader, but the negotiations fell through. Ko Po Dwe supports the story of Kummarrappa Chettyar. He says that on the day he mortgaged the property to him he went with the money to the office of the defendant firm where he found the Chettyar's clerk. The clerk asked him to pay the interest only and not the principal and on his replying that he

wanted to pay both the principal and the interest the clerk told him that Latchamanan (the agent) would be there in the evening. He went again in the evening with the Headman Ko Pyu and one Maung Po Ke and asked Latchamanan the agent of the respondent firm, to allow redemption on payment of the debt in full. Latchamanan refused to accept money borrowed from another Chettyar firm. The Headman Maung Pyu corroborates the story of Ko Po Dwe. As to this incident the respondent Latchamanan admits that Ko Po Dwe came to pay the mortgage money, but says that he told him that he could pay if he liked and Ko Po Dwe then went away saying he would bring the money and did not come back again. Latchamanan's evidence on this point is supported by that of his clerk Periyakarappan. The trial Court believed the evidence of Ko Po Dwe on this point. The District Court came to no definite finding as to what took place on this occasion, though the learned District Judge appears to have thought Maung Pyu's evidence to be unworthy of credit because he states that the Chettyar defendant was present on the occasion of the second visit to tender payment, whereas it was clear that he was not present on that occasion. Maung Pyu may have made an incorrect statement on this point, but I see no reason for differing from the view of the trial Judge who examined the witness as to what happened on the 8th February 1928. It seems clear that a second mortgage was effected on that date and it is not very likely on the face of it that Ko Po Dwe would have asked the respondent Chettyar to accept the money due and then have taken no further steps in the matter.

Chinniah Pillay's evidence shows that Ko Po Dwe was seriously attempting to redeem the mortgage. The trial Judge believed the evidence of Po Dwe and Maung Pyu and his finding on this point should in my opinion be accepted. It is clear that on that day Po Dwe had received from the appellant Rs. 2,700. Maung Pyu says that when they went to redeem Po Dwe had with him more than Rs. 2,000. Admittedly the sum due on the mortgage on that date was less than Rs. 2,000.

A good deal of argument in this case has been directed to the question whether under the mortgage interest was payable according to the Burmese Calendar or the Gregorian Calendar; but this question does not arise in connexion with the first tender. Po Dwe himself says that it was his intention to pay interest according to the Burmese month, and there is no reason for not believing him on this point. It was certainly not on this ground that the tender of that date was not accepted. Latchamanan Chettyar told Po Dwe in the presence of this pleader that he would not accept the tender. In the circumstances, although the money may not have been actually offered to the Chettyar, it seems to me that there was a valid tender.

In the case of *Venkatarayanim Garu* v. *Venkata Subadrayamma*(1) (at pp. 114 and 115 *of* 46 *Mad.*) their Lordships of the Privy Council in dealing with the question of tender remarked as follows:

> Before reading this reply it is well to bear in mind that has been stated by Vice-Chancellor Wigram in the case of *Hunter* v. *Daniel* (2) "as to the true position in such a case. He there says: The practice of the Courts is not to require a party to make a formal tender where from the facts stated in the bill or from the evidence it appears the tender would have been a mere form and that the party to whom it was made would have refused the money. Their Lordships think that this is a true and accurate expression of the law and the question therefore is whether the answer that was sent on behalf of the mortgagee amounted to a clear refusal to accept the offer."

The answer of Latchamanan Chettyar on 8th February was a clear refusal to accept it. That being so, the provisions of S. 84, T. P. Act, come into play and no interest is chargeable on the mortgage from that date.

It has been objected that the present appellant cannot claim the advantage of the tender made by the original mortgagor. The District Judge referred to S. 74, T. P. Act, and expressed the opinion that to claim the benefit of that section the subsequent mortgagee himself must pay the prior mortgagee the full amount due on the mortgage. S. 74 lays down the procedure to be followed by a subsequent mortgagee if he wishes to acquire the rights of the prior mortgagee keeping

(1) A. I. R. 1923 P. C. 26=71 I. C. 1035=50 I. A. 41=46 Mad. 108.

(2) [1846] 4 Hare. 420=9 Jur. 520=14 L. J. Ch. 194.

the prior mortgage alive. That is not what is alleged to have been attempted in the present case. What the plaintiff claims in the present case is that the mortgagor tendered the amount due on the previous mortgage, and if this tender had been accepted that mortgage would have been extinguished. The section applicable to such a case is S. 84. S. 83 sets forth the conditions under which a mortgagor or any other person entitled to institute a suit for redemption may deposit in Court the money due under the mortgage, and S. 84 states :

"When the mortgagor or such other person as aforesaid has tendered or deposited in Court under S 83 the amount remaining due under the mortgage interest on the principal money shall cease from the date of the tender."

This section clearly lays down that interest shall cease when the mortgagor has tendered the amount and it appears to me clearly to govern the present case. The objection has not in fact been seriously pressed before me.

There remains the amount due at the time the tender was made. The plaintiff states that the amount due for interest on that date was Rupees 308-14-0. This sum was calculated on the assumption that a month in the document of mortgage means a month under the Gregorian calendar. It has been contended before me that that is not correct and that a month must be held to be a lunar month. As I have held that a tender in either view of the matter was duly made this point is now only of a minor importance as it would merely make a difference of a few rupees to the amount of interest due on 7th February 1928.

In the case of *South British Fire & Marine Insurance Co.* v. *Brojo Nath Shaha* (3) it was held that the term "month" in all contracts means in India as in England a lunar month. The reasons for this finding are given at pp. 535 and 536 of the judgment. As pointed out therein the General Clauses Act and S. 25, Lim. Act, do not refer to the meaning of the word "month" in this connexion. It would seem fairly clear from the evidence in the present case that the parties understood in their contract that interest would be payable by the Burmese on lunar month and not by the calendar month. I think, therefore, it may be accepted that in the present case interest was payable by the Burmese month. The amount involved by this decision is trifling and the appellant has substantially won his appeal.

(3) [1909] 36 Cal. 516=2 I. C. 573.

I set aside the decree of the District Court and pass a decree in favour of the appellant for the redemption of the mortgage on payment of the principal Rs. 1,500 and such interest as was due after allowing for the payment of Rs. 315 corresponding to the 3rd Lazok of Tahodwe, 1289, under the Burmese calendar. Respondent 1 will pay the costs of the appellant throughout. The cross-objection is dismissed without costs.

S.N./R.K. *Decree set aside.*

* A. I. R. 1930 Rangoon 257

BROWN, J.

A. K. R. P. L. A. Chettyar Firm—Appellant.

v.

S. Meher Singh—Respondent.

Second Appeal No. 437 of 1929, Decided on 3rd February 1930, against decree of Dist. Court, Insein, D/- 8th July 1929.

*** Civil P. C., S. 141 and O. 9, R. 9—Sale proceeds of mortgaged properties insufficient — Application for personal decree against mortgagor dismissed for default—Fresh application is barred under O. 9, R. 9—Civil P. C., O. 34, R. 6.**

An application for a personal decree against a mortgagor where the sale proceeds of the mortgaged properties are insufficient to satisfy the decree is not an application in execution proceedings but is an application for a decree. Where such application is dismissed for default a fresh application is barred under O. 9, R. 9. Proper remedy of decree-holder is to set aside the order dismissing the application for default: 17 *All.* 106 (*P.C.*) and *A.I.R.* 1925 *Cal.* 834, *Rel. on.* [P258 C 2 ; P 259 C 1]

Anklesaria—for Appellant.

Patel—for Respondent.

Judgment.—The appellant brought a suit against the respondent and claimed a preliminary mortgage decree. After the expiry of six months he obtained a final decree for sale of the properties. The properties were put up to sale and after crediting the amount realized by the sale to the decree there still remained a balance due under the original decree. The appellant then made a written application to the Court for a personal decree against the mortgagor. Notice was issued on the mortgagor and

on the date fixed for the hearing of the application the mortgagor was represented by counsel, but the decree-holder was absent. The application was, therefore, dismissed for default. The decree-holder then, without making any application to have the order of dismissal for default set aside, filed a fresh application for a personal decree. This application was opposed by the defendant, but a personal decree was finally passed by the trial Court. The respondent appealed to the District Court and the District Court set aside the decree. The appellant now asks this Court to restore the personal decree.

The sole question for decision in this appeal is whether the provisions of R. 9, O. 9, Civil P. C., apply to the case.

It is contended on behalf of the respondent that in view of the provisions of S. 141 of the Code, R. 9 applies to a case such as the present. S. 141 lays down that the procedure provided in this Code in regard to suits shall be followed as far as it can be made applicable in all proceedings in any Court of civil jurisdiction. It is conceded that this section has no application to execution proceedings. That was decided by the Privy Council in the case of *Thakur Prasad* v. *Fakir Ullah* (1). If then an application for a personal decree be held to be an application in execution proceedings the ordinary procedure relating to suits would not apply and the dismissal of the first application for a personal decree would be no bar to subsequent application for a similar decree. It seems to me, however, that the District Court was clearly right in its views that the proceedings cannot be regarded as execution proceedings. This point was decided by a Full Bench of the High Court of Calcutta in the case of *F. H. Pell* v. *M. Gregory* (2). The actual point for decision in that case was whether the provisions of Art. 181, Lim. Act, applied to an application for a personal decree under the provisions of R. 6, O. 34. The Bench decided that that article did apply and held that an application for a personal decree was not an application in execution. R. 6, O. 34 lays down:

"Where the net proceeds of any such sale are found to be insufficient to pay the amount due to the plaintiff, if the balance is legally recoverable from the defendant otherwise than out of the property sold, the Court may pass a decree for such amount."

It was pointed out in the judgment referred to in *Pell's* case (2), that when the Court has an application for such a decree before it it has to be satisfied that the balance is legally recoverable from the defendant personally. That is not a matter for decision in execution. No authority has been cited to me for the contrary view and it must be held that the application in question was not an application in execution proceedings. It is, however, contended on behalf of the appellant that this does not conclude the matter. It is suggested that, even if the application be not an application in execution it does not necessarily follow that the provisions of R. 9, O. 9, apply to the case. In *Thakur Prasad's* case (1) their Lordships of the Privy Council remark at p. 111 of their judgment:

"But the whole Chap. 19 of the Code consisting of S. 121 is devoted to the procedure in executions, and it would be surprising if the framers of the Code had intended to apply another procedure, mostly unsuitable, by saying in general terms that the procedure for suits should be followed as far as applicable. Their Lordships think that the proceedings spoken of in S. 647 include original matters in the nature of suits such as proceedings in probates, guardianships and so forth, and do not include executions."

Following these principles I am of opinion that the section must be held to include the decisions of an application for a personal decree under R. 6, O. 34. According to the view taken by the Calcutta High Court in *Pell's* case (2) the application must be treated in the nature of an original application for a decree. There is no special procedure in the Code laid down for such an application and that being so the general provisions laid down in S. 141 must be held to apply.

I think it is clear from the remarks I have quoted from the judgment in *Thakur Prasad's* case that their Lordships of the Privy Council would have held that for the hearing of an original application in probate proceedings the provisions of O. 9, Civil P. C., would apply. I see no reason why they should not also apply to the present application. R. 8, O. 9, says:

"Where the defendant appears and the plaintiff does not appear when the suit is called on for hearing, the Court shall make an order

(1) [1895] 17 All. 106=22 I.A. 44=6 Sar. 526 (P.C.).

(2) A.I.R. 1925 Cal. 824=52 Cal. 823 (F.B.).

that the suit be dismissed unless the defendant admits the claim, or part thereof;"

and R. 9 provides that:

"Where a suit is wholly or partly dismissed under R. 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action."

In the present case the proceedings in the application for personal decree were called on for hearing; the defendant appeared; the plaintiff did not appear and the Court made an order dismissing the suit. The plaintiff is, therefore, precluded under R. 9 from making a fresh application. His remedy was to apply to the Court to set aside the order of dismissal.

I have had certain authorities cited to me in which it has been held that the dismissal for default of suits for redemption or partition do not necessarily preclude the bringing of a fresh suit. But these decisions are based on the special circumstances of the cases to which they refer, the cause of action in each case being of a nature which could not be determined by the order passed. It was in fact in each case a continuing cause of action. That cannot be said to be the case here. There is only one cause of action here and once a claim on that cause of action has been decided and adjudicated on, no further cause of action remains. I am of opinion that the District Judge has rightly decided that the application in the present case was barred under the provisions of R. 9, O. 9, Civil P. C. I dismiss this appeal with costs.

P.N./R.K. *Appeal dismissed.*

** A. I. R. 1930 Rangoon 259

HEALD, AG. C. J. AND OTTER, J.

S. M. Mitra—Appellant.

v.

Corporation of the Royal Exchange Assurance—Respondent.

Civil Misc. Appeal No. 134 of 1929, Decided on 26th March 1930, from order of Original Side in Civil Misc. Appln. No. 86 of 1929.

(a) Letters Patent (Rangoon), Cl. 13 — Order of Judge on original side of High Court refusing to allow person to sue as pauper is appealable as judgment —(Per *Heald, Ag. C. J.*)—But not where permission to sue as pauper is given.

The word "judgment" in Cl. 13 is intended to cover an order as well as a decree, but the effect of the adjudication must be such as to put an end to the suit or proceeding so far as the Court before which the suit or proceeding is pending is concerned, or if its effect, if it is not complied with, is to put an end to the suit or proceeding. If it has the effect, the adjudication is a judgment, otherwise not.

The order of the Judge on the original side of the High Court refusing to allow a person to sue as a pauper is appealable as a judgment inasmuch as the order put an end to the pending proceeding: *A. I. R.* 1929 *Rang.* 41 (*F.B.*), *Foll.* [P 260 C 1]

Per *Heald, Ag. C. J.*—But the case in which permission to sue as a pauper is refused must be distinguished from the case in which such permission is given: *A. I. R.* 1925 *Mad.* 167, *not Appr.* [P 262 C 2]

**** (b) Civil P. C., O. 33, Rr. 1 and 3— "Person" means natural person and person to be considered is person actually applying—Receiver in insolvency proceedings cannot sue as pauper unless he himself is pauper.**

Word "person" in O. 33 means a natural person, that is a human being, and does not include a juridical person such as a receiver. Therefore a receiver appointed under the Provincial Insolvency Act cannot be allowed to sue as a pauper, where the receiver himself is possessed of sufficient funds to carry on the suit though the estate of which he is the receiver may not be sufficient for that purpose: 36 *Bom.* 279, *Rel. on.*; 41 *Mad.* 624; 3 *Mad.* 3 and 47 *I. C.* 577, *Dist*;. *A.I.R.* 1925 *Mad.* 765; *A. I. R.* 1927 *Cal.* 309 and 5 *L. R. A.* 857, *Cons.* [P 263 C 2, P 264 C 1]

P. K. Basu—for Appellant.

Clark—for Respondent.

Otter, J.—By an order dated 19th June 1929 a Judge of the original side of this High Court refused an application by the applicant for permission to bring a suit in forma pauperis against the respondent. The applicant is a receiver appointed in insolvency proceedings in the course of which one Ayoob Cassim was adjudicated insolvent under the Provincial Insolvency Act.

The applicant appeals against this refusal and two questions arise for our decision: (1) As to whether an appeal lies; (2) whether in law the decision of the learned Judge was correct.

Upon the first question it is not suggested that an appeal lies under the Civil Procedure Code. The decision is not a decree, for it is not a decision in a suit. There is no suit at present, and the application for leave to bring the suit is only deemed to be the plaint when the application is granted: see O. 33, R. 8. Moreover, it is not an appealable order: see O. 43, R. 1.

The question therefore is whether the order sought to be appealed from is a judgment within the meaning of Cl. 13, Letters Patent, and therefore ap-

pealable. This matter has been recently the subject of an exhaustive pronouncement by a Full Bench of this Court, (6 *Rang.* 703) and the material part of the head-note in that case is :

"The word "judgment" in Cl. 13, Letters Patent, is intended to cover an order as well as a decree, but the effect of the adjudication must be such as to put an end to the suit or proceeding so far as the Court before which the suit or proceeding is pending is concerned, or if its effect, if it is not complied with, is to put an end to the suit or proceeding. If it has the effect, the adjudication is a judgment, otherwise not."

All the more important authorities of the High Courts of India were reviewed by the learned Judge who delivered the judgment of the Full Bench, and it is quite unnecessary to refer to them for there cannot be any question but that the order under appeal put an end to a pending proceeding. We have no doubt therefore, that an appeal lies.

The second question for our determination depends upon whether the applicant can be said to be a person within the meaning of the explanation to O. 33, R. 1. This rule runs as follows :

"Subject to the following provisions any suits may be instituted by a pauper."

And in the explanation it is provided inter alia that a person is a pauper when he is not possessed of sufficient means to enable him to pay the fee prescribed by law for the plaint in such suit.

In the present suit it is agreed that the estate is not, but the applicant himself is, possessed of sufficient funds for this purpose. It may be useful to see what the position of a receiver so appointed is. On appointment the property of insolvent vests in him and his powers and duties in relation to it are regulated by the Act. Among such powers he may institute suits relating to the property of the insolvent, but he is the legal owner of the insolvent's property until he is discharged. Under S. 56 (4) of the Act, in cases of improper conduct by a receiver, his own property may be attached and sold to make good any loss, and he may even be committed for contempt of Court. He is also an officer of the Court. In all these cases, however it is the receiver himself who sues or is sued (or whose property may be taken). The receiver does not sue and is not sued on behalf of the insolvent; he sues or is sued on his own behalf as owner of the insolvent's property. In other words, the insolvent drops out altogether.

Such cases therefore as *Perumal Goundan* v. *Therumalaruyampuram Jananukoola Dhaneskhara Singh Nidhi* (1) and *Venkatanarasaya* v. *Achemma* (2) cannot be relied upon on behalf of the appellant. In the first of these it was held that the liquidator of a company who has the proper pauper qualifications may sue in forma pauperis, although he himself is not a pauper. In the second (and earlier) case it was held that a minor may sue as a pauper by a next friend, who is not a pauper. In both these cases, of course, the plaintiff was acting not on his own behalf, but as agent for and on behalf of the company and of the minor respectively, who were his principals : vide *Perumal Goundan's* case (1) at p. 627 of the report affirming the principle already laid down in *Venkatanarasaya's* case (2).

Both these cases were referred to by Mr. Basu, who appeared for the appellant, but these must be distinguished for the reasons we have given. The learned advocate, however, also referred us to the cases of *Mohomed Zaki* v. *Municipal Board of Mainpuri* (3); *Sivagami Ammal* v. *T. S. Gopalaswami Odayar, A. I. R.* 1925 *Mad.* 765; *S. M. Mabia Khatun* v. *Sheik Satkari, A.I.R.* 1927 *Cal.* 309.

In the first of these cases a Bench of the Allahabad High Court held that where a person obtains leave to sue in forma pauperis in a suit commenced before his insolvency, the receiver appointed on an adjudication of insolvency is entitled to continue the suit as the insolvent might have done. From the judgments it is not possible to say whether the matter was fully argued before the Court, and the only passage to which reference may be made is as follows :

" We think that once Nisar Ali obtained leave to sue in forma pauperis in a suit which had been commenced before his insolvency, the receiver was entitled to continue the suit just as Nisar Ali could have done, and in this respect the order of the Court below was wrong."

No reasons were advanced in support of this view and the case is therefore of less assistance than if the contrary

(1) [1918] 41 Mad. 624=45 I. C. 164.
(2) [1881] 3 Mad. 3.

had been the case. The decision as it stands is, however, in favour of the proposition contended for by the appellant. It is not of course upon all fours with the present case, for the insolvent himself had before his adjudication obtained leave to sue as a pauper and from the extract from the judgment we have quoted, it is at least arguable that had this not been so, a contrary decision would have been arrived at.

In the second case the question was whether the legal representative of a deceased pauper should be dispauperised under the provisions of O. 33, R. 9, Civil P. C., by reason of the fact that he had private means. It was held that he should not. It was also held that if the legal representative was shown to have come into possession in his character as legal representative and out of the estate of the deceased of sufficient means, he should be dispauperized. In the course of the judgment appears the following passage :

"The real question is whether the expression "plaintiff" in R. 9, O. 33, Civil P. C., when applied to the legal representative of a deceased pauper plaintiff, refers to the physical person before the Court, or the legal person in his representative capacity as the legal representative of the deceased pauper plaintiff."

And after a reference to the explanation of the word "person" in the General Clauses Act, the Court expressed the view that in India the word "person" indicates a juridical person and thus an individual human might by reason of his possessing several juridical capacities be susceptible of possessing a number of juridical personalities. A number of other authorities were considered, including the case of *Perumal Goundan* (1). The Court in arriving at the conclusion that the plaintiff ought not to be dispauperized approved the principle that regard should be had to the real juridical plaintiff in the case, and not to the person who may be merely acting for the plaintiff. In other words it was held that the status of the plaintiff as representative of the pauper and not his personal status should be considered.

We would observe that the position was analogous to the case under record. The assets of the deceased pauper would of course devolve upon his personal representatives in exactly the same way as the assets of the insolvent vests in the receiver in the present case. The Court however took the view that his "representative capacity" should be considered and apparently attached no importance to the fact that in law a personal representative stands in the shoes of the deceased, and is the lawful owner of his property. The case of *Manaji Rajuji* v. *Khandoo Baloo* (4), to which we must presently refer, was dissented from.

In the third case it was held that where a plaintiff sues in a representative character, such as a mutwalli or trustee, unless it is shown that he has in his possession property belonging to the estate or trust for which he sues sufficient to enable him to pay the requisite court-fee, he may be allowed to sue as a pauper, even if it is shown that he has sufficient personal property of his own. No authorities were cited and the reason underlying the decision was that the representative character of the person suing must be kept distinct from his personal capacity.

As has already been indicated a contrary view was held by a single Judge of the Bombay High Court in the case of *Manaji Rajuji* v. *Khandoo Baloo* (4). In that case it was decided that the privilege of continuing a pauper suit is a personal privilege granted to people who have no means of carrying on or continuing the litigation and it was held that there seems to be no authority whatever for holding that the representative of a pauper is entitled to continue the suit of his testator or testatrix in forma pauperis even though admittedly he is not a pauper. In coming to this conclusion the learned Judge referred inter alia to a previous case, namely, *In the matter of the Will of Dawyubhai* (5)

From a perusal of this latter case, it would appear that it would have been held that an executor or administrator would not be allowed either to institute or maintain or continue legal proceedings unless and until it was shown that he himself was a pauper. Moreover it seems clear that the ratio decidendi in *Manaji Rajuji's* case (4) was that the provisions of O. 33 of the Code seem to negative the idea of anyone but a pauper suing in forma pauperis, and the

(3) [1919] 47 I. C. 577.
(4) [1912] 36 Bom. 279=11 I. C. 724.
(5) [1893] 18 Bom. 237.

learned Judge came to the conclusion we have stated.

The cases to which we have referred were all dealt with by the learned Judge of the original side, whose decision is now under appeal, and as we have indicated there is no decision on all fours with the present case. It is true that *Mahomed Zaki's* case (3) is similar, and that the case as regards personal representatives of deceased persons are in point, but here we find a conflict of authority, and moreover, in *Sivagami Ammal* v. *Gopalaswami Odayar* (supra) the question whether a personal representative stands in the shoes of the deceased and does not represent him was not considered. Further, as was pointed out by the learned Judge of the original side, the question for us is not whether the word "person" covers an individual in capacities other than his personal capacity, but whether upon a consideration of the provisions of the order of the Code relating to pauper status the word a "person" should be held to refer to a person who is not in fact a pauper. It is obvious that in law an individual may be clothed with and perform acts in capacities other than his personal capacity, as for example a trustee who can of course sue and be sued in his capacity as trustee entirely apart from his personal capacity. In the present case, however, it seems to us from an examination of O. 33 and of the rules thereunder that the whole matter is one personal to the applicant. It is the applicant's means, of course, that have to be considered, it is the applicant in person who presents his application and so on. It seems to us, as the learned Judge in the lower Court pointed out, that it would have been a simple matter to have provided for a legal representative of a deceased person or the receiver of the estate of an insolvent to be allowed to institute a suit in forma pauperis. We agree that the word "person" in the provision under review must be considered in its ordinary and plain meaning, and we see nothing in the context in which it stands to indicate that the legislature meant that the word "person" should or might have the meaning of a juridical person. In practice, of course, in such a case as this, the funds necessary to institute proceedings are furnished by contribution from the other creditors. In *Mahomed Zaki's* case (3) no substantial reasons were advanced for the decision arrived at; the case may be distinguished from the facts, and as we have pointed out that the decision of the Madras High Court as to personal representatives of the deceased person does not seem to touch the real position of a personal representative.

The real point seems to us to be that a receiver takes the place of an insolvent and sues in respect of what in law are for the time being his own interests. He acts in a personal capacity throughout. When, therefore, we bear in mind that the provisions of the order under review seem clearly to indicate that the person to be considered is the person actually applying and no other person, we think the receiver must be considered from his personal point of view and not from any representative point of view. For these reasons we think that the judgment of the learned Judge of the original side was correct, and this appeal must be dismissed.

Heald, Ag. C. J.—Only two questions arise in this appeal, namely: (1) Whether an order of this Court on the original side refusing to allow an applicant to sue as a pauper is appealable as a "judgment" under the first part of Cl. 13, Letters Patent, of this Court and (2) whether a receiver appointed under the Provincial Insolvency Act can, as such receiver, be allowed to sue as a pauper, if the estate of which he is receiver, and for the benefit of which he claims to sue, is not possessed of sufficient means to enable him to pay the fee prescribed by law for the plaint in such suit.

As for the first of these questions in view of the decision of a Full Bench of this Court in the case of *P. K. P. V. L. Chidambaram Chettyar* v. *N. A. Chettyar* (6) there can be only one answer, namely that the order is appealable because "its effect if it is not complied with is to put an end to the suit." I would, however, distinguish a case in which permission to sue as a pauper is refused from a case in which such permission is given, and with due respect for the learned Judges who decided the

(6) A. I. R. 1929 Rang. 41=114 I. C. 524 = 6 Rang. 703 (F. B.).

case of *P. Baba Shah* v. *V. M. Purushothama Shah* (7) I would say that I consider that case to have been wrongly decided.

In *Dawyubhai's* case (5) a single Judge of the High Court of Bombay

"being satisfied that the petitioner is a pauper and that there is none of his testatrix's estate available to enable him to take out probate granted him leave to petition for and if entitled thereto to obtain probate in forma pauperis."

With reference to this decision it may be noted that the learned Judge had on a previous occasion refused to accept such a petition as no precedent was in existence for such a course being pursued, and that in the present instance the matter was pressed upon him "as being one of great hardship," so that it seems possible that the case was one of those hard cases which made bad law.

In *Manaji Rajuji* v. *Khandoo Baloo* (4) anther single Judge of the Bombay High Court held that leave to sue as a pauper is a personal privilege and that the executor of a person who had been allowed to sue as a pauper was not entitled to continue the suit as a pauper if he was not himself a pauper. He referred to *Dawyubhai's* case (5) and said that in it

"there are very clear indications that an executor or an administrator would not be allowed either to institute or maintain or continue legal proceedings (as a pauper) unless and until it was shown that he himself was a pauper."

Both these cases were mentioned in *Perumal Goundan's* case (1) where the learned Judge said:

"These were cases of executors suing, and without expressing any opinion as to the correctness of the decisions it is sufficient for the purposes of this case, to say that in the case of executors the estate vests in them and they are the real plaintiffs though they sue not for their own benefit but for the benefit of the beneficiaries. For the purpose of O. 33 the real question is who is the actual plaintiff and is he a pauper."

In *Perumal's* case (1) the Official Liquidator of a company, who was not personally a pauper, applied to be allowed to sue a debtor of the company as a pauper on the ground that the company was a pauper within the meaning of O. 33, and the learned Judges held that a company could be allowed to sue as a pauper, and that the liquidator as representing the company, could be allowed to sue similarly.

(7) A. I. R. 1925 Mad. 167=85 I. C. 201 = 48 Mad. 700.

These seem to be all the officially reported cases on the subject. I have had the advantage of reading my learned brother's judgment and I agree with him that the word "person" in O. 33 (and O. 44) was intended to mean a human being or "natural person" and not a juridical or "artificial person." In the case of *Pharmaceutical Society* v. *London and Provincial Supply Association* (8) which was decided in 1880, Lord Blackburn said:

"the word "person" may very well include both a natural person (human being) and an artificial person (a corporation). I think that in an Act of Parliament, unless there is something to the contrary, probably (I would not like to pledge myself to that) it ought to be held to include both. I have equally no doubt that in common talk, in the language of men not speaking technically, a "person" does not include an artificial person, that is to say a corporation. It is plain that in common conversation and ordinary speech "a person" would mean a natural person. In technical language it may mean the artificial person; in which way it is used in any particular Act must depend on the context and the subject matter. I do not think that the presumption that it does include an artifical person, a corporation (if that is the presumption) is at all a strong one. Circumstances and indeed circumstances of a slight nature in the context might show in which way the word is to be construed in an Act of Parliament, whether it is to have the one meaning or the other. I am quite clear about this, that whenever you can see that the object of the Act requires that the word "person" shall have the more extended or the less extended sense, then whichever sense it requires, you should apply the word in that sense and construe the Act accordingly."

That expression of opinion was of course before the date of the Interpretation Act, 1889, to which the General Clauses Act more or less corresponds, but although under the latter Act the word "person" in the Code ordinarily includes any company or association or body of individuals, whether incorporated or not, nevertheless it need not do so if there is anything repugnant in the subject or context. It seems to me that the provisions of R. 3, O. 33 prescribing that an application for leave to sue as a pauper must be presented by the applicant in person is repugnant to the view that "person" in that rule was intended to mean anything but a natural person or was intended to include a juridical or artificial person, and that the provisions of Rr. 4 and 7 regarding the examination of the applicant and the

(8) [1879] 5 A. C. 857=49 L. J. K. B. 736=45 J. P. 20=28 W. R. 957=43 L. T. 389.

reference to "wearing apparel" in the explanation to R. 1 tend in the same direction. I would accordingly hold that "person" in O. 33 means a natural person, that is a human being, and does not include a juridical person such as a "receiver" and I would dismiss the appeal with costs. Advocate's fee in this Court to be 10 gold mohurs.

P.N./R.K. *Appeal dismissed.*

A. I. R. 1930 Rangoon 264

DOYLE, J.

Po Hte Maung and *others*—Appellants.

v.

Ma Bwin—Respondent.

Second Appeal No. 516 of 1929, Decided on 10th June 1930, from decree of Dist. Judge, Magwe, in Civil Appeal No. 61 of 1929.

(a) Buddhist Law (Burmese)—Succession—Filial relationship.

Where a daughter is born, after her mother and father divorced, but where the father takes back his daughter at the age of five, when her mother remarried, it is strong evidence that filial relationship had never been severed and the daughter is not disqualified from inheriting : *A. I. R.* 1928 *Rang.* 289, *Rel. on.* [P 264 C 2]

(b) Practice—Duty of Court—Legal aspect must be considered though not specifically pleaded.

The Court is in duty bound to consider the legal aspect of the case as they appear on the record whether specificially pleaded or not. [P 264 C 2]

Kya Gaing—for Appellants.

Ba Thin—for Respondent.

Judgment.—It has been found by both Courts that Ma Bwin is the daughter of Maung Paik Gyi, the son of Daw Kyi, that Maung Kywet is the adopted son of Daw Kyi, and that therefore as co-heir with Maung Kywet is entitled to a half share in the land mortgaged with possession to Maung Po Hte on payment of half the mortgage money, that is Rs. 350 out of Rs. 700, the amount for which the land was originally mortgaged to Maung Po Hte.

Ma Bwin was not born when her mother and Maung Paik Gyi divorced. The Court of first instance held, however, that there had been no severence of filial relations which would warrant her disqualification from inheritance. The Court of first appeal somewhat inconsistently said that although there was not sufficient evidence of conduct to establish renewal and maintenance of filial relations the evidence was indicative of the fact of that Ko Paik Gyi looked upon her as his child.

The grounds of appeal are that, as the first appellate Court had found that filial relations had not been renewed it should have been held that she was not Paik Gyi's heir; that having found the land in suit belonged not to Maung Paik Gyi but, to Daw Gyi, the first appellate Court should have dismissed the suit; that it erred in deciding the suit on the ground that Paik Kyi was aurasa as that was not the case set out by Ma Bwin, and that partial redemption of the mortgaged land without payment of interest or account settled should not be allowed.

There is no substance in any of these grounds. Filial relationship is bilateral, and where a father clearly treats his daughter by a divorced wife as if she were his daughter it must be held that filial relationship exists. It cannot be said that there is severance of filial relations where a child unborn at the time of divorce remains with its mother through the suckling stage unless a definite agreement for severance between the parents is established; see *Maung Ba Thwin* v. *Maung Po Hti* (1).

The action of the father in taking his daughter back at the age of five when her mother remarried was strong evidence that filial relations had never been severed. The finding of the appellate Court, although not clearly worded, is a finding concurrent with that of the lower Court and amply warranted by the evidence. No finding that the land belonged solely to Daw Kyi was come to by the lower Court. Witnesses for both sides agreed that it was owned jointly by Maung Paik Kyi and Daw Kyi.

As the land had belonged to Daw Kyi's husband originally, the only way in which under the circumstances it could be held jointly by Daw Kyi and her son was by the latter having the status of aurasa as otherwise Daw Kyi would be the sole heir. The Court was in duty bound to consider the legal aspects of the cases as they appeared on the record whether specificially pleaded or not. On the last ground it is only necessary to say that as the mortgage

(1) A. I. R. 1928 Rang. 289=113 I. C. 804=6 Rang. 510.

was a usufructuary one no question of interest or of settlement of account arose. The appeal stands dismissed with costs in all Courts.

P.N./R.K. *Appeal dismissed.*

A. I. R. 1930 Rangoon 265 (1)

OTTER AND CARR, JJ.

Maung Maung—Appellant.

v.

A. R. R. M. A. N. Chettyar Firm—Respondent.

Misc. Appeal No. 180 of 1929, Decided on 19th May 1930, against decree of Dist. Judge, Tharrawaddy, in Misc. No. 75 of 1929.

Provincial Insolvency Act, S. 51—Application of creditor for adjudication of his debtor as insolvent relying on sale in execution of his decree dismissed sale being subsequent to petition—Second application made after confirmation of sale is not continuation to first.

Where an application by a creditor for adjudication as insolvent of his debtor relying on sale in execution of his decree is dismissed, act of insolvency, namely sale in execution of decree, having taken place subsequent to the filing of petition, and where after confirmation of sale second application is made and is granted, second insolvency proceeding cannot be regarded as continuation of the first, but is an entirely fresh proceeding based on a different act of insolvency. [P 265 C 2]

Ba Maw—for Appellant.

P. B. Sen—for Respondent.

Judgment.—On 17th November 1928, in Civil Miscellaneous Case No. 154/28 of the District Court of Tharrawady the A. R. R. M. A. N. Chettyar firm applied for the adjudication as insolvent of Daw Kaw. In January 1929 the same firm applied in Civil Execution No. 1 of 1929 of the District Court for execution of a decree against Daw Kaw. The District Judge allowed the execution to proceed. Certain immovable property was bought in by the decree-holder, who had been allowed to bid and to set off the price against his decree. The sales took place on 18th March 1929.

In the insolvency proceedings the petitioning firm led no evidence to prove the acts of insolvency alleged in the petition and relied only on this sale in execution. The District Judge held that since the attachment and sale were subsequent to the filing of the petition Daw Kaw could not in that petition be adjudicated because of this act of insolvency. He dismissed the petition on 11th April 1929, at the same time giving leave to file a fresh petition. On 23rd April 1929 the sale in execution was confirmed.

On 8th May the same firm again applied in Civil Miscellaneous No. 75 of 1929 for the adjudication of Daw Kaw and on this petition she was adjudicated on 20th June 1929.

In September at the instance of another creditor, the receiver, the present appellant applied that the A. R. R. M. A. N. Firm should be ordered to pay to him the price of the property realized in the execution proceedings. This application was rejected by the District Judge and against that order this appeal is laid.

The order of the District Judge was highly unsatisfactory, no reasons whatever being given for the decision. But we are clearly of opinion that this appeal must fail. The appellant relies on S. 51, Prov. Insol. Act and contends that the second insolvency proceedings must be regarded as a continuation of the first. This we cannot accept. As soon as that petition was dismissed it ceased to have any effect. The second petition was an entirely fresh proceeding based on a different act of insolvency, and since the money in question was realized before the institution of that proceeding the decree-holder who realized it is entitled to the benefit of it. The appeal is therefore dismissed. But in view of the fact that the decree-holder and the petitioning creditor in both proceedings were the same firm we pass no order as to costs.

P.N./R.K. *Appeal dismissed.*

* A. I. R. 1930 Rangoon 265 (2)

HEALD, OFFG. C. J., AND CHARI, J.

Co-operative Town Bank of Padigon—Appellant.

v.

Shanmugam Pillay and *another*—Respondents.

Letters Patent Appeal No. 77 of 1929, Decided on 28th August 1929, from judgment of High Court in Second Appeal No. 352 of 1928.

* **(a) Transfer of Property Act, S. 53—Assignment by debtor of his decree to one**

creditor in preference to another is not invalid.

When a debtor assigns a decree in his favour to one creditor an intention on his part to prefer that creditor to another does not invalidate the assignment even if the assignee creditor is a party to that intention. [P 268 C 1]

(b) Evidence Act, S. 115 — Defence of estoppel.

Defence of estoppel can always be taken if it is warranted by the facts proved or admitted even if those facts have not been specifically pleaded. [P 268 C 1]

(c) Contract Act, S. 229—Chairman and Manager of bank arranging between themselves without actual knowledge on the part of bank, assignment of decree by Chairman to bank—Bank cannot claim benefit of assignment without accepting liability for knowledge on the part of Chairman and Manager of subsequent attachment of decree—If in such case bank by omission to object to attachment leads attaching decree-holder of assignor to believe that decree was still property of judgment-debtor at the time of attachment bank is estopped from denying that Chairman was still owner of decree attached at the time of attachment—Evidence Act, S. 115.

In the case of a body like a bank which carries on its business through its Chairman and Manager, and which ordinarily has no knowledge other than their knowledge, it is difficult to understand why their knowledge should not be regarded as its knowledge. In such a case the officers of the bank who carry on its business and represent it in its transactions are more than mere agents and any information which they receive relating to transactions carried out by them on behalf of the bank must be regarded as information received by the bank. Thus where the Chairman and the Manager of a bank have arranged, between themselves without actual knowledge on the part of other officers of the bank, the assignment of a decree by the Chairman to the bank cannot claim the benefit of that assignment without accepting liability for knowledge on the part of the Chairman and Manager of a subsequent attachment of the decree which had been assigned. If in such a case the bank by its omission to object to that attachment of the decree leads the attaching decree-holder of the assignor Chairman to believe that the decree was still the property of his judgment-debtor at the time of the attachment, and to act on that belief in giving credit for the amount recovered by execution of the decree which he attached, the bank is estopped from denying that the Chairman was still owner of the decree attached at the time of attachment. [P 268 C 2; P 269 C 1]

Thein Maung—for Appellant.

Doctor and *Kalyanwalla* — for Respondents.

Heald, Offg. C. J.—In Suit No. 67 of 1922 of the Subdivisional Court of Paungde the present respondent 2 Maung Myo obtained a simple money decree for Rs. 3,150 with costs against one Po Hlaing, and in execution case 56 of 1923 of the same Court he applied for execution of that decree by the arrest and imprisonment of Po Hlaing. As a result of that application the parties to those proceedings, namely Maung Myo and Po Hlaing, together with one Ma Pyu who was Po Hlaing's mother-in-law, filed a joint application in which Po Hlaing and Ma Pyu undertook to pay Rs. 2,700 by 22nd March 1925 and agreed that in default of such payment Maung Myo should be entitled to execute his decree for the full amount against Ma Pyu's properties as well as against Po Hlaing's, and Maung Myo agreed to accept Rs. 2,700 in full satisfaction of his decree if it were paid by that date.

On 12th November 1924 the present respondent, 2 namely the S. V. K. V. Chettyar firm, instituted a suit against Maung Myo and two others to recover Rs. 2,792 due on a promissory note. None of the defendants in that suit contested the claim, and on 22nd December 1924 the Chettyar obtained a decree for the amount which he claimed.

While that suit was pending, on 12th December 1924, Maung Myo assigned his decree against Po Hlaing to the Padigon Co-operative Town Bank of which he was Chairman. On 15th January 1925 the Chettyar applied for execution of the decree which he held against Maung Myo by the attachment and execution of the decree which Maung Myo held against Po Hlaing. The decree was duly attached, notice of the attachment being served on Maung Myo, and notice to show cause why the decree should not be executed against him being issued to Po Hlaing. Maung Myo raised no objection to the attachment but Po Hlaing pleaded Maung Myo's agreement to accept Rs. 2,700 in full satisfaction if that amount were paid by 22nd March. The case was adjourned and on 21st March Rs. 2,700 was deposited in Court in accordance with the agreement. That sum was withdrawn by the Chettyar on 23rd March.

On 20th April the Padigon Co-operative Town Bank instituted a suit against the Chettyar to recover that amount on the strength of Maung Myo's assignment of his decree against Po Hlaing to

it. It said that it discovered that the decree had already been executed and the money withdrawn by the Chettyar only on 24th March when it applied for execution, and it claimed that it was entitled to recover the money from the Chettyar. It impleaded Maung Myo, but although it did not say expressly that it did not claim to recover the money from him it appears from the subsequent proceedings that it does not in fact claim any relief against Maung Myo.

The Chettyar pleaded that he had no notice of the assignment of the decree, that no notice of the assignment had been given to the Court, that the execution of the decree in his favour had been regularly made in the ordinary course of law, that the bank had been negligent in not giving the Court notice of the assignment, and that he was under no liability to pay anything to the bank. Maung Myo did not at first contest the suit. The trial Court dismissed the suit, holding that there was nothing in law to prevent execution of the decree at the instance of the Chettyar, and that there was no reason why the Chettyar should be ordered to pay the money to the bank. The bank appealed but the lower appellate Court dismissed the appeal. A second appeal was filed in this Court but was dismissed: *Co-operative Town Bank Padigaon* v. *Raman Chettiar* (1).

A third appeal under Cl. 13 of the Letters Patent was then filed, and the Bench which heard that appeal *Co-operative Town Bank Padigaon* v. *Raman Chettiar* (2) set aside all the earlier judgments and decrees and remanded the case for trial on the merits on grounds that

"the holder of a money decree acquires no right, title or interest in the property of his judgment-debtor by virtue of that decree and has no right to execute that decree against any property that is not the property of his judgment-debtor at the time of attachment and that if at the time of the attachment of the decree in this case the Chettyar's judgment-debtor had no longer any rights in the decree attached the Chettyar could obtain no rights in that decree and in respect of the proceeds of the execution of the decree attached must be regarded as a trustee for the bank."

In remanding the case the Bench directed that the costs of the three appeals should be borne by the respondents, meaning apparently by the Chettyar.

When the case was thus remanded for trial on the merits Maung Myo who, as has been said, was Chairman of the bank, filed a written statement in which he admitted the assignment of the decree to the Bank.

The trial Court, on the evidence, came to the conclusion that the assignment of the decree by Maung Myo to the bank of which he was Chairman was not a real transaction, that it was not sanctioned by any resolution of the Committee of Management of the bank, which would admittedly have been the usual procedure, that it was not brought to account or recorded in any of the books of the bank, that since Maung Myo had notice of the attachment of the decree the bank, of which he was Chairman, must also be regarded as having notice of the attachment, and that the transaction was a fraudulent attempt on Maung Myo's part to use his position as Chairman of the bank to put the decree in his own favour out of the reach of the Chettyar by a pretended assignment of it to the bank. On these findings the trial Court again dismissed the bank's suit, with costs and in its decree it directed the bank to pay the Chettyar's costs in respect of the two appeals in this Court.

The bank again appealed but did not object to the order for costs made in the trial Court's decree. The lower appellate Court found that the bank through its Manager as well as through its Chairman Maung Myo had notice of the attachment, and that it was estopped from denying the Chettyar's right to execute the decree. The appeal was accordingly dismissed summarily.

Another second appeal was filed in this Court, and the learned Judge held that the assignment was valid, but that because the bank through Maung Myo had knowledge of the attachment, and took no action to prevent or remove it, it was estopped from denying the Chettyar's right to execute the decree. The appeal was therefore dismissed with costs. A question of the correct-

(1) A. I. R. 1927 Rang. 55=99 I. C. 309=4 Rang. 426.

(2) A. I. R. 1928 Rang. 25=106 I. C. 853=5 Rang. 595.

ness of the trial Court's order for costs was raised in the memorandum of appeal, but the learned Judge did not discuss it. The bank has now filed still another appeal under the provisions of Cl. 13 of the Letters Patent of this Court on grounds that a defence of estoppel could not be founded on facts which were not pleaded, that notice to Maung Myo was not notice to the bank, that the bank's failure to object to the attachment would not estop it from suing to recover the money from the Chettyar, that there was no conduct on the part of the bank constituting an estoppel, and that the recent judgment of this Court failed to consider the matter of costs.

There is no doubt as to the fact of Maung Myo's assignment of his decree to the bank and an intention on Maung Myo's part to prefer the bank to the Chettyar as a creditor would not invalidate the assignment even if the bank was a party to that intention. The assignment must therefore be regarded as valid, and unless the bank is estopped or otherwise debarred from recovering the money from the Chettyar it is entitled to succeed in this appeal.

There is no force in the contention that the defence of estoppel could not be based on facts which were not pleaded, particularly in a case like the present where the fact that the defendant Maung Myo was Chairman of the plaintiff bank was not disclosed in the plaint. Such a defence can always be taken if it is warranted by the facts proved or admitted even if those facts have not been specifically pleaded.

The vital question in the case is whether or not the bank must be held to have had notice of the attachment. Maung Myo, who was the principal officer of the bank, undoubtedly had notice, and according to the evidence of the Chettyar's agent Aung Nyein the Manager of the bank with whom the assignment of the decree to the bank was arranged by Maung Myo, also had notice of the attachment. Aung Nyein did not say that he himself had no knowledge of the attachment, but he does not seem to have been asked about his personal knowledge, and he did say that Maung Myo did not inform the bank that the decree had been attached at any time before the institution of the suit. I think it probable that Aung Nyein did in fact know of the attachment. It is true that if the bank or its Manager Aung Nyein knew of the attachment, it might have been expected to object; but if, as I believe, the assignment was merely an arrangement between Maung Myo and his subordinate Aung Nyein intended to defeat the Chettyar, the bank, apart from Aung Nyein having no knowledge of it and little interest in it, then Aung Nyein might well be inclined to regard the intention of that arrangement as having been defeated when the Chettyar succeeded in attaching the decree, and for that reason might take no action in respect of the attachment in spite of his knowledge of it. The bank would be in exactly the same position as regards Maung Myo's debts as it was before the assignment, and there is no evidence that that position was causing it any anxiety, so that Aung Nyein, in so far as he represented the bank, might well be content with that position until he and Maung Myo decided to file the suit. No strong inference of want of knowledge on the part of Aung Nyein seems to me to arise from the bank's failure to take action, and on the evidence I would hold that Aung Nyein had knowledge of the attachment.

Strong reliance is placed by the bank on the proviso in S. 229, Contract Act, that the knowledge of the agent must have been acquired in the course of the business transacted by him for the principal, and a large number of English authorities to that effect have been cited; but it seems to me that where the Chairman and the Manager of a bank have arranged between themselves without actual knowledge on the part of other officers of the bank the assignment of a decree by the Chairman to the bank, the bank cannot claim the benefit of that assignment without accepting liability for knowledge on the part of the Chairman and Manager of a subsequent attachment of the decree which had been assigned. In the case of a body like a bank, which carries on its business through its Chairman and Manager, and which ordinarily had no knowledge other than their knowledge, I find it difficult to understand why their knowledge should not be

regarded as its knowledge. I think that in such a case the officers of the bank who carry on its business and represent it in its transactions are more than mere agents, and that any information which they receive relating to transactions carried out by them on behalf of the bank must be regarded as information received by the bank. I would therefore hold that the bank had information of the attachment of the decree which had been assigned to it.

The question then arises as to the effect of the bank's having had that information. The learned Judge who dealt with the second appeal in this Court held that the bank was estopped from denying the Chettyar's right to execute the decree and to take the proceeds of the execution, because it stood by and allowed the Chettyar to act as he would not otherwise have acted. The Chettyar's agent said that he would not have attached the decree if he had known of the assignment, and that after he had recovered the money he gave the debtors who were jointly liable with Maung Myo under the decree in his favour a document releasing them from that liability. His statement that such a release was given is corroborated by one of those debtors and there is nothing to show that his statement that it was given as a result of his obtaining the sum of Rs. 2,700 towards satisfaction of his decree is untrue. I would therefore accept the view that the bank did by its omission to object to the attachment of the decree led the Chettyar to believe that the decree was still the property of his judgment-debtor Maung Myo at the time of the attachment and to act on that belief in giving credit for the amount recovered by execution of the decree which he attached, and in releasing the other debtors who were jointly liable under the decree in his favour from liability under that decree. I would therefore hold that the bank was estopped from denying that Maung Myo was still owner of the decree attached at the time of the attachment.

On this view of the case it is unnecessary to decide whether or not the owner of property attached who has knowledge of the attachment and who takes no steps to establish his title under R. 63, O. 21, Civil P. C., is still in law entitled to sue for relief on the strength of his title. The matter of costs remains. The Bench of this Court which dealt with the earlier appeal in this Court under the Letters Patent ordered that the costs of that appeal and of the two earlier appeals should be borne by the respondents, meaning apparently by the Chettyar. After the remand the trial Court ordered the bank to pay the Chettyar's costs in the suit, and in its decree included the costs incurred by the Chettyar in the second appeal and in the Letters Patent appeal in this Court. In its appeal in the District Court against that decree the bank did not question the correctness of the order in the decree in respect of costs, and the order for costs was confirmed by the dismissal of the appeal.

In the appeal which it brought in this Court against the dismissal of its appeal in the District Court, the bank did say that the lower Courts erred in allowing the Chettyar's costs in the High Court, but the learned Judge did not deal with that ground of appeal presumably either because the matter was not argued before him or because he was of opinion that a matter which had not been made a ground of appeal in the lower appellate Court could not be considered in a second appeal against the lower appellate Court's judgment. In the present Letters Patent appeal the matter of costs has again been raised, but in view of the fact that no objection to the order for costs was made in the first appeal I would refuse to consider it. The result of this finding as to costs would seem to be as follows : Under the decree of this Court in Letters Patent Appeal No. 156 of 1926 the Chettyar would have to pay the bank's costs : (a) in the appeal in the District Court amounting to Rs. 162; (b) in Second Appeal No. 589 of 1925 of this Court amounting to Rs. 190-5-0, and (c) in the Letters Patent appeal, amounting to Rs. 189-11-0, and under the final decree of the trial Court the bank would have to pay the Chettyar's costs in the trial Court, amounting to Rupees 504-11-0, and in Second Appeal No. 253 of 1928 of this Court amounting to Rs. 162. There were apparently no costs incurred by the Chettyar in the

first appeal in the District Court. As I would dismiss the present appeal in this Court with costs the bank would also have to pay the Chettyar's costs in respect of the present appeal in this Court. Those costs will amount to Rs. 162.

In the result therefore I would dismiss the present appeal with costs, so that the bank would have to pay to the Chettyar the difference between the sum of Rs. 162 plus Rs. 162 plus Rupees 504 11-0, which is Rs. 828-11-0, and the sum of Rs. 162 plus Rs. 190-5-0 plus Rs. 189-11-0, which is Rs. 542, the total amount payable by the bank to the Chettyar for costs under the final decree of this Court in accordance with this judgment being Rs. 286-11-0.

Chari, J.—I concur.

P.N./R.K. *Appeal dismissed.*

A. I. R. 1930 Rangoon 270

BROWN, J.

Ko Tha Lin Bwin and *another*—Applicants.

v.

Ko Hla Kye and *another*—Respondents.

Civil Revn. No. 48 of 1929, Decided on 12th November 1929, against order of Dist. Judge, Myaungmya, in Civil Misc. Appeal No. 78 of 1928.

Civil P. C., O. 9, R. 13, and O. 17, Rr. 2 and 3—No evidence taken till date to which case was adjourned on defendant's application—Defendant absent on that date—Court after taking evidence for plaintiff decreed suit—It acted under O. 17, R. 2 and defendant has right to apply under O. 9, R. 13.

There is nothing whatever to prevent the party that was absent coming before the Court under O. 9, R. 13, and if that party can satisfy the Court that he was prevented by due cause from appearing, from arguing that the decision to proceed under O. 17, R. 3 was wrong. Where no evidence is taken for either side till the date to which the case is adjourned on the application of the defendant and where the defendant is absent on that date and the Court after examining plaintiff's witnesses decrees the suit, the Court acts under O. 17, R. 2 and the defendant has a right to present an application under O. 9, R. 13: 41 *Mad.* 286, *Rel. on*; 41 *Cal.* 956, *Cons.* [P 271 C 1,2]

Ray—for Applicants.

Banerjee—for Respondents.

Judgment.—The respondent brought a suit in the Subdivisional Court of Myaungmya against he petitioners. Issues were framed and the case was fixed for hearing on 23rd April 1928. On that date the Court had no time to take up the case, and the case was adjourned for peremptory hearing on 15th May. On 15th May on the application of the defendants adjournment was granted. The applicatian was on the ground that the defendant's pleader was ill and the Judge remarked that if the pleader was not well by the adjourned date they should be prepared to go on with the case by engaging another pleader and a note was made that the hearing was peremptory. On 5th June to which date the case was then adjourned the plaintiff was present, the defendant being absent. The Judge then examined the plaintiff and one witness and passed a decree in favour of the plaintiff. The next day the defendants applied to have the decree set aside on the ground that they had mistaken the date. The Judge dismissed the application not on the merits but because he had decided the original case on the facts and not ex parte. Against this order the petitioners appealed to the District Court and that Court dismissed their appeal. They have now come to this Court in revision.

The contention on behalf of the petitioner is that the Court was acting under the provisions of O. 17, R. 3, and that therefore the petitioners had no right to make an application under the provisions of R. 13, O. 9. There are conflicting rulings in the Indian Courts as to when an order passed by a Court must be considered to be an order passed under R. 3, O. 17. In the case of *Enatulla Basunia* v. *Jiban Mohan Roy* (1) it was held that the provisions of O. 9 do not by themselves apply to a case in which the defendant has already appeared in answer to a summons, but has failed to appear at an adjournment of the suit. For such a case the matter must be dealt with under the provisions of O. 17. If the Court proceeds under R. 2, it is not disputed that the provisions of O. 9 apply. It was held in the *Calcutta* case that ordinarily R. 2 refers to hearings adjourned at the instance of the Court and R. 3 of the hearings adjourned at the instance of the parties. The opinion of the learned Judges who decided the

(1) [1914] 41 Cal. 956=23 I. C. 769.

case was apparently that if R. 3 applied then the case could not have been considered to be decided ex parte and the provisions of R. 9 would not apply but they actually found in the case before them that the Judge had proceeded under R. 9 and their finding as to what would have been the effect of the case falling under R. 3 was therefore obiter dictum.

The question was considered by a Full Bench of the High Court of Madras in the case of *P. B. Pichamma* v. *Sreeramulu* (2). In that case the Bench held that where at the close of the plaintiff's case an adjournment was granted to the defendant to enable him to produce his evidence and he failed to appear at the adjourned hearing and the Court proceeded to pass a decree against him, the case came under the provisions of R. 2, O. 17, and an application to set aside the decree as an ex parte one did lie. The view taken by Wallis, C. J., was that when a case is called on and the defendant is absent and the Court resolves to proceed against him ex parte, it will be open to the defendant to apply under the provisions of R. 13, O. 9, whether the Court actually acted under R. 2 or R. 3. If, as in the present case the defendant fails to appear R. 2 is clearly applicable. R. 3 may be applicable also. But R. 3 does not in itself contemplate the absence of a party and does not lay down any rule as to what is to be done on account of his absence. If the defendant is absent under R. 2 the Court can proceed to make such further order as it thinks fit and I see nothing to prevent that order being that it will decide the suit forthwith. But I can see nothing whatever to prevent the party that was absent coming before the Court under R. 13, O. 9, and if that party can satisfy the Court that he was prevented by due cause from appearing from arguing that the decision to proceed under R. 3 was wrong. However this may be it seems to me clear that in the present case it must be held that the Court was acting under R. 2. Before that date no evidence had been taken for either side. The Court did in fact proceed in the manner provided by R. 6, O. 9 that is to say it heard the case ex parte. The petitioner had, therefore, in my opinion a right to present an application under the provisions of R. 13 for a re-opening of the case. Whether he was or was not in fact prevented by sufficient cause it is impossible now to decide. The application has not yet been considered on its merits at all. I set aside the order of the lower Courts and direct that the application of the petitioner for the rehearing of the case be admitted and considered on its merits. Costs of the appeal in the District Court and the revision in this Court will be borne by the respondents.

P.N./R.K. *Case remanded.*

(2) [1918] 41 Mad. 286=43 I. C. 566 (F.B.).

A. I. R. 1930 Rangoon 271

OTTER AND CARR, JJ.

Meyappa Chettyar, M. P. R. M.—Appellant.

v.

Ma Zu and *others*—Respondents.

First Appeal No. 128 of 1929, Decided on 12th June 1930, from decree of Dist. Judge., Myingyan, D/- 4th March 1929 in Civil Reg. Suit No. 1 of 1929.

Civil P. C., O. 40, R. 1—Mortgage void ab initio under S. 9 (2), Electricity Act—Receiver cannot be appointed at the instance of mortgagee.

When the properties contained in the mortgages are part of an undertaking for the supply of electric energy to which the prohibition in S. 9 (2), Electricity Act, applies, the mortgage must be held to be void ab initio and it cannot give such mortgagee who has got only a simple money decree, right to the appointment of a Receiver. [P 272 C 1]

R. G. Aiyangar—for Appellant.

Thein Maung—for Respondents.

Judgment.—In this case the appellant sued the respondents upon two simple mortgages the security of which was expressed to be certain works and offices belonging to the Nyangoe Electric Supply Company. The District Judge granted a simple money decree only, upon the ground that the property charged is an undertaking to which the Electricity Act of 1910, applies and the assignment or transfer of which (or any part thereof) is forbidden by S. 9 (2) of that Act.

On appeal a Bench of this Court remanded the case for evidence to be taken upon the question whether the properties charged in fact formed part of the electrical undertaking within the meaning of the section we have referred to. The learned District Judge after

hearing evidence answered the question in the affirmative. In appeal it is not suggested that this finding is wrong, or that the mortgages operate as valid charges.

There can be no doubt that the mill building, land, machinery and other effects contained in the mortgages are part of an undertaking for the supply of electric energy to which the prohibition we have referred to applies. But it is said that a receiver ought to be appointed. We cannot agree. The mortgages must be held to be void ab initio. They cannot therefore, give him any of the rights to which a mortgagee of a valid mortgage would be entitled. One of them no doubt is, the right in certain circumstances to have a receiver of the mortgage property appointed. Unless, however, there is a valid mortgage, no such right exists. We think, therefore, that the view of the District Judge was correct, the appeal must fail for the reasons we have given, and it is dismissed with costs.

P.N./R.K. *Appeal dismissed.*

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* A. I. R. 1930 Rangoon 272

DAS AND BROWN, JJ.

D. K. Cassim & Sons—Applicant.

v.

Abdul Rahman and *another*—Respondents.

Civil Misc. Appeal No. 66 of 1929, Decided on 12th November 1929.

*** Civil P. C., O. 33, R. 1 — Firm is person —Insolvent firm can be granted leave to appeal as pauper.**

Firm can be considered to be "person" under O. 33, R. 1. Where the firm brings a suit for reovery of certain amount by way of damages for certain wrongful acts but afterwards become insolvent and the suit is dismissed as Official Assignee refused to prosecute it, the firm can be granted leave to appeal as a pauper even though there is a possibility that some of the assets will come back to the firm later. [P 272 C 2]

N. M. Cowasjee—for Applicant.

Leach—for Respondents.

Judgment.— Messrs D. K. Cassim & Sons brought a suit on the original side against Mr. Abdul Rahman and one for the recovery of five lakhs of rupees by way of damages for certain wrongful acts. Shortly after the trial had commenced it was brought to the notice of the trial Judge that the plaintiffs had been adjudicated insolvents. The Official Assignee demanded a security of Rs. 25,000 before he would consent to prosecute the suit, and as the security was not forthcoming he refused to do so. In the result the suit was dismissed.

The plaintiffs now apply for leave to appeal as a pauper. Their assets are estimated at about seven lakhs and their liabilities at about ten lakhs. But under the Insolvency Act the assets have become vested in the Official Assignee. The court-fee payable is Rs. 3,000. Are the plaintiffs paupers within the meaning of the explanation to O. 33, R. 1, Civil P. C. That explanatin reads:

> "A person is a pauper who is not possessed of sufficient means to enable him to pay the fee prescribed by law."

In the first place is a firm a person? The answer is in the affirmative, as under the General Clauses Act (10 of 1897) the word "person" includes any company or association or body of individuals whether incorporated or not. The next question is whether the insolvent firm, whose assets amounting to about seven lakhs which have become vested in the Official Assignee can be considered to be possessed of sufficient means to enable it to pay the required court-fee of Rs. 3,000. The answer will have to be in the negative. The firm has been deprived of its assets and it can no longer exercise any dominion over these assets. There may be a possibility that some of the assets will come back to the firm later. With reference to the first condition the Legislature have not used the words "entitled to" which they used with reference to the alternative condition but simply used the words "possessed of". Moreover, damages recoverable by insolvent in respect of a personal wrong suffered by him are not divisible among the creditors as held in *re Vine* (1). S. 17, Presidency Town Insolvency Act, lays down that in making of an order of adjudication the property of the insolvent shall vest in the Official Assignee and shall become divisible among his creditors and S. 52 (2) defines the property of an insolvent divisible among his creditors. We are of opinion that the firm is a pauper and that it is a fit case to grant the leave to appeal as a pauper.

P. N./R.K. *Order accordingly.*

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(1) [1878] 8 Ch. D. 364.

* A. I. R. 1930 Rangoon 273

MAUNG BA, J.

Maung Aung Kin—Appellant.

v.

Maung Lu Saung and *another*—Respondents.

Special Second Appeal No. 124 of 1930, Decided on 25th June 1930, from decree of Dist. Judge, Henzada, in Civil Appeal No. 182 of 1929.

*** Tort—Malicious proceeding—Damages—Person applying to Court to appoint receiver to seize paddy crops as property of his debtor knowing that the crops were purchased by another before debtor applied to be insolvent—Receiver appointed—Suit by vendee claiming damages for such unlawful interference is maintainable.**

Where a person moves the insolvency Court to appoint an ad interim receiver to seize the paddy crops as the property of his debtor knowing that the paddy crops were bought by another before the debtor applied for the benefit of insolvency and a receiver is accordingly appointed, the act is in the nature of trespass to property because the person unlawfully interferes with the exercise of the property rights of the vendee, and a suit by the vendee for such interference claiming damages is maintainable. In such an action for trespass to goods the damages in general are measured by the value of the goods or the amount or injury done to them. Special damages resulting from the immediate loss or injury may also be allowed for, if not of too remote a nature : 9 *W. R.* 133, *Rel. on.* [P 274 C 1]

A. H. Paul—for Appellant.

Lunn Thi—for Respondents.

Judgment.—The suit out of which the present appeal arose is the outcome of an insolvency case (Civil Miscellaneous No. 96/27) where Maung Tha Nge was adjudicated insolvent. In the schedule of creditors appellant Maung Kin was mentioned. Appellant in his written objection alleged that Tha Nge omitted to mention some paddy belonging to him and he applied to the insolvency Judge to appoint an ad interim receiver to seize the paddy.

The learned Judge appointed the bailiff of the District Court interim receiver and the receiver took charge of the paddy. Respondent 1, Lu Saung put forward a claim to that paddy alleging that he had bought it from Tha Nge by a registered deed dated 26th October 1927. The insolvency petition was presented by Tha Nge on 28th November 1927. Lu Saung also asked the Court to allow him before the decision of his claim to carry on the reaping and threshing of the paddy crops in the presence of two watchmen appointed by the receiver. That request was granted by the District Judge. During the pendency of the enquiry into the claim made by Lu Saung the paddy after deducting the rent due to the landlord was sold by auction and Aung Kin bought it. The sale proceeds were kept in deposit. After enquiry the learned District Judge came to the conclusion that the original purchase by Lu Saung by a registered deed was bona fide and with the knowledge of Aung Kin. About a week after that decision Aung Kin applied for a review of the decision but that review application was not finally decided as the parties came to a settlement out of the sale proceeds kept in deposit. Aung Kin was paid Rs. 180 for cattle hire due to him by Tha Nge, while Lu Saung was given the balance. Practically Lu Saung was successful in his claim to the paddy which had been seized by the receiver at the instance of Aung Kin.

Lu Saung alleged that though Aung Kin was perfectly aware of his purchase of the paddy crops from Tha Nge and of the bona fide character of the purchase he maliciously caused the seizure of the crops by the interim receiver. He therefore brought a suit against Aung Kin for such interference and claimed damages to the extent of Rs. 1,100. The Sub-Divisional Court of Henzada dismissed the suit on the ground that it was not maintainable. On appeal to the District Court, the learned District Judge held that such a suit was maintainable and passed a decree.

Against that decree this second appeal has been preferred. The learned District Judge's view is correct. Sir Barnes Peacock, C. J., in the case of *Joykalee Dassee* v. *Chandmall* (1) observed :

"If a plaintiff brings a suit or makes an application maliciously or without probable or reasonable cause to a Court of competent jurisdiction to seize property of another person as the property of his judgment-debtor, he may be liable to damages for any injury which may be occasioned by reason of the order of the Court. Upon the same principle a person may be liable to damages for applying for an injunction upon grounds which he knew to be insufficient."

(1) [1868] 9 W. R. 133.

In the present case Aung Kin's act was in the nature of trespass to property because he unlawfully interfered with the exercise of the property right of Lu Saung. He knew that Lu Saung had bought the paddy crop from Tha Ngt before the latter applied for the benefie of insolvency. Yet he moved the Court to appoint an ad interim receiver to seize the crops as the property of Tha Nge. In an action for trespass to goods the damages in general are measured by the value of the goods, or the amount of injury done to them. Special damages resulting from the immediate loss or injury may also be allowed for, if not of too remote a nature. The damages claimed are made up of as follows:

(1) The amount paid as watching fees, etc.

(2) Interest on Rs. 13,000 borrowed from a Chetty for buying the paddy.

(3) Pleader's fee.

(4) Expenses incurred in attending Court.

(5) Subsistence allowances paid to witnesses and process fees.

The learned District Judge in his judgment stated that the plaintiff did not press for the last three items. He accordingly passed a decree in respect of the first two items. The first item namely Rs. 225-1-0 the amount paid to Aung Kin comprised several items such as reaping charges, cart hire for carting paddy sheaves, threshing charges, measuring charges, hire of watchmen to watch paddy at the talin, cost of kerosine oil burnt at the talin, travelling expenses of the respondent and his two servants. Out of these items, the watching fees and the respondent's travelling expenses might reasonably be considered as loss resulting from the tort but the remaining items appear to represent expenses which Lu Saung himself would have incurred whether any receiver was appointed or not. In my opinion these expenses should be disallowed. I would therefore allow only watching fees amounting to Rs. 142 and respondent's travelling expenses amounting to Rs. 4-12-0.

As regards the other items (namely interest on Rs. 1300 that is, Rs. 364-5-0) the case for Lu Saung was that he had to borrow Rs. 1,300 from a Chetty to purchase his own paddy at the auction held by the respondent receiver, during the pendency of the enquiry proceedings. In my opinion it seems reasonable that this item should also be allowed. For these reasons the decree of the District Court is accordingly varied by a slight reduction to the extent of Rs. 78-5-0. In the result there will be a decree for Rs. 511-1-9 with proportionate costs throughout.

P.N./R.K. *Order accordingly.*

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* A. I. R. 1930 Rangoon 274

PAGE, C. J., AND BA U, J.

Chettyar E. M. Firm—Applicant.

v.

Commissioner of Income-tax—Respondent.

Civil Misc. Appln. No. 60 of 1930, Decided on 11th June 1930, from judgment of Rangoon High Court in Misc. Appln. No. 148 of 1929, reported as *A. I. R.* 1930 *Rang.* 224.

*** Income-tax Act, S. 66 (3)—High Court cannot grant leave to appeal to His Majesty in Council from order of High Court under S. 66 (3), refusing to require Commissioner to state case — Letters Patent (Rangoon), Cl. 37—Civil P. C., S. 109.**

Proceedings connected with the assessment of income-tax normally and mainly are concerned with issues of fact and where neither the Commissioner nor the High Court is of opinion that any question of law has arisen in the course of the assessment, it may be that the legislature did not think it convenient or desirable that the Judicial Committee should be called upon to review an order which in the opinion of the High Court turned solely upon questions of facts. Therefore, the High Court has no jurisdiction to grant leave to appeal to His Majesty in Council from an order of the High Court under S. 66 (3) refusing to require the Commissioner to state a case: 40 *Cal.* 21 (*P. C.*), *Rel. on.*; *A. I. R.* 1927 *P. C.* 242; 2 *Income-tax Cases* 30; *A. I. R.* 1921 *Bom.* 378 and *A. I. R.* 1923 *P. C.* 138, *Ref.* [P 276 C 2]

Foucar—for Applicant.

A. Eggar—for Respondent.

Page, C. J.—This petition raises a question of some difficulty and importance, namely, whether an appeal lies to His Majesty in Council under Cl. 37 of the Letters Patent, 1922, from an order of the High Court refusing to require the Commissioner of Income-tax of Burma to state a case under S. 66 (3), Income-tax Act (11 of 1922).

The material facts preceding the order in question are set out in *Commissioner of Income-tax* v. *E. M. Chet-*

tiar Firm (1) and need not be restated. It will be observed that on reference being made to the High Court under S. 66 (2) it was held that :

"If the enhancement of the Assistant Commissioner is based on materials from which he could reasonably conclude, though only as a rough estimate, that two lakhs of rupees was the income of the Moulmein business then the enhancement was legal; if, on the other hand, the enhancement was wholly arbitrary and based upon no materials, it was illegal. In view of this answer the proper course for the Commissioner to adopt will be to call upon the Assistant Commissioner to give the grounds on which he based his assessment, and the Commissioner as an appellate tribunal can then consider whether the enhancement was justified on these materials. If in his opinion there were materials on which the Assistant Commissioner could arrive at the enhanced figure there is an end of the matter, since there is no further appeal, and we cannot enter into questions of fact, namely, as to the sufficiency of these materials for the conclusion arrived at (*ibid p.* 642.)."

The Assistant Commissioner accordingly reported to the Commissioner the materials upon which he had enhanced the assessment, and the Commissioner, having heard the learned advocate for the assessees, dismissed the appeal. Thereafter the assessees pursuant to the provisions of S. 66 (2) by application required the Commissioner to refer to the High Court certain questions of law, which they alleged had arisen out of such order. On 9th October 1929, the Commissioner refused to state a case and rejected the application of the assessee upon the ground that

"the order against which it is directed is a revisional order passed in pursuance of the High Court's order under S. 66 (5) of the Act.

The assessees thereupon applied to the High Court under the provisions of S. 66 (3) for an order that the Comissioner be required to state a case, and to refer it to the High Court. On 19th March 1930, the High Court dismissed the application on the ground that there was no question of law which the Commissioner could have referred or which the High Court could require him to refer. The assessees have now applied by way of petition to the High Court for a certificate granting leave to appeal to His Majesty in Council from the order of the High Court of 19th March 1930.

Now an appeal does not lie except under some enactment by which a right of appeal is given: *Rangoon Botataung Co. Ltd* v. *Collector of Rangoon* (2), but the assessees contend that the order of the High Court refusing to require the Commissioner to state a case is a "final order" within Cl. 37, Letters Patent, and appealable as such. Cl. 37 runs as follows :

"And we do further ordain that any person or persons may appeal to Us, Our Heirs, and Successors, in Our or Their Privy Council, in any matter not being of criminal jurisdiction from any final judgment, decree or order of the High Court of Judicature at Rangoon made on appeal from any final judgment, decree or order made in the exercise of original jurisdiction by Judges of the said High Court or of any Division Court, from which an appeal shall not lie to the said High Court under the provisions contained in Cl. 13 of these presents :

Provided in either case that the sum or matter at issue is of the amount or value of not less than Rs. 10,000 or that such judgment, decree or order involves, directly or indirectly, some claim, demand or question to or respecting property amounting to or of the value of not less than Rs. 10,000; . . ."

It is common ground that the order of the High Court was not an order "made on appeal" but it is urged that it is a final order "made in the exercise of original jurisdiction" and inasmuch as it is admitted that the sum at issue is of the amount or value of not less than Rs. 10,000 that an appeal from the said order lies under Cl. 37, Letters Patent, and Ss. 109 and 110, Civil P.C. Now, for the purpose in hand, I assume without deciding that the order in question is a "final order" within Cl. 37, Letters Patent. *Toharmal Uttamchand of Amritsar* v. *Commissioner of Income-tax* (3), *Alcock Ashdown Co. Ltd.* v. *Chief Revenue Authority, Bombay* (4) : see also *Tata Iron & Steel Co. Ltd.* v. *Chief Revenue Authoirty of Bombay* (5) (at p. 738 *of* 47 *Bom.*) but was the order made in the exercise of original jurisdiction ?

Now if the order had been passed under S. 45, Specific Relief Act (1 of 1877) it might have been necessary to consider whether in making the order the High Court was exercising its original jurisdiction: see *Birendra*

(1) A. I. R. 1930 Rang. 4=122 I. C. 898=7 Rang. 635 (S. B.).

(2) [1913] 40 Cal. 21=39 I. A. 197=16 I. C. 188 (P. C.).

(3) 2 Income-tax Cases 30.

(4) A. I. R. 1921 Bom. 378=64 I. C. 959.

(5) A. I. R. 1923 P. C. 148=74 I. C. 469=50 I. A. 212=47 Bom. 724 (P. C.).

Kishor Manikya v. *Secretary of State* (6); *Emperor* v. *Probhat Chandra Barna* (7) at p. 546 (*of* 51 *Cal*).; *Navivahoo* v. *Turner* (8) and *Alcock Ashdown & Co. Ltd.* v. *Chief Revenue Authority, Bombay* (9). But the order in question was not and I think could not have been made under the Specific Relief Act, for the assessees had another "specific and adequate legal remedy" which they were entitled to pursue, namely an application to the High Court for an order requiring the Commissioner to state and refer a case under S. 66 (3), Income-tax Act, 1922. S. 48, Specific Relief Act, provides for an appeal from an order made under S. 45 of that Act, but no appeal is provided under S. 66, Income-tax Act, from an order of the High Court made under that section. Under S. 66-A (2) however an appeal is granted to His Majesty in Council from a judgment of the High Court delivered on a reference made under S. 66 in any case which the High Court certifies to be a fit one for an appeal to His Majesty in Council.

In my opinion the object and effect of Ss. 66 and 66-A, Income-tax Act, 1922, was to provide special machinery whereby the Commissioner or the assessee should be enabled to obtain the opinion of the High Court upon any question of law arising in the course of the assessment. The jurisdiction with which the High Court is invested under the Income-tax Act, 1922, however is of an exceptional nature, and I apprehend that the intention of the legislature in enacting Ss. 66 and 66-A was to provide that the only procedure available for obtaining a reference by way of case stated should be that prescribed under those sections. In my opinion the effect of Ss. 66 and 66-A is that no appeal lies from an order of the High Court under S. 66 (2) except as provided in S. 66-A. In 1922 the legislature remodelled S. 51, Income-tax Act, 1918, and in 1926 after the decision of the Privy Council in *Tata Iron & Steel Co. Ltd.* v. *Chief Revenue Authority of Bombay* (5) and *Alcock Ashdown & Co. Ltd.* v. *Chief Revenue Authority of Bombay* (9). By S. 8 of Act 25, 1926, it was provided that under S. 66-A (2) a limited appeal should be permitted to the Privy Council from a judgment of the High Court on a reference made under S. 66 where the High Court certified that the case was a fit one for appeal to His Majesty in Council. No provision however was made in S. 66-A for an appeal to His Majesty in Council from an order of the High Court under S. 66 (3) refusing to require the Commissioner to state a case, and I am of opinion that the High Court has no jurisdiction to grant leave to appeal to His Majesty in Council from such an order. Further, it appears to me that there were sound reasons for granting an appeal from a judgment of the High Court, where the High Court had entertained a reference and providing no appeal where the High Court refused to order the Commissioner to state and refer a case. Proceedings connected with the assessment of income-tax normally and mainly are concerned with issues of fact, and where neither the Commissioner nor the High Court are of opinion that any question of law has arisen in the course of the assessment, it may well be that the legislature did not think it convenient or desirable that the Judicial Committee should be called upon to review an order which in the opinion of the High Court turned solely upon questions of fact: see per Lord Macnaghten in the *Rangoon Botataung* case(2) p. 28 (*of* 40 *Cal.*)—and for that reason granted an appeal only where a case had been stated and a reference entertained by the High Court. In either case of course the right to apply to His Majesty in Council for special leave would not be affected.

If the law were otherwise, the position would be an anomalous one. Under S. 66-A (2) an appeal lies to His Majesty in Council from a judgment "delivered on a reference" only where the High Court certifies the case to be a fit one for appeal to His Majesty in Council, and these words are textually the same as the concluding words of S. 109 (c), Civil P. C., and, coupled with the carefully limited referential words to the Civil Procedure Code in

(6) A. I. R. 1921 Cal. 262=61 I. C. 112=48 Cal. 766.

(7) A. I. R. 1924 Cal. 668=84 I. C. 31=51 Cal. 504.

(8) [1889] 13 Bom. 520=16 I. A. 156=5 Sar. 400 (P. C.).

(9) A. I. R. 1923 P. C. 138=75 I. C. 392=50 I. A. 227=47 Bom. 742 (P. C.).

sub-S. (3), suffice in their Lordship's judgment to exclude from any right of appeal cases which fall within the requirements of S. 110 of the Code, and are operative to confine that right to cases which are certified to be otherwise fit for appeal to His Majesty in Council: per Lord Blanesburgh in *Delhi Cloth & General Mills Co.* v. *Income-tax Commissioner, Delhi* (10) (p. 424 *of* 54 *I. A.*). On the other hand, if any appeal lies to His Majesty in Council under Cl. 37, Letters Patent, from an order of the High Court refusing to require a Commissioner to state a case under S. 66 (3) such an appeal will be provided only that the conditions laid down in Cl. 37, Letters Patent, and Ss. 109 and 110, Civil P. C., are complied with. Thus there would be a right of appeal on less stringent conditions where neither the Commissioner nor the High Court thought that any question of law was involved in the assessment than where a case had been stated and the High Court had entertained the reference. So anomalous a situation, I think, was neither intended nor created by the legislature. For those reasons the petition will be dismissed with costs.

Ba U, J.—I concur.

P.N./R.K. *Application dismissed.*

(10) A. I. R. 1927 P. C. 242=106 I. C. 156=64 I. A. 421 (P. C.).

A. I. R. 1930 Rangoon 277

HEALD AND OTTER, JJ.

U Tha Daung and *another*—Appellants.

v.

Ma Cho—Respondent.

First Appeal No. 131 of 1929, Decided on 23rd January 1930, from judgment of Dist. Judge, Pegu, in Civil Regular Suit No. 20 of 1928.

(a) Registration Act—Construction.

The Act must be strictly construed: 14 *M. I. A.* 129, *Foll.* [P 280 C 1]

(b) Registration Act, S. 17 (1) (b) (c)—Mortgagee agreeing after certain litigation is over to waive Rs. 3,000 as principal with interest thereon in consideration of mortgagor paying all expenses in connexion with litigation proceedings—Document does not require registration.

There is a clear distinction between a discharge of a debt and the extinguishment of a mortgage, though one may be the result of the other. Where the mortgagee agrees to waive "after the litigation is over" the sum of Rs. 3,000 by way of principal and all the interest therein in consideration of mortgagor paying all expenses in connexion with certain litigation proceedings, the terms of the document amount only to a promise to release part of the mortgage debt in the event of the promisee performing his obligation and inasmuch as the interest in the mortgaged property cannot be held to be affected until the promisee had fulfilled his part of the bargain, the document does not fall within S. 17 (1) (b) or S. 17 (1) (c) and does not require registration: 43 *Mad.* 803, *Rel. on.*; 2 *Bom.* 489; 6 *All.* 335; 9 *All.* 108; 7 *Bom.* 123; 33 *Cal.* 613; 27 *All.* 305; 34 *All.* 528 and *A. I. R.* 1926 *All.* 693, *Cons.* [P 277 C 2, P 280 C 1]

Ba Si—for Appellants.

Foucar—for Respondent.

Otter, J.—In this case the respondent sued the appellants upon a mortgage dated 22nd March 1927, whereby the appellants mortgaged some paddy land to a man called Maung Ba Tun for the sum of Rs. 8,000 and interest at Re. 1-8-0 per cent per mensem. In June or July 1927 Maung Ba Tun died leaving his brother Maung Po Tha Nyun as his heir. It is claimed by the respondent that she is the only other heir of Ba Tun and that moreover by the conveyance dated 4th January 1928 Maung Po The Nyun sold to her his interest in the estate of Ba Tun.

The status of the respondent is denied by the appellants and it is also said that the conveyance to her by Maung Po Tha Nyun of his interest in the deceased's estate was made subject to and with notice of an agreement between Maung Po Tha Nyun and appellant 1. This latter agreement is Ex. 1 dated 6th September 1927, and by it Maung Po Tha Nyun agreed to waive "after the litigation is over" the sum of Rs. 3,000 by way of principal and all the interest thereon then owing by appellant 1 to the deceased Ko Ba Tun in consideration of appellant 1 paying all expenses in connexion with proceedings by Maung Po Tha Nyun for the recovery of the estate of his brother Maung Ba Tun.

At the hearing, it was objected by the respondent that Ex. 1 is not admissible in evidence for want of registration. The point was dealt with as a preliminary point and the learned Additional District Judge held, without hearing evidence, or dealing with any other question, that this document was inadmissible and he, therefore, granted the respondent the usual preliminary mortgage-decree.

The sole question for us is, therefore, whether the decision as to the admissibility of this document was correct. By S. 17, sub-S. (1), Cl. (b), Registration Act, 1908, it is provided inter alia that the following documents shall be registered, namely, non-testamentary instruments (other than instruments of gift of immovable property) which purport or operate to limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of Rs. 100 and upwards to or in immovable property. By Cl. (c) of this subsection, non-testamentary instruments which acknowledge the receipt or payment of any consideration on account of the limitation or extinction of any such right, title and interest (as is mentioned in Cl. (b), require registration). By sub-S. (2), Cl. (11) of that section, it is provided that the above clauses of sub-S. (1) shall not apply to any endorsement on a mortgage-deed acknowledging the payment of the whole or any part of the mortgage money, and any other receipt for the payment of money due under a mortgage when the receipt does not purport to extinguish the mortgage.

It is necessary, therefore, to consider whether Ex. 1 must be held to fall within the before-mentioned provisions or any of them.

It is to be observed that the material words in Ex. 1 do not expressly limit or extinguish any interest in the subject of the mortgage. There is no stipulation for the return for alteration of the mortgage bond. The matter for our consideration (so far as Cl. (b) is concerned) must be whether in law the document under review must be held to have operated to limit or extinguish any such interest. We would point out that Cl. 11, sub-S. (2), came into force as a result of the Registration Act of 1886 and this fact must therefore not be lost sight of in considering cases which were previously decided. There have been a number of decisions in various Courts in India upon this question and it will be necessary to refer shortly to some of them.

In *Basawa* v. *Kalkapa* (1) it was held that a document called a receipt, but intended to be used to prove the release of a claim secured by a mortgage, required registration under S. 49 of the Act of 1874 as it affected immovable property. The exact words of the document do not appear in the report, but it would seem that it is likely that the mortgage interest was not expressly released.

In *Imdad Husain* v. *Tasadduk Husain* (2) it was held that the payment of money by a mortgagor to a mortgagee in satisfaction of a mortgage debt is a payment of consideration on account of the extinction of the mortgagee's right within the meaning of Cl. (c) of the section and that a receipt for such a payment required registration. Mahmood, J., in the course of the judgment of the Court, said at p. 339 :

> "The holder of a simple mortgage deed possesses rights which jurisprudence recognizes as one of the various species of *Jura in re aliena*, or estates carved out of the full ownership of property ; such rights subsist in that property so long as the mortgage debt remains unpaid, and on payment of such debt by the mortgagor, and acceptance of such payment by the mortgagee, the rights are extinguished."

In *Jiwan Ali Beg* v. *Basa Mal* (3), it was held that the strictest construction should be placed on the prohibitory sections of the Registration Act. It was decided however that :

> "an instrument to come within S. 17 (b) of the Act must in itself purport or operate . . . . to limit or extinguish some . . . . interest . . . . in immovable property;"

and that :

> "to come within S. 17 (c) it must be on the face of it an acknowledgment of the receipt . . . . of some consideration on account of the limitation or extinguishment of such . . . . interest."

In that case certain entries on mortgage bonds were in the following terms: "Paid on 21st December 1881, Rs. 3,500," and upon the remaining bonds appear similar endorsements. Edge, C. J., who delivered the judgment of the Court, said at p. 115 :

> "Is every entry to be considered an instrument within the meaning of S. 17 and of no value as evidence without registration, although the mortgagee made the entries himself as memoranda ?"

And it was held that such endorsements will not be objected to as not having been registered. We would point out that it was in consequence of the decision in that case that Cl. 11, sub-S. (2), S. 17 appeared in the amending Act to which we have already referred.

(1) [1877] 2 Bom. 489.

(2) [1884] 6 All. 335=(1884) A.W.N. 107.

(3) [1886] 9 All. 108=(1886) A. W. N. [illegible] (F.B.).

In *Ramapa* v. *Umanna* (4) it was held that a receipt intended to show that the interest of the plaintiff in the mortgage had been extinguished required registration. In that case the receipt of the plaintiff for Rs. 250 on account of the mortgage debt was tendered in evidence by the defendant to show that the interest of his co-mortgagee (the plaintiff) had been extinguished. The Court, following *Basawa* v. *Kalkapa* (1) to which we have referred, held that the document was rightly excluded.

In *Imam Ali* v. *Baij Nath Ram Sahu* (5), it was distinctly stated in the document under review that the properties had been conveyed free from liability under the bond. The document was therefore held to require registration. In *Ganga Bakhsh* v. *Jagannath* (6), the head-note is :

"A portion of certain property, the subject of the mortgage, was purchased by a stranger to the bond, who paid off a portion of a mortgage debt, and on the bond the fact of payment together with the release of a specified portion of the mortgaged property was endorsed."

It was held by a Bench that such an endorsement did not require registration. It is sufficient to say that this decision followed that in a previous case in the Allahabad Court and the matter was not fully considered.

In *Piari Lal* v. *Makhan* (7), a Bench of that Court held that a receipt for money due upon a mortgage in the terms : "The bond is returned, no money remains due" fell within Cl. 11, sub-S. 2 of the section and did not require registration as the words : "No money remains due" did not purport to extinguish the mortgage. In this case again the matter does not seem to have been fully discussed, but a number of previous authorities in the Allahabad Court appear to have been considered and followed.

In *Neelamani Patnaik Mussadi* v. *Sukaduvu Beharu* (8) it was held that where a receipt by a mortgagee in terms only discharges a mortgage debt, it does not fall under S. 17 (b), Registration Act. The receipt was on the following terms :

"Payment received given on 30th day November 1911 . . . I have this day received payment from you of Rs. 350 on account of the principal and interest due under the registered mortgage bond executed by you in my favour on 26th July 1908. I have excused payment of balance of interest. Nothing remains due under the said document."

It is to be observed that these words bear some resemblance to those in the present case. It is true that the latter words appear to constitute an agreement in future, but the concluding words in the *Madras* case, "Nothing remains due under the said document" appear to us to be strong. On p. 806 of the Report, Krishnan, J., who delivered the judgment of the Bench, said :

"We find it to be merely a receipt for money actually paid which was taken in full discharge of the mortgage debt, the payment of the balance of interest due being excluded. There is nothing in the document to show that the mortgage interest was expressly extinguished by it ; it is only a discharge of the mortgage debt. We think there is a clear distinction between a discharge of a debt and the extinguishment of a mortgage interest, though one may be the result of the other. Where a receipt in terms only discharges the debt, it cannot be brought under S. 17 (b), Registration Act."

A previous case where an agreement to cancel and return a mortgage deed is distinguished, and the effect of the judgment in this case appears to us to be that the document was not in law a proposal to extinguish the mortgage interest. It is to be observed that this case was not decided upon the ground that the document fell within the exception in sub-S. 2, Cl. 11.

One further case may be mentioned, *Jwala Prasad* v. *Mohan Lal* (9). In that case, the head-note is :

"A receipt for money payable on a mortgage did not expressly state that the payment was accepted in full satisfaction of the mortgage debt, but contained a promise to return the mortgage deed."

In this case, *Neelamani Patnaik Museadi* v. *Sukaduvu Beharu* (8) and *Piari Lal* v. *Makhan* (7) were dissented from ; the former on the ground that it was not agreed that the mortgage deed should be returned, and the latter on the ground that where a mortgagee gives a written acknowledgment that the mortgage debt has been satisfied in full and that nothing further remains to be paid and goes on to say that he has returned the mortgage bond, the mort-

(4) [1883] 7 Bom. 123.
(5) [1906] 33 Cal. 613=3 C.L.J. 576=10 C.W.N. 551.
(6) [1905] 27 All. 305=1 A.L.J. 693=(1904) A.W.N. 266.
(7) [1912] 34 All. 528=16 I.C. 179.
(8) [1920] 43 Mad. 803=60 I.C. 255.
(9) A. I. R. 1926 All. 693=97 I. C. 162=48 All. 705.

gage must be taken to have been extinguished.

It will be seen, therefore, that the matter is not free from difficulty, but if the terms of the document are closely scrutinized it seems to us that they amount only to a promise to release part of the mortgage debt in the event of the promissee performing his obligation. As we have previously indicated, there was no provision, e.g., that the mortgage deed should be returned for endorsement of any kind, and the mortgage interest is not referred to. If, however, the document had been a mere bare receipt, no registration would of course be required, for it would fall within Cl. 11, sub-S. (2) of the section. It was suggested that Ex. 1 should be held to be such a receipt, but we cannot hold that this is so. The money was not paid until much later and the document itself is not in the form of a receipt. We agree, however, with the view of the Madras Bench in the *Neelamani Patnaik Mussadi* case (8) that there is a clear distinction between a discharge of a debt and the extinguishment of a mortgage, though one may be the result of the other. It is perfectly true that the object of producing Ex. 1 must be to show that credit must be given for at least Rs. 3,000 and interest. It is not clear from Ex. 1 whether credit was also to be given for amounts paid for costs. The interest in the mortgaged property however could not be affected until the first appellant had fulfilled his part of the bargain. It is also true that the Act must be construed strictly : see *Futteh Chand Sahoo* v. *Leelumber Singh Doss* (10) ; yet in view of the considerations we have referred to and especially because the mortgage interest could not possibly be held to be affected until the services were in fact rendered and as there are no words providing that the document was intended to affect such interest, we have come to the conclusion that Ex. 1, while not a receipt within Cl. (11), sub-S. (2) of the section, does not fall within either Cl. (b) or Cl. (c), sub-S. (1) of the section. The document therefore was admissible in evidence. This appeal must be allowed with costs and the case remitted to the lower Court for hearing upon the merits. Advocate's fee three gold mohurs and the certificate under S. 13, Court-fees Act, will be granted.

(10) [1870] 14 M. I. A. 129=16 W. R. 26=2 Suther 467=2 Sar. 709 (P.C.).

Heald, J.—I agree that the document (Ex. 1) in this case does not either purport or operate to limit or extinguish the mortgage on which respondent sued, and therefore it was not compulsorily registrable and was admissible in evidence without registration. The lower Court's judgment and decree must therefore be set aside and the case must be remanded to the trial Court under the provisions of O. 41, R. 23.

Respondent will pay appellants' costs in respect of the appeal in this Court, advocate's fee to be three gold mohurs; and the costs in the trial Court will abide the final order in the suit in respect of costs. A certificate under S. 13, Court-fees Act, must be granted to the appellants.

P.N./R.K. *Case remanded.*

A. I. R. 1930 Rangoon 280

HEALD AND MYA BU, JJ.

Ma Nyein Yone—Applicant.

v.

P. D. Patel—Opposite Party.

Civil Misc. Appln. No. 141 of 1929, Decided on 23rd December 1929.

Civil P. C., S. 151, O. 33, R. 1, and O. 47, R. 1—Court has no power to grant leave to apply for review in forma pauperis.

The Court has no inherent power to grant leave to prosecute an application for review of order in appeal in forma pauperis. The Court has also no power to grant such leave on the ground that an application for review should be regarded as a continuation of the appeal in which the order which it is desired to be reviewed was passed : 33 *Cal.* 927 ; 40 *Cal.* 955 and 5 *Cal.* 819, *Ref.* [P 231 C 1]

L. C. Robertson—for Applicant.

Heald, J.—Applicant was allowed to appeal as a pauper and her appeal was dismissed on the merits. She now claims that she is entitled to file an application for review of the appellate judgment in forma pauperis. We have heard her learned advocate who admits that he has been unable to find any case in which permission to apply for review in forma pauperis has been granted but he suggests that we should either regard an application for review as a continuation of the appeal or should fall back on the inherent power of the Court to make such order as may be necessary for the ends of justice.

I see no reason to believe that we are entitled to regard an application for review of the order passed in an appeal as a continuation of the appeal. The Code provides separately for suits, appeals, applications in revision and applications for review and has expressly provided that in certain circumstances leave to litigate in forma pauperis may be given in the case of suits and appeals. There is no similar provision for cases of revision and review.

It was said in the case of *Hakim Chand Boid* v. *Kamalanand Singh* (1) that the Court has inherent power to allow a defence in forma pauperis but no authority for that proposition was cited in that ruling or in the case of *Nanda Kishore Singh* v. *Ram Gotan Sahu* (2) where the statement was repeated. The earliest authority on the subject seems to be the case of *Doorga Charan Dass* v. *Nittakally Dassee* (3) where no judgment was delivered but where the learned Judge is reported *to* have said at the hearing:

"The Code binds the Court so far as it goes but if the Court had power before the Code was passed to allow a defendant to appeal in forma pauperis, and that power is not expressly taken away by the Code the power must remain. In Courts of common law the defendant was not allowed to defend in forma pauperis because the power was statutory but in the Court of Chancery the defendant was allowed so to defend because the power was not statutory."

That dictum seems to me to be a slender basis for the proposition that the Courts in India have inherent power to allow a defendant to defend a suit in forma pauperis and even if it is correct it is no basis for the suggestion that we have inherent power to give leave to prosecute an application for review in forma pauperis.

I am not satisfied that we have power to grant such leave either on the ground that an application for review should be considered as a continuation of the appeal in which the order which it is desired to have reviewed was passed, or in the exercise of the inherent powers of the Court under S. 151 of the Code, and I would reject the application.

Mya Bu, J.—I agree.

P.N/.R.K. *Application dismissed.*

(1) [1905] 33 Cal. 927=3 C. L. J. 67.
(2) [1919] 40 Cal. 955=13 I. C. 207.
(3) [1880] 5 Cal. 819.

A. I. R. 1930 Rangoon 281

MAUNG BA, AND BAGULEY, JJ.

Ma Hla May—Appellant.

v.

Nyaunglebin Urban Co-operative Bank Ltd. and *another*—Respondents.

Civil Misc. Appeal No. 196 of 1929, Decided on 26th June 1930, from order of Dist. Judge, Pegu, in Civil Misc. No. 78 of 1929.

Civil P. C., S. 47 — Dispute between judgment-debtor and auction-purchaser does not fall within S. 47.

A dispute between judgment-debtor and the auction-purchaser even if the latter is regarded as the representative of the former does not fall within the purview of S. 47: *A. I. R. 1927 Rang. 45, Dist.* [P 282 C 2]

Shaffee—for Appellant.

Venkatram, P. B. Sen and *S. C. Guha*—for Respondents.

Maung Ba, J.—In Suit No. 10/28 of the District Court of Pegu plaintiff was one Ma Dwa. During the pendency of the suit she died, and her daughter Ma Hla May was brought on the record as legal representative. The suit was dismissed with costs. In execution of the decree for costs a certain house and its site were attached as the property of the deceased. Ma Hla May did not raise any objection and allowed the said property to be sold by auction and one Roy bought it. After the sale and before it was confirmed Ma Hla May suddenly woke up and thought that she could claim half the property as co-owner with her mother the deceased judgment-debtor. In her application she made the decree-holder as well as Roy parties. The learned District Judge held that Ma Hla May should be held personally liable for the costs and dismissed her application. Against that order of dismissal the present appeal has been preferred.

As a preliminary objection it has been urged that the order dismissing her application does not come within the purview of S. 47 and that no appeal lies. S. 47 is clear that only questions arising between the parties to a suit in which a decree has been passed or their representatives can be determined under that section. In the first place Ma Hla May held dual capacities (1) as legal representative of the deceased and (2) in her own personal capacity. The claim was made in her personal capacity, so it is doubtful whether in

respect of her claim she can be considered as a party to the original suit. In the second place, it is doubtful whether her claim to half of the property sold is a question relating to the execution, discharge or satisfaction of the decree. So far as the decree is concerned it has been executed and satisfaction either in whole or in part has been obtained by the sale of the property. And, in the third place, there is also the complicated question as to whether Roy can be treated as a representative of the judgment-debtor. Even if he can be considered to be such a representative the dispute in the present instance is not between the decree-holder and Roy. The dispute is between Ma Hla May in her personal capacity and the auction purchaser. For these reasons I am inclined to think that the question now before the Court is not one which falls within the purview of S. 47. I therefore hold that no appeal lies and would dismiss the appeal with costs. Advocates' fees four gold mohurs.

Baguley, J.—I agree that this appeal should be dismissed, but would add a few remarks. In the first place, the appellant does not appear to have taken any trouble to find out against whom she wishes to file this application. The original petition in the lower Court was filed against the Nyaunglebin Urban Co-operative Bank and one A. C. Roy a pleader. An order was passed in favour of the Nyaunglebin Urban Co-operative Bank and A. C. Roy, but it appears that Roy was not the auction-purchaser. The auction-purchaser was S. P. K. Roy, his wife, for whom he acted. As the auction-purchaser was not made a party to the application it was bound to fail. A formal final order having been passed in favour of the Nyaunglebin Urban Co-operative Bank and A. C. Roy, the present appeal is filed against the Nyaunglebin Urban Co-operative Bank and S. P. K. Roy who was not a party to the order appealed against. For this reason, again the appeal fails. Taking the matter a step further however I am not prepared as at present advised to decide whether Ma Hla May in her personal capacity is to be regarded as a party to the suit within the meaning of S. 47, as she undoubtedly has a dual capacity. But assuming for the sake of argument that she is a party to the suit she must be regarded as the judgment-debtor. The question which the Court had to decide was the interest in the property which passed, whether the full interest or a half-interest. It is a matter of complete indifference to the decree-holder whether the whole interest has passed or a half interest had passed. They were entitled to the nett sale proceeds which were already determined. The only dispute lay between Ma Hla May and the auction purchaser. According to the view of some High Courts the auction-purchaser is a stranger to the suit and therefore the dispute with regard to the interest that passed is between a stranger and a party to the suit and does not come under S. 47. According to the view of certain other High Courts the auction purchaser is the representative of the judgment-debtor and this application would then be a contest between the judgment-debtor and the representative of the same judgment-debtor. No authority has been quoted holding that a dispute between judgment-debtors and their own representatives is a matter for decision under S, 47.

It has been held in *Abdul Sattar* v. *Chi Dee Bhi* (1) that the question as between co-plaintiffs and co-defendants may be decided under S. 47, but this ruling is no authority for holding that a dispute between a judgment-debtor and his own representative can be decided under S. 47. I would therefore agree that this appeal should be dismissed with costs. Advocate's fees four gold mohurs

P.N./R.K. *Appeal dismissed.*

(1) A. I. R. 1927 Rang. 45=99 I. C. 418=4 Rang. 418.

A. I. R. 1930 Rangoon 282

HEALD, OFFG. C. J. AND MYA BU, J.

Municipal Corporation of Rangoon—Appellants.

v.

Pazundaung Bazar Co. Ltd. and *others*—Respondents.

First Appeals Nos. 79 to 83 of 1929, Decided on 29th October 1929, from judgment of Original Side in Civil Regular Suits Nos. 497 to 501 of 1927.

Rangoon City Municipal Act (6 of 1922), Ss. 178 (3), 230, 231 and 232—Corporation

has power to charge license-fee for private market—Court cannot interfere unless it is established that fee fixed is so excessive as to be unreasonable—Burden of proving unreasonableness is on person alleging it to be so — License-fee may cover cost of all special services necessitated by duties imposed in respect of supervision of private markets—Fixing of fee does not require sanction of Local Government.

The Corporation has express power under S. 178 (3) to charge a license-fee for private market at such rate as shall from time to time be fixed by it and the Court has no right to interfere until it is established that the fee as fixed is so unreasonable as to be illegal, and the burden of proving that the fee fixed by the Corporation is so excessive as to be illegal is on the owner of the market alleging it to be so. The license-fee may reasonably cover the cost of all special services necessitated by the duties and liabilities imposed on the Corporation in respect of the supervision and regulation of private markets, and is not limited to the cost of the paper on which licenses and receipts for the fees are printed, together with the cost of printing and writing thereon, and the cost of such inspection as is directly connected with the licenses themselves. The fixing of the license-fee under S. 178 (3) is not a matter which falls within the purview of S. 230 or S. 231 and does not require the sanction of the Local Government. [P 286 C 1 ; P 288 C 2]

N. M. Cowasjee—for Appellant.
Leach—for Respondents.

Heald, Offg. C. J.—In the five cases with which this judgment deals the Municipal Corporation of Rangoon appeals against a judgment given by a learned Judge on the original side of this Court, in favour of the respondents, who are the owners of the private markets in Rangoon, whereby the Corporation was prohibited from collecting license fees from the respondent under S. 178 (3) read with S. 125 (1), City of Rangoon Municipal Act (6 of 1922) at the rates fixed by the Corporation in pursuance of S. 178 (3) of the Act, and whereby the learned Judge fixed the license fees chargeable for private markets at Rs.150 per annum per market and directed that the license fees paid in excess of Rs. 150 for each market be refunded by the Corporation to the respondents.

Under the Burma Municipal Act, which was repealed by Act 6 of 1922, the license fee for private markets was Rs. 10 for every 100 square feet of floor area, but by reason of certain provisions in that Act respondents were exempted from payment of that fee because their markets were in existence before 1910 so that the fee fixed by or under that Act was never in fact collected. Under S. 125 (1), Act 6 of 1922 respondents' markets had to be licensed, and under that section read with S. 178 (3) of the Act respondents became liable to a license fee "at such rate as shall from time to time be fixed by the Corporation."

Under the new Act the Corporation fixed the same fee as under the old Act by including as R. 2 (a) of the Rules for Markets, contained in Chap. 15, Sch. 2, of the new Act, the old provision that the license fee for private markets should be "ten rupees for every hundred feet of the floor area."

The scheme of the new Act was that certain schedules, containing rules which might need alteration from time to time were annexed to the Act and that it was provided by S. 230 of the Act that

"the Corporation may add to Schs. 1, 2, 3 and 4 rules not inconsistent with the provisions of this Act to provide for any of the matters dealt with in such schedules or for any of the purposes specified in S. 235 and may, subject to the same limitation, amend, alter or annul any rule in the said schedules."

Under S. 232 :

"The power to make, add to, alter or rescind rules under S. 230 . . . . is subject to the sanction of the Local Government and to the condition of the rules being made after previous publication,"

and

"all rules made under S. 230 . . . . shall be finally published in the Gazette and shall thereupon have effect as if enacted in this Act."

Under S. 229 :

"The schedules attached to this Act as from time to time amended, shall be deemed to be part of this Act."

The "Rules for Markets" embodied in Chap. 15, Sch. 2 of the Act did not form part of Sch. 2 when the Act came into force on 1st August 1922, but were inserted in that schedule by a notification of the Local Government dated 15th May 1923.

In 1924 the present respondents filed suits on the original side of this Court claiming an injunction to restrain the Corporation from charging license fees at the rate fixed by the Corporation under S. 178 (3) and embodied in R. 2 (a), Chap. 15, Sch. 2, on the ground that that rule was ultra vires and unreasonable. They also claimed a refund of the fees paid by them under that rule. The learned Judge on the original side found: *Municipal Corporation, Rangoon* v. *Soo-*

ratee Bara Bazar Co. (1)] that in so far as the license fees charged exceeded the amount necessary for the "financing of the licenses" they were not in fact license fees but were an "unofficial tax" on the respondents' property, that for that reason the order of the Corporation fixing the fees at the rate fixed in R. 2 (a) was ultra vires and illegal, and that respondents were entitled to an injunction restraining the Corporation from collecting license fees at that rate or at any rate "otherwise than the bare scale necessary for the proper financing of the licenses." On the footing of these findings he granted the injunction and ordered the license fees already paid to be refunded.

These cases came before a Bench of this Court on appeal and the appellate Bench found that S. 178 (3) of the Act did not comtemplate the Corporation's making a "rule," but indicated that the Corporation by "resolution" from time to time should fix the rate of fee for a license as it might think fit, and that because the fixing of license fees was not a matter dealt with in any of the schedules as originally annexed to the Act or in S. 235 of the Act, the fixing of the license fees by rule was ultra vires and the levy of license fees so fixed was illegal. But the learned Judges went on to say that there was nothing in law to prevent their deciding whether or not the fixing of the license fee was reasonable regarding it as having been done not by rule but by resolution of the Corporation, and on that view of the matter they found that since it was the intention of the legislature in enacting S. 178 (3) of the Act to give power to charge a fee which would save the Corporation from being out of pocket by reason of the duties and liabilities of the supervision and regulation of private markets, and not to give the Corporation power to impose on the owner of private markets a charge for a license which might extend to any amount for which the sanction of the Local Government could be obtained, the rule was unreasonable. The Bench accordingly dismissed the Corporation's appeal with costs.

Accepting the ruling of the Bench that the intention of S. 178 (1) of the Act was to give power to the Corporation to charge a license fee which would save it from being out of pocket in respect of the cost of the supervision and regulation of private markets, the Corporation had an account taken of the cost of such supervision and regulation, and having found that cost to be Rs. 12,308 fixed the proportion of that amount to be paid as license fee in respect of each private market on the basis of the relative assessable value of the various markets. The date of that resolution was 1st March 1927.

The respondents then filed the suits with which the present appeals deal. They pleaded that the license fees thus fixed were greatly in excess of what was necessary for "the proper financing of the licenses" and in fact amounted to taxation. They alleged that in so far as the charge was made for the year 1926-27 it involved the imposition of a tax with retrospective effect. They claimed that they were entitled to an injunction prohibiting the Corporation from charging license fees according to the new scale or according to any scale in excess of what might be necessary for the proper financing of such licenses and that they were entitled to a refund of the fees which they had paid. After all the evidence had been taken they added a further pleading:

"that by reason of the absence of any sanction of the Local Government the imposition of the said license fee was ultra vires and illegal."

The learned Judge on the original side, accepting respondents' contention that the license fee should be confined to the bare "financing of the license" and should not cover extraneous matters such as services connected with the public health, weights and measures, or inspection of food, held that license fees could not be charged so as to cover any of the costs of the supervision and regulation of the markets, but could only be charged so as to cover the cost of the issue and inspection of the licenses and the stationery and office expenses connected therewith, and he actually fixed the fee himself at Rs. 150 per annum per market. He accordingly granted respondents an injunction restraining the Corporation from charging a license fee on any private market at a rate higher than Rs. 150 per annum and he ordered that the difference

(1) A. I. R. 1927 Rang. 183=102 I. C. 878=5 Rang. 212.

between Rs. 150 and the amount actually paid be refunded to the respondents. The Corporation appeals on grounds that the learned Judge was mistaken in finding that the license fees, as now fixed, are unreasonable or ultra vires and that the learned Judge acted without jurisdiction and beyond the scope of the duties of the Court in fixing the fees at Rs. 150 per annum.

Appellants' learned advocate complains that the learned Judge entirely disregarded the judgment of the appellate Bench by which he was bound and that he acted arbitrarily in fixing the license fee himself. He says that the power of fixing the license fee is vested in the Corporation by S. 178 (3) of the Act, and that the Court had no jurisdiction to interfere in the matter unless it was proved that the fee was so unreasonable as to be illegal. He points out that the Act itself imposes special duties on the Corporation in respect of markets. S. 25 (12) for instance says that the Corporation shall make adequate provision for the regulation of all markets. S. 126 provides for the sale of meat for food either in licensed premises or in a market. S. 130 provides for the inspection of weights and measures in markets, and S. 138 for the inspection of markets and other places where animals, food, drink or drugs for human consumption are sold, while S. 235 provides for the making of rules for the construction and structural features of private markets, the drainage, water supply, ventilation, lighting, sanitary condition and regulation of such markets, the prevention of cruelty, nuisances, obstruction, overcrowding on or in the approaches to or in the passages of such markets, the supervision of such markets, the appointment of superintendents of such markets, the fixing of days and hours on or during which such markets may be kept open, and the prevention of the entry of undesirable or diseased persons into such markets. He suggests that in view of these special duties imposed by the Corporation in respect of markets the license fee now fixed by the Corporation is neither unreasonable nor excessive.

Respondents' learned advocate says that Rs. 5 a year would cover all the expenses incurred by the Corporation in connexion with the issue of the licenses, that the only inspection of the markets which is necessary in connexion with the licenses is that involved in seeing that no unlicensed private markets exist, that the only regulation of the markets which is necessary in respect of the licenses is that involved in seeing that the terms of the licenses themselves are not contravened, that the supervision and regulation of private markets contemptated by the appellate Bench could not include the supervision of the sanitary condition of the markets or the inspection of the meat or other foodstuffs sold in the markets, or the inspection of the weights and measures used in the markets, and that the Corporation is not entitled to charge by way of license fee more than the costs of the stationery and clerical labour involved in the issue of the eight licenses and eight receipts annually, and the cost of such inspection as is necessary to verify that no unlicensed markets exist and that the conditions of the license are observed, those conditions being merely that the limits of the market shall not be extended, that the market shall be kept clean, that the license fee shall be paid, and that if the license is cancelled the market shall be closed. He contends that the total cost involved to the Corporation is the cost of the eight license and receipt forms, an infinitesimal fraction of the time of one clerk to fill up those forms, and fraction of the time of an inspector to check the licenses.

He contends further that the statement of expenses, on the basis of which the Corporation fixed the present license fees, is shown by the Corporation's own records to be dishonest, and by the evidence of the Corporation's own witnesses to be false. He bases these allegations mainly on the fact that in the statement the cost is worked out on the footing of a six-hour day, whereas the officers of the Corporation are admittedly supposed to work seven hours a day. He says further that even if the statement embodied correct principles, which he denies, respondents would still be entitled to an injunction because the figures given in it are incorrect, being worked out on the false basis mentioned above. He contends that

the burden of proving that the charge was reasonable was on the Corporation, and that there was no burden on respondents to show that it was unreasonable. On these contentions it is clear that there are certain questions of law which must be decided before the evidence is considered.

As for the burden of proof I have no hesitation in finding that it lay on respondents, who were plaintiffs in the suits, to establish prima facie that the license fees were unreasonable. The Corporation has express power under S. 178 (3) of the Act to charge a fee at such rate as shall from time to time be fixed by it, and the Court has no right to interfere until it is established that the fee so fixed is so unreasonable as to be illegal. I would therefore hold that the burden of proving that the fee fixed by the Corporation was so excessive as to amount to an abuse of its legal powers, such as this Court was bound to restrain, was on the respondents.

As for the interpretation of the phrase :

"a fee which would save the Corporation from being out of pocket by reason of the duties and liabilities imposed on it by the Act of the supervision and regulation of private markets,"

which was used in the judgment of the appellate Bench, I am satisfied that it was not intended to have the restricted meaning for which respondents contend, and that it was intended to mean that in the opinion of the Bench the Corporation was entitled to recover by way of license fee the cost of the special services which are necessary in the case of a market but which are not necessary in the case of the premises of an ordinary tax-payer.

Markets are clearly places in respect of which special precautions, which are not needed in the case of the premises of ordinary tax-payers, are necessary. Foodstuffs can be sold only in markets or in licensed premises and places in which articles of food are sold must be specially clean and sanitary. It is clearly necessary to secure that foodstuffs sold in a licensed market should be fit for human consumption and it is in my opinion a reasonable function of the licensing authority to inspect food exposed for sale under its licenses and to prevent the sale of food which is not fit for human consumption. It is similarly in my opinion a proper function of the licensing authority to inspect the weights and measures used in the markets which it licenses, so as to ensure that they are correct, and in view of the express provisions of the Act it is clearly the duty of the Corporation to prevent nuisances, obstruction, overcrowding, and the entry of undesirable or diseased persons in markets which it licenses. Further it seems to me clear that in view of the fact that persons from the surrounding country congregate in large numbers in markets, special scavenging and conservancy arrangements, which are not required in the case of the premises of ordinary taxpayers, are necessary in the case of markets. I have no doubt that the appellate Bench intended to include the cost of such special services in the cost of "the supervision and regulation of private markets," which it held to be reasonably recoverable by the Corporation in the shape of a license fee.

Respondents relied largely on the evidence of Mr. Friedlander, a retired Assessor of the Corporation, who since his retirement is said to have worked as a private rating surveyor and land valuer. He was the only witness examined by the respondents in the earlier case and his evidence in that case was by consent admitted as evidence in this case. The first part of his evidence in this case was intended to show that the statement (Ex. 1) of the cost of the special service imposed on the Corporation in respect of the supervision and regulation of private markets, which had been produced by Mr. Scott, the Commissioner of the Corporation, when he was examined *de bene esse* before the regular hearing of the suits began, was dishonest. Mr. Friedlander gave evidence that the officials of the Health and Market Departments of the Corporation used to work from seven to eight hours a day for five days a week, that is, excluding Saturdays, on which they worked only half a day, and Sundays. He said that there are 116 holidays in the year, counting Saturdays as a half-holiday, so that Corporation officials earn a year's pay for doing 249 days' work or a month's pay for doing about 146 hours' work. Applying these figures to the statement, which they were intended to discredit the total

cost, as shown in that statement, is much lower than it should be. The cost of the services of the Health Officer works out at Rs. 813 instead of Rs. 660, that of the Assistant Health Officer at about Rs. 3,000 instead of Rs. 2,426, that of the Sanitary Supervisors at Rs. 1,070 instead of Rs. 953, that of the Sanitary Inspectors at Rs. 1,610 instead of Rs. 1,300, that of the Food Inspectors at Rs. 4,274 instead of Rs. 3,467 and that of the Illicit Slaughter Inspectors at Rs. 1,410 instead of Rs. 1,144, the difference against the Corporation in respect of the Health Department alone being well over Rs. 2,000.

This part of the evidence, therefore, does not support respondent's case that the statement submitted by the Corporation dishonestly exaggerates the cost of the services mentioned therein but rebuts that case and shows that the statement under-estimates the cost. Further it is clear that the statement makes no provision for the cost of the leave of the officers mentioned in it, so that the ultimate total would be very considerably more than Rs. 12,308 which was the figure adopted by the Corporation in fixing the license fees. The witness went on to suggest that the number of inspections entered in the statement was false because, according to a Corporation report (Ex. G, p. 25) there were in 1926 only 3,657 inspections of "markets, cinemas and schools" by Sanitary Inspectors whereas the total number of inspections of private markets shown in the Corporation's statement works out at 4,672 a year. This suggestion is clearly fallacious because the number of inspections by Sanitary Inspectors entered in the Corporation's statement is only 1,248, the other inspections entered in the statement being those of the Health Officer, Assistant Health Officer, the Sanitary Supervisors, the Food Inspectors and the Illicit Slaughter Inspectors. Inspections by those officers are not mentioned in the report to which the witness refers and he gives no evidence of the number of inspections ordinarily made by those officers. The witness further suggested that the cost of the inspection of weights and measures, as entered in the Corporation's statement, was exaggerated, but his evidence misrepresented the effect of that statement since it suggested that the sole services of the Market Superintendents charged for in that statement were concerned with the testing of weights and measures and it was obviously partisan and unfair. The rest of the evidence of this witness seems to me to be irrelevant.

The next witness called by the respondents was Mr. Latimour, who is the present Chief Accountant of the Corporation. He was called apparently to say how the cost of general administration is charged in the Corporation accounts against certain services, and I fail to see how his evidence helps respondents' case. It seems to me to suggest that the Corporation would have been justified in including in the cost of the special services rendered in respect of the respondents' markets some proportion of the cost which falls under the heading of general administration and which may be presumed to include such matters as the pay of the Municipal Commissioner and the cost of the Corporation offices and office establishment, but that can hardly have been the suggestion which respondents desired to make.

The only other witness called by the respondents was the Secretary of the Suratee Bara Bazaar Company, who own a number of private markets in Rangoon, and are the chief respondents in this case. He produced five notices of demand together with five bills for license fees issued by the Corporation for 1927-28. The bills were at the rate fixed by the Corporation on 1st March 1927, that is after the decision of the appellate Bench of this Court, and apparently all that the witness was called to say about them was that before the new fees were fixed the owners of the markets, or at any rate the company which he represents, had no opportunity of objecting to them. He also produced the licenses actually issued by the Corporation to his company for their five markets for the years 1927-28 and 1928-29. In cross-examination he admitted that Mt. E. M. Patail, who is a Director of his Company, is also a member of the Corporation, and from a copy of the minutes of the meeting of the Corporation at which the license fees were fixed which copy was filed by respondents themselves it ap-

pears that Mr. Patail was present at the meeting at which the rates of license fees were fixed and that he proposed a motion to refer the matter back to the Finance Committee, which motion was lost.

That is all the oral evidence called by the respondents to show that the license fees as fixed by the Corporation were so unreasonable as to warrant the interference of the Court, but respondents rely also on certain admissions alleged to have been made by various witnesses called by the Corporation. Their learned advocate says that the Corporation's assessor, Mr. Rennick, admits that the Corporation is seeking to charge twice over for the services of the Health Department. What Mr. Rennick actually said was that the Corporation was asking the private markets to pay for the whole of the time devoted by the Health Department to private markets, and the learned advocate's argument is that because every occupier of premises is entitled to the services of the Health Department of the Corporation in respect of his premises by reason of his payment of the ordinary taxes, therefore if respondents, who pay the ordinary taxes, are charged separately for the services of the Health Department they have to pay for those services twice over. The answer to that argument is that the services of the Health Department required by the ordinary tax-payer in respect of his premises are negligible in quantity, while the services required by a market as such are, as the Commissioner of the Corporation said in his evidence:

"greater in volume, continuity and degree than the services rendered to buildings in private occupation."

Such services in the case of markets must clearly be daily and continuous, whereas in the case of the ordinary taxpayer they are needed only in cases of emergency, as for instance when there is an outbreak of epidemic disease. This refers of course only to the services of the Health Department, which is different and separate from the Conservancy Department.

Respondent's learned advocate also professes to rely on an admission of the Commissioner of the Corporation that the general body of citizens is entitled to the performance of municipal services in return for payment of taxes, but the Act itself treats persons carrying on certain trades, including that of keeping private markets, as exceptions, from the general rule and requires them to take out licenses and to pay license fees in addition to taxes because they need more than the ordinary municipal services and it is reasonable that they should pay specially for the special services which they need. The admission on which the learned advocate relies must be read as qualified by the words which immediately follow it namely that

"the general principle on which a license fee is levied on privately owned markets is that the supervision of these markets imposes so heavy a burden on the Corporation that additional payment may reasonably be demanded in the shape of license fees.

The learned advocate's last argument concerns the pleading added to the plaint at the end of the case, to the effect that by reason of the absence of any sanction of the Local Government the imposition of the present license fees is illegal. I suspect that that pleading was added by reason of certain words which occur in the licenses issued to the respondents for the year 1926-27 in which there was a reference to the sanction of the Local Government, such sanction being at that time supposed to be necessary, but what the learned advocate contends before us is that the alteration of license fees is a matter which ought to be sanctioned by the Local Government, and in support of that contention he refers only to S 232 of the Act. That section relates only to rules made or altered under Ss. 230 and 231 of the Act, and since the appellate Bench of this Court has held in the earlier appeals that the fixing of a license fee under S. 178 (3) of the Act is not a matter which falls within the purview of S. 230, and it is clearly not a matter which falls within the purview of S. 231 there is no substance in this argument.

My findings on the points raised by the appeals may be summarized as follows:

I would hold that the initial burden of proof was on respondents and that unless they succeeded in proving that the license fees fixed by the Corporation were so unreasonable as to be illegal, their suits were bound to fail. I would reject the respondent's contention that

the only charges recoverable by way of license fees are the costs of the paper on which the licenses and receipts for the fees are printed together with the cost of printing and writing thereon and the cost of such inspection as is directly connected with the licenses themselves, and I would hold that the license fee may reasonably cover the cost of all special services necessitated by the duties and liabilities imposed on the Corporation in respect of the supervision and regulation of private markets. I would hold that the statement (Ex. 1) on the footing of which the Corporation fixed the present license fees is not a dishonest and exaggerated statement of the cost of those special services but is in fact an under-estimate of that cost, which might reasonably have included expenses over and above those mentioned in the statement. I would find therefore that the respondents have failed to prove that the license fees are unreasonable. I would hold that there is no substance in respondents' claim that the resolution of the Corporation fixing those fees is invalidated by the absence of the sanction of the Local Government, because such sanction is not required by S. 178 (3) or by any other provision of the Act. I would find that there are no merits in respondents' claim that the charging of the recent license fees for the year 1926-27 involved the imposition of fees with retrospective effect because respondents, by their acceptance of licenses for the year 1926-27, in which it was expressly provided that license fees should be charged thereon in accordance with the decision of this Court in the appeal then pending or at such rate as should be fixed by the Corporation in accordance with the decision in those appeals agreed to pay license fees at such rate as should thereafter be so fixed, that is in effect at the present rates.

I would accordingly set aside the judgment and decrees of the original side of this Court and dismiss respondents' suits with costs for appellants in respect of the hearing on the original side to be calculated at the rates fixed by the learned Judge, that is to say, 15 gold mohurs for the first day and ten gold mohurs for each succeeding day in each case plus taxed costs on the valuation of the suit in each case. The advocates' fees in these appeals will be thirty gold mohurs in Appeal No. 83 of 1929, and 15 gold mohurs in each of the other appeals.

Mya Bu, J.—I concur.

P.N./R.K. *Decree set aside.*

* A. I. R. 1930 Rangoon 289

PAGE, C. J. AND DAS, J.

Cassim, D. K. & Sons—Appellants.

v.

V. M. Abdul Rahman and *another*—Respondents.

First Appeal No. 237 of 1929, Decided on 23rd June 1930.

*** Presidency Towns Insolvency Act, Ss. 2 (e) and 17—Insolvent's credit and reputation are not part of insolvent's property—Damages caused by loss of credit and reputation do not vest in Official Assignee and insolvent can therefore maintain suit for damages in such case.**

Insolvent's credit and reputation are not part of the insolvent's property within S. 2 (e) and so the damages caused by loss of credit and reputation do not vest in the Official Assignee but remain vested in the insolvents in spite of the bankruptcy. The insolvents therefore can maintain and carry on the suit for damages caused to their reputation and credit in their personal capacity. The principle applicable to the individuals is also applicable to two or three persons carrying on business under a firm name : *Wilson* v. *United Counties Bank Ltd.*, (1920) *A.C.* 102 ; *Beckham* v. *Drake*, 2 *H. L. C.* 579 and *Brewer* v. *Dew*, 11 *M. & W.* 625), *Rel. on.* : *A. I. R.* 1924 *Cal.* 74, *Ref.* [P. 290 C 2]

Cowasjee and *P. C. D. Chari*—for Appellants.

Leach—for Respondents.

Das, J.—On 10th June 1925, the firm of D. K. Cassim & Sons filed a suit against the two defendants for damages caused to the reputation and credit of the plaintiffs by certain wrongful acts of the defendant. On 14th February 1929 the plaintiff firm were adjudicated insolvents on their own petition. After that the Official Assignee was added as a plaintiff as it was thought that the cause of action vested in the Official Assignee after the adjudication of the plaintiff firm. The Official Assignee declined to go on with the suit unless the insolvent firm furnished him with security for Rs. 25,000 for the costs which he might have to incur if he went on with the suit. The insolvent firm were unable to furnish the security demanded by the Official Assignee and the Official Assignee declined to go on with the suit. Then a creditor of the insolvent

firm sought the leave of the Court to appear and to argue that the cause of action in the suit filed by the firm did not vest in the Official Assignee and that the insolvents could carry on the suit themselves in spite of the adjudication order. But the learned Judge rightly held that he could not allow an outsider to raise that point and as that point was not raised by the insolvents before him he declined to consider the same and dismissed the plaintiffs' suit.

The insolvents have now filed the present appeal on the ground that the cause of action in the present suit did not vest in the Official Assignee and that they had a right to bring and carry on the suit in their personal capacity.

The first thing to consider in this case is what vests in the Official Assignee on an adjudication. S. 17, Presidency Towns Insolvency Act, states that on the making of an order of adjudication the property of the insolvent wherever situate shall vest in the Official Assignee and shall become divisible among his creditors. S. 2 (e) of the same Act defines property and runs as follows :

"Property includes any property over which or the profits of which any person has a disposing power which he may exercise for his own benefit."

It may be noted here that the definition of property in the Presidency Towns Insolvency Act is not so wide as the definition of property in the English Bankruptcy Act. The question to consider is whether the right to sue for damages caused by loss of credit and reputation of a person vests in the Official Assignee or is a personal right belonging to the insolvent. The leading authority on this point is the case of *Wilson* v. *United Counties Bank, Ltd.* (1). Viscount Finlay at p. 120 of his judgment states as follows :

"On principle and from these two cases it appears clear that, while all causes of action for damage to the property vest in the trustee, any cause of action for damage to the person or reputation of the bankrupt would remain vested in him in spite of his bankruptcy."

Lord Atkinson at p. 128 of the judgment states as follows :

"The neglect of the defendants to take reasonable steps to maintain Major Wilson's credit and reputation caused loss to his estate, and at the same time inflicted upon him as a trader (for it was a reference to his trade and business the contract was entered into) pain and humiliation and loss of credit and repute. That credit and repute, though of great value to him was not part of his assets. Injury to it, though it might do him much harm, did not lessen or depreciate his property ; it would appear to me that the right of action in respect of this injury would no more pass to this trustee than would his right of action for slander reflecting on him as a trader published in the course of the bankruptcy proceedings."

It is clear from these observations that damages caused by loss of credit and reputation are not part of the assets which vest in the Official Assignee and that the insolvent's credit and reputation are not part of the insolvent's property within S. 2 (e).

But it has been argued by the advocate for the respondents that as the suit was filed by a firm therefore the principle laid down in *Wilson's* case (1) would not apply as that was the case of an individual and not of a firm. He also argued that the credit and reputation of a firm was part of the goodwill of the firm and therefore vested in the Official Assignee. This argument would have been quite sound if the firm was entirely separate from the individual partners of the firm. I may refer in this connexion to the case of *Seodoyal Khemka* v. *Joharmull Manmull* (2). In the course of his judgment, Page, J., at p. 558 (*of* 50 *Cal.*) states as follows :

"A partnership under S. 239 is a relationship which subsists between persons but a firm is not a person ; it is not an entity ; it is merely a collective name for the individuals who are members of the partnership. It is neither a legal entity, nor is it a person."

I fail to see why the principle applicable to a person should not apply to two or three presons carrying on business under a firm name. It is clear from the decision in *Wilson's* case (1) that damages caused by loss of credit and reputation do not vest in the Official Assignee, but remain vested in the insolvents in spite of the bankruptcy. I must therefore hold that the cause of action in this case did not vest in the Official Assignee and that the insolvents were entitled to carry on the suit in their individual capacity. The order of the learned Judge on the original side dismissing the suits must be set aside, and the suit remanded to the trial Court for trial on the merits.

Page, C. J.—I agree. In *Wilson's* case (1) the jury found that the defendants undertook to supervise the carry-

(1) [1920] A. C. 102.

(2) A. I. R. 1924 Cal. 74=75 I. C. 81=50 Cal. 549.

ing on of the plaintiffs' business as a master and also to take all reasonable steps to maintain his credit and reputation. They further found that by reason of the defendant's negligence damages had been caused both to the plaintiff's business and estate, and also to his credit and reputation and it was held that the cause of action quoad the damage to the plaintiff's business and estate passed to his trustee in bankruptcy and quoad the damage to his credit and reputation the cause of action remained vested in the plaintiff.

At the hearing of the appeal in the present case it was not contended before us that any damage had been caused to the plaintiffs' business, otherwise than by reason of the loss of credit and reputation that the firm had suffered by reason of the defendants' wrongful acts. I cannot differentiate between the credit and reputation of a firm and the credit and reputation of the partners of the firm. It appeared to me to be one and the same thing. In *Brewer* v. *Dew* (3) as was pointed out by Lord Atkinson in *Wilson's* case (1) (at p. 129):

"an action as brought for trespass for seizing and taking the plaintiff's goods under a false and unfounded claim of debt"

per quoad the plaintiff was annoyed and prejudiced in his business and believed by his customers to be insolvent, and certain lodgers left his house. It was held that this right of action did not pass to the assignees. In my opinion the principles of law laid down in *Beckham* v. *Drake* (4) and *Wilson* v. *United Counties Bank, Ltd.* (1) conclude the case against the respondents, and I concur in the order proposed by my learned brother Das. The appeal will be allowed with costs.

P.N./R.K. *Appeal allowed.*

(3) 11 M. & W. 625=1 D. & L. 383=7 Jur. 953=12 L. J. Ex. 448.

(4) 2 H. L. C. 579=13 Jur. 921=11 M. & W. 315=12 L. J. Ex. 486.

A. I. R. 1930 Rangoon 291

PAGE, C. J., AND DAS, J.

Maung Kywe—Appellant.

v.

Ma Kyin—Respondent.

First Appeal No. 49 of 1930, Decided on 18th June 1930, from order of Original Side in Civil Regular Suit No. 371 of 1929.

Buddhist Law (Burmese)—Divorce—Proof of matrimonial offence is necessary for allowing divorce—Restitution of conjugal rights is competent—It was however refused under the circumstances.

A divorce is not permissible at the will and pleasure of one party to a Burmese Buddhist marriage without proof of a matrimonial offence. Consequently a suit for restitution of conjugal rights in respect of parties to a Burmese Buddhist marriage is competent. [P 294 C 1]

Two persons lived as husband and wife for about 11 years and had children. After that period the husband left the place and lived with another woman whom he had made his lesser wife.

Held: that the wife had reasonable cause for not returning to her husband and no decree for restitution of conjugal rights could be passed at the instance of the husband: *A. I. R.* 1924 *Rang.* 182; 2 *U. B. R.* 5 and *A. I. R.* 1929 *Rang.* 307, *Rel. on.*; 2 *U. B. R.* 3; 11 *L. B. R.* 385 and 38 *Cal.* 629 (*P. C.*), *Ref.* [P 294 C 1]

J. B. Sanyal—for Appellant.

Page, C. J.—This case raises a question of general interest and importance namely whether a suit for restitution of conjugal rights lies in respect of a marriage between Burman Buddhists. The material facts lie within a narrow compass. The parties have been married about 11 years and lived happily together at Pegu. There are three children of the marriage. Some time ago the petitioner left Pegu and came to Rangoon where he now resides. As the result of a domestic quarrel the respondent left the petitioner and took the children away with her to Pegu where she is now living with her sister. It is not pretended that the respondent has been guilty of any matrimonial offence, but as she has refused to return to her husband the petitioner has brought the present suit claiming restitution of conjugal rights.

My learned brother Cunliffe, J., tried the suit and dismissed the petition with costs. I will state the ratio decidendi of his judgment in the learned Judge's own words:

"After a perusal of the reasons given by the learned Judges in the old Recorder's Court, the Upper Burma Courts and so on, I am impressed by the fact that the natural personal law of the Burman Buddhist does not appear to have contemplated any such action on the part of a Court of law. The whole establishment of the principle has been brought about by various deductions which the learned Judges have made from texts in the Dhammathats, which contain no direct authority that Burmese Buddhists before the establishment of the Britsh Courts ever knew of such relief."

The first question that falls for determination is whether the ground upon which Cunliffe, J., based his decision can be supported in law. Now I respectfully agree with the learned Judge that

"a suit for restitution of conjugal rights is a natural remedy where one or other of a married couple has failed in carrying out their marital duty;"

and I further agree that if either party to a Burmese Buddhist marriage is at liberty to dissolve the marriage contract at pleasure and without proof of any default on the part of the other party in carrying out the obligations that matrimony entails, a decree for restitution of conjugal rights would be nugatory, and a suit claimng such relief would not be within the contemplation of the personal law relating to marriage which governs the Burmese Buddhists. A decree ordering a wife to resume cohabitation with her husband which the wife could counter at will by dissolving the marriage-contract would of course be a mere brutum fulmen. On the other hand, if a marriage between Burmese Buddhists can only be dissolved by mutual consent or for some matrimonial fault, the right to enforce the obligations of the marriage by claiming restitution of conjugal rights, where one of the parties without reasonable cause has withdrawn from cohabitation, in my opinion, is a right incidental and ancillary to the marriage contract so long as it subsists. But is one of the parties to a Burmese Buddist marriage entitled to put an end to the marriage contract at pleasure and merely for a whim without proving mutual consent, or that the other party to the marriage has been guilty of a matrimonial offence? In my opinion he is not. The conflicting views on this subject are clearly set out in *Mi Kin Lat* v. *Nga Ba So* (1), *Ma Thein Mya* v. *Maung Tun Hla* (2), *Nga Nwe* v. *Mi Su Ma* (3), *Maunng So Min* v. *Ma Ta* (4) and *Ma Hmon* v. *Maung Tin Kauk* (5), and it would be a work of supererogation to restate the arguments on the one side and on the other. I have however considered all the available texts and authorities and whatever might have been the practice of the Burman Buddhists long ago in the dark ages I am satisfied that from time immemorial it has not been permissible under the personal law of Burman Buddhists for one party to a marriage to put an end to the marriage contract for mere caprice and without the consent of the other party or proof of some matrimonial offence. There is no doubt the passage in Ch. 3, Book 12, of the Manugye to the effect that

"when the husband wishes to separate and the wife does not, or the wife wishes to separate and the husband does not, when there is no fault on either side, but their destinies are not cast together the law for partition of property is this:

"Let the party in whom there is no fault, but who wishes to separate set aside what the king may have given (this party) with clothes, or ornaments belonging to him. But of all other property, animate or inanimate, the party wishing to separate shall have no share; let the party who does not wish to separate have the whole, and let the other party pay all law expenses. If there are debts, the party wishing to separate must pay them. If there are no debts and no property given by the king, let each take what they are entitled to, let the party wishing to separate pay the price (of his or her body) according to their class to the other. This is the law when there is no fault on either side, and when one wishes to separate."

But the meaning of the word "kanmasat" is not clear, and the passage is somewhat obscure; moreover there are other passages in the Dhammathats which would appear to lead to a different conclusion, and I am not persuaded that divorce was permitted merely for a whim even in ancient days when the Burmans had scarcely emerged from a state of society akin to barbarism.

U May Oung, some time a Judge of this High Court suggests an explanation of the matter in his work on Buddhist Law (1919 Edn. at p. 76):

"In the olden time a divorce, which meant the disintegration of a household, must have been an event of considerable importance in the village life, and the rights and wrongs of the parties would be freely discussed by the community... But if in spite of the counsels to the contrary, the husband or wife persisted in demanding a separation without being in a position to point to any grave direliction on the other side, the elders would be powerless to prevent him or her from leaving the house and abandoning all claim to the joint property. It is inconceivable that, in such a case, the party demanding divorce would not put forward some reason, however flimsy, some real or imagined grievance, which however would

(1) [9104-06] 2 U. B. R. (Buddhist Law Divorce) 3.
(2) A. I. R. 1923 Rang. 86=69 I. C. 980.
(3) [1872-1892] L. B. R. 391.
(4) [1872-1892] L. B. R. 610.
(5) A. I. R. 1924 Rang. 182=79 I. C. 705=1 Rang. 722.

not be considered a sufficient cause requiring action on the part of the elders. Persuasion being in vain, the latter would regard the matter as one of sheer perversity, a different thing from caprice."

To me it appears to be a strange doctrine that the infliction of a penalty for the commission of an act involves the sanction and validation of the act, but whatever may have been the legal position in ages long past, I am satisfied that under the personal law of the Burmese Buddhist as it obtains today divorce at the instance of one party to the marriage merely for caprice and without proof of some matrimonial fault is not permissible even if the party desiring the divorce is prepared to surrender his or her share of the joint property, and to pay "kobo" (price of body).

Heald, J. in *Ma Hmon* v. *Maung Tin Kauk* (5), (at p. 749 *of* 1 *Rang.*) points out that:

"the provisions of the Burmese Buddhist law as to the payment of a fine or "body price" on divorce have long been obsolete, and if either party can claim divorce without alleging misconduct on the part of the other the result would seem to be that in every case where divorce is claimed a divorce must be given, that is, that the application to the Court is a mere formality, that if there is property of the marriage the husband can get a decree for divorce against the wife and leave her to sue for the property, and that if there is no property either party can divorce the other at any time without penalty."

Loss of property, indeed may result from a divorce, but the surrender of the joint property, in my opinion will not in itself entitle a party to a Burmese Buddhist marriage to put an end to it. As the Privy Council pointed out in *Maung Pe* v. *Ma Lon Ma Gale* (6):

"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. The partition may no doubt, be treated as relief consequential upon the 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."

Further the doctrine that divorce can be obtained at the will and pleasure of one party to the marriage is wholly inconsistent with a personal law that compels a husband to maintain his children and also his wife, at any rate, unless she has means of her own sufficient for her support. *Maung Hmun Taw* v. *Ma Pwa* (7). Now, where the mandate and intention of the lawgiver is obscure I agree with U May Oung that

"the present customs are a safer guide than the little known laws of the Dhammathats and I pray in aid of the opinion that I have expressed some observations of Mr. Jardine and U May Oung both of whom are recognised authorities in this subject."

At p. 3 of his Notes on Buddhist Law Mr. Jardine observes:

"I have wondered why so many Europeans insinuate without definitely saying that a Burmese husband or wife may break the marriage contract at any time without consent of the other party . . . . . Maung Kyaw Doon informs me that any such freedom of divorce is contrary to the Burmese ideas, and that he never heard of an exparte divorce being allowed merely because the one partner had ceased to love the other. Such an idea might find favour among men addicted to concubinage, but its discordance with the Buddhist law is perceptible at once in its ignoring pregnancy and the rights of born or unborn children of women united in the first and most honourable form of marriage.

Again at p. 13, the learned author states:

"If the written law, written ages ago, gives such freedom of divorce as to undermine marriage altogether, one might fairly expect to find plain effects in the shape of existing custom conforming to the written law. I have already stated that different native Judges have informed me that no such custom exists to their knowledge. U May Oung, at p. 77 of his work on Buddhist law (1919 edition), observes that in Jardine's days there was a difference of opinion and many Burmans maintained the view now held in Upper Burma but there was no evidence of the existence of a custom of divorcing faultless persons against their will. He took great pains to collect all available data and was invariably led to the firm conclusion that the doctrine of exparte divorce was unsustainable from any point of view. Experience gained since then points to the same result, there is no such custom among the Burman Buddhists, either in Lower or Upper Burma, and where parties cannot agree to a divorce the general view is that it cannot be effected unless some 'fault' is shown to exist."

And in *Ma Hmon* v. *Maung Tin Kauk* (5) at p. 748, (of 1 Rang.) Heald J, adds:

My experience for what it is worth points to the same state of facts. I have been dealing as Judge with cases of divorce under Burmese Buddhist law for nearly 25 years; I have spent several years in the Court of the Judicial Commissioner of Upper Burma and several years in this Court, first as the Chief Court of Lower Burma and now as the High Court for the whole of Burma and I have never till now dealt with a case in which a claim for divorce without fault was made.

After perusing the material text-books and authorities I am clearly of

(6) [1911] 38 Cal. 629=11 I. C. 497 (P.C.).

(7) [1872-1892] L. B. R. 258.

opinion that a divorce is not permissible at the will and pleasure of one party to a Burmese Buddhist marriage without proof of a matrimonial offence. It follows therefore that a suit for restitution of conjugal rights lies in respect of parties to a Burmese Buddhist marriage: *Nga Nwe* v. *Mi Su Ma* (3), *Maung Sein* v. *Kin Thet Gyi* (8), *Ma Thet Nwe* v. *Maung Kha* (9).

To hold otherwise would strain to breaking point the gossamer thread which binds together the parties to a Burmese Buddhist marriage. I decline to assist in severing that tie, and if the effect of this decision is to strengthen the bond of marriage between Burman Buddhists it cannot be doubted, I think, that so salutary a result will tend to the welfare of the people of this country.

A further question now arises, whether a decree for restitution of conjugal rights should be passed in favour of the petitioner in the present case. In my opinion it should not. It appears not only from the evidence of the respondent but also from the admission of the petitioner himself that since he has come to Rangoon, he has been consorting and living with another woman whom he states that he had made his lesser wife. I am of opinion, in the circumstances of the present case that the respondent has reasonable cause for refusing to return to her husband, and that the Court ought not to compel the petitioner's first wife who is the mother of his three children, to resume cohabitation with the petitioner against her will or to pass in favour of the petitioner a decree for restitution of conjugal rights.

With all due respect, I feel myself bound to hold that the ground upon which the learned trial Judge based his judgment is not in accordance with law but for the reasons that I have stated I am of opinion that the suit was rightly dismissed. The appeal is dismissed and as there was no appearance by the respondent, there will be no order as to costs.

Das, J.—I agree.

P.N./R.K. *Appeal dismissed.*

(8) [1904] 4th Qr. Buddhist Law 5.
(9) A. I. R. 1929 Rang. 207=120 I. C. 137=7 Rang. 451.

A. I. R. 1930 Rangoon 294

DOYLE, J.

Ko Po Kauk—Appellant.

v.

Ko Mya and *others*—Respondents.

Second Appeal No. 78 of 1930, Decided on 2nd July 1930, from decree of Dist. Judge, Pyapon, in Civil Appeal No. 102 of 1929.

Civil P. C. (1908), S. 11—Wrong decision of competent Court operates as res judicata.

Where a Court is competent to try a suit, the mere fact that the Court through an error in procedure comes to a decision which it is not permitted by law to make does not render its decree a nullity and the decision operates as res judicata: 21 *Bom.* 205; 33 *Bom.* 479 and *A.I.R.* 1928 *Cal.* 777, *Rel. on.* [P 295 C 1]

S. C. Mukerjee—for Appellant.

Maung Gyee—for Respondents.

Judgment.—In Civil Regular No. 1 of 1928 of the Sub-Divisional Court of Kyaiklat Ko Mya and Ma E Tin sued Po Kauk for a declaration that a house and site holding No. 9, block No. F-2, serial No. 225, Dedaye, were liable to attachment as being the property of Ko Ba Sein and Ma Mai Sein. The suit was filed on 24th January 1928 and in support of the claim of the plaintiff a landholder's certificate obtained on 24th August 1926 by Maung Ba Sein and Ma Mai Sein was filed. This order conferring the status of landholder had been unsuccessfully appealed against by Po Kauk, an order adverse to his claim being passed by the Deputy Commissioner Pyapon on 6th August 1928. The judgment in Civil Regular No. 1/28 of the Sub-Divisional Court of Kyaiklat was passed on 8th October 1928 but on appeal to the Commissioner it was held that the Deputy Commissioner's orders in appeal were irregular and a decree in favour of Po Kauk was obtained on 18th January 1929.

Po Kauk thereupon filed Civil Regular No. 22 of 1929 of the Sub-Divisional Judge, Kyaiklat, against Ko Mya, Ma E Tin, Ma E Sein (whose husband is now dead) and Ko Shaw Ba who had purchased the land in a Court auction for a declaration that the house belonged to him and that delivery be made over to him. The Sub-Divisional Judge held that the matter was res judicata by Civil Regular No. 1 of 1928 of the Sub-Divisional Judge, Kyaiklat and dismissed the suit. In appeal the District Judge held that so far as the site was concerned, the matter was not res judicata

because the cause of action alleged was new and subsequent but as regards the house which was affected by the Revenue Officer's declaration, the matter was res judicata. Since the prayer in the Sub-Divisional Court was for a declaration in connexion with the house above mentioned the District Judge dismissed the appeal.

In appeal it is urged that as the house could not exist apart from the site which had been held by the District Court to belong to the appellant, it necessarily follows that the suit was not barred and that the lower Court should have followed the provisions of S. 15, Lower Burma Towns and Village Lands Act.

The error in procedure under S. 15, Lower Burma Towns and Village Lands Act, did not take place in the present litigation but in Civil Regular No. 1 of 1928 of the Sub-Divisional Judge, Kyaiklat. The decision of 1926 not being five years old was not final and it was the duty of the Sub-Divisional Judge in that suit to refer for final adjudication by the revenue authorities the question as to status. The argument that because he failed to do so his decree in that suit as to the ownership of the land did not render the matter res judicata is unsound. It cannot be denied that the Sub-Divisional Court was a Court competent to try a suit as to ownership of the property now in question and the mere fact that the Court through an error in procedure came to a decision which it was not permitted by law to make on one of the issues did not render its decree a nullity.

It was the duty of the defendant Po Kauk to raise the defence in the previous suit that there was no finality in the decree of 1926. The question as to the status of landholder was merely incidental to the decision of Civil Regular No. 1 of 1928. It has been pointed out by Strachey, J., in *Sardarmal Jagenath v. Aranvayal Sathapathy Moodaliar* (1), that where a Court is competent to decide a suit it is competent to decide all questions which arise in that matter, whether they are questions of fact or law, while in *Tarini Charan Bhattacharya v. Kedar Nath Haldar* (2), the view was taken that since S. 11 makes conclusive the decision, the reasoning of the Court has nothing to do with the matter. In *Chhaganlal Kishoredas v. Bai Harkha* (3) where a suit was decided on the basis of an alienation specially forbidden by Bombay Act 5, 1872, it was held that a plea of estoppel by res judicata must prevail against a subsequent suit even if the result of giving effect to the former decision would be to sanction what was illegal. In the opinion of this Court even had the present suit been one for a declaration of rights on the land as well as on the house, the plea of res judicata as held by the Court of first instance must prevail. The present appeal must therefore fail and is dismissed with costs in all Courts.

P.N./R.K. *Appeal dismissed.*

(1) [1897] 21 Bom. 205.

(2) A.I.R. 1928 Cal. 777=56 Cal. 723.

(3) [1909] 33 Bom. 479=2 I.C. 530.

A. I. R. 1930 Rangoon 295

DAS, J.

Maung E Maung—Appellant.

v.

Ma Chit May—Respondent.

Special Appeal No. 179 of 1930, Decided on 18th July 1930.

(a) Buddhist Law (Burmese) — Husband can sue for moneys entrusted by him without joining his wife.

A Burmese Buddhist husband can file a suit for recovery of moneys entrusted by him to another without making the wife a party to the suit: *A. I. R.* 1927 *Rang.* 209, *Expl.* [P 296 C 1]

(b) Civil P. C., O. 1, R. 9, and O. 6, R. 17 —Suit should not be dismissed on ground of non-joinder without allowing parties opportunity of amending plaint—Plea of non-joinder not raised in trial or appellate Court —Court should not go into it at all.

A suit should not be dismissed on the ground of non-joinder of parties without allowing the parties an opportunity of amending the plaint by joining the person not a party to the suit. Where the plea of non-joinder is neither raised in the trial Court nor in the grounds of appeal, the appellate Court should not go into it at all. If it raises it and dismisses the suit on that ground its action is contrary to the provisions of O. 1, R. 9. [P 296 C 1]

Maung Ni—for Appellant.

Judgment.—The appellant filed a suit against his mother-in-law for a sum of money which he stated he had entrusted to her soon after his marriage. The respondent's case was that the money had been given to her by the appellant's father. In the trial Court respondent did not raise the question that the appellant could not sue without making his wife a party to the suit. As a matter of fact the respondent did not raise this point in her grounds of appeal before the lower appellate Court. The trial Court

held that the money belonged to the appellant and passed a decree in his favour. The lower appellate Court raised the point as to whether the suit could be filed by the appellant himself and decided that the suit was bad for non-joinder of parties and dismissed the suit. The lower appellate Court overlooked the plain provision of law that a suit should not be dismissed on the ground of non-joinder without allowing the parties an opportunity of amending the plaint by joining the person not a party to the suit. O. 1, R. 9, provides for this. This is the danger of a Court raising a point of its own accord and deciding a suit on that point alone. I am not satisfied that the plaintiff could not file the suit himself and that the wife was a necessary party to the suit; but as the point was never raised by the defendant the lower Court should not have gone into it at all and should not have decided the suit on that point. The case of *Ma Paing* v. *Maung Shew Hpa* (1) does not decide that a husband or wife cannot file a suit for moneys due to them jointly without making the husband or wife a party to the suit. I do not see any reason why a husband cannot file a suit for moneys entrusted by him to another especially as the defendant did not raise the point that the wife should be a party to the suit. I must therefore set aside the decree of the lower appellate Court and remand the case to the lower appellate Court for decision on the merits. The appellant will get his costs in this Court.

P.N./R.K. *Case remanded.*

(1) A. I. R. 1927 Rang. 209=103 I. C. 563=5 Rang. 296 (F.B.).

A. I. R. 1930 Rangoon 296

CARR, OFFG. C. J., AND DAS, J.

Ismail Hossein Mamsa—Appellant.

v.

Official Assignee, Rangoon—Respondent.

Civil Misc. Appeal No. 60 of 1930, Decided on 4th August 1930, from order of Original Side judgment D/- 20th March 1930, in Insolvency Case No. 207 of 1927.

Presidency Towns Insolvency Act (3 of 1909) Sch. 2, R. 23, (2)—Question of allowing interest to creditors under scheme of composition — Scheme should prevail if inconsistent with R. 23 (2).

When the question of allowing interest to creditors under a scheme of composition entered by an insolvent with his creditor arises, the terms of the composition itself must be taken into consideration, and if the scheme of composition itself contains something inconsistent with R. 23 (2), the terms of the scheme should prevail and the rule is not applicable. [P 297 C 1]

N. N. Sen—for Appellant.

Masani—for Respondent.

Carr, Offg. C. J.—The appellant in this case is one of the creditors of Mahomed Saleh, who was adjudicated insolvent in Case No. 207/1927 of this Court. After his discharge had been refused, the insolvent entered into an agreement for a composition with his creditors, this agreement being embodied in the document filed at p. 42 of the record. The terms of the agreement are that the undersigned creditors agree to accept a composition of 4 annas in the rupee on the amount of the debts provable in insolvency. This composition was approved of by the Court. In subsequent proceedings the Official Assignee disallowed interest claimed by the appellant to the extent of Rs. 144-2-9. Against this order the appellant appealed to the Court and the learned Judge on the original side dismissed his appeal. This is an appeal against the order of the learned Judge.

The Official Assignee and the learned Judge relied upon R. 23, Sub-R. 2, Sch. 2, Presidency Towns Insolvency Act. The learned Judge said that he was unable to see any difference in principle between a proof for the purpose of receiving a dividend in the ordinary course and a proof for the purpose of receiving a dividend under a scheme of composition. In my opinion, when the question arises under a scheme of composition, the terms of the composition itself must be taken into consideration, and, as I have already pointed out, the agreement in this case provides for a composition of 4 annas in the rupee on the amount of debts provable in insolvency.

When we turn to R. 23 (2), it is, I think, apparent that a debt, which includes interest, is provable in its entirety, but the rule provides that in respect of the interest only, interest at 6 per cent per annum shall rank for dividend in the first instance. Interest in excess of that rate, although provable, is not payable until all the debts

proved, excluding such interest, had been paid in full.

My view of this paragraph is that the whole debt is provable although there may be no difference in principle, as the learned Judge said, between a proof for dividend in the ordinary course and a proof for dividend under a scheme of composition, if the scheme itself contains nothing to prevent the application of R. 23 (2). I think that when the scheme of composition itself does contain something inconsistent with that rule, then, the terms of the scheme should prevail, and the rule is not applicable.

I would therefore allow this appeal and direct that the disallowed interest be allowed. There will be no order as to costs.

Das, J.—I concur.

P.N./R.K. *Appeal allowed.*

A. I. R. 1930 Rangoon 297
Full Bench

HEALD, AG. C. J., AND OTTER AND ORMISTON, JJ.

Government of Burma—Appellant.

v.

Municipal Corporation of Rangoon—Respondent.

Civil Ref. No. 2 of 1930, Decided on 9th April 1930.

(a) Rangoon City Municipal Act (1922), Ss. 29, 31, 230 and 235—Corporation can make provisions by regulations and resolutions for payment of passage money to officers.

Per *Full Bench*.—The Corporation is competent to make provision by resolution and regulation for payment of passages to officers in the service of the Corporation under Ss. 29 (3) and 31—(*Heald, Ag. C. J.* contra). [P 307 C 1]

Per *Heald, Ag. C. J.* — The true interpretation of Ss. 29 and 31 read with Ss. 230 and 235 of the Act is that in respect of the matters mentioned in those sections the Corporation, if it makes standing orders at all, must make them in the form of rules, which are subject to the sanction of the Local Government, and cannot make them in the form of regulations so as to avoid the necessity for that sanction. [P 302 C 1]

(b) Interpretation of Statutes — Enactments conferring power — Permission does not exclude duty.

Per *Heald, Ag. C. J.*—In enactments which confer powers, and particularly in enactments which confer powers on public authorities, language of mere permission may not preclude the existence of a duty: *Bishop of Oxford's case*, 5 *A. C.* 214, *Foll.* [P 300 C 2]

Per *Otter, J.*—Where a statute directs the doing of a thing for the sake of justice or the public good, the word "may" is the same as the word "shall:" *Rex* v. *Barlow*, 2 *Salk* 609 *and Macdougall* v. *Paterson*, 11 *C. B.* 755, *Ref.* [P 306 C 1]

(c) Rangoon City Municipal Act (1922), Ss. 230 and 235—Although wording is permissive, duty is cast to make rules when circumstances calling for them exist.

Although the wording of Ss. 230 and 235 of the Act is permissive, nevertheless there is a duty on the Corporation to make rules for the purposes for which it is empowered to make rules, when circumstances calling for such rules exist. [P 300 C2]

(d) Rangoon City Municipal Act (1922), Ss. 230 and 235—Sections are enabling.

Sections 230 and 235 are not mandatory, but enabling. The Corporation "may," not "shall" make rules. [P 303 C 2]

(e) Rangoon City Municipal Act (1922), Ss. 230 and 232—Scope.

Rules made under Ss. 230 and 232, by virtue of the Act, are to have the force of law. They cannot be altered or rescinded except by resorting to the same process as is resorted to when they are made, and since many of the matters specified in S. 235 are, or appear to be, of minor importance, it would be unreasonable to hold that the Corporation is precluded from dealing with them otherwise than by rules made under Ss. 230 and 232. [P 303 C 2]

(f) Rangoon City Municipal Act (1922), S. 235—Passage allowance to officers comes under S. 235.

Passage allowances to officers in the service of the Corporation may well be said to be ejusdem generis with many matters dealt with in S. 235. [P 303 C 1]

Government Advocate—for Appellant.

N. M. Cowasjee—for Respondent.

Heald, Ag. C. J. — S. 241, City of Rangoon Municipal Act, provides that where any dispute arises between the Corporation of Rangoon and the Local Government as to the interpretation of any of the provisions of the Act the Local Government may (and at the request of the Corporation shall) draw up a statement of the case and refer it with the opinion of the Government Advocate thereon for the decision of this Court.

The Corporation recently drafted rules for the payment of passage allowances to officers in the service of the Corporation under Ss. 29 and 31 of the Act, and submitted those draft rules to the Local Government for sanction under the provisions of S. 232 (1) of the Act. The Local Government objected to certain provisions in the draft rules and withheld its sanction.

The Corporation then decided that it was not bound to proceed in the matter by way of rules requiring the sanction of the Local Government but was entitled to proceed by way of "regulations"

in S. 31-A, introduced by S. 6 of the amending Act, it provides that

" the Corporation may, in accordance with the rules made under S. 230 read with S. 235,"

grant pensions, gratuities or compassionate allowances to dependants of officers and servants. And in order that the Corporation may have power to make such rules a new sub-head is inserted in S. 235 (vi). These considerations lead to the conclusion that the legislature intended that, under ordinary circumstances, unless otherwise provided, the Corporation should have the power to make regulations, not necessarily having the force of law, in respect of matters which fall within the scope of S. 235. I need only touch on two other arguments put forward by Mr. Eggar. The first is that it has been the previous practice of the Corporation to act under procedure indicated in Ss. 230 and 232. Instances are the rules for the provident fund, for the payment of gratuities to officers and servants and for applying the Fundamental Rules, which have been made as Chaps. 10, 14 and 16, Sch. 1. This argument is irrelevant to the question whether the Corporation has power to make regulations without resorting to this procedure. The other argument is that the legislature could not have intended that the Corporation should have the power by means of a mere resolution, possibly passed by a snap vote, to give to its officers passage allowances on an extravagant scale. It is sufficient, in reply to this argument, to refer to the emergency power conferred on the Local Government by S. 233. Sub-S. (1) of that section empowers the local Government to require the corporation to make rules under S. 230 in respect of any purpose or matter specified therein. Under sub-S. (2), if the Corporation fails to comply with the requisition within a reasonable time to be fixed, the Local Government may, after previous publication make such rules which shall, on final publication in the Gazette have effect as if enacted in the Act. If the Corporation did abuse its powers in the manner suggested it would be open to the Local Government, by action under this section, effectively to prevent a repetition of the abuse. If further the Local Government in its discretion so thought proper, it could under the same section secure the passing of rules to carry out the provisions of Ss. 29 (3) and 31. As such rules would have the force of law while the "regulations for the payment of passages to officers" above referred to, do not, the effect would be that the "regulations" would be superseded by the "rules." A more complete check on the action of the Corporation it is difficult to imagine.

I would answer the question referred by saying that the Corporation is competent to make provision by resolution and regulation for payment of passages to officers in the service of the corporation under S. 29 (3) and 31, City of Rangoon Municipal Act, 1922.

I agree that there should be no order as to costs.

Otter, J.—The only question in this case is whether on the one hand the Corporation is competent to make provision by resolution and regulation for payment of passages to officers in the service of the Corporation under Ss. 29 (3) and 31, City of Rangoon Municipal Act, 1922, or on the other hand whether such provision must be effected by rules made by virtue of S. 230 of the Act. In the latter case by reason of S. 232 of the Act the sanction of the Local Government must be obtained and the rules must be published.

I have had the advantage of reading the judgment of the learned Officiating Chief Justice and also that of my brother Ormiston and I do not propose therefore to set out the matters under review at any length. There can be no question that the Act nowhere in terms provides that in such a case the Corporation must proceed by rules sanctioned by the Local Government. It is necessary to see therefore whether upon a fair construction of the Act as a whole such procedure must be resorted to.

It cannot be disputed that Ss. 29 (3) and S. 31 of the Act (by reason of which there can be no doubt I think that the Corporation is given the power to make passage allowances) cannot upon the face of them be construed in this sense. Nor can I find anything in the Act, except that passage allowances are no doubt ejusdem generis with certain of the matters dealt with in S. 235, and in the rules which directly or indirectly make it incum-

tention mainly on the wording of an amendment to the Act which was effected by Act 9 of 1928. S. 29, Municipal Act, dealt with the appointment and terms of service of the Health Officer, Secretary, Assessors, and Chief Accountant of the Corporation and as originally enacted, provided that they should receive such "salary" as the Corporation should, with the previous sanction of the Local Government, determine, and that no variation in the amount of salary so determined should be made by the Corporation except with the previous sanction of the Local Government. S. 31 dealt with the appointment and conditions of service of other officers and servants of the Corporation and, as originally enacted, it provided that the Corporation should pay them such "salaries, allowances, pension, and gratuities" and should make on their behalf such payments to provident or annuity funds as it should consider reasonable. The difference in the original wording of these two sections suggested that the Corporation had no power to pay anything but "salary" to the officers mentioned in S. 29 although for its other officers and servants it could pay allowances pensions; gratuities and provident fund contributions in addition to salaries. That was not the intention of the Act and therefore S. 29 was amended by the addition of a provision that the Corporation might pay for the officers mentioned therein such allowances, pensions gratuities and provident fund contributions as it might think fit in addition to their salaries. That addition put the officers mentioned in Ss. 29 and 31 on the same footing so far as concerned the power of the Corporation to pay allowances, pensions, gratuities and provident fund contributions, and that was all that it was intended to do.

But by the same amending Act (Act 9 of 1928) a new section was added after S. 31. That section dealt with a new matter, namely the payment of pensions, gratuities or compassionate allowances not to officers themselves but to the widows or dependants of officers who had died while in service, and it is on an inference from the wording of this new section that the Corporation bases its claim that rules are not necessary for the payment of the allowances, pensions, gratuities, and provident fund contributions mentioned in Ss. 29 and 31. The new section says:

"The Corporation may, in accordance with rules made under S. 230 read with S. 235, grant pensions, gratuities or compassionate allowances to the widows or other dependent relations of any officers or servants appointed under Ss. 27, 29, 30 or 31 who have died while in the service of the Corporation."

The Corporation contends that because this new section contains an express reference to "rules" in respect of the grant of pensions, gratuities or compassionate allowances to widows or dependants and because there is no similar reference to rules in Ss. 29 and 31, we are bound to infer that Ss. 29 and 31 do not contemplate the framing of the rules. It seems to me that the suggested inference would have been very much stronger if the two provisions on which it is based had been included in the Act at the same time, but even in that case it would in my opinion have been negatived by the fact that Cl. (6), S. 235, actually provides for the framing of rules for the purposes mentioned in Ss. 29 and 31. It is in my opinion no part of the scheme of the Act that sections, for the purposes of which it was intended that rules should be framed, should contain an express indication of that intention, and it seems to me clear that the words "rules made under S. 230 read with S. 235," which appear in S. 31-A and in no other section of the Act and which add nothing to the sense of that section, were inserted in the section inadvertently and unnecessarily and without reference to the general scheme and drafting of the Act. Until this recent amendment of the Act by which the new S. 31-A was introduced into the Act there was clearly nothing in the Act to suggest that the legislature intended that rules should not be framed for the purposes of Ss. 29 and 31. On the contrary there was, as I have said, express provision for such rules in S. 235 (vi). There is no suggestion even now that the words in question in the new S. 31-A were introduced into that section with any intention of effecting a change of the law as previously appearing in Ss. 29 and 31 read with S. 235. The argument is this, that even if the legislature did not in fact intend to make any change in the law by its use of the words in question in S. 31-A,

nevertheless according to the rules of interpretation applicable to legislative enactments we are bound to infer from the fact that those words were inserted in the new S. 31-A and did not appear in the original Ss. 29 and 31, that a change in the law was intended and are therefore bound to hold that such a change was in fact effected. In the absence of any allegation or probability that the legislature did in fact intend or even contemplate such a change in the law, and in view of the express provisions of S. 235 of the Act, I find myself entirely unable to accept that argument or to hold that the fact that a reference to rules appears in S. 31-A, which was recently added to the Act, and does not appear in Ss. 29 and 31, which are parts of the original Act, warrants the suggested inference that rules were not intended to be made for the purposes of Ss. 29 and 31.

A somewhat similar argument is sought to be founded on the addition of a provision in S. 235 (vi) (i) corresponding to the new S. 31-A and the omission of any similar addition corresponding to the addition to S. 29; but S. 235 (vi) (i) already provided for the subject-matter of the addition to S. 29 so that there was no need for any amendment of that subsection by reason of the amendment of S. 29.

Another somewhat similar argument is sought to be founded on the omission of any reference to the "sanction of the Local Government" in the clause added by the amending Act to S. 29 and in S. 31, the suggestion being that if it had been intended that rules should be framed for the purposes of those sections that intention would have been indicated by such a reference. But an examination of the Act shows that in the case of other sections for the purposes of which rules having the force of law have been actually made and were intended to be made there is no reference in the sections themselves to the sanction of the Local Government and I do not think that the argument is well founded.

The only other argument used by the Corporation's learned counsel in support of the Corporation's contention that it was not bound to make rules for the purposes of Ss. 29 and 31, but was entitled to make regulations instead of rules, is that the wording of Ss. 230 and 235 of the Act is permissive and not mandatory, and that even if it be held that in certain cases a duty may be coupled with a power given by a legislative enactment, still such a duty will only be coupled with the power in cases where the exercise of the power is for the public good. There is good authority for the proposition that in enactments which confer powers, and particularly in enactments which confer powers on public authorities, language of mere permission may not preclude the existence of a duty. In the *Bishop of Oxford's* case (1) Lord Selborne said :

"The language (certainly found in authorities entitled to very high respect) which speaks of the words 'it shall be lawful' and the like, when used in public statutes, as ambiguous and susceptible (according to certain rules of construction) of a discretionary or an obligatory sense, is in my opinion inaccurate. I agree with my noble and learned friends who have preceded me, that the meaning of such words is the same whether there is or is not a duty or obligation to use the power which they confer. They are potential, and never (in themselves) significant of any obligation. The question whether a Judge or a public officer, to whom a power is given by such words, is bound to use it upon any particular occasion or in any particular manner must be solved aliunde, and in general it is to be solved from the context, from the particular provisions, or from the general scope and objects of the enactment conferring the power."

Applying that dictum to the present case I am of opinion that the scheme and intention of the Act is that in respect of matters which call for standing orders the Corporation is bound to make rules when occasion for those standing orders arises, Government having power to require it to make rules, and in default to make the necessary rules itself. For these reasons I would hold that although the wording of Ss. 230 and 235 of the Act is permissive, nevertheless there is a duty on the Corporation to make rules for the purposes for which it is empowered to make rules, when circumstances calling for such rules exist. Since in this case the Corporation actually drafted rules and submitted them to the Government for sanction it may be assumed that in the opinion of the Corporation circumstances calling for such rules do exist. With reference to the contention that the Court will not couple a duty with a power given by a legisla-

(1) [1879-80] 5 A. C. 214.

tive enactment except in cases where the exercise of the power is for the public good, and that the power of making rules regulating allowances payable to Municipal officers or servants has no connexion with the public good, I venture to suggest that the cases in which it was necessary to consider the question whether or not the exercise of a power was for the public good in order to determine whether there was a duty to exercise the power, were cases where the intention of the legislature was not clear from the Act itself; and that in cases, like the present case, where the intention is clear from the actual provisions or the scheme of the Act, there is no need to consider such a question, the Court being concerned merely with the intention of the legislature. But if it is necessary to consider whether or not the exercise of such powers as those in question in this case is for the public good I would say that from the very purpose of Municipal legislation there arises a presumption that powers given by Municipal enactments to a Municipal body are intended for the public good, as tending to the efficiency of Municipal administration. If on the other hand we are to look only at the enactment itself I would say that on a perusal of the Municipal Act, and particularly of Ss. 230, 232, 233 and 235 and the original schedules, I have no doubt that the intention of the legislature when it passed the Act was that if occasion arose for standing orders in respect of matters such as those mentioned in S. 235 or in the schedules, those standing orders must be in the form of rules.

With reference to the Corporation's claim to be entitled to make what are in fact rules under the guise of "regulations" it may be noted that the only references to "regulations" which occur in the Rangoon Municipal Act are in S. 148 which deals with emergency provisions for the prevention of disease and says that in the event of the city being visited or threatened with an outbreak of dangerous disease the Commissioner may by public notice prescribe "temporary regulations" to prevent the outbreak or spread of the disease, and in S. 207 which provides punishment for contravention of the provisions of such "regulations." There is a reference to "regulations" in R. 2, Chap. 4, Sch. 2 to the Act, which says that no person shall obstruct streets except with the permission of the Commissioner and in accordance with such terms and conditions as the Corporation may impose either generally by "regulation" or in each special case, but that rule did not form part of the Act or schedules as enacted but was a later addition. The Corporation has also purported to make "regulations" under S. 163 of the Act, but that section gives no power to make "regulations" and S. 235 (xxii), contemplates the framing of "rules" for matters covered by S. 163. It appears, therefore, that the only "regulations" which were contemplated by the legislature at the time the Act was passed were the temporary regulations which might be made by the Commissioner under S. 148 of the Act.

The case, put shortly, seems to me to be as follows :

Sections 29 and 31 empower the Corporation to pay allowances, pensions and gratuities for its officers and servants. S. 235 says that the Corporation may make rules for the payment of leave allowances, acting allowances, pensions, gratuities, or compassionate allowances, conveyance allowances, and travelling allowances. That section does not mention "passage allowances" as being among the purposes or matters for which rules may be made because no provisions for the payment of passage allowances to civil officers were in existence at the time when the Municipal Act came into force, but passages or passage allowances are in my opinion ejusdem generis with various matters mentioned in S. 235 and particularly in sub-S. (vi) of that section, as being matters for which rules may be made, and in view of the provisions of sub-S. (iii) of that section, if the rules for the payment of passage allowances which the Corporation submitted to the Local Government had been sanctioned and brought into force, I do not think that any Court would have held that they were ultra vires of the Corporation. The Corporation undoubtedly in my opinion had power to make those rules, and the need for the rules had admittedly arisen. The power to make the rules was in my view

coupled with a duty to make those rules, because the legislature, when it passed the Municipal Act, intended that standing orders relating to allowances should be in the form of rules, that intention being shown by the express provisions of sub-S. (vi), S. 235 and not being negatived either by the wording of S. 29, as amended or by that of S. 31.

I would therefore hold that the Corporation in purporting to make "regulations" for the payment of passages to its officers without the sanction of the Local Government required by S. 232 (1) of the Act was acting illegally, the true interpretation of Ss. 29 and 31 read with Ss. 230 and 235 of the Act being that in respect of the matters mentioned in those sections the Corporation, if it makes standing orders at all, must make them in the form of rules, which are subject to the sanction of the Local Government, and cannot make them in the form of regulations so as to avoid the necessity for that sanction.

In the circumstances of the case I would make no order for costs.

Ormiston, J. — A dispute having arisen between the Municipal Corporation of Rangoon and the Local Government as to the interpretation of certain of the provisons of the City of Rangoon Municipal Act (Act 6 of 1922), the Local Government has, under the provisions of S. 241 of the Act, referred to this Court the decision of the question:

"Whether the Corporation is competent to make provision by resolution and regulation for payment of passages to officers in the service of the Corporation under Ss. 29 (3) and 31, City of Rangoon Municipal Act, 1922."

Section 29 (1) directs the Corporation to appoint persons to be heads of certain departments. Sub-S. (3), which was added bv the City of Rangoon Municipal Amendment Act, 1927 (Act 11 of 1928), is as follows:

"To each of the said officers the Corporation shall pay, in addition to their salaries, such allowances, pensions and gratuities, and make on their behalf such payment to provident or annuity funds as it thinks fit."

Section 31 enacts that

"the Corporation shall appoint such other officers and servants as are necessary for the efficient carrying out of the purposes of this Act and shall assign to them such duties, and shall pay them such salaries, allowances, pensions and gratuities, and make on their behalf such payments to provident or annuity funds, as it thinks reasonable."

Section 229 provides that the schedules attached to the Act are to be deemed to be part of the Act. S. 230 enables the Corporation to add to Schs. 1 to 4 rules to provide for any of the purposes specified in S. 235. By S. 232 (1) the power to make rules under S. 230 is rendered subject to the sanction of the Local Government and to the condition of their being made after previous publication. By sub-S. (2) all rules made under S. 230 are to be finally published in the Gazette and are thereupon to have effect as if enacted in the Act. By S. 235 it is provided that

"in particular and without prejudice to the generality of the powers conferred by S. 230, rules made thereunder may provide for or regulate all or any of the following purposes and matters."

Then follows a list of purposes or matters occupying 11½ pages of an octavo volume. The list comprises 52 items, the majority of them divided into numerous sub-heads, and appears to have been designed to attempt to cover the whole field of Municipal administration. Item (vi) deals with a variety of matters relating to Municipal, officers and servants. Sub-head (b) is "the conditions of service of Municipal officers or servants." Sub-head (f) is:

"the payment of allowances to municipal officers and servants, or to certain of them, whilst absent on leave."

Sub-head (j) provides for pensions, gratuities and compassionate allowances to officers and servants on retirement or discharge. Sub-heads (j) and (k) deal with conveyance and travelling allowances. No sub-head specifically covers passage allowances. Item (iii) is an omnibus clause "generally for carrying out the purposes of this Act."

The Corporation, being desirous of providing for passage allowances for its officers, framed rules dealing therewith under Ss. 230 and 235 and forwarded them to the Local Government for its sanction under S. 232. Sanction was refused. The Corporation then, by resolution, passed a set of "regulations" for the payment of passage to its officers. The enacting clause is:

"In exercise of the powers conferred by Ss. 29 (3) and 31, City of Rangoon Municipal Act, 1922, the Corporation of Rangoon will, in its discretion, pay passage allowances to officers in its service in accordance with the following regulations."

proved, excluding such interest, had been paid in full.

My view of this paragraph is that the whole debt is provable although there may be no difference in principle, as the learned Judge said, between a proof for dividend in the ordinary course and a proof for dividend under a scheme of composition, if the scheme itself contains nothing to prevent the application of R. 23 (2). I think that when the scheme of composition itself does contain something inconsistent with that rule, then, the terms of the scheme should prevail, and the rule is not applicable.

I would therefore allow this appeal and direct that the disallowed interest be allowed. There will be no order as to costs.

Das, J.—I concur.

P.N./R.K. *Appeal allowed.*

A. I. R. 1930 Rangoon 297
Full Bench

HEALD, AG. C. J., AND OTTER AND ORMISTON, JJ.

Government of Burma—Appellant.

v.

Municipal Corporation of Rangoon—Respondent.

Civil Ref. No. 2 of 1930, Decided on 9th April 1930.

(a) Rangoon City Municipal Act (1922), Ss. 29, 31, 230 and 235—Corporation can make provisions by regulations and resolutions for payment of passage money to officers.

Per *Full Bench.*—The Corporation is competent to make provision by resolution and regulation for payment of passages to officers in the service of the Corporation under Ss. 29 (3) and 31—(*Heald, Ag. C. J.* contra). [P 307 C 1]

Per *Heald, Ag. C. J.* — The true interpretation of Ss. 29 and 31 read with Ss. 230 and 235 of the Act is that in respect of the matters mentioned in those sections the Corporation, if it makes standing orders at all, must make them in the form of rules, which are subject to the sanction of the Local Government, and cannot make them in the form of regulations so as to avoid the necessity for that sanction. [P 302 C 1]

(b) Interpretation of Statutes — Enactments conferring power — Permission does not exclude duty.

Per *Heald, Ag. C. J.*—In enactments which confer powers, and particularly in enactments which confer powers on public authorities, language of mere permission may not preclude the existence of a duty: *Bishop of Oxford's case*, 5 *A. C.* 214, *Foll.* [P 300 C 2]

Per *Otter, J.*—Where a statute directs the doing of a thing for the sake of justice or the public good, the word "may" is the same as the word "shall:" *Rex* v. *Barlow*, 2 *Salk* 609 *and Macdougall* v. *Paterson*, 11 *C. B.* 755, *Ref.* [P 306 C 1]

(c) Rangoon City Municipal Act (1922), Ss. 230 and 235—Although wording is permissive, duty is cast to make rules when circumstances calling for them exist.

Although the wording of Ss. 230 and 235 of the Act is permissive, nevertheless there is a duty on the Corporation to make rules for the purposes for which it is empowered to make rules, when circumstances calling for such rules exist. [P 300 C2]

(d) Rangoon City Municipal Act (1922), Ss. 230 and 235—Sections are enabling.

Sections 230 and 235 are not mandatory, but enabling. The Corporation "may," not "shall" make rules. [P 303 C 2]

(e) Rangoon City Municipal Act (1922), Ss. 230 and 232—Scope.

Rules made under Ss. 230 and 232, by virtue of the Act, are to have the force of law. They cannot be altered or rescinded except by resorting to the same process as is resorted to when they are made, and since many of the matters specified in S. 235 are, or appear to be, of minor importance, it would be unreasonable to hold that the Corporation is precluded from dealing with them otherwise than by rules made under Ss. 230 and 232. [P 303 C 2]

(f) Rangoon City Municipal Act (1922), S. 235—Passage allowance to officers comes under S. 235.

Passage allowances to officers in the service of the Corporation may well be said to be ejusdem generis with many matters dealt with in S. 235. [P 303 C 1]

Government Advocate—for Appellant.

N. M. Cowasjee—for Respondent.

Heald, Ag. C. J. — S. 241, City of Rangoon Municipal Act, provides that where any dispute arises between the Corporation of Rangoon and the Local Government as to the interpretation of any of the provisions of the Act the Local Government may (and at the request of the Corporation shall) draw up a statement of the case and refer it with the opinion of the Government Advocate thereon for the decision of this Court.

The Corporation recently drafted rules for the payment of passage allowances to officers in the service of the Corporation under Ss. 29 and 31 of the Act, and submitted those draft rules to the Local Government for sanction under the provisions of S. 232 (1) of the Act. The Local Government objected to certain provisions in the draft rules and withheld its sanction.

The Corporation then decided that it was not bound to proceed in the matter by way of rules requiring the sanction of the Local Government but was entitled to proceed by way of "regulations"

in S. 31-A, introduced by S. 6 of the amending Act, it provides that

"the Corporation may, in accordance with the rules made under S. 230 read with S. 235,"

grant pensions, gratuities or compassionate allowances to dependants of officers and servants. And in order that the Corporation may have power to make such rules a new sub-head is inserted in S. 235 (vi). These considerations lead to the conclusion that the legislature intended that, under ordinary circumstances, unless otherwise provided, the Corporation should have the power to make regulations, not necessarily having the force of law, in respect of matters which fall within the scope of S. 235. I need only touch on two other arguments put forward by Mr. Eggar. The first is that it has been the previous practice of the Corporation to act under procedure indicated in Ss. 230 and 232. Instances are the rules for the provident fund, for the payment of gratuities to officers and servants and for applying the Fundamental Rules, which have been made as Chaps. 10, 14 and 16, Sch. 1. This argument is irrelevant to the question whether the Corporation has power to make regulations without resorting to this procedure. The other argument is that the legislature could not have intended that the Corporation should have the power by means of a mere resolution, possibly passed by a snap vote, to give to its officers passage allowances on an extravagant scale. It is sufficient, in reply to this argument, to refer to the emergency power conferred on the Local Government by S. 233. Sub-S. (1) of that section empowers the local Government to require the corporation to make rules under S. 230 in respect of any purpose or matter specified therein. Under sub-S. (2), if the Corporation fails to comply with the requisition within a reasonable time to be fixed, the Local Government may, after previous publication make such rules which shall, on final publication in the Gazette have effect as if enacted in the Act. If the Corporation did abuse its powers in the manner suggested it would be open to the Local Government, by action under this section, effectively to prevent a repetition of the abuse. If further the Local Government in its discretion so thought proper, it could under the same section secure the passing of rules to carry out the provisions of Ss. 29 (3) and 31. As such rules would have the force of law while the "regulations for the payment of passages to officers" above referred to, do not, the effect would be that the "regulations" would be superseded by the "rules." A more complete check on the action of the Corporation it is difficult to imagine.

I would answer the question referred by saying that the Corporation is competent to make provision by resolution and regulation for payment of passages to officers in the service of the corporation under S. 29 (3) and 31, City of Rangoon Municipal Act, 1922.

I agree that there should be no order as to costs.

Otter, J.—The only question in this case is whether on the one hand the Corporation is competent to make provision by resolution and regulation for payment of passages to officers in the service of the Corporation under Ss. 29 (3) and 31, City of Rangoon Municipal Act, 1922, or on the other hand whether such provision must be effected by rules made by virtue of S. 230 of the Act. In the latter case by reason of S. 232 of the Act the sanction of the Local Government must be obtained and the rules must be published.

I have had the advantage of reading the judgment of the learned Officiating Chief Justice and also that of my brother Ormiston and I do not propose therefore to set out the matters under review at any length. There can be no question that the Act nowhere in terms provides that in such a case the Corporation must proceed by rules sanctioned by the Local Government. It is necessary to see therefore whether upon a fair construction of the Act as a whole such procedure must be resorted to.

It cannot be disputed that Ss. 29 (3) and S. 31 of the Act (by reason of which there can be no doubt I think that the Corporation is given the power to make passage allowances) cannot upon the face of them be construed in this sense. Nor can I find anything in the Act, except that passage allowances are no doubt ejusdem generis with certain of the matters dealt with in S. 235, and in the rules which directly or indirectly make it incum-

bent upon the Corporation to proceed by rules. It is perfectly true that, by virtue of S. 230 the Corporation may add to the schedules (which contain rules) and that by S. 235 they may make rules for a very large number of matters therein provided for. It is also true that a vast number of rules are contained in schedules which were actually published with the Act, and moreover it is also true that the Corporation has already made rules dealing with gratuities and has applied the Fundamental Rules for Government servants to its officers; and it is also true that passage allowances may well be said to be ejusdem generis with many matters thus dealt with in S. 235.

I do not think, however, that the latter fact has any real bearing upon the matter, for the question is not as to what the Corporation has been in the habit of doing, but what the Act says that it is bound to do or not to do.

Thus there can be no doubt that the words of Ss. 230 and 235 of the Act are upon the face of them merely permissive. It is said however that if their context and the general scope of the Act are looked at, it should be held that they are not permissive only but mandatory. If so I think there can be little doubt that the contention of the Local Government is correct and that rules are required. The learned Officiating Chief Justice has come to this conclusion. He says that in view of the nature of the Act (which confers powers on public authorities) language of mere permission may not preclude the existence of a duty. That may be so. But in coming to the conclusion that in the present case a duty exists, he relies upon what was said in the leading case of the *Bishop of Oxford* (1). In that case the material words of a section in the Church Discipline Act were as follows:

> "In every case of any clerk in holy orders who may be charged with any offence...... it shall be lawful for the Bishop of the diocese .... on the application of any party complaining .... or if he shall think fit, of his own motion, to issue a commission...., for the purpose of making inquiry....."

It was held by the House of Lords that such words were permissive only. It will be seen that the position was very different from that in the present case, though the words may be said to be more plainly permissive than those under review. It might however have been there argued with more force than in the present case that a duty was cast upon the Bishop to enquire into the conduct of clerks in holy orders. It is perfectly true that on p. 235 of the report, Lord Selborne says:

> "The question whether a Judge, or a public officer, to whom a power is given by such words, is bound to use it upon any particular occasion, or in any particular manner, must be solved aliunde, and, in general, it is to be solved from the context, from the particular provisions, or from the general scope and objects of the enactment conferring the power."

and in applying that dictum to the present case the learned Officiating Chief Justice is of opinion that the scheme and intention of the Act is that in respect of matters which call for standing orders, the Corporation is to make rules, and that the Local Government may actually require it to make rules, and in default may itself make the necessary rules. He goes on to say that that being, in his view, the scheme and the intention of the Act, there is a duty on the Corporation to make rules for the purposes for which it is empowered to make rules should circumstances calling for such rules exist. The question upon this aspect of the case therefore is whether from the scheme and intention of the Act there is a duty upon the Corporation to proceed by rules. In considering this the Act must be examined as a whole, and as I shall later endeavour to show, its provisions do not seem to me to bear this interpretation. Before doing so however I wish to refer to certain passages in the *Bishop of Oxford's* case (1) which seem to me to throw considerable light upon the matter.

Earl Cairns at p. 222 of the report says:

> "The words 'it shall be lawful' are not equivocal. They are plain and unambiguous. They are words merely making that legal and possible which there would otherwise be no right or authority to do. They confer a faculty or power, and they do not of themselves do more than confer a faculty or power. But there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the

(1) [1879] 5 A. C. 214 (235).

power is reposed, to exercise that power when called upon to do so."

In the present case I am unable to see anything in the objects for, or conditions under, which the act (viz. the payment of salaries) to be done presupposes a duty upon the Corporation. Nor can I see that existence of such a duty may be inferred from the "title of the person" for whose benefit the power is to be exercised. Lord Penzance at pp. 229 and 230 of the report uses similar words. He includes among the considerations relevant for the determination of the question whether a duty in such a case exists but includes the words "the general objects of the statute." It can scarcely be argued I think that one of the general objects of the Rangoon Municipal Act was to provide leave passages for its servants. It seems to me on the other hand that had the legislature intended that such a minor matter as this should be the subject of a rule and the sanction of the Local Government, this could have quite simply been stated in the statute.

I do not propose to refer in detail to the numerous authorities considered in the *Bishop of Oxford's* case (1), but in the well-known case of *Rex* v. *Barlow* (2) it is laid down that where a statute directs the doing of a thing for the sake of justice or the public good, the word "may" is the same as the word "shall." It does not seem that it can be said here that the payment of leave passages can be either for the sake of justice or the public good. The case of *Macdougall* v. *Paterson* (3) may also be briefly referred to. Part of the head-note in this case is as follows:

"The word 'may' in S. 13, County Courts Extension Act, 13 and 14, Vict. Col. 61, which provides, that in certain cases, the Court or a Judge at chambers may by rule or order direct that the plaintiff shall recover his costs, is not used to give a discretion, but to confer a power upon the Court and Judges."

In the course of his judgment Jervis, C. J., said that the

"object (of the section under review) would be effectually defeated by giving the Judges a discretion,"

and he held that in that case the word "may" must be construed as "must." It seems to me that this is an entirely different case from the present one, and that the existence of a duty there might well be inferred.

The learned author of Maxwell on the Interpretation of Statutes discusses the matter at pp. 206 to 214 of the seventh edition of that text-book, and I cannot find that any case to which he refers was decided on the facts analogous to those in the present case. Such duties as the issue of a summons by a Magistrate, the examining of a Churchwarden's accounts by the proper official, the issue of a warrant to enforce a poor rate and so forth, are all cases where, for the public good, the duty to perform the act in question may well be said to exist. In the present case I find it difficult to see what duty exists at all, or on whom that duty lies if it could be said to exist. Unless some such duty as I have referred can be found it seems to me impossible to hold that the word "may" in Ss. 230 and 235 of the Act should be given an imperative meaning.

There is no doubt at all that the whole field of Municipal administration is covered by the list of matters contained in S. 235 of the Act, and it might be possible to argue from this, that the legislature intended that rules should be made in respect of all such. I am by no means sure that there is any force in such an argument, but upon the assumption that there is, I am clearly of opinion that an answer to it can be found upon a consideration of Ss. 29 (3) and 31 (a) of the Act. I do not propose to elaborate the argument upon this point, which appears in the judgment of my brother Ormiston; and it is sufficient to say that the first of these sections, upon the face of it, can have but one meaning only, viz. that the Corporation has unfettered discretion to make such payments as leave passages to the servants therein referred to; whereas in the second, it is specifically laid down that rules are necessary for grant of pensions, gratuities, etc., there dealt with. It is true that these are new provisions, but they form part of and must be read together with the Act. The Act must be considered as a whole and upon the plain, to my mind, unambiguous wording of its provisions, and, although it may be possible to argue that the intention of the legislature was that rules should be made for the pur-

(2) 2 Salk. 609.
(3) 11 C. B. 755=15 Jur. 1103=21 L. J. C. P 27=2 L. M. & P. 681.

pose now under consideration, yet I cannot hold that there is anything in the plain wording of the statute, as it stands, which makes this necessary.

For these reasons I feel bound to agree with the judgment of my brother Ormiston, and am of opinion that the Corporation may otherwise than by rules made under Ss. 230 and 235 of the Act make provision for the payment of leave passages to its servants. I agree that there should be no order as to costs.

V.B./R.K. *Reference answered.*

A. I. R. 1930 Rangoon 307

BROWN AND BAGULEY, JJ.

U Ba Thein and *another*—Appellants.

v.

U Po Mya and *another*—Respondents.

Civil Misc. Appeal No. 78 of 1930, Decided on 19th August 1930, from order of Dist. Judge, Insein, D/- 8th March 1930, in Civil Appeal No. 13 of 1930.

Civil P. C., (1908), Sch. 2, Para 16—Decree without allowing time to file objections—Appeal lies.

Appeal lies where a decree is passed without allowing the parties 10 days' time to file their objections to the award: 29 *All.* 584, *Foll.* [P 308 C 1]

P. B. Sen—for Appellants.

Aung Gyaw—for Respondents.

Judgment.—The appellant brought a suit against the respondents to evict them from a small portion of land lying on the boundary between holdings owned by the appellants and the respondent U Po Mya respectively. Issues were framed and the plaintiff Maung Ba U and one of his witnesses were examined. The parties then filed a petition in which they stated that they had learned that the Inspector U Tun Hla had surveyed the suit land twice under the orders of the Superintendent of Land Records. The petition then stated that

"we should like to abide by the decision made by the Superintendent of Land Records himself pronouncing which of the two surveys made on two different occasions is correct. Therefore we pray that order may be passed without costs in respect of the suit land, in accordance with the decision of the Superintendent of Land Records."

After this application had been put in, and on the same day, the diary record of 21st November 1929 shows that the pleaders of the parties orally asked that in order to be able to give a final decree, the Court should call the Superintendent of Land Records and examine him as an expert witness. The matter was referred according to the petition and the Superintendent surveyed the land and made his report. He was then examined by the Court as a witness and a decree was passed in accordance with his finding. The respondents appealed against this decree to the District Court. That Court held that the parties must be held to have referred the matter in dispute under the provisions of para. 1, Sch. 2, Civil P. C. Under the provisions of para. 16 no appeal lies from a decree duly passed in accordance with an award as a result of such a reference. In the present case however the decree had been passed without allowing the parties 10 days time to file their objections to the award, and following the decision in the case of *Najuruddin Ahmed* v. *Albert Purah* (1), the learned Judge of the District Court held that an appeal did lie, and remanded the case to the trial Court to allow of objections being filed to the award.

It is against this order of the District Court that the present appeal has been filed.

It has been contended that the case should be treated as though the suit had been compromised under the provisions of R. 3, O. 23, Civil P. C., and not as though there had been a reference to arbitration. Para 1, Sch. 2, Civil P. C., lays down that:

"Where in any suit all the parties agree that any matter in difference between them shall be referred to arbitration they may, at any time before judgment is pronounced, apply to the Court for an order of reference. Every such application shall be in writing and shall state the matter sought to be referred."

It seems to me that there has been a substantial compliance with the provisions of the paragraph here. The petition states clearly that they wish to abide by the decision of the Superintendent of Land Records, and asks that an order may be passed in accordance with that decision. The subsequent oral request made by the pleaders cannot I think be treated as more than a request by consent that before the award was accepted the Court should examine the arbitrator. I think the District Court was right in holding that there had been

(1) [1907] 29 All. 584=(1907) A. W. N. 184.

a reference to arbitration. Nor can I see any good reason for differing from the decision in the Allahabad case that an appeal does lie in such cases where the parties have not been given time to file objections to the award. Para. 16 specifically lays down that a decree can only be passed under it after the time for making application to set aside the award has expired.

The question for consideration now is therefore whether there was sufficient reason for interference. The Additional District Judge suggests that the Court did not refer the matter to the Superintendent of Land Records in the terms of the reference to arbitration. The trial Judge's letter of 25th November would appear substantially to communicate the terms. The fact however remains that the parties were not given time to file their objections. It may be that they would not be able to satisfy the Court that their objections were sound. But it is premature to decide on this point now. They were clearly entitled to have time to formulate objections and I do not see any good reason therefore for interfering with the orders of the District Judge. I dismiss this appeal with costs.

P.N./R.K. *Appeal dismissed.*

A. I. R. 1930 Rangoon 308

CARR, OFFG. C. J. AND OTTER, J.,

Abdul Kader—Appellant.

v.

Daw Yin and *another*—Respondents.

First Appeal No. 267 of 1929, Decided on 3rd July 1930, from order of District Judge, Toungoo, D/- 9th November 1929, in Civil Execution Case No. 19 of 1929.

(a) Civil P. C. (1908), O. 21, R. 16 proviso. —Scope.

The proviso to O. 21, R. 16, is one of procedure only and does not create either rights or liabilities. [P 309 C 2]

(b) Civil P. C. (1908), O. 21, R. 16—Upon construction of its terms, assignment inoperative—It cannot be made operative by having recourse to words "by operation of law"—Principles of equity cannot be considered as rendering transfer valid by "operation of law."

The words "by operation of law" cannot be invoked so as to make an assignment operative to transfer the decree and the right under it, which would upon the true construction of its terms, otherwise, be inoperative in that regard. Although in certain cases, principles of equity may be relied on, e. g., in the case of a transfer by trustees and a beneficiary, such principles cannot be considered as rendering a transfer valid by "operation of law." Therefore in the case of a transfer by a decree-holder of his rights under the decree, the deed of transfer must be looked at for determining if the decree is transferred, and it would be a question in each case whether the principles of equity can be invoked upon such an examination: 11 *Bom.* 506; *A.I.R.* 1921 *Cal.* 74, *Disc.*; 30 *All.* 28 and *A.I.R.* 1924 *Cal.* 661, *Rel. on.* [P 311 C 2; P 312 C 1]

P. S. Chari—for Appellant.

F. S. Doctor—for Respondents.

Otter, J.—In Civil Regular Suit No. 2 of 1927 of the District Court of Toungoo, one Ali Bi sued to set aside a sale deed entered into by the administrator of the estate of a man, called Sayed Mohideen, upon payment of a sum representing amounts spent for the benefit of the estate less certain moneys withdrawn by the purchasers, and mesne profits.

She obtained a decree, which was, on 16th July 1928, substantially affirmed upon appeal to this Court, the decree directing that the sale deed in question be set aside on payment of Rs. 6,956-5-0, less costs. On 4th August 1928 Ali Bi, by her agent one Mustak Ahmed, executed a sale deed in favour of the appellant, the effect of which is one of the matters now under consideration.

It will be convenient to refer at once to the material portions of this document. It states (inter alia) that in consideration of Rs. 20,000 paid and to be paid in respect of a number of sums due to Chettyars and others for money advanced in connexion with various legal proceedings, and other matters inter alia that Rs. 4,180-7-0 is to be deposited in the District Court of Toungoo, in pursuance of the judgment and decree in Civil First Appeal No. 71 of 1928 in the High Court of Judicature in Rangoon that

"the vendor hereby grants, transfers, and conveys absolutely unto the purchaser, the right, title and interest to all the properties, particularly described hereunder in schedule attached hereto."

"The properties are now in possession and occupation of one Daw Yin, wife of Mr. Samuel, and Ma Kye, daughter of Mr. Samuel of Kanyutkwin, Pyu Township, Toungoo District. The purchaser agrees to take possession from Daw Yin and Ma Kye, through the District Court of Toungoo, on payment of the money shown in item 6 above."

"The documents of the title of the properties are in the possession of Daw Yin and Ma Kye, the defendants in Civil Regular No. 2 of 1927, of the District Court of Toungoo, and the purchaser will get the title deeds from the defendants through Court."

On 16th August 1923, in Civil Execution Case No. 23 of the District Court, Ali Bi applied to execute the decree and (according to the diary order of 14th November 1928) the necessary amount having been deposited in Court. Before 17th November 1928 however Ali Bi had died and the case was closed.

On 20th November 1928 the appellant seems to have applied to be made a party to the execution proceedings, opened by Ali Bi, who, as I have stated, was then dead. The petition was however returned to the appellant, and the appellant was informed he could make a separate application, and the case was closed. On 25th July 1929 the appellant himself applied in Execution Case No. 19 of 1929, now under review, to execute the decree as purchaser of the interest of Ali Bi, under the deed of 4th August 1928.

Objection was raised on behalf of both respondents and the substantial contentions put forward were:

(a) That on the facts no valid transfer took place upon the ground of fraud and want of authority upon the part of the agent of Ali Bi.

(b) That there was no valid assignment of the decree within the meaning of O. 21, R. 16, Civil P. C.

(c) That in any event no notice as required by the second part of the rule in question was given to the heirs of Ali Bi.

The learned District Judge was of opinion that contentions (b) and (c) must be decided in favour of the respondents upon the grounds as to (b) that as the assignment transferred the property only and not the rights under the decree; the appellant did not bring himself within the rule under review; and as to (c) that there was no evidence of notice to the transferor of Ali Bi.

The appellant appeals from this order, and before this Court the substantial contentions on his behalf were:

(1) That as the assignment was of all the property the subject of the decree in law an assignment of all rights under the decree was effected.

(2) That if contention (1) is wrong, upon a true construction of the assignment all rights in the decree were in fact assigned.

(3) That by virtue of S. 146 of the Code the appellant is a person claiming under Ali Bi, and therefore was entitled to proceed in Execution Case No. 23 instituted by her.

(4) That by virtue of S. 47 of the Code the appellant is a representative of Ali Bi, entitled to a determination of the question put in issue in Execution Proceeding No. 23.

(5) That no notice as required by R. 16, O. 21, Civil P. C. was given to Ali Bi.

It will be convenient to set out the material part of O. 21, R. 16, for much argument was addressed to us as to its effect and a number of authorities were quoted, with which it will be necessary to deal.

The material part of the rule (as amended so far as to proviso 1 is concerned by this Honourable Court in their list (No. 8 of July 1929) is as follows:

"(16). Where a decree, or if a decree has been passed jointly in favour of two or more persons the interest of any decree-holder in the decree, is transferred by assignment in writing or by operation of law, the transferee may apply for execution of the decree to the Court which passed it; and the decree may be executed in the same manner and subject to the same conditions as if the application were made by such decree-holder."

"Provided that, where the decree, or such interest as aforesaid has been transferred by assignment, notice of such application shall be given to the transferor; and unless an affidavit by the transferor admitting the transferor is filed with the application the decree shall not be executed until the Court has heard his objections (if any) to its execution."

I may point out that this provision is one of procedure only and does not create either rights or liabilities. It is plain that subject to the proviso set out above (and a second proviso with which we are not concerned) the appellant would be entitled to apply to the District Court of Toungoo, for the execution of, and to execute, the decree obtained by Ali Bi, provided her interest was transferred to the appellant by "assignment in writing" or by operation of law.

Mr. Chari says that he has obtained such a right by virtue of the deed of 4th August 1928. He does not, or at least in his final address to us did not, contend, as I understood his argument, that the words "by operation of law" assist him. That he could not well so contend, would appear at first sight plain, for the words "by operation of

law" would, as Mr. Doctor pointed out, in their ordinary meaning, refer not to a case, where an assignment between parties has been entered into, but to a case where by reason of some statute or other law, a decree (and all rights under it) has become the property of a person other than the decree-holder e. g. in the case of the legal representatives of a deceased, decree-holder or an official assignee, or a receiver in the case of an insolvent decree-holder.

What Mr. Chari does say however is that by virtue of the deed of assignment the decree and all rights under it, passed to his client. It will be convenient to deal seriatim with the contentions for the appellant and Nos. 1 and 2 of those may be considered together. The first contention depends upon certain authorities decided in India and as the matter is of a certain importance, I propose to deal shortly with them, although if I am right in my view, upon the second of the contentions for the appellant this course may be unnecessary.

The first case relied upon by Mr. Chari is *Purmanand Das Jiwandas* v. *Vallabdas Wallji* (1). In this case, by a trust deed, properties had been settled by a deceased person upon trustees with directions to assign to the appellant on the coming of age of the latter. In 1868, a suit was filed by the trustees to recover loans due to the estate; in May 1870 an assignment of "all moveable property, debts, claims, and things in action" was entered into in accordance with the direction; and in 1873 a decree in the loan proceedings was passed. It was held that the appellant was a transferee of the decree within the meaning of S. 232, Civil P. C. of 1882 which corresponded with the rule now under review. From a consideration of the judgment, I think that it is not clear whether the Court came to the conclusion it did upon the ground that the assignment itself passed the decree to the appellant, or whether this occurred "by operation of law" within the meaning of the rule. At p. 511 of the report, Sargent, C. J., used these words:

"By the deed of assignment the trustees transfer to Purmanand Das 'all moveable property, debts, claims, and things in action whatsoever vested in them' which would include the claim which was the subject-matter of the then pending suit; and the effect of the assignment was, in equity, to vest in Purmanand Das the whole interest in the decree which was afterwards obtained."

He went on to say at p. 512 of the report:

"There is no doubt that, in a Court of equity, in England the decree would be regarded as assigned to Purmanand Das, and he would be allowed to proceed in execution in the name of the assignors. Here there is no distinction between 'law' and 'equity' and by the expression 'by operation of law' must be understood, the operation of law as administered in those Courts. We think under the circumstances that we must hold that this decree has been transferred to Purmanand Das 'by operation of law'. In the pressnt case the decree has been transferred by an assignment in writing as construed in these Courts."

Thus the learned Judge seems to have thought that by reason of the wide nature of the words in the assignment, the principles of equity supervened, and that as a result it should be held that by operation of these principles the decree and the rights under it passed to the appellant.

I confess I do not understand the reasoning of the learned Chief Justice, for it seems to me that, although it was his view that upon a proper construction the document was an assignment in writing of the whole interest in the decree, it was unnecessary (and as I think, mistaken) to hold that the decree passed "by operation of law" within the meaning of the rule at all.

That this may be so emerges from a consideration of the next case relied upon by Mr. Chari, viz. *Ananda Mohan Roy* v. *Promotha Nath* (2). In this case the mortgagees obtained a decree and in execution they purchased, at a Court sale, a mortgage together with "all arrears of rent". Before the purchase the mortgagor had commenced suits against tenants of the mortgaged property for rents, and he obtained decrees in these suits on the day of the purchase by a mortgagee. It was held that the mortgagee should be treated as an assignee of the decree under the rule under review, though there was no assignment of the rent decree in so many words.

The Court purported to follow *Purmanand Das'* case (1); but I do not understand this, for if the real ground of the decision in that case was the decree

(1) [1887] 11 Bom. 506.

(2) A. I. R. 1921 Cal. 74=57 I. C. 874.

passed "by operation of law" the Court, in the case under review, does not seem to have held in that sense. On p. 865 of the report, after setting out at length a portion of the judgment of Sargent, C. J., (in *Purmanand Das'* case (1)) appears this passage :

"In the present case the decree has been transferred by an assignment in writing as construed in these Courts."

If I am right in my view of the Calcutta case, it would seem to follow that the words "by operation of law" were not held to assist the transferee at all, but that such rights as he got were obtained by virtue of the terms of the assignment in writing and nothing else.

The distinction is a fine one, but it is important, for it must follow that in the present case the terms of the document alone must be considered, and it cannot be (and indeed, I think it was not) suggested that there is any virtue in the words "by operation of law" so far as the appellant is concerned.

Two other cases must be mentioned, viz., *Hansraj Pal* v. *Mukraji Kunwar* (3) and *Mathurapore Zamindari Co. Ltd.* v. *Bhasaram Mandal* (4). In the first of these cases, a portion of the property covered by the decree had been sold, and it was held that the purchaser had not the right to execute the decree. The ratio decidendi of this case appears to be that, as the deed did not purport to sell or transfer the decree, the sale of the property for possession of which the vendor had obtained it, does not necessarily pass the decree itself. It does not seem to have been suggested in that case that the decree or the rights under it passed "by operation of law" and the Court looked only at the terms of the deed of assignment.

In the second case, the material portion of the head-note is :

"An assignment of the property in writing does not ordinarily operate as an assignment of a decree subsequently obtained by the assignor in respect of the property assigned. In such a case, the assignees cannot execute the decree under O. 21, R. 16."

In the course of the judgment of the Court, Mukerjee, J. reviewed a number of authorities on the point, and in particular *Purmanand Das'* case (1) and the case of *Ananda Mohan Roy* (2). At p. 711 (*of* 51 *Cal.*) the learned Judge in referring to the judgment of Sargent, C. J. in *Purmanand Das'* case (1), said :

"In my judgment it is obviously right to invoke the aid of doctrines of equity in the matter of interpretation of a document of this nature executed by a trustee under a will in favour of the cestui que trust. If, however the decision purports to lay down broadly that Courts of execution have to look to equity in considering whether there has been an assignment by operation of law, I regret I am unable to assent to the proposition."

Referring to *Ananda Mohan Roy's* case (2), the learned Judge at p. 710 (*of* 51 *Cal.*) said :

"From the fact that all arrears of rent had been assigned over, and there having been decrees passed in respect of some simultaneously with, if not before the execution of the conveyance, the construction put upon the conveyence which was in writing was that it also meant to include the decrees."

It is clear therefore that the view of Mukerjee, J., was that the case of *Ananda Mohan Roy* (2) was decided purely upon a construction of the assignment itself, and also that although consideration of equity might apply in certain cases upon the question of the construction of the document, such consideration would not be covered by the words "by operation of law."

In *Mathurapore's* case (4), the assignment (as in the present case) was by way of a simple assignment, and the Court was clearly of opinion that no question of equity arose.

I would mention, though this fact does not seem to me to affect the reasoning of the learned Judge, to which I have referred, that in *Mathurapore's* case (4) the decree was not in existence at the time of the assignment of the property, and upon this ground also it was held that the assignee was not within the purview of the rule under review.

If therefore I am right in my view as to the meaning of the rule, arrived at in the light of the foregoing authorities it would seem to follow : (1) That the words "by operation of law" cannot be invoked so as to make an assignment operative to transfer the decree and the right under it which would upon the true construction of its terms, otherwise, be inoperative in that regard. (2) That although in cer-

(3) [1907] 30 All. 28=4 A. L. J. 759=(1907) A. W. N. 280.

(4) A. I. R. 1924 Cal. 661=80 I. C. 881=51 Cal. 703.

tain cases, principles of equity may be relied e. g. in the case of a transfer by trustees and a beneficiary, such principles cannot be considered as rendering a transfer valid "by operation of law." (3) That in view of (1) and (2) (above) in the present case the terms of the deed itself, only must be looked at, and it would be a question in each case whether the principles of equity can be invoked upon such an examination.

So far as this case is concerned, therefore, the fact that all property covered by the decree is transferred is only important upon the construction of the deed itself, and I as have already indicated, I am of opinion that the terms of the deed may well be held to transfer the decree and the rights under the decree.

I have come to this conclusion quite apart from equitable principles, which in view of the reasons, such as those, given by Mukerjee, J. in *Mathurapore's* case (4), (which turned upon similar words) may well not be applicable at all.

It is unnecessary to decide this point, however, for I am of opinion that the reasonable construction of the terms of the deed is that the decree itself (and its attendant rights) must be held to be transferred. To my mind it is clear that in order to get possession of the property, which is expressed to be in the hands of the judgment-debtors, the aid of the District Court must be invoked.

That some proceedings in execution must be resorted to by the appellant seems to me to be clear, and from the words themselves it would also seem clear that the right to take these was transferred. If not, it may be asked, why was it necessary to say that the purchaser agrees to take possession through the District Court. In my view also the same effect would follow from the words in the next paragraph of the deed :

"the purchaser will get the title deeds from the defendants through the Court."

Moreover, the "money shown in item 6," viz. the exact amount payable under the decree must be paid and as I have pointed out it was paid, into Court, though whether it was paid before the death of Ali Bi is not clear.

It seems to me therefore that it was contemplated by both Ali Bi and the appellant (and expressed in the deed) that the latter acquired the right to stand in the shoes of the former, and take the steps still remaining necessary to obtain possession of the property and the title-deeds.

That being so the next question is as to how the proviso to the rule in question affects this matter. Now it might possibly be argued, I think, that as on 20th November 1928, (according to the diary order in case No. 23 of that date) Mr. Chowdhury appeared on behalf of Ali Bi, upon the objection filed by the appellant and stated he could not get an

"authorization from anyone to proceed as legal representative"

(viz. of Ali Bi) that he as then representing Ali Bi, or her legal representative or representatives whoever they were, was affected by the notice of the intention of the appellant to intervene in the execution. It is however very doubtful whether Mr. Chowdhury on that date could be held to be representing anyone, and moreover the appellant's petition was far from being explicit. There can be no question of course as to notice to both respondents, for although only the first is now represented they were both served in case No. 19, now under review.

With regard to the transferor the death of Ali Bi has no doubt raised a difficulty which the District Judge held to be insuperable. On 7th August 1929 however the appellant in the present case required :

"notice to the petitioner's transferor (decree-holder) who is said to be dead."

He was ordered to furnish names and addresses of the legal representatives. This was done ; but it was disputed by Mr. Chowdhury (who by that time was representing the judgment-debtors) that the persons named were not the legal representatives of the transferor. The appellant filed a reply. Argument seems to have been ordered and heard on the matter, but no order seems to have been passed until 11th November, when the order now under review was delivered.

In it it is said that the appellant replied to the objection that the persons named by him were not the legal representatives of Ali Bi, by saying he was unable to find anyone else, and contending that no notice was necessary.

Now the question as to whether the persons named by the appellant were the legal representatives or not has never been gone into, but as the learned Judge thought notice was essential he said it would not therefore

"seen that under O. 21, R. 16, Civil P. C., Abdul Kader cannot execute the decree."

Now, I agree that the giving notice and the hearing of objection (if any) is a condition precedent to execute. The words of the proviso are plain. But it seems to me holding the view I do of the effect of the assignment, that the appellant should not be shut out by the fact of Ali Bi's death and the difficulty in discovering her legal representatives, from his rights under the decree. Having come to the conclusion that the words of the deed operate to transfer the decree and the rights under it to the appellant, the case must be returned to the District Court in order that the appellant may proceed with his claim, and for determination (if necessary) of the matters raised on behalf of the respondents. In the meantime notice should be served upon the persons said by the appellant to be the legal representatives of Ali Bi and the District Court must cause notice to be published in two appropriate newspapers circulating in the district, calling upon the legal representatives of Ali Bi to come forward and object if they wish to the claim of the appellant.

That being my opinion, it is unnecessary to deal with points 3 and 4 raised by Mr. Chari. The result is therefore that this appeal must be allowed with costs, the case remanded to the District Court for hearing on the merits, after issue of the notices and service upon such persons as are said to be the legal representatives of Ali Bi as I have already directed. Advocate's fee 15 gold mohurs.

Carr, Offg. C. J.—I agree.

P.N./R.K. *Case remanded.*

A. I. R. 1930 Rangoon 313

BAGULEY, J.

Desram Bara Singh—Respondent—Applicant.

v.

Baswa Singh—Non-Applicant.

Civil Misc. Appln. Decided on 19th December 1929, against decree in Second Appeal No. 42 of 1928.

Legal Practitioner—Compromise by counsel—Barristers in Burma, not filing power of attorney from client, cannot bind client by compromise entered into without his express consent—Civil P. C. S. 2 (15).

As in Burma barristers merely appear because they are advocates and not because they are barristers, they must be judged by rules applicable to advocates.

To enter into a compromise an advocate must "act" for his client and no advocate can act for his client unless he possesses a power of attorney.

A barrister, in Burma, therefore, filing only a notice of appearance and not a power of attorney from his client, cannot bind the client by a compromise entered into without his express consent unless the client subsequently ratifies it: 64 *I. C.* 528; 1 *B. L. J.* 1; *A. I. R.* 1925 *Cal.* 696 and *A. I. R.* 1926 *Rang.* 215, *Rel. on.*; 13 *All.* 272 and *A. I. R.* 1924 *Cal.* 651, *not Foll.* [P 314 C 2]

Bose—for Respondent.

Judgment.—This is an application to set aside a decree passed with the consent of the advocates on both sides in an appeal. Originally in the Township Court of Pauk, Baswa Singh sued two defendants described as Desram Bara Singh and Mahomed Bagah for Rs. 850. The suit was decreed in full. The two defendants appealed to the District Court, and were partially successful, the amount of the decree being reduced to Rs. 200-14-0. Baswa Singh appealed to this Court asking that the decree of the trial Court should be restored. Respondent 2 did not put in an appearance.

Mr. Day appeared for the appellant. Ko Ko Gyi filed a notice of appearance for respondent 1. When the case was called Mr. Day was present and Mr. Sanyal held Ko Ko Gyi's papers. They informed the Court that by consent there would be a decree for Rs. 400 with proportionate costs throughout, and a decree was passed in these terms.

Now the present application has been filed by respondent 1 in person asking that the decree may be set aside and the appeal may be heard on its merits. He says that he knew nothing of the proposed settlement and did not consent to it.

Had Ko Ko Gyi held an ordinary power of attorney from his client there would be nothing more to be said about the matter, for such powers almost invariably contain authority to settle a case out of Court. Unfortunately however there is no power

filed only a notice of appearance, and Ko Ko Gyi, though he says he makes it a practice always to get a power from his client, is unable to say definitely that he had one in this instance, and his clerk is in somewhat the same position; he can only swear an affidavit "so far as I remember:" It not being proved that Ko Ko Gyi had a power of attorney we must, for the purpose of this case, act on the basis that he had not got one.

There seems to be no officially reported cases on the point that apply to this province. In *M. Haroon* v. *M. Ebrahim* (1) it was laid down that barristers practising in Indian Courts do so, not because they are members of the Bar, but because they are entitled under the rules for admission as advocates of the Court, and are subject to the same liabilities as other advocates of the Court. It was also laid down that a barrister practising in Burma cannot bind his client by a compromise made or consent given without the client's express authority.

In *U Po Yeik* v. *Ba Khaing* (2) it was laid down that, although in England it is settled law that a barrister has power to compromise a suit without reference to his client, an advocate in Burma has no such inherent power. He must either have express authority to do so or obtain his client's consent to the compromise.

In the present case Ko Ko Gyi is a barrister; and I have been referred to some Indian cases which seem to show that a barrister has power to compromise a suit without the express consent of his client. The first of these is *Jang Bahadur Singh* v. *Shankar Rai* (3). This is a Full Bench ruling, and was decided solely by reference to English cases with regard to the power of barristers practising there. It having been laid down that barristers only appear in this province because they are qualified for admission as advocates under the rules in force here, and are bound by the same rules as advocates, it is clear that a ruling based on the special privileges of barristers as such can have no application here.

The next case is *B. N. Sen and Brothers* v. *Chuni Lal Dutt & Co.* (4). In this case the same rule was laid down, and here the ruling above named was quoted, and also English cases with regard to the powers of barristers. The judgment is really based on a citation from Lord Halsbury's Laws of England, but as in Burma barristers merely appear because they are advocates, and not because they are barristers, they must be judged by rules applicable to advocates.

More help will be found in *Askaran Choutmal* v. *The E. I. Ry. Co.* (5). In this case Page, J., goes into the matter at some length. In this case the settlement arrived at was made, not in Court, but in a discussion out of Court in the Bar Library. Counsel came to an agreement, but before the agreement had been mentioned in Court and made the basis of a decree one of the clients objected. Page, J., was of opinion that had the agreement been made in Court it would have been binding on the client, even had he given no express authority to compromise, because in Court the advocate "acts" for his client, whereas, out of Court, the advocate merely acts in an advisory capacity.

I think that we have here the touchstone. If an advocate is "acting" for his client, his client is bound by any agreement that he may come to. In this province however it is now settled law that no advocate can "act" for his client unless he has a power of attorney: vide "*In the matter of filing Powers*" (6).

To enter into a compromise an advocate must undoubtedly "act" for his client, and in the present case as I have already pointed out we must proceed on the assumption that Ko Ko Gyi had not got a power of attorney from his client, he had only filed a notice of appearance. Any compromise, then, entered into without the express consent of his client would not bind the client unless he had subsequently ratified it, and there is no suggestion here of any subsequent ratification.

The compromise entered into therefore cannot bind the present applicant.

(1) [1920] 64 I. C. 528.
(2) 1 B. L. J. 1.
(3) [1891] 13 All. 272=(1891) A. W. N. 61 (F. B.).
(4) A. I. R. 1924 Cal. 651=83 I. C. 611=51 Cal. 385.
(5) A. I. R. 1925 Cal. 696=88 I. C. 413=52 Cal. 382.
(6) A. I. R. 1926 Rang. 215=98 I. C. 15=4 Rang. 249.

The consent decree based on this compromise will therefore have to be set aside and the appeal will have to be put down for hearing on its merits.

R.M./R.K. *Decree set aside.*

A. I. R. 1930 Rangoon 315

MAUNG BA AND BAGULEY, JJ.

Chettyar, A. K. R. M. M. C. T., Firm —Appellant.

v.

Maung Ba Chit—Respondent.

Civil Misc. Appeal No. 151 of 1929, Decided on 7th August 1930, from judgment of Dist. Judge, Pegu, in Misc. Case No. 184 of 1928.

(a) Civil P. C. (1908), O. 26, R. 1—Successor of Judge has power to cancel order of issue of commission passed by his predecessor.

It cannot be held that a Judge has not the power to alter an order of his predecessor with regard to the issue of a commission. Such an order is not a final one and it relates more to the routine of the case than to the merits of the case. There can be no possible doubt that a Judge can alter an order passed by his predecessor with regard to the framing of issues, an order for the examination of witnesses, adjournments and so forth, and therefore there is no reason why he should not alter an order passed by his predecessor with regard to the issue or non-issue of a commission. [P 316 C 2]

(b) Provincial Insolvency Act (5 of 1920), S. 53—Mortgage taken from prospective insolvent representing to settle with his creditors can be annulled.

If a person tricks the would-be insolvent into giving him a mortgage by a representation that he would settle with his other creditors, the transfer can be annulled under S. 53. [P 317 C 1]

(c) Provincial Insolvency Act (5 of 1920), S. 54—Fraudulent preference explained.

In the case of a transfer of a man's whole assets to one creditor for no reason whatsoever, a fraudulent preference must be deduced. [P 316 C 2]

(d) Provincial Insolvency Act (5 of 1920), S. 54 — Preference given in return for money payment for benefit of insolvent personally and not for his business falls within S. 54.

A preference given in return for a money payment which was made for the benefit of the insolvent personally and which would not possibly be for the benefit of his business and therefore for his creditors would result in preference being given to the man who made it, which could only be described as fraudulent: *A. I. R.* 1924 *Rang.* 303, *Dist.* [P 317 C 1]

Anklesaria—for Appellant.

Clark—for Respondent.

Maung Ba, J. — This is an appeal from an order of the District Court of Pegu annulling the mortgage effected by the insolvent San Po in favour of the appellant A. K. R. M. M. C. T. Firm. The learned Judge was of the opinion that the transfer was one which could not be allowed to stand both under Ss. 53 and 54, Prov. Insol. Act. Before we deal with the questions arising under these sections, we have been asked to consider that one of the Judges who dealt with the case acted without jurisdiction when he set aside his predecessor's order for the issue of a commission to India for the examination of the appellants' agent Krishnappa Chettyar. The record shows that Krishnappa himself signed the written objection and that he left Burma after the hearing of the respondent's case had commenced. The application for commission was made nine days after the respondent had closed his case. Two authorities have been cited in support of this contention. These two cases refer to matters which are not of an interlocutory nature. In the first place I am of opinion that the order directing the issue of a commission was not justified. No attempt was made to have the witness examined de bene-esse before his departure. Therefore I am not prepared to hold that the later order cancelling the first order was without jurisdiction, but still it remains to be considered whether the evidence of Krishnappa, if taken, would affect the decision of the case. It is alleged in the evidence tendered by the other party that Krishnappa induced San Po to enter into this transaction by making a promise that he would settle with the other creditors of San Po. If Krishnappa were allowed to give evidence, he would no doubt deny the truth of that allegation at his examination. It must be remembered that his evidence cannot be treated as the evidence of an independent witness. Therefore in my opinion his evidence would not carry the appellant's case any further.

Under S. 53, Prov. Insol. Act, it lay heavily on the appellant to prove that the transfer to him by way of mortgage was not only for valuable consideration but was made in good faith. As regards the consideration it seems clear that the mortgage was effected for old debts due on promissory notes.

The next point is whether there was good faith. The evidence shows that the insolvent was hopelessly in debt

and that all his creditors were pressing him. The insolvent himself admitted that he told the appellant that there were creditors who were also pressing him for payment and that he consented to effect this mortgage only when the appellant promised that he would settle with the other creditors. In my opinion there is some corroborative evidence on that point. It is also proved that Krishnappa never kept his promise, so that it became clear that at least he acted mala fide. The result of such finding will be that the transaction is voidable as against the receiver.

In considering whether the transaction can also be put under S. 54, Prov. Insol. Act, it is necessary to determine whether there has been a fraudulent preference. The insolvents's debts amounted to about Rs. 50,000 and the transfer was of all the properties possessed by him. Such an act amounts to an act of insolvency within the purview of S. 6 of the said Act. Some attempt has been made to show that the transfer was immediately followed by a loan of Rs. 500. This attempt no doubt is to bring the case within the case decided by a Bench of this Court in *M. A. Raeburn & Co.* v. *Zollikofer & Co.* (1) where it was held that an act done by the insolvent not as a free agent, but under pressure, or as a purely voluntary act in order either to protect the insolvent from legal proceedings or to gain for him some immediate advantage, would not be a fraudulent preference, although it might have the result of preferring one creditor at the expense of the other. The facts of the present case are different from those dealt with in that case. There a further sum of Rs. 7,000 was lent to enable the would-be insolvent to carry on his business. In the present case the amount alleged to have been lent is not much ; and there is no allegation that the loan was given to enable the insolvent to continue his business. It was also pointed out that when the mortgage was taken a reduction in interest was made, but it is in evidence that when debts are secured by mortgages, the interest is at a lower rate. I fail to see any material advantage gained by the insolvent. I am of opinion that this transaction is one falling within the purview of both the sections. I would therefore dismiss the appeal with costs.

(1) A. I. R. 1924 Rang. 308=83 I. C. 440=2 Rang. 193.

Baguley, J.—I agree that this appeal should be dismissed. I wish to give my view shortly. I do not think that it can be held that a Judge has not the power to alter an order of his predecessor with regard to the issue of a commission. Such an order is not a final one and it relates more to the routine of the case than to the merits of the case. There can be no possible doubt that a Judge can alter an order passed by his predecessor with regard to the framing of issues, an order for examination of witnesses, adjournments and so forth; and therefore I see no reason why he should not alter an order passed by his predecessor with regard to the issue or non-issue of a commission.

I do not think in this case that it is necessary to have the appellant's agent examined on commission now, as I do not think that his evidence would possibly carry the case very much further. The only point on which he could give evidence of material value would be with regard to whether he promised the insolvent that he would settle with the other creditors or not. In view of the fact that there can be no possible doubt that he made no attempt whatsoever to settle with the other creditors this is not of much importance. If he tricked the insolvent into executing this mortgage by making such a promise then it cannot possibly be said that he got this transfer bona fide. If he did not make such a promise, then it is clear that he exercised no more pressure on the insolvent than the other creditors did. There was no reason whatsoever why he should get a transfer of practically the insolvent's assets, than any other creditor should get such a transfer ; and in the case of a transfer of a man's whole assets to one creditor for no reason whatsoever, a fraudulent preference must be deduced. It is very doubtful whether this Rs. 500 was actually paid by the appellants' agent to the insolvent. It looks as though the evidence of this payment was merely put in to bring the case within the ambit of *Zollikofer's* case (1) referred to by my learned brother. That a sum of Rs. 500 however has been paid in this way would not bring the case into the same category as *Zollikofer's*. I should be prepared to

hold that a preference given in return for a money payment which was made for the benefit of the insolvent personally, and which would not possibly be for the benefit of his business and therefore for his creditors, would result in a preference being given to the man who made it which could only be described as fraudulent.

If the appellant tricked the insolvent into giving this mortgage by a false representation that he would settle with his other creditors, the transfer can be annulled under S. 53. If he got it in return for a money payment to the insolvent personally, the transfer would be void under S. 54. In either case I consider that the appeal should be dismissed.

P.N./R.K. *Appeal dismissed.*

A. I. R. 1930 Rangoon 317

OTTER AND BAGULEY, JJ.

Mahomed Adjum Nacoda and *others*—Appellants.

v.

Chettyar, E. M., Firm—Respondent.

First Appeals Nos. 227 and 228 of 1929, Decided on 6th August 1930, against decree of Dist. Judge, Amherst, in Civil Regular Nos. 30 and 31 of 1929.

Provincial Insolvency Act (5 of 1920), S. 28 (2)—Suit by creditor of insolvent for declaration that property attached in execution of decree is property of insolvent judgment-debtor is covered by S. 28 (2).

A suit by a creditor of an insolvent for a declaration that the property attached in execution of the decree is the property of the insolvent judgment-debtor is covered by S. 28 (2) and leave of the Court is necessary before filing such suit.

Per Otter, J.—The Civil Procedure Code cannot of itself establish a right which does not exist under the ordinary law. It is a Code of procedure only, and not of substantive law, and if, under the terms of the Provincial Insolvency Act (an Act enacting substantive law) a person is barred from filing a suit, the Civil Procedure Code cannot assist him.

Baguley, J.—Although the Civil Procedure Code is a Code of procedure it gives a definite right, such as the suit under O. 21, R. 63, for a declaration with a period of limitation of its own. But the Provincial Insolvency Act being of a later origin than the Code, it must be regarded as limiting so far as the creditor of the insolvent is concerned, a statutory right that he may have obtained under the Code : *A. I. R.* 1922 *Nag.* 108 ; 9 *L. B. R.* 47 ; 42 *Mad.* 684, *Rel. on.* ; 35 *Cal.* 202, *Expl.* ; *A. I. R.* 1927 *Mad.* 201, *not Foll.* [P 319 C 1, 2]

Anklesaria—for Appellants.

A. J. Darwood and *Shanmugam*—for Respondent.

Otter, J.—In execution of a decree the respondent Chettyar firm attached a certain property said to belong to a man called Nacoda. On 24th January and 30th January 1929, respectively, two applications were filed, asking for removal of the attachment (namely, Civil Miscellaneous Nos. 21-A, and 28-A of 1929, of the District Court of Amherst).

On 13th February 1929, the respondent firm applied for the adjudication in insolvency of the said A. M. Nacoda and on 18th March of that year, an ad interim receiver was appointed. On 24th April 1929, the said Nacoda was adjudicated insolvent and on that date, the interim receiver was appointed receiver.

Meanwhile, on 22nd March, an application had been made on behalf of the interim receiver in both the removal of attachment cases, that he should be made a party to those proceedings. The present appellants objected, but the interim receiver was brought on the record in both cases, apparently on 28th March 1929.

It is material to point out that on behalf of the present appellants, it was objected, inter alia, that the correct procedure was to close the execution case, and for the receiver appointed in the insolvency proceedings to take charge of the properties belonging to the insolvent. It would appear therefore that proper notice that an insolvency petition had been admitted was given to the Court (which was the same Court as that in which the insolvency proceedings were going on) and also, that an application was made to that Court that the attached property should be delivered to the receiver under the provisions of S. 52, Prov. Insol. Act.

The Court however seems to have thought that such notice and application should have been at the instance of the receiver, and for this reason, and also because the receiver did not seem to be anxious that the sale should be stayed, an order was passed, merely granting the application of the receiver to be made a party.

It is true that the receiver then was an interim receiver only (appointed

under S. 20 of the Act) and that the receiver proper (if he may be so called) was not appointed until the 24th April, when the order of adjudication was passed. It seems to me however that in the circumstances the proper course would have been to stay the execution proceedings until the adjudication was made and a receiver of the insolvent's property was appointed.

If this course had been taken, the receiver appointed upon adjudication could, and as I think, should, have taken the steps provided by S. 52 of the Act, to have the property transferred to him. No such steps were taken, and in the result, the attachments were removed.

The respondent in the present appeals then filed regular suits (Nos. 30 and 31 of 1929, of the District Court, Amherst) for declarations that the attached property was the property of judgment-debtor, Nacoda. The defendants were the respective applicants in the two attachment proceedings and they are the appellants in these appeals. The insolvency proceedings were meanwhile adjourned from time to time, pending the result of the proceedings in this Court.

No leave of the Court to commence the suits under appeal was obtained under S. 28 (2), Prov. Insol. Act, and in the result the respondent firm was held to have had an interest in the attached property in both cases. It was adjudged that these interests were liable to be sold in execution of these decrees. On appeal to this Court, two main points, in the nature of preliminary points, were argued on behalf of the appellants, the remaining issues being left open for later argument and decision if necessary. The first of those preliminary points was that, as leave of the Court was a condition precedent to the commencement of the suits, under appeal, the failure to obtain such leave is fatal to the respondents' case. In other words, it was argued that the suits were not maintainable.

Section 28 (2), Prov. Insol. Act, is as follows:

"On the making of an order of adjudication, the whole of the property of the insolvent shall vest in the Court or in a receiver as hereinafter provided, and shall become divisible among the creditors, and thereafter, except as provided by this Act, no creditor to whom the insolvent is indebted in respect of any debt provable under this Act, shall during the pendency of the insolvency proceedings have any remedy against the property of the insolvent in respect of the debt, or commence any suit, or other legal proceedings, except with the leave of the Court on such terms as the Court may impose."

Now there can be no doubt that these suits were filed by the respondent firm in its capacity as a creditor of the insolvent, and that the purpose of the suit was in order to obtain satisfaction of decrees if obtained.

In my view the words of the provision above quoted must cover such suits as these. Moreover, there is authority to this effect: see the cases of *Trimback* v. *Sheoram* (1), *Raman Chetty* v. *Ma Hme* (2), *Vasudeva Kamath* v. *Lakshmi Narayana Rao* (3).

In the first of these the facts were that the applicants obtained a decree against a man called Sheoram on 19th April 1917 and on 30th May of that year; in execution of that decree they attached a certain property. Objections were raised to the attachment and were allowed. In the meantime, on 16th June 1917, Sheoram applied to be made an insolvent, and on 10th November he was so adjudicated. A suit filed by the applicant for declaration that the property was liable to be sold in execution was dismissed. On appeal it was held that under S. 16, Prov. Insol. Act, 1908, (corresponding to S. 28, of the present Act) a Court making an order of adjudication is vested with the whole property of the insolvent, and no creditor to whom the insolvent is indebted, in respect of any debt provable under the Insolvency Act, has any remedy against the property of the insolvent in respect of the debts, nor can he commence any suit or other legal proceedings, except with the leave of the Court, on such terms as the Court may impose.

A similar view was held in the two other cases I have mentioned, and in the last of those, Wallis, C.J., said at p. 686 of the report:

"A suit by a judgment-creditor such as I have mentioned, without the leave of the Court, would I think be in contravention of this section, and would enable the judgment-creditor to obtain satisfaction of his decree out of the property declared in a suit to be the property of the insolvent."

(1) A. I. R. 1922 Nag. 108=65 I. C. 941=19 N. L. R. 126.

(2) [1917] 9 L. B. R. 47=37 I. C. 803.

(3) [1919] 42 Mad. 684=52 I. C. 442.

On behalf of the respondent firm, however the case of *Phul Kumari* v. *Ghanashyama Misra* (4) was referred to. It was said that this case decided that in a suit under O. 21, R. 63, Civil P. C., which seeks merely a declaration that the property belonged to the judgment-debtor, leave of the Court was not necessary. An examination of the authority however shows that it is not an authority for that proposition at all, but merely turned upon a question of court-fees.

It was also argued on behalf of the respondent that O. 23, R. 63, Civil P.C., gives a statutory right to institute such suits as those under appeal, and that he cannot be deprived of such rights.

I cannot agree. The Code of Civil Procedure cannot of itself establish a right which does not exist under the ordinary law. It is a Code of procedure only, and not of substantive law, and as I am opinion that, under the terms of the Provincial Insolvency Act (an Act enacting substantive law), the respondent is barred from filing such suits as those under review without the leave of the Court, the Civil Procedure Code cannot assist him.

One further case may be mentioned *Narasimham* v. *Subramaniam* (5). In this case it was held that leave of the Court to file a suit in such a case was necessary, but it was also said that the absence of such leave, where no objection was taken, would not render a decree passed in such a suit a nullity.

In view of the terms of S. 28 (2), Prov. Insol. Act, however I cannot, with respect, subscribe to a view held on this point by the single Judge who decided that case.

In my view, for these reasons, the first of the preliminary points raised on behalf of the appellants must succeed, and therefore it is unnecessary to set out or discuss the further points raised. The appeals must therefore both be allowed, the decrees of the lower Court set aside, and the suits dismissed. I observe however that the point taken before us was not raised in either case in the lower Conrt, and therefore I think each party should bear their own costs in both Courts.

(4) [1908] 35 Cal. 202=35 I. A. 22=7 C. L. J. 36 (P. C.).

(5) A. I. R. 1927 Mad. 201=98 I. C. 446.

Baguley, J.—I agree with the order proposed to be passed by my learned brother in these appeals. I concur with the whole of the judgment save on one point, and that is with regard to, whether O. 21, R. 63, can be regarded as giving a statutory right of suit. It seems to me that although the Civil Procedure Code is a Code of procedure it does in this instance give a definite right to bring a suit with a period of limitation of its own as shown by Art. 11, Sch. 1, Lim. Act. This however does not affect the result of the appeals, for there can be no question but that what one statute may give, a later statute may take away or limit. The Provincial Insolvency Act being of a later date than the Civil Procedure Code it must in this respect be regarded as limiting, so far as creditors of insolvents are concerned, a statutory right that they may have obtained under O. 21, R. 63.

P.N./R.K. *Appeal allowed.*

A. I. R. 1930 Rangoon 319

OTTER AND BROWN, JJ.

Kyin Maung and *another*—Appellants.

v.

Ma Kya Gaing and *others* — Respondents.

First Appeal No. 121 of 1929, Decided on 11th June 1930, from decree of Dist. Judge, Pyapon, D/- 18th February 1927, in Civil Regular No. 38 of 1927.

Buddhist Law (Burmese) — Succession — Daughter, second born child, eldest son having died in infancy can, on father's death and mother's remarriage, claim quarter share in joint property of her parents—Her being minor at her father's death does not affect her claim—It is sufficient if she was major at the mother's remarriage.

An eldest daughter becomes entitled to a quarter-share in the joint property of her parent's marriage upon the remarriage of the mother. The fact that there was an elder child (a son), who predeceased his father and died in infancy, does not prevent the next born child, even if a daughter, from attaining the status of technical orasa. Therefore, under the Burmese Buddhist law, a daughter, a second born child, the eldest having died in infancy, can on her father's death, and on her mother's remarriage, claim a quarter-share in the joint property; and the fact that she was a minor at the time of her father's death does not affect her claim. If she was a major when the mother remarried, the requirements of the law are fulfilled: *A. I. R.* 1924 *P. C.* 238; 2 *L. B. R.* 255; *A. I. R.* 1914 *P. C.* 97 and *A. I. R.* 1921 *L.B.* 68, *Ref.*, *A.I.R.* 1926 *Rang.* 211 and *A.I.R.* 1929 *Rang.* 365 and 2 *L. B. R.* 292, *Rel. on.*; 2 *U. B. R.* 46, *not Foll.* [P 322 C 1,2]

Otter, J.—This appeal concerns the estate of a man called U Kan Gyi who died in the year 1912-13. The appellants (who were the plaintiffs in the suit) are the husband and child of his daughter, Ma Hla Yin (deceased) by his first wife Ma Kya Gaing, respondent 1. Ma Hla Yin at her death was the eldest then surviving child, but not the first-born child of U Kan Gyi. Respondents 2 and 3 are the children of U Kan Gyi and Na Kya Gaing who now survive; respondent 4 is the minor child of respondent 1; respondent 5 is a successor in title to the first three respondents and respondents 6 and 7 are the successors in title of respondent 1.

The claim of the appellants is disputed in law, and respondent 1 Ma Kya Gaing further contended that, after the death of U Kan Gyi and before the death of Ma Hla Yin, an arbitration was agreed to by those then interested, and that subsequently a partition of the joint property took place. The Additional District Judge came to the conclusion that as Ma Hla Yin was not a first-born child, she did not acquire the status of orasa and that therefore her claim upon this basis was not maintainable. As I have indicated, the claim of the appellants was not based upon the right of Ma Hla Yin as a true orasa daughter arising upon the death of her mother, for of course the latter is still alive. But the claim rests upon what has been described as the status of quasi (or technical) orasa daughter which gives her a right arising on the remarriage of the mother.

It may be useful at this stage to briefly refer to the leading case upon the question of the status of the true orasa, viz. *Kirkwood* v. *Maung Sin* (1). A number of questions had been referred to a Full Bench of this Court and two of these were:

"6. In such a family (viz. a family consisting of sons and daughters) can there be an orasa son who, predeceasing his parents, can transmit to his children a right to preferential treatment in the division of the estate?

7. If so, can the eldest child, being a daughter, on her mother predeceasing her father, claim a quarter-share as orasa or transmit to her children a right to preferential treatment in the division of the estate?"

The answers of the five Judges composing the Full Bench were in substantive agreement with that of Heald, J., (as he then was) appearing at p. 769 of the report and which was as follows:

"6. In a family where the eldest born child is a daughter and is competent, there can be no auratha son, and there can be no son whose children have a right of preferential treatment in the division of the parent's estate.

7. If the eldest born is a daughter, and is competent, she is auratha, and as auratha can, on her mother's death, claim from her father a quarter share of the estate. If she dies before becoming entitled to that share her children have a right to preferential treatment in the division of the estate."

Their Lordships of the Privy Council expressed no opinion upon question 7, but they concurred in the answer to question 6, and part of the head-note in the case is:

"An orasa child is the eldest born child capable of undertaking the responsibilities of a deceased parent, and the status of orasa does not depend upon the child, if a son, surviving the father or, if a daughter surviving the mother. There can be but one orasa. The three essential conditions for the existence of the status of "orasa" are that: (a) the child is the first-born; (b) the child attains majority; (c) the child being a son helps in the acquisition of the family properties and the discharge of the father's responsibilities, or being a daughter helps the mother in the management and control of the family properties and household.

Held that the appellant's father who was the eldest son but the second born child has not the status of an "orasa." As the eldest child (though a daughter) fulfilled the conditions laid down in the head-note of the case, she, and not the oldest son who was the second born child acquired the status of orasa."

The result so far seems to be that an eldest child (as the case may be) on fulfilling the three requirements laid down attains the status of orasa and thus acquires a right in the property of the parents, and that on the death of the orasa whether son or daughter the children of the orasa are entitled to preferential treatment.

As I have already shown, the claim in the present case is not put forward upon this basis, for the mother of Ma Hla Yin is still alive but it is said that as a "technical" (or quasi) orasa child Ma Hla Yin is entitled to claim her one-fourth share on the remarriage of her mother. This was the only point of substance argued before us, and it may be shortly stated as follows: Are the appellants being the heirs and legal representatives of Ma Hla Yin, entitled, under Burmese Buddhist law to a one-fourth share in the joint property of U Kan Gyi and respondent 1, upon the

(1) A. I. R. 1924 P. C. 238=84 I. C. 567=51 I. A. 334=2 Rang. 693 (P. C.).

ground that Ma Hla Yin was the eldest surviving child of these persons at the time of the remarriage of respondent 1?

For a long time there was a conflict between the Courts in Upper and Lower Burma upon this point. For whereas there never was much doubt but that upon his father taking a second wife the eldest son must be given one-fourth of the joint property of the previous marriage, the position with regard to daughters has not been so plain. The case of *Ma Thin* v. *Ma Wa Yon* (2) may be referred to. There after an examination of the relevant Dhammathats it was held by a Full Bench that a daughter, being an only child, is entitled to claim a one-fourth share of her parents' joint estate from her mother, when the latter remarries after the father's death.

I was referred in argument to the Dhammathats cited in S. 44 of the Digest and there can be no doubt that so far as it is possible to ascertain their meaning, the majority of these pronouncements favour the view that an eldest daughter in such a case is entitled to a one-fourth share in such property. The Manugye Dhammathat however, to which, where it is not ambiguous, special authority must be attributed since the case of *Ma Hnin Bwin* v. *U Shwe Gon* (3), would appear to allot to the daughter only a one-fourth share in her father's clothes and ornaments. It may be convenient to set out the relevant extract in full:

"On the mother marrying again after the death of the father, the latter's clothes and ornaments shall be divided into four shares; the eldest daughters shall get one share and the mother and younger daughters the remainder. The mother shall also get the house. The eldest daughter's share including animate and inanimate property, shall be publicly made known and kept in the custody of the mother."

The suggestion has been made that the one-fourth share on the clothes etc,, was intended to be given in addition to the other items and support is lent to this view by the mention of "animate and inanimate property." But as the learned author of May Oung's Burmese Buddhist law states at p. 232 of the second edition, "it is not usual for writers of Dhammathats to leave out such details as this." However that may be, the Upper Burma case of *Mi The O* v. *Mi Swe* (4) relying mainly upon the wording of this Dhammathat held

"that the eldest daughter cannot claim a quarter of the estate from her mother even though the latter marries again."

The majority of the Dhammathats however support the claim of such a child to a quartershare, and it may also be argued that the Manugye on this point is ambiguous; moreover the modern tendency in Burma seems to have been to do away with distinctions between the sexes, and two important cases lend support to the view contended for by the appellants on this part of the case. These are *Ma Shwe Ywet* v. *Maung Tun Shein* (5) and *Maung Po Kin* v. *Maung Tun Yin* (6).

In the first of these, the head-note is as follows:

"While an auratha son cannot claim a one-fourth share of the property jointly acquired by his parents merely by reason of his mother's death, the remarriage of his father gives him a right to claim the one-fourth share which he would not have if his father did not remarry."

In the course of his judgment, Heald, J., surveyed the whole of the law on the subject with great particularity and although he was doubtful as to the meaning of the text of the Manugye referred to above he came to the conclusion that the effect of the case law is that, on the death of the mother and the remarriage of the father, the auratha son is entitled to get from the father one-fourth of the estate.

Heald, J., referred with approval (at p. 212 of the report) to the case of *Mi Hlaing* v. *Mi Thi* (7), where it was stated that the texts giving the auratha daughter the right to claim one-fourth do not authorize her to claim one-fourth from her mother "at least when she has not married again." The learned Judge then referred to the case of *Mi The O* v. *Mi Swe* (4), which I have already mentioned aad it will be seen that about one month after *Hi Hlaing's* case (7), it was held by the same Court but by a different Judge that, after the death of the father the eldest daughter cannot claim one-fourth of the estate from her mother even though she marries again; and he said that he doubted if the decision was good law, and that it

(2) [1904] 2 L. B. R. 255.
(3) A. I. R. 1914 P. C. 97=23 I. C. 433=41 I. A. 121=41 Cal. 887=8 L. B. R. 1 (P.C.).
(4) [1914-16] 2 U. B. R. 46=28 I. C. 821.
(5) A. I. R. 1921 L. B. 68=66 I. C. 538=11 L. B. R. 199.
(6) A. I. R. 1926 Rang. 211=98 I. C. 4=4 Rang. 207.
(7) [1914] 2 U. B. R. 40=28 I. C. 806.

is contrary to the decision in *Ma The's* case (4).

In the second case the head-note is:

"*Held* that, at Burmese Buddhist law the eldest child on the remarriage of the surviving parent, becomes entitled to a quartershare in the joint estate of the parents, if he or she has not already taken a share as orasa."

In that case, Heald, J., in delivering the judgment of the Court quotes (at p. 211 of the report) the following passage from the judgment in the case of *Ma E Hmyin* v. *Maung Ba Maung* (8):

"The ordinary rule of Burmese Buddhist law is that the widow succeeds to her husband's estate to the exclusion of all her children, except the auratha if there is an auratha, and that so long as the mother is alive and remains unmarried no child of his, except the auratha can claim any share of the property left by her father."

The learned Judge then stated his view to be as follows:

"In these circumstances I am of opinion that it should be taken as the rule of Burmese Buddhist law not only that the eldest child, if he or she has not already taken a quarter share of the joint estate as auratha becomes entitled to a quartershare of that estate on the remarriage of the surviving parent. . . . ."

Thus there can be no real doubt that as the law stands today an eldest daughter prima facie does become entitled to a quarter-share in the joint property of her parents' marriage upon the remarriage of her mother.

It is said however (and this was the view held by the learned Additional District Judge) that in view of the fact that a male child had been born earlier than Ma Hla Yin the claim of the latter must be defeated. Two other points also require consideration, viz., whether Ma Hla Yin's claim is not defeated because she had not attained her majority in the lifetime of both her parents; and whether her right (if any) was or was not a vested right. It would be well at this stage to endeavour to ascertain as far as possible the dates of the material matters under review upon this appeal.

It is admitted on the pleadings that U Kan Gyi died in 1274 B.E. (or 1912-13) that his widow remarried in 1280 B. E. (or 1918-19) and that Ma Hla Yin died in 1285 B. E. (1923-24). According to the evidence of respondent 1; the first-born child was an infant called Maung Ba Thaw who was born in 1258 B.E. (or 1897-98) and died in 1260 B.E. (or 1898-99). In the latter year, according to respondent Ma Hla Yin was born; she was, therefore, 13 or 14 when her father died and 20 or 21 when her mother remarried. Thus it is evident that, so far as her claim in based upon her age, Ma Hla Yin had attained her majority at the date of respondent 1's remarriage.

Upon the first point the question: "Did Ma Hla Kin attain the status of orasa?" I was referred to *Ma Aye Yin* v. *Ma Mi Mi* (9). The head-note is:

"*Held* that if the first born child dies before attaining the age of majority, the eldest child who attains the age at which he or she would be able to take the place of the father or the mother in case of their death is the orasa.

Held also that for an orasa to qualify for his special rights joint living with the surviving parent and active assistance in his or her duties is not necessary."

At p. 572 (*of 7 Rang.*) of the report appears the following passage:

"It is further contended, however, that Maung Kin Maung never did attain the status of orasa, and that he could not do so, as he was not the eldest born child."

In the case of *Tun Maung* v. *Ba Tun* (10) at p. 294 the following principles were enunciated:

"The eldest born son is the orasa by right, but he does not attain the complete status as such till he attains his majority and becomes fit to assume his father's duties and responsibilities and to assist in the acquisition or management of the family estate. If he dies before he attains his majority or if he is incompetent to fulfil the above conditions, then his next younger brother, subject to the same conditions, succeeds to his position as orasa. If, however the eldest son attains his majority and fulfils the prescribed conditions and then dies before his parents, his position as orasa remains unfilled and the next brother does not succeed to it. If this enunciation of the law is correct, then it is clear that for the status of orasa to be attained it is not at all necessary for the child, for whom that status is claimed, to have been the eldest born if the eldest born died in infancy."

The learned Chief Justice then discussed the question whether the decision in the *Kirkwood* case (1) had altered the position and he came to the conclusion that it had not.

Upon this question I think that the *Kirkwood* case (1) supports the view that the fact that there was an elder child (a son) who predeceased his father and died in infancy does not prevent the next born child (even if a daughter) from attaining the status of technical orasa.

(8) A. I. R. 1924 Rang. 298=83 I. C. 426=2 Rang. 123 (125).

(9) A. I. R. 1929 Rang. 365=121 I. C. 778=7 Rang. 569.

(10) [1904] 2 L. B. R. 292.

The learned Judge went on to say at p. 574 of the report:

"The tendency of judicial decisions of recent years has been to place the sexes on a status of absolute equality with regard to their claims of inheritance in the estate of their deceased parents, and we know of no authority in the Dhammathats for the view that if the eldest born child is a daughter and dies in infancy, no other child can attain the status of an orasa."

(1) I think therefore that the fact that there was a first-born son who died in infancy, did not prevent Ma Hla Yin from attaining the status..

(2) It is perfectly true that in *Ma Aye Yin's* case (9) the orasa attained his majority in the life time of both his parents, and that the Court seemed to attach importance to the fact that both parents were alive at his majority; moreover they seemed to have done so in view of the decision in the *Kirkwood* case (1). So far as I can see however it was not laid down then that the majority must be attained by a son during the lifetime of his mother, though it must, of course, be attained during the lifetime of his father in order to found a claim upon the death of the latter. We see no reason to think that it is a condition precedent to the attainment of orasa status that the child should attain majority while both parents are alive.

It seems to follow, therefore that, as in the present case, Ma Hla Yin was a major when her mother remarried, the requirements of the law in this connexion were fulfilled.

(3) Upon the last point, since the decision in the *Kirkwood* case (1), it cannot be argued that the right to a one-fourth on the death of a parent is not a vested right. It depends only upon the attainment of the status of orasa, and when this is attained the right becomes vested. I can see no distinction between such a case and a case like the present when the right arises on the remarriage.

Upon the question of partition, according to the evidence of Ma Kya Gaing, there was a request by Ma Hla Yin and Maung Kyin, appellant 1, (for a partition) and she agreed. She says an agreement was prepared and she and all her surviving children signed it. According to her, a partition subsequently took place in the presence of elders and three witnesses. D. W's. 2, 3 and 4 do give some evidence supporting her contention. I observe however that on p. 104 of the record U Kyaw, D. W. 1, uses these words: "There was no partition yet, though the lugyis had allotted them their shares." It is quite clear moreover that a quarrel took place between Maung Kyin, appellant 1, and his wife, and moreover there was clearly some dispute about a safe, part of the property to be partitioned. Also D.W. 2 Maung Thaung made use of this expression in the course of his evidence. "All the land which we were to divide is still with defendant 1." The matter does not rest here however, for D.W. 4 U Tok San says that upon Maung Kyin claiming the safe, defendant 1 said that she would not take the property which the mother did not want to give, and there was then a quarrel between her and her husband, respondent 1. Maung Kyin of course denies the fact of partition and there seems to be no doubt that the property is still with defendant 1. Upon the evidence as stated I am asked to hold that a partition did not in fact take place, and I agree therefore with the view of the learned Additional District Judge upon the point.

Upon the whole case, holding as I do that the appellants have established their right to a quartershare in the estate of the mother of Ma Hla Yin upon her remarriage, this appeal must succeed. There will be a decree declaring that the appellants are entitled to a quartershare in the estate as claimed and for a partition and for an account of the moveable and immovable properties claimed, which are now in the hands of the defendants or any of them. The case will be remitted to the District Court in order that the necessary orders may be passed giving effect to this decree. Respondents 1 to 4, who alone seem to have contested the appellants' claim throughout, must pay the costs of the latter both here and in the Court below.

Brown, J.—I agree in the order proposed. I agree that in view of the recent decisions it must now be held that Ma Hla Yin was on her mother's remarriage entitled to claim a quartershare of the joint estate of her mother and her deceased father. The claim of the auratha on remarriage of the survi-

ving parent was fully discussed in the case of *Maung Shwe Ywet* v. *Maung Tun Shein* (5). It was there held that while an auratha son cannot claim a one-fourth share of the property jointly acquired by his parents merely by reason of his mother's death, the remarriage of the father gives him a right to claim the one-fourth share which he would not have if his father did not remarry. The claimant in that case was a son. There was therefore no definite finding that the same rule would apply in the case of a daughter. But at p. 212 of his judgment Heald, J., expressly questions the correctness of the decision in the case of *Mi Tha E* v. *Mi Shwe Ni* (4). In the case of *Maung Po Kin* v. *Maung Tun Yin* (6), the claim again was made on behalf of a son. But in p. 211 (*of* 4 *Rang.*) of his judgment in that case Helad, J., remarks:

"I am of opinion that it should be taken as a rule of Burmese Buddhist law not only that the eldest child, if he or she has not already taken a quarter share of the joint estate as auratha, becomes entitled to a quarter share of that estate on the remarriage of the surviving parent, but also that the children, other than the eldest child, similarly becomes entitled to a quarter share in the joint estate on the remarriage of the surviving parent."

It is to be noted that in this case on the remarriage the child who claimed a quartershare was still a minor. These two cases seem clearly to establish the right of the eldest son, if also the eldest child to claim a quarter share on remarriage of the surviving parent, and in order to establish this claim it is not necessary for the claimant to show that he was technically the auratha in the sense that he was able to fill the place of his deceased parent.

The general tendency is to the equality of the sexes in the matter of inheritance, and although in both these two cases the claim was made by a son, there are clear indications in the latter case at any rate, that the opinion of the learned Judges who decided that case was that the same rule should be applied to the case of daughters. Ma Hla Yin was a major at the time of the remarriage. In both the two cases cited minority at the time of the death of the one parent was not held to be a bar to the claim. I can see no obstacle therefore to Ma Hla Yin's claim on this ground. I also agree with my learned brother that the fact that Ma Hla Yin had an elder brother who died in infancy does not affect her claim.

P.N./R.K. *Appeal allowed.*

A. I. R. 1930 Rangoon 324

DAS, J.

Ma Bok—Applicant.

v.

Maung Sein and *others*—Respondents.

Civil Revn. No. 7 of 1930, Decided on 18th July 1930, from order of Dist. Judge, Tharrawaddy, in Civil Misc. No. 41 of 1929.

Civil P. C., (1908), O. 33, R. 1—Burmese Buddhist wife applying to sue as pauper—Her only property was house which jointly belonged to her and her husband—Judge failing to consider that property was joint and that as such wife had no definite share in it—His judgment is perverse and High Court can interfree.

Where a Judge passes a perverse judgment, the High Court can always interfere. Where a Burmese Buddhist wife applies to sue as a pauper and has no property except a house belonging jointly to her and her husband and the Judge fails to consider that the house is joint and as such the wife has no definite share in it, and further holds that the wife is entitled to sell the property and to pay the court-fee the Judge is perverse in doing so. [P 324 C 2, P 325 C 1]

Thein Maung—for Applicant.

N. N. Burjorjee—for Respondents.

Judgment.—The judgment in this case is a perverse one, and when a Judge delivers a perverse judgment he is exercising his jurisdiction illegally. It is argued before me that no revision lies from the order of the Judge that the petitioner is not a pauper. But I am firmly of opinion that, when a Judge passes a perverse judgment, as I hold he has done in this case, this Court can always interfere.

The only question to be decided by the District Judge was whether the petitioner was in possession of enough property to pay the court-fees in this case which amounted to Rs. 3,000. The District Judge held that a house assessed in the name of the petitioner and her husband belonged to the petitioner, and that therefore the petitioner was entitled to sell the same and pay the court-fees. But it is quite clear from the decision in *Ma Paing* v. *Mg Shwe Paw* (1) that a husband or wife does

(1) A. I. R. 1927 Rang. 209=103 I. C. 568=5 Rang. 296 (F.B.).

not possess any definite share in the joint property belonging to them and it cannot be said that the wife possessed a definite share in the house. The house is valued by the District Judge at Rs. 1,800. Even accepting that value it does not show that the petitioner was the owner of the house, and therefore could sell the same and pay the court-fees. If this house is not taken into consideration it is quite clear that even with other properties the petitioner would not have sufficient property to pay the court-fees.

The next item of property which is alleged to belong to the petitioner is about six acres of land which was in the possession of her brother. But the father states that he has taken back the land, and that he is in possession of it, and though the petitioner might be able to claim the land by a suit against the father, yet she is not in possession of the land, and it cannot be said that when she applied to sue as a pauper, she was the owner in possession of this piece of land.

Apart from these two pieces of property, i. e. the house and six acres of land, it is admitted that the petitioner does not possess sufficient property to pay the court-fees in this suit. The learned Judge entirely failed to consider that the house was the joint property of the husband and wife, and I must hold that he was perverse in doing so. The order of the District Court is set aside, and the petitioner will be allowed to sue as a pauper. The petitioner will get her costs five gold mohurs.

P.N./R.K. *Revision allowed.*

A. I. R. 1930 Rangoon 325

BROWN AND BAGULEY, JJ.

Ko Kyin Sein—Applicant.

v.

Abas Khan—Respondent.

Civil Revn. No. 68 of 1930, Decided on 19th August 1930, from order of Township Court, Gyobingouk, D/- 11th January 1930, in Civil Sm. C. Execution No. 86 of 1929.

Civil P. C. (1908), O. 21, R. 57—Decree-holder attaching debt—Court unable to proceed further with execution owing to decree-holder's default—Proceedings ordered to be closed—No further action against garnishee for one year—Such order must be treated as dismissal of application and as removing attachment.

A decree-holder in execution of a decree had attached a debt. The Court was unable to proceed further with the execution proceedings owing to decree-holder's default. The Court then ordered the proceedings to be closed for failure of the decree-holder in taking any further steps with regard to the proceedings and no action was taken against garnishee for more than one year.

Held: that under the circumstances it was unreasonable to keep property under attachment without taking any further steps to realize the decretal amount for an indefinite period. The order closing the proceedings must be treated as a dismissal of the application, involving the removal of the attachment: 17 *Mad.* 58 and 37 *All.* 542, *Ref.* [P 326 C 1]

Kalyanwala—for Applicant.

B. C. Guha—for Respondent.

Baguley, J.—The petitioner Ko Kyin Sein obtained a decree against one Ma Kyin Sein. In execution of that decree he attached a debt due to Ma Kyin Sein by the respondent Abas Khan. He applied for execution of the decree against Abas Khan. Abas Khan said he had satisfied the debt, and the trial Court after hearing evidence decided that he had proved this, and dismissed the application against him. Ko Kyin Sein has now come to this Court in revision.

Under the Civil Procedure Code, as originally drafted, the Court had no power to order execution in this way against a garnishee, but by rules which have subsequently been issued by the High Court, execution can be taken out against garnishees. These rules now appear as Rr. 63 (a) to 63 (g), O. 21, Civil P. C. The question then for consideration is whether Abas Khan did owe the money to Ma Kyin Sein at the time the debt was attached. The present execution proceedings were commenced on 27th September 1929. Abas Khan has claimed that he had settled the whole debt before that date. The trial Court has found that he has proved this, and there is no ground for interference with his finding of fact in revision. It has however been contended before me that for another reason the order passed by the trial Judge was wrong.

The proceedings instituted on 27th September 1929 were not the first proceedings instituted against Abas Khan. Application for execution was filed on 13th June 1928 in execution case No. 54 of 1928 and the debt was then attached. On 18th July 1928, an entry was made in the diary.

"Small Cause Execution No. 55 of 1928 has been closed for non-satisfaction. Close this case. Enter non-satisfaction."

In Execution Case No. 55, a similar application had been made against Abas Khan with regard to another decree in favour of Ko Kyin Sein against Ma Kyin Sein, and the order passed on 18th July in that case was:

"U Pyan, for decree-holder present, and prays that the case be closed for non-satisfaction on the ground that the debtor has not paid up the debts to judgment-debtor. Granted. Close the case. Enter non-satisfaction."

The question for consideration is whether the attachment of the debt continued after the closing of the execution proceedings. Abas Khan admits that he paid Ma Kyin Sein her debts after he had received the earlier prohibitory order. If therefore that prohibitory order is still in force, his payment to Ma Kyin Sein would not absolve him from liability.

Under R. 57, O.21 where any property has been attached in execution of a decree, but by reason of the decree-holder's default the Court is unable to proceed further with the application for execution, it shall either dismiss the application or for any sufficient reason adjourn the proceedings to a future date. Upon the dismissal of such an application, the attachment shall cease. The question then for consideration is whether the order of 18th July must be treated as a dismissal of the application, and whether it can be held that the Court was unable to proceed further by reason of the decree-holder's default.

That the proceedings were closed is clear and no further action was taken against the garnishee for nearly a year. I think in the circumstances it must be held that the Court was unable to proceed further with the application by reason of the decree-holder's default. The decree-holder could at that time have applied for further action to be taken against the garnishee. He failed to do so. It is unreasonable to keep property under attachment, without taking any further steps to realize the decretal amount, for an indefinite period. No special reason has been shown as to why such a course was necessary in the present case. Prior to the enactment of R. 57 the effect of the dismissal of an application for execution on an attachment was a matter of some doubt. In the case of *Rangaswamy Chetty* v. *Periaswamy Mudaliar* (1) it was held that when an application for execution is dismissed on the ground that no further steps have been taken, the question whether the dismissal puts an end to any attachment that had been effected would depend on the facts of the particular case. In the case of *Daud Ali* v. *Ram Prasad* (2) it was suggested that ordinarily there would be a presumption in such cases that the attachment continued. But the actual decision in the case was based on the particular circumstances of the case.

I think it must be held that under the provisions of the present R. 57, the Court in this case was unable to proceed further with the decree-holder's application for execution and that its orders closing the proceedings must be treated as a dismissal of the application involving the removal of the attachment. That being so, the attachment was no longer in force at the time that Abas Khan satisfied his debts.

The order passed by the trial Court was therefore correct and I dismiss this application with costs. Advocates fee one gold mohur.

B.V./R.K. *Revision dismissed.*

(1) [1894] 17 Mad. 58=3 M. L. J. 211.
(2) [1915] 37 All. 542=30 I. C. 787.

A. I. R. 1930 Rangoon 326

PAGE, C. J. AND DOYLE, J.

Chwan Swee Bee—Appellant.

v.

National Carbon Co.—Respondents.

First Appeal No. 153 of 1929, Decided on 20th May 1930, from decree of Rangoon High Court in Civil Regular Suit No. 437 of 1928.

(a) Trade-mark—Test for determination is dishonest purpose.

It is true that a person is entitled to take from anywhere even from a competitor's wrapper, a combination of colours and form of lettering which would improve the artistic form of his wrapper. But the colour combination and the lettering must be used for an honest purpose and must not be made an instrument whereby persons seeing the colouring and the lettering are led to believe that the imitator's batteries are of the competitor. [P 328 C 1]

(b) Trade-mark—Intent to deceive established—It is only short step to its success.

When once the intent to deceive is established it is only a short step to proving that the intent has been successful, but still it is a step, even though it be a short step. Whether

the get-up of a particular article is calculated to deceive depends upon the circumstances prevailing in respect of the particular article in question. [P 328 C 2, P 329 C 1]

J. K. Munshi—for Appellant.

Mc Donnell—for Respondents.

Page, C. J. — When the facts are understood this case presents no difficulty. The plaintiffs sought to restrain the defendants from using a wrapper with a certain get-up, which it is alleged they were entitled to pass off their electric batteries for those of the plaintiffs.

The plaintiffs for many years have imported into Burma electric flashlight batteries, more than 80 lakhs of which have been sold in Burma, and for some years before this suit was brought the plaintiffs had established a wide reputation as traders in this line of goods. The plaintiffs use a wrapper for their electric batteries with a distinctive get-up that has been set out in detail by the learned trial Judge, and which I need not again describe. That the plaintiffs' wrapper has a distinctive get-up which has been associated in the minds of the general public with the plaintiffs' batteries is not in dispute. There are three distinctive features of this get up which it is material to notice: (1) a combination of red, white and blue colours (2) the word "Eveready" which is set out in the front of the wrapper in an uncommon and distinctive form of lettering; (3) No. 950 over the word "Eveready."

Now, for some years the defendants have been selling the plaintiff's batteries with the wrappers on them that I have mentioned, and in addition to the batteries of the plaintiffs, the defendants also sold a number of their own batteries. The evidence is that in the year the defendants sold about 40 to 50 cases of their own batteries and 240 cases of those of the plaintiffs. In 1926 the defendants were minded to change the form of the wrapper of their batteries. They had been supplied from America with "Bright Star" battery No. 10 with a scarlet wrapper, and in March 1926 the defendants sent an indent e. g. in which they stated that they required

"20 cases of cells, each case to contain 750 pieces, quality as No. 10 which had been described before in a cardboard box to be printed in English and Burmese with the figure of "Polo" as per sketch sent and the ground of the colour to be red as sample with a blue border."

In compliance with that indent the wrappers were created which form the subject-matter of this suit.

It was admitted by the manager of the defendants that they were responsible for the form of the new wrapper. Choong Swee Hong in his evidence stated:

"I am not responsible for making the letters higher in the middle than at the beginning and at the end. I only gave instructions to make big letters. I do not know who is responsible for that. I suggested the No. "650" on "Polo" batteries. I suggested the number should be put above "Polo Brand" instead of down below as in Bright Star. I did not get the idea from the Eveready cells. "650" is a lucky number and I like this number."

Mr. Pow, who was called as a witness by the defendants, and who was the manager of Messrs. Marshall Cotterell & Co., importers of goods for the defendants from America, stated:

"Our office had nothing to do with the way in which the words "Polo Brand" were designed. The defendants were responsible for that and they were also responsible for having the number put on the top of the cell instead of at the bottom as on Bright Star."

The wrapper of which the plaintiffs complained has a colouring of red, white and blue with the same shade of red as that of the plaintiffs' electric batteries. It has also the words "Polo Brand" in a similar position on the wrapper as the word "Eveready" are set out in the form of lettering identical with that in which the word "Eveready" is set out on the plaintiffs' wrapper; and above "Polo Brand" in the same position with respect to the words "Polo Brand" that the No. "950" is in respect of the word "Eveready" the No. "650" is placed on the defendants' wrapper. One has to ask oneself why was it that the defendants elected on their wrapper to make use of a combination of colouring similar to that of the plaintiffs' wrapper, "Polo Brand" in the same form of lettering as that in which "Eveready" appears on the plaintiffs' wrapper, and the No. "650" in the same place in respect of "Polo Brand" as the No. "950" is in respect of "Eveready"? The learned advocate for the appellants with respect to the first two alterations of the defendants' wrapper contended that there was not, and could not be, any monopoly in a colour, that is true. He contended that the reason why the defendants

took the form of lettering and the peculiar combination of colouring, which is found on the plaintiffs' wrapper and used it on their own wrapper was because they did, as they were entitled to do, take from anywhere, even from a competitor's wrapper a combination of colours and form of letteriug which would improve the artistic form of their wrapper. No doubt, that is true, provided that the colour combination and the lettering are used for an honest purpose and are not made an instrument whereby persons seeing the colouring and the lettering are led to believe that the defendants' batteries are the plaintiffs.

It is doubtful, I think, whether this particular form of colouring, or the particular form of lettering which is found on the plaintiff's wrappers are artistic at all. But, be that as it may, one has to view questions of fact broadly, and both my learned brother and I endeavoured to obtain from the learned advocate for the appellants some explanation as to why it was that it so happened that the defendants took these distinctive marks in the get-up of the plaintiffs' wrapper for use on their own wrapper. Although the question was asked many times no satisfactory answer was forthcoming, and no answer in my opinion could be found which would not destroy the appellants' case. The true inference to be drawn from the conduct of the defendants in taking these three distinctive marks in the get-up of the plaintiffs' wrapper is that thereby they intended to sell their own batteries as those of the plaintiffs. And what could be the reason for doing so? The reason was that the defendant's battery was sold by them at the same price as that at which the plaintiffs' battery was sold; but as it cost them less, if they could induce the unwary buyer to purchase one of their batteries when he expected to buy one of the plaintiffs' batteries, it would be a very good business for the defendants. In my opinion the inference to be drawn from the evidence is that by taking these distinctive features from the plaintiffs' wrapper and using them on their own wrapper they intended fraudulently thereby to pass off their goods as being those of the plaintiffs. Now, how does the law stand in such circumstances? In Vol. 7 of Reports of *Patent Cases* (1889) at p. 538 Lord Justice Lindley observed:

"One must exercise one's own common sense, and if you are driven to the conclusion that what is intended to be done is to deceive if possible, I do not think it is stretching the imagination very much to credit the man with occasional success as possible success. Why should we be astute to say that he cannot succeed in doing that which he is straining every nerve to do?"

If the intention of the defendants was to pass off their electric batteries as being the plaintiffs' batteries by means of this wrapper, did they succeed? As to what plaintiffs must prove. I desire to refer to the observations of Lord Loreburn in the case of *Claudine Ash, Sons & Co.* v. *Invicta Manufacturing Co. Ltd.* (1) at p. 475:

"As regards the charge of passing off, put it as you will, it must be established that the defendant's goods were calculated to mislead purchasers into the belief that they were the plaintiffs' goods. It is said in this case that the defendants intended to deceive, not that the goods were calculated even innocently to deceive, but that there was a fraudulent intention on the part of the defendants. That is a material fact which would be weighed duly, and to which no doubt great weight would be attached by any Court if it were established, because the Court would be astute when they discovered an intention to deceive, in coming to the conclusion that a dishonest defendant had been unsuccessful in his fraudulent design. When once you establish the intent to deceive it is only a short step to proving that the intent has been successful, but still it is a step, even though it be a short step."

If from an examination of the defendants' wrapper it was apparent to us, that the imitation was clearly so marked that any person might reasonably be expected, unless he was on his guard, to accept the defendants' battery when he thought that that he was receiving the plaintiffs' battery, undoubtedly we should hold that the defendants' conduct was such that their wrapper was calculated to deceive the unwary buyers who would be likely to purchase an electric battery. But in the present case, the similarity between the two wrappers is not so apparent when one finds at the back of the defendants' wrapper the figure of a man in polo costume riding a polo pony, and no doubt anybody examining the two wrappers and understanding what was set upon them would not be deceived into thinking that the defendants' battery was the plaintiffs' battery; and in this

(1) [1912] 29 Patent Cases 465.

case there is no evidence from any witness who stated that he was induced by the defendants' wrapper to believe that he was purchasing the plaintiffs' battery when in fact he was purchasing one of the defendants.' But that is not conclusive, for whether the get-up of a particular article was calculated to deceive must depend upon the circumstances prevailing in respect of the particular article in question.

Two classes of persons would be likely to buy the electric batteries sold by the plaintiffs and by the defendants. The first class would be literate persons, and the evidence in respect of such persons was that they used to seek to obtain "Eveready" batteries by asking for "No. 950." If that is so, and we accept the evidence in that behalf a ready explanation is to be found for the insertion on the defendants wrapper above the uncommon lettering the "No. 650" in colours and figures identical with "No. 950" which is found on the "Eveready" wrapper and in my opinion any unwary buyer on asking for "No. 950" battery and receiving the defendants' battery with the "No. 650" on it not pausing meticulously to examine the form of the wrapper might well be deceived into buying the defendants' battery instead of those of the plaintiffs. The other class of persons, who would be likely to buy these electric batteries would be the illiterate inhabitants of Burma.

The evidence is to the effect that such persons, if they wished to buy "Eveready" batteries of the plaintiffs would be guided by the colouring and the design of the wrapper. Now if the sellers pointed out to a prospective illiterate buyer who asked for the "Eveready" battery that the battery which they proposed to sell as being the "Eveready" battery was a battery which had at the back of the wrapper the figure of a horse and man equipped for polo, no doubt they would buy the defendants' battery at their own risk. But assume, and it must be assumed in this case, that the intention of the defendants was fraudulently to deceive the unwary illiterate buyer and assume that pursuant to that intention in a gadi in the bazar an unwary illiterate customer accustomed to obtain from the defendants the "eveready" battery demanded another "eveready" battery and one of the defendants' batteries was given to him not with a man and horse equipped for polo as evidence, but with the other side of the wrapper exposed, it is easy to draw the inference that from time to time the defendants would succeed in persuading an illiterate prospective buyer to accept one of their batteries when he was expecting to be given an electric battery of the plaintiffs. There was evidence therefore from which an inference may reasonably be drawn both from the testimony of witnesses and from the appearance of the two wrappers that the wrapper of the defendants was calculated to deceive the public who would be likely to buy electric batteries. For these reasons, in my opinion the conclusion arrived at by the learned trial Judge was the correct conclusion and the appeal fails and must be dismissed with costs.

Doyle, J.—I concur.

P.N./R.K. *Appeal dismissed.*

A. I. R. 1930 Rangoon 329

BAGULEY, J.

Daw Ywet—Appellant.

v.

U Tin and *another*—Respondents.

Second Appeal 122 of 1929, Decided on 18th February 1930, from order of Dist. Judge, Mandalay, in Civil Misc. Appeal No. 86 of 1929.

Civil P. C. (1908), O. 21, R. 2—Application by decree-holder for certification of payment can be made at any time after payment—Such application even if made after application for execution is sufficient to support application for execution.

No period of limitation has been laid down specifically for an application for certification of payment by a decree-holder and such an application can be made by the decree-holder at any time.

It is not prescribed that the certification shall be made in any particular form and with any particular details, and the fact that the details of payment are only furnished after the original application for execution has been made does not nullify the effect of the statement that the money had been paid, which is made in the original application: *A. I. R.* 1928 *All.* 629 and *A. I. R.* 1927 *P. C.* 146, *Foll.*; *A. I. R.* 1922 *Cal.* 30 and *A. I. R.* 1925 *Cal.* 1012, *Rel. on*; *A. I. R.* 1925 *Rang.* 26, *Diss. from.* [P 331 C 2]

Sanyal—for Appellant.

A. C. Mukerjee—for Respondents.

Judgment.—In Civil Regular 271 of 1925 U Tin and Daw Hmi got a decree against Daw Ywet for Rs. 4,281-3-0, payable by monthly instalments of

Rs. 125, with the condition that in the case of default of one instalment the whole remaining amount should become due. At the same time it was declared that the decree-holders had a lien over a certain printing-press. According to the record of the case the defendant paid one instalment of Rs. 125 into Court on 20th July 1925. No further payments were made through the Court. On 1st September 1926 the decree-holders applied to the Court for payment to them of this sum of Rs. 125 and it was paid out to them on 14th September 1926.

On 19th March 1929 the decree-holders filed an application for execution. In the application it is mentioned that Rs. 1,125 had been received towards decretal amount, and the Court was asked to attach and sell the interest of the judgment-debtors in the printing-press over which they had a lien.

In the application it is stated that the last application for execution was in Civil Execution 180 of 1925 and was dated 25th March 1926. On this application the office noted that there had apparently been no previous execution proceedings and the application was time barred under Art. 182, Limitation Act. The Judge directed notice to issue to the judgment-debtor and stated that the matter would be decided when the judgment-debtor put in an appearance. The judgment-debtor applied for further particulars of the satisfaction alleged, which she denied, and she also took exception to the note of the previous application for execution. The decree-holders filed a reply stating that after Rs. 125 had been paid through the Court the judgment-debtor paid eight further instalments of Rs. 125 each, and explained that the execution proceedings were by some other decree-holder in which they had filed an application claiming that they had a lien, over the press which the other decree-holder had attached. The proceedings are Civil Execution 180 of 1925.

The executing Court recorded evidence as to the payment of the last instalment of Rs. 125 only. The Judge then came to a finding that the payment of the instalment of Rs. 125 on 24th March 1926 had been proved and he disallowed the objection of the judgment-debtor to the execution proceeding.

The judgment-debtor appealed. It was argued on her behalf that the payment of 24th March 1926 had not been proved; that an application in Civil Execution 180 of 1925, dated 25th March 1925, was not a step in aid of execution and that there had been no certification of any payment according to law within the prescribed period and that therefore the application for execution was barred by limitation.

The District Court held that the payment of 24th March 1926 had been proved; that there had been steps in execution within three years, holding, it would seem, that some orders in the diary of the original trial record proved this, for on 10th August 1926, the Sub-Divisional Judge had noted part satisfaction of the decree to the extent of Rs. 125 paid through the Court; that the decree-holder's application mentioning the receipt of Rs. 1,125 was sufficient certification of the payment of that amount; and that in any case the application was not time-barred in respect of any instalment falling due within three years before the date of the application. The appeal was, in consequence, dismissed.

The present appeal being a second appeal under the Civil Procedure Code only point of law can be raised. The first point was that the lower appellate Court failed to sift the evidence properly and erred in holding that the payment of 24th March 1926, had been proved. It is true that the judgment does not go at length into the evidence on the point, which is very short, but the learned Judge has noted that the judgment-debtor never went into the witness-box to deny having made the payment, and no doubt he thought that in the absence of a denial on oath which was liable to be tested by cross-examination, the very smallest modicum of proof was required on the other side. I do not think I can possibly interfere with this concurrent finding of fact, when there is this note about the absence of the judgment-debtor from the witness box to show that the District Judge has considered the evidence on the point.

The next ground argued was that as there had been no certification of any

payment to the Court within the time prescribed by law the application must be held to be barred by limitation. The basis of this argument is, of course, that no Court is entitled to recognize, in execution proceedings, any payment which has not been certified to it either at the instance of the judgment-debtor or of the decree-holder. Under O. 21, R. 2, a judgment-debtor may move the Court for a payment made, or claimed to have been made, by him to be recorded. Limitation for such an application by a judgment-debtor is comparatively short, ninety days under Art. 174, but no period of limitation has been laid down specifically for an application for certification of payment by a decree-holder. There is authority for holding that a decree-holder can certify a payment at any time, subject to no limitation: vide *Joti Prasad* v. *Sri Chand* (1), and though the Allahabad High Court in *Peare Mohan Prasad* v. *Raghunath Lal* (2) had held that a certification must be made before a decree had on the face of it become time barred, this requirement was set aside in the case just previously quoted.

The only ruling of this Court that has been quoted is that of *Maung Law San* v. *Maung Po Thein* (3) in which it was laid down that an application may be made by a decree-holder to certify any payment, itself made within time, within three years of the date of the payment. This proviso that the payment must be certified within three years of its being made was dissented from by a Bench of this Court in *Ma Tok* v. *Maung Sin* (4). This case has not been officially reported, but the appeal from it is reported as *Maung Sin* v. *Ma Tok* (5), and, though in that ruling their Lordships of the Privy Council do not endorse the finding of the Bench of this Court they do not dissent from it. I hold, therefore, following the Bench ruling of this Court, that an application for certification may be made at any time.

The question then arises as to whether there has, in fact, been a certification in the present case. In the application for execution there is a note that Rs. 1,125 has been received. No date or particulars of the payment or payments are given. It was only after the judgment-debtor had asked for particulars that it was stated that the Rs. 1,125 had been paid in nine monthly instalments ending with 24th March 1926. It is argued that this is no certification because it is made after the application for execution had been filed, and controversy had arisen. Speaking for myself I am unable to understand how it can possibly affect limitation whether controversy has arisen or not, but this point had been made a great point of in *Joti Prasad* v. *Sri Chand's* case (1). A certificate of payment by a decree-holder is no more than a statement that the payment has been made, which the decree-holder makes to the Court and it is not prescribed that it shall be made in any particular form or with any particular details. The information may be conveyed by the decree-holder to the Court even incidentally in his application for execution: vide *Bali Mahommed Sahi* v. *Aijanmai* (6) and *Jalim Chand Patwari* v. *Yusuf Ali Chowdury* (7). I do not consider that the fact that details of the payment were only furnished after the original application for execution had been made can nullify the effect of the statement that the money had been paid which was made in the original application.

This being the case I would hold that the decree-holders were entitled to lead evidence with regard to the payment that they proved. The fact of that payment had been held to be proved by both the lower Courts and I am unable to go into that question. The payment having been made a fresh starting point for limitation arose on the date when it was paid, and the present application is within time.

It is, in my opinion, a matter for regret that in *Maung Sin* v. *Ma Tok* (5), it ultimately turned out to be unnecessary for a final ruling to be pronounced with regard to the limitation for certifying satisfaction on the part of a

(1) A. I. R. 1928 All. 629=112 I. C. 73=51 All. 237 (F. B.).
(2) A. I. R. 1928 All. 55=107 I. C. 40=53 All. 259.
(3) A. I. R. 1925 Rang. 26=84 I. C. 473=2 Rang. 393.
(4) Second Appeal No. 24 of 1925.
(5) A. I. R. 1927 P. C. 146=101 I. C. 736=54 I. A. 272=5 Rang. 422 (P. C.).
(6) A. I. R. 1922 Cal. 30=68 I. C. 780.
(7) A. I. R. 1925 Cal. 1012=86 I. C. 1051.

decree-holder. It appears to me open to argument, if not open to doubt, that Art. 181 may apply; the present absence of any limitation at all, enabling a decree-holder to keep his decree alive almost indefinitely if he chooses to take appropriate steps; but that may perhaps be a matter for the legislature.

In the present case I hold, though for different reasons, that the judgment of the lower appellate Court was correct. I therefore dismiss this appeal with costs; advocate's fee three gold mohurs.

R.M./R.K. *Appeal dismissed.*

A. I. R. 1930 Rangoon 332 (1)

MAUNG BA AND BAGULEY, JJ.

U. Tha Hlaing—Plaintiff—Appellant.

v.

Mahomed Isaq—Respondent.

Civil Misc. Appeal No. 95 of 1930, Decided on 29th July 1930, from order of Dist. Judge, Toungoo, in Civil Misc. No. 108 of 1929.

Provincial Insolvency Act (1920), Ss. 53 and 54-A—Application under S. 53 in violation of S. 54-A—Decision on merits is ultra vires.

Where a Court holds that a creditor has no locus standi to present a petition for annulling a transaction under S. 53 having violated the provisions of S. 54-A, the Court has no jurisdiction to give a decision on the application on merits and the decision if given is ultra vires. [P 332 C 2]

S. Ganguli—for Appellant.

Judgment.—In Civil Miscellaneous No. 110 of 1929, Zafer Ali applied to be adjudicated an insolvent. He was adjudicated and a schedule of creditors was prepared. One of these creditors was K. K. Dey. He objected to the inclusion in the schedule of a creditor by name Mahomed Isaq on the ground that the mortgage produced in his favour was a sham one. He moved the Court to have it declared so; but he did not ask the receiver to take action nor did he obtain the leave of the Court to make the application.

The District Judge held an enquiry and at the close of the enquiry came to two findings: firstly that K. K. Dey was not entitled to make the application at all and secondly, that the mortgage was a bona fide one. Subsequently the receiver himself moved the Court to set aside the mortgage of Mahomed Isaq but his application was rejected on the ground that the mortgage had already been found to be a bona fide one on K. K. Dey's application. This finding is obviously incorrect. K. K. Dey having been held to have no locus standi to move the Court to declare the mortgage a bad one, the Court had no jurisdiction on his application to come to a finding with regard to the mortgage. We note in particular that one of the grounds put forward by the present appellant is that evidence which should have been placed before the Court by K. K. Dey was not so placed.

For these reasons we set aside the order of the District Judge dismissing the receiver's application and return the file to the District Court with a direction that the District Judge do dispose of the receiver's application on the merits. This appeal has been heard ex parte so we direct that the costs of this appeal shall be costs in the case,

B.V./R.K. *Case remanded.*

A. I. R. 1930 Rangoon 332 (2)

BAGULEY, J.

S. C. Guha—Accused—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 238-B of 1930, Decided on 2nd July 1930, from order of Second Addl. Magistrate Moulmein, D/- 24th March 1930, in Criminal Regular Trial No. 124 of 1929.

(a) Principal and Agent—Agent undertaking to be insurer of goods made over to his charge for separate consideration—He does not cease to be agent.

It is quite possible that an agent might make himself responsible for loss or damage to goods belonging to his principal. There is nothing in law which would prevent an agent undertaking to be an insurer of goods consigned to his care provided that there is consideration for that insurance and this consideration would have to be something outside the terms of the employment at the ordinary rate: 7 *L. B. R.* 278, *Ref.* [P 331 C 2]

(b) Penal Code (1860), S. 409—Goods entrusted to firm and not to its manager personally—He is not criminally liable for breach of trust in respect of goods.

A person who is the manager of the firm cannot be held criminally liable for breach of trust where there is no personal entrustment of goods to him but to the firm in respect of which the offence was alleged to have been committed. [P 335 C 1]

Judgment.—This is an application in revision. The applicant S. C. Guha has been convicted under S. 409, I. P. C., of criminal breach of trust of goods

valued at Rs. 8,081-12-0 as an agent and employee of the Dunlop Rubber Co., (India) Ltd. His appeal to the Sessions Judge was dismissed and he now comes to this Court in revision.

The allegation of the complainant is that Guha was a "stockist" of Dunlop tyres; that as a "stockist" he was entrusted with goods on what is known as "consignment terms." The contract which is the basis of the case is contained in a letter filed as Ex. A. At the end there are four spaces against which are printed the caption "Name in full," "Address" "Dated at," and "Signature." "Name in full" is written against National Cycle and Motor Company, and "Signature" is against S. C. Guha. The document is in the form of a letter addressed to the Dunlop Rubber Company (India) Limited, and begins:

"Dear Sirs,

In consideration of your placing my name/our name upon your list of traders who will have the benefit of holding consignment stocks of Dunlop pneumatic tyres, covers and tubes and for Dunlop solid tyres, during the session ending 30th September 1929, I/We hereby agree as follows:

1. You are, subject to the terms hereof, to supply me/us, unless prevented by causes beyond your control, with such stock of Dunlop goods as may be agreed upon between us from time to time to be managed by me/us on your behalf in the way of my/our trade, and as far as possible during the continuance of this agreement to replace the same as and when sold.

2. I/We shall from time to time acknowledge receipt in writing in the form prescribed by you of all stocks of Dunlop goods immediately same are delivered to me/us, and such stock shall remain your absolute property until same is sold and paid for by me/us at your list price less agreed discounts and I am/We are to be deemed to be a trustee/trustees of the said stock for you and on your behalf until you are paid in cash for same.

3. All sales from the said stock shall be on your account, and all cash received in payment for the said stock shall, until payment is made by me/us in trust for you. When any such article has been sold I am/We are to advise you of the sale forthwith in the form prescribed by you.

4. I am/We are to send you on the 15th day each month or such date as you may advise later a detailed return in the form prescribed by you setting out the stock position from the date of the previous return of all Dunlop goods I/We held in stock on your behalf and provided I/We settle your accounts before the 5th day of the month following sale you are to allow me/us a settlement discount of 5 per cent.

5. I/We undertake to keep and maintain all goods supplied to me/us under this agreement in a safe, sound and saleable condition and do hereby undertake to indemnify you against all loss to such goods from fire, theft, pilferage or from any cause whatsoever and will afford your traveller, or other representative every facility at any time during business hours to inspect and check the said stock, and if at any time any article be missing, destroyed or damaged, I/We will forthwith pay you the then current list price, less agreed discount of such article.

The remainder of the document is not material at the present time.

The main defences relied upon are firstly that the offer contained in the document, if accepted, would not constitute the executant an agent of Dunlops, and in the second place that the applicant is not the executant of the document personally. It was argued on behalf of the applicant that the offer contained in this letter, if accepted by Dunlops, would merely make the executant a purchaser of the goods, the main point relied upon being that the stockist undertakes to keep all goods made over to him under the agreement in sound and saleable condition and undertakes to indemnify Dunlops against all loss to such goods from fire, pilferage etc., and on the principles laid down in *Po Ywet* v. *Emperor* (1) it was argued that, as the loss, if the goods were damaged, would fall upon the stockist, the goods must be regarded as his. I wish in no sense to be regarded as dissenting from the principles laid down in this ruling, but it appears to me to be quite possible that an agent might make himself responsible for loss or damage to goods belonging to his principal. There is nothing in law which would prevent an agent undertaking to be an insurer of goods consigned to his care provided that there is consideration for that insurance and this consideration would have to be something outside the terms of the employment at the ordinary rate. Ex. A seems to suggest that a stockist under this agreement has something beyond the ordinary commission that the usual dealer on commission might be expected to receive. The opening words of the letter refer to a stockist being placed on the special list of traders, and there is the obvious benefit that a stockist appointed under this agreement holds in that he does not have to pay for the goods less the usual trade

(1) [1913] 7 L. B. R. 278=15 Cr. L. J. 452=24 I. C. 332 (F. B.).

discount on receipt of the goods. It is in evidence that in addition to this relationship of stockist for tyres the parties were also dealing with with one another in what is referred to as the "straight sales basis" in which the goods were consigned to the dealer presumably either subject to the usual trade discount or for cash. Goods sold under the stockist agreement required no outlay on behalf of the stockist until the goods were actually sold by him, and then he was allowed to retain the cash for a certain length of time before remitting it to Dunlops. In addition to this there is a specific discount referred to as "settlement discount" subject to the goods being paid for on due date, and it was also pointed out in argument that by virtue of his stockist agreement the stockist would obtain by supplying goods from his stock to other dealers at trade rate a percentage on all Dunlop tyres sold within the Moulmein area, for all other dealers would get their goods from him to sell there. For these reasons I would hold that there is nothing impossible in a stockist on these terms being agent of Dunlops. The stockists directly in terms undertake to be an agent of Dunlops. In Cl. (2) he states that he is to be deemed to be a trustee of the stock on behalf of Dunlops, until he pays in cash for the goods. In Cl. (3) he undertakes that all sales from stock shall be on Dunlop's account and all cash received in payment of the stock shall, until paid to Dunlops, be held in trust for them, and when a man explicitly declares himself to be a trustee or agent in this manner, I do not consider the fact that for a specific consideration he insures the goods made over to his charge would prevent him from being an agent. The next point for consideration therefore is whether the application under this agreement became the agent of Dunlops.

The letter is in a printed form in which the words "I" and "we" both appear and neither the "I" nor the "we" has been scratched out. But at the bottom of the letter the name in full is the National Cycle Motor Company. There is evidence which does not seem to have been seriouly disputed that the National Cycle & Motor Company is a family firm, of which Guha is the Managing Agent, but in which other members of the family sometimes assist. There is nothing on the record which leads one to suppose that Dunlops regarded themselves as dealing with Guha as a man. One bundle of exhibits, the G series, apparently invoices, are all made out in the name of Messrs. The National Cycle & Motor Company. The prosecution have also filed a number of letters; Ex. H is addressed to Messrs. The National Cycle & Motor Company and it begins "Dear Sirs," and is signed "Yours faithfully, for and on behalf of the Dunlop Rubber Co. (India) Ltd." Ex. I is the same. Ex. J is slightly different being in the form of what would be known in Government circles as a D. O. letter and is addressed to S. C. Guha, Esq., C/o The National Cycle & Motor Company, and begins "Dear Mr. Guha," and is signed "Yours sincerely." Ex. K is the same. Ex. L is headed "Mr. S. C. Guha, the National Cycle & Motor Company" and begins "Dear Mr. Guha." It is signed "Yours faithfully, F. F. M. Ferguson, District Manager," and is also of the D. O. type, and the reply thereto, Ex. M, is addressed to Mr. F. F. M. Ferguson and signed "Yours faithfully, S. C. Guha," Ex. N is of the same type. In Ex. P we find the official type once more and is addressed to Messrs. The National Cycle & Motor Company, and begins "Dear Sirs" and is signed "Yours faithfully, for and on behalf of the Dunlop Rubber Co. (India) Ltd., F. F. M. Ferguson, District Manager." Again Ex. Q which is a deed of assignment of certain agreements to Dunlops is described at the beginning as being made between the National Cycle & Motor Company of Lower Main Road, Moulmein, represented by S. C. Guha, their managing representative of the same address, and the Dunlop Rubber Co. (India) Ltd.

These series of extracts and exhibits show quite clearly that Dunlops regarded the National Cycle & Motor Company as being a firm of which S. C. Guha was the Manager, and it seems clear that the company regarded themselves as dealing with the firm. This being the case I fail to understand how Guha personally could have been regarded as a stockist under Ex. A. In my opinion the stockist was the

firm and therefore it was the National Cycle & Motor Company who were the agents of Dunlops, under this agreement, and not Guha personally. There can, I think, be no possible doubt that, if Dunlops were reduced to filing a civil suit on the basis of Ex. A, they would have to make the National Cycle & Motor Company the defendants and not Guha personally, except possibly as a member of the firm for the price of the goods. It seems to me to follow that the goods were entrusted to the firm and not to Guha, and, if there was no personal entrustment to Guha, he cannot be regarded as criminally liable for breach of trust. Guha's position under Ex. A is such that he could not be held personally liable in a civil Court for goods delivered under it, and a man cannot be held criminally liable for goods for which he is not even civilly liable.

I have been referred to a number of cases in the course of argument, but in consequence of the view that I take of the letter Ex. A, it is unnecessary to deal with the question of whether there was actual shortage in the payments which were made for the goods, as I consider Guha personally was neither the agent nor the servant of Dunlops and this being the case the charge of criminal breach of trust under S. 409, I. P. C., is bound to fail. I therefore set aside the conviction and sentence and acquit the applicant.

P.N./R.K. *Conviction set aside.*

A. I. R. 1930 Rangoon 335

DOYLE, J.

Maung Ba Maung—Accused — Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. Appln. No. 338-B of 1930, Decided on 24th July 1930, from order of Addl. Sess. Judge, Maubin, D/-11th July 1930.

(a) Criminal P. C., S. 497—Offence under S. 409, Penal Code — Magistrate cannot grant bail.

Under the provisions of S. 497, Criminal P. C., a Magistrate has no power to grant bail in cases falling under S. 409, Penal Code: *A. I. R. 1927 Rang. 205, Foll.*; *A. I. R. 1926 Rang. 51, Held absolute.* [P 336 C 1]

(b) Criminal P. C., S. 17—Order of Additional Sessions Judge, granting or cancelling bail without special powers is ultra vires.

The Code of Criminal Procedure strictly limits the powers of an Additional Sessions Judge to such as are conferred upon him directly by the Local Government or by the Sessions Judge of the division in which he exercises power. Power to grant or cancel bail could be conferred on him under S. 17. Where no such power is conferred, the order of an Additional Sessions Judge granting or cancelling bail is ultra vires. [P 336 C 1, 2]

(c) Criminal P. C., Ss. 497 and 498— Offence punishable with death or transportation — High Court will not usually grant bail.

The High Court should not grant bail in cases where a person is charged with offences punishable with death or transportation for life except for exceptional and very special reasons. [P 336 C 2]

O'de Glanville—for Applicant.

Assistant Government Advocate — for the Crown.

Judgment.—Maung Ba Maung, Secretary of the Maubin Municipality, is accused under S. 409, I. P. C., of committing criminal breach of trust. Having been arrested on 7th July 1930 he was sent up before the Head-quarters Magistrate on 8th July 1930, with a view to obtaining a remand. The Magistrate was of opinion that there was a prima facie case against Ba Maung, but on the authority of *Mahomed Eusoof* v. *Emperor* (1) considered that he had power to release Ba Maung on bail and proceeded to do so. The District Superintendent of Police, Maubin, thereupon applied to the Additional Sessions Judge, Maubin, to have this order cancelled. The Additional Sessions Judge, Maubin, very rightly pointed out that the case of *Mahomed Eusoof* v. *Emperor* (1) had been overruled by a Full Bench ruling in the case of *Emperor* v. *Nga San Htwa* (2) and cancelled the order for bail.

The High Court is now moved in revision on the ground that the order of the Additional Sessions Judge was ultra vires. This application is opposed by the Assistant Government Advocate on the ground that, whatever the powers of the Additional Sessions Judge may be, the original order was ultra vires, and he further urges that this is not a case in which the High Court should use the powers of revision in enlarging an accused on bail.

(1) A.I.R. 1926 Rang. 51=93 I.C. 65=27 Cr. L.J. 401=3 Rang. 538.

(2) A.I.R. 1927 Rang. 205=104 I.C. 101=28 Cr. L.J. 773=5 Rang. 276 (F.B.).

The provisions of S. 167, Criminal P. C., by themselves would leave it in doubt as to whether a Magistrate before whom an accused could be sent for a remand preliminary to sending him up for trial had any power other than of ordinary detention of the accused before being sent to a Magistrate having jurisdiction for trial purposes. It has been however the practice in this province in the past to regard the term "Magistrate" under S. 167 as synonymous with "Court" under S. 496, Criminal P. C., and bail is habitually granted in cases falling under S. 167, Criminal P. C. It is not necessary for the purpose of this case to discuss the question as to whether bail can be granted under S. 167 by Magistrates, since it is clear that under the provisions of S. 497, Criminal P. C., coupled with the Full Bench ruling above mentioned, a Magistrate has no power to grant bail in cases falling under S. 409, I. P. C.

As to the legality of the action of the Additional Sessions Judge in cancelling the bail order the Assistant Government Advocate argues that the Additional Sessions Judge, Maubin, acted as a Court of Sessions under S. 497 (5), Criminal P. C. By office order of the District and Sessions Judge, Myaungmya-Maubin, dated 30th July 1927, the Additional Sessions Judge was empowered to hear all criminal appeals under S. 409, Criminal P. C., criminal miscellaneous cases under S. 123 (2), Criminal P. C., and to preside over Sessions trials of the Maubin District. The Code of Criminal Procedure strictly limits the powers of an Additional Sessions Judge to such as are conferred upon him directly by the Local Government or by the Sessions Judge of the division in which he exercises power. Thus S. 17, Criminal P. C., enables the Sessions Judge to make provision for the disposal of any urgent application by an Additional Sessions Judge when the Sessions Judge is unavoidably absent or incapable of acting. S. 123 (2) provides that where a Magistrate orders a person to give security for a period exceeding one year and the person does not give such security, he shall be imprisoned pending the orders of the Sessions Judge, and the proceedings shall be laid as soon as conveniently may be, before such Court. It is however made clear by S. 123 (3-B) that the word Court does not include an Additional Sessions Judge, since a Sessions Judge may in his discretion transfer any proceedings to an Additional Sessions Judge. S. 193 says that no Court of Sessions should take cognizance of any offence as a Court of original jurisdiction unless the accused has been committed to it, but S. 193 (2) only permits Additional Sessions Judges to try such cases as the Local Government or the Sessions Judge may make over to them for trial. S. 409 states that an appeal to the Court of Sessions or Sessions Judge shall be heard by the Sessions Judge or by an Additional Sessions Judge provided that an Additional Sessions Judge shall hear only such appeals as the Local Government or as the Sessions Judge may make over. The alternative phrase in S. 409 suggests that the Court of Sessions normally means the Sessions Judge, and that the phrase "the Court of Sessions" only refers to the Additional Sessions Judge in cases in which he has proper seisin. S. 438 restricts the powers of an Additional Sessions Judge to such cases only as have been transferred to him.

It would appear therefore that according to the Code an Additional Sessions Judge can only be regarded as exercising the powers of a Court of Sessions where these powers are specially conferred upon him. Power to grant or cancel bail in cases like the present could have been conferred upon him under S. 17. I am therefore of opinion that the order of the Additional Sessions Judge was ultra vires.

As regards the desirability of enlarging the accused in the present case on bail it has been laid down time and again that the High Court should not grant bail in cases where a person is charged with offences punishable with death or transportation for life except for exceptional and very special reasons. No such reasons have been urged before this Court, while affidavits have been sworn on behalf of the prosecution which would suggest that prima facie it was desirable that the applicant should be kept in custody. The orders of the Headquarters Magistrate allowing bail are set aside.

K.N./R.K. *Order accordingly.*

A. I. R. 1930 Rangoon 337 (1)

CUNLIFFE, J.

In the matter of the Companies Act 1913.

Civil Misc. Petn. No. 270 of 1929, Decided on 16th June 1930.

Companies Act (1913), S. 271—" Shall include " indicate other concerns of same nature.

The words " shall include " indicate that there are other concerns to be dealt with by S. 271, of the same nature as the companies exactly designated. *Bowline and Wilby's Contract In re* (1895) 1 *Ch.* 663, *Ref.* [P 337 C 1]

Clark and *Bose*—for Petitioner.

Burjorjee—for Respondent Company.

Judgment.—This is an application on the part of the Administrator-General of Burma to wind up a private concern known as Wor Lee Lone & Co., under S. 271, Companies Act, 1913. Objections to the winding up come from two quarters. The ground on which both the objectors rely is technical. It is contended that S. 271 is inapplicable because at the date of the application there were not more than seven members of the company within the meaning of the said section. Originally there had been more than seven, but it is argued that the date of the application is the real test.

There are no Indian decisions as far as I can gather on the construction of S. 271 in this connexion. The objectors however cited certain English decisions, notably the case of *Bowling and Welby's Contract, In re* (1) which held that under S. 199, of the English Act of 1862 an unregistered company could not be wound up unless there were seven members of the company at least. The English Act of 1862 has given place to the English Companies Act of 1908—from which the Indian Act appears to be closely copied. The material words dealing with this question in S. 271, of the Indian Act, are :

" Shall include any partnership, association or company consisting of more than seven members."

I think that the English authorities have taken a somewhat narrow view of the language applicable to unregistered companies. In my opinion the words " shall include " indicate that there are other concerns to be dealt with by the section, of the same nature as the companies exactly designated.

(1) [1895] 1 Ch. 663=64 L. J. Ch. 427=43 W. R. 417=72 L. T. 411=2 Manson 257.

If, for example, to take a parallel case, someone said :

" I intend to found a thoroughbred stud which will include a number of American thoroughbred brood mares,"

it would indicate in the ordinary construction of language that the stud would consist of other thoroughbred horses as well. I think that this is the broad way to construe the intention of the Act.

In my opinion the language does not indicate, where the words " shall include " are used, the implied addition of the extra words " shall mean and," making the section read " shall mean and shall include." For these reasons, and as I am satisfied with the affidavits put forward in support of the Administrator-General's petition as to the merits, I order this concern to be wound up compulsorily under S. 271, Companies Act.

B.V./R.K. *Order accordingly.*

* A. I. R. 1930 Rangoon 337 (2)

MAUNG BA AND BAGULEY, JJ.

S. R. Samson—Appellant.

v.

Mrs. Gananamanikam Ammal—Respondent.

First Appeal No. 94 of 1930, Decided on 6th September 1930, from order of Dist. Judge, Pyinmana, D/- 10th April 1930, in Civil Execution No. 2 of 1930.

*** Civil P. C. (1908), S. 47—Decree on the face of it absolutely bad as being passed by Court having no jurisdiction whatsoever to deal with matter—Court to which it is sent for execution can refuse to execute it.—Civil P. C., O. 21, R. 7.**

A dispute between parties can be referred by them to arbitration and the arbitrators can only settle the dispute as between the parties who have made the reference to them, and if any Court arrogates to itself the powers to file an award which on the face of it is invalid and hence cannot be filed, the filing of the award and the decree passed thereon are nullity. The executing Court to which such a decree has been sent for execution can refuse to execute it : *A. I. R.* 1925 *Cal.* 907 ; *A. I. R.* 1921 *Cal.* 34 and *A. I. R.* 1930 *Bom.* 141, *Rel. on.* ; 2 *U. B. R.* 199, *not Foll.*; 38 *Bom.* 194 and 43 *Mad.* 675, *Ref.* [P 340 C 2, P 341 C 2]

McDonnell and *P. B. Sen*—for Appellant.

S. R. Chowdry—for Respondent.

Baguley, J.—This appeal arises out of an execution matter and it will be well to start by outlining the facts of the case. There was an Indian Christian by name Samson, who had a wife and family in Madras, but who worked and

earned his living in this Province. He took to himself a Burman woman; of course she could not be his legitimate wife, as he belonged to a monogamous religion and by this Burmese woman he had a son who is the appellant in the present case.

Samson died and after his death his family in Madras tried to get possession of the property which he had left in this Province. A suit was filed in the District Court of Yamethin by his widow against the illegitimate son by the Burmese woman in which she claimed to have been in possession of Samson's properties after his death and stated that she had left this country to go to Madras, leaving the properties in the care of an agent, and that, during her absence, the illegitimate son had obtained possession of them. This plaint was twice amended and finally became a suit for possession by the widow and her three daughters as plaintiffs, and the present appellant, the deceased's eldest son, and another daughter as defendants.

This second amended plaint was filed in August 1922. On 12th December 1922 a reference to arbitration of the whole dispute was apparently made between the widow and the eldest son on the one side and the illegitimate son on the other. When the case next came before the Court on 22nd December it was dismissed for default, the widow not putting in an appearance. However the widow was apparently not satisfied with the case being dismissed. She applied to have it reopened, and got it reopened, whereupon the present appellant applied for a review of the order, and the dismissal was confirmed on 10th April 1923. The widow (the present respondent) appealed to this Court. Orders were passed on 25th February 1924, finally dismissing the suit.

This suit it may be repeated was not an administration suit. It was a direct suit for possession of a certain piece of land in the Pyinmana subdivision, some household goods, cattle and other moveable property. Meanwhile, despite the fact that the respondent was endeavouring to continue this case in Burma, the arbitration was proceeding and before the Burma suit was finally decided by this Court, on 10th April 1923 the arbitrators made an award on 5th March. On this award an application was filed in the District Court of Cuddalore where some of Samson's estate was situated, for the award to be filed in Court, and a decree to be passed thereon, and after many vicissitudes, which included an appeal to the Madras High Court, a decree was passed in terms of the award on 6th December 1928. The decree so passed was transferred from the Cuddalore Court to the District Court of Pyinmana for execution and the execution proceedings are Civil Execution No. 19 of 1929.

The appellant argued that the decree could not be executed, but the District Judge, in a short order which really gives no reasons at all, held that the execution must proceed. This order was passed on 10th April 1930 and it is against this order that this appeal has been filed.

It was argued before us that the decree was inexecutable, being a declaratory decree; that the decree as embodied in the award contained no directions for any act to be performed; that it was a nullity being based on a private award the subject of which was being actively litigated upon in Civil Regular No. 7 of 1922 and that the Court which passed the decree had no jurisdiction, and in any event the decree was a fraudulent and wrong one which could not be executed by any Court.

As against this the respondent contended that the Pyinmana Court being a Court to which the decree was transferred for execution, could not question the validity of the decree in any way whatsoever, except possibly in some of the ways suggested in O. 21, R. 7, Civil P. C.

Order 21, R. 7, Civil P. C., is as follows:

> "The Court to which a decree is so sent shall cause such copies and certificates to be filed, without any further proof of the decree or order for execution, or of the copies thereof, unless the Court, for any special reasons to be recorded under the hand of the Judge requires such proof."

It will be seen that this order states that the copies and certificates shall be accepted without challenge, unless the Court requires proof of their authenticity. Stress was laid on the fact that in the previous Civil Procedure Code one of the points which was not to be challenged, except for special reasons, was the

jurisdiction of the Court which passed the decree. It was stated that this particular point was omitted from the present rule, and that this was done because there was a conflict of opinion between certain Courts as to whether the jurisdiction of the Court which passed the decree could be challenged or not, and the omission of this clause was intended to set the matter at rest.

There are undoubtedly rulings which hold that, because under the present rule it is not stated that the jurisdiction is not to be traversed ordinarily, therefore it follows that the jurisdiction can never be challenged. With all due respect I find it difficult to follow this line of reasoning, but I do not think it necessary to deal with this point in detail in the present case.

The respondent's case was argued in a most exhaustive manner by Mr. S. R. Chowdry, and I am quite sure that his researches have been so painstaking that nothing could be said in favour of the respondent's case which he did not say; but despite this I am still unconvinced by his argument that the executing Court, when the decree is transferred for execution has no right whatsoever to examine the decree sent to it for execution.

Mr. Chowdry extended his doctrine of what I may perhaps be allowed to call "untouchability" to such an extent that he even stated that, because it was not mentioned in O. 21, R. 7, Civil P. C., a Court which received a decree for execution was not entitled even to ascertain for itself the fact that the Court which purported to have passed the decree existed.

It is true that justice is said to be blind, but I consider that this means that the Court shall merely regard litigants as they appear from their claims put forward in the Courts and not as individuals having any personal characteristics. I will not consider that it means that the Courts are to act so blindly that they do not even see the course they are pursuing.

The case which was commented on by both sides, and which appears to be the leading case on the point, is *Gora Chand Haldar* v. *Prafulla Kumar Roy* (1). The head-note of this case runs as follows:

"Where a decree presented for execution was made by a Court which apparently had no jurisdiction, whether pecuniary or territorial or in respect of the judgment-debtor's person, to make the decree, the executing Court is entitled to refuse to execute it on the ground that it was made without jurisdiction. Within these narrow limits, the executing Court is authorized to question the validity of a decree."

This judgment is undoubtedly an important one, and was passed by a Bench of five Judges of the Calcutta High Court. The order of reference, which was made to it, was as follows:

"Where a decree, having been passed by a Court having no jurisdiction to pass it, is void and a nullity, is the executing Court competent to question its validity and refuse to execute it?"

Mr. McDonnell for the appellant relied on this case to support his contentions. Mr. Chowdry argued in the first place that the ruling had no application and in the second place that it supported his contention. The decree under discussion in this case was one passed by a Court which had no geographical jurisdiction to pass it. Mr. Chowdry emphasized the well-known dictum in *Quinn* v. *Letham* that every ruling is to be regarded as deciding only the case actually before the Court that made the ruling. *Quinn* v. *Letham* however was a case before the House of Lords, and their Lordships were dealing with a case under the English law; and so far as we are aware all English rulings are rulings on cases; there is no provision under the English law whereby a pure question of law can be referred to a Bench, but where a point of law is desired to be questioned by a higher authority, the usual thing is for the lower Court when there is not a direct appeal, to state a case, and on that case the higher tribunal comes to a decision.

When the argument reached this stage unfortunately we were without the help of Mr. McDonnell's presence, as he was in another Court, but that, so far as either member of the Bench or the two members of the Bar who appeared before us know, is the fact.

On the other hand the Calcutta case now under consideration was a reference by an ordinary Bench of the Calcutta High Court to a Full Bench. The

(1) A. I. R. 1925 Cal. 907=89 I. C. 685=53 Cal. 166.

wording of the reference is perfectly general and is a pure question of law. It does not even differentiate as to whether the execution Court was the Court which passed the decree or the Court to which the decree was sent for execution. It merely refers to the execution Court challenging the jurisdiction of the Court that passed the decree.

Section 42, Civil P. C. lays down that the Court executing a decree sent to it shall have the same powers in executing such decree as if it had been passed by itself, and it would therefore appear that the rule in question applies equally to the Court which passed the decree and proceeded to execute it, and the Court to which the decree was sent for execution.

The answer to the question has already been given in the question from the head-note in *Gora Chand Haldar's* case (1) and the question shows that, for the purposes of the argument it was assumed that the decree was a nullity as the Court had no jurisdiction to pass it. In argument on p. 171 appears a passage which shows that the question whether the decree was a nullity or not was one which required evidence, for it was stated in argument, and apparently accepted relying on the case of *Hriday Nath Roy* v. *Ram Chandra Barna Sarma* (2) (at pp. 147, 149 of 48 *Cal.*), that if the nullity of a decree is apparent on the face of the decree the executing Court could certainly question the lack of jurisdiction and refuse to proceed. In the head-note of this case the following passage occurred:

"The authority to decide a case at all aud not the decision rendered therein is what makes up jurisdiction:"

and at p. 48 appears the following passage:

"Since jurisdiction is the power to hear and determine it does not depend either upon the regularity of the exercise of that power, or upon the correctness of the decision pronounced; for the power to decide necessarily carries with it the power to decide wrongly as well as rightly."

"Jurisdiction" is not defined in the Civil Procedure Code, nor is it defined in the General Clauses Act. In Wharton's Law Lexicon "jurisdiction" is defined as

"legal authority; extent of power; declaration of the law, jurisdiction may be limited either locally . . . . . or personally . . . . : or as to amount, or as to the character of the questions to be determined."

It will be seen that the appellant's case here is stronger than was the case of the judgment-debtor in the Calcutta case referred to *Gora Chand Haldar's* case (1). It is argued that in the present case the lack of jurisdiction is apparent on the face of the decree. The decree shows as parties: (i) the plaintiff, the illegitimate son of the deceased Samson, (ii) the present respondent, the deceased's widow; (iii) the daughter of the deceased; and (iv), (v) and (vi) daughters of the deceased by guardians, and therefore apparently minors. The suit is described as being a "suit to enforce an award under para. 20, Sch. 2, Civil P. C." The decree goes on to state that the award was made by three arbitrators in pursuance of a deed of reference made by them by plaintiff and defendants 1 and 2 and the decree then goes on to embody the actual award, which is in Tamil, but a translation of which shows that shares have been allotted to the widow, the legitimate and illegitimate sons and to the daughters, while one house is awarded to one of the arbitrators. In short, to put the matter diagrammatically, the decree shows that shares that a dispute between A, B and C was referred to the arbitration of P, Q and R and that the arbitrators made an award allotting property to A, B and C to X, Y and Z and also to P.

It seems to me quite clear that such an award could never be filed quite apart from any other points raised to show the invalidity of the award. A dispute between parties can be referred by them to arbitrators, and the arbitrators can only settle the dispute as between the parties who have made the reference to them, and if any Court arrogates to itself the powers to file an award, which on the face of it cannot be filed, the filing of the award and the decree passed thereon are merely nullities and nothing else.

Mr. Chowdry argued that the only cases in which decrees have been declared to be nullities have been those in which the decrees have been passed against dead persons, and that it has even been held that a decree passed

(2) A. I. R. 1921 Cal. 34=58 I. C. 806=48 Cal. 138 (F. B.).

against a minor without a properly appointed guardian ad litem is not a nullity. This may be so, but from the mere fact that there are rulings which say that a decree against a dead person is a nullity it does not follow that it can be said to be held that the only decrees which are nullities are those which are passed against dead persons. I can quite well understand that no case exactly similar to the present one had ever appeared before any High Court to form the basis of a published ruling and nowhere is it laid down, so far as I am aware, or so far as Mr. Chowdry's researches were able to discover that the only decree which are nullities are those against deceased persons.

Reverting once more to *Gora Chand Haldar's* case (1) it seems to me quite clear that the present decree on the face of it was one passed in a case where the Court had no jurisdiction with regard to four of the six defendants and, as it is quite impossible to separate the decree as to the remaining persons, the whole decree must be regarded as a nullity.

The respondent relied upon *Ma Me* v. *Maung Aung Min* (3). This is a ruling of the late Judicial Commissioner of Upper Burma and states that a Court to which a decree is sent for execution has no power to question the jurisdiction of the Court which passed the decree. This ruling was published several years before *Gora Chand Haldar's* case (1). It is not binding upon us, and with due respect I consider that it is couched in much too general terms. Reliance was also placed in *Hari Govind* v. *Narsing Rao Konherrao* (4). This is one of the cases which is referred to in the beginning of my judgment, which deals with the omission of certain words from O. 21, R. 7, Civil P. C.

Reference was also made to *Sheddappa Irappa* v. *Revappa Somappa Sajjan* (5), but this, to a certain extent, is against the respondent for part of the head-note says:

Held also: that the only contention open to the judgment-debtor to raise in execution was that the decree was a nullity an executing Court otherwise had no power to question the jurisdiction of the Court which passed the decree under execution."

Once it is established that the decree to be executed is a nullity, it seems to me quite clear that the executing Court can go into the question whether it will execute the decree or not.

The respondent also relies upon *Zamindar of Ettiyapuram* v. *Chidambaram Chetty* (6). The reply to this case would be to quote it against the respondent, for this was a case in which the jurisdiction of the Court was objected to on geographical grounds, but the rule laid down in it is not, in my opinion, fatal to the appellant's case. In the judgment the following passage occurs:

"The ordinary way of questioning a decree passed without jurisdiction is on appeal or in revision and if this is forbidden a Court of first instance cannot in execution do that which the appellate or revisional Court is precluded from doing."

The cases dealt with in that ruling turned upon S. 21, Civil P. C. That is a specific section with regard to the place of suing, and the law lays down that an objection with regard to the place of suing must be taken in the Court of first instance at the earliest possible opportunity.

As a last point it was argued that the question of jurisdiction was res judicata because the Cuddalore Court considered that it had jurisdiction and this point was not taken up on appeal. I can see no force in this point. There can be no question of res judicata on a pure point of law of this kind, for, if it was so, the whole basis of *Gora Chand Haldar's* case (1) would vanish.

I am fully aware of the danger of allowing executing Courts to question the decrees which they are executing. It might open the way for a party who has lost his case in a regular suit to reagitate the whole matter again in execution proceedings, but I am of opinion that this danger must be risked in certain cases.

It is only necessary for the purposes of this case to hold that an executing Court may refuse to execute a decree which on the face of it was absolutely bad and a nullity as being passed by a Court which had no jurisdiction whatsoever to deal with the matter which came before it.

(3) [1916] 2 U. B. R. 119=36 I. C. 10.
(4) [1914] 38 Bom. 194=23 I. C. 123.
(5) A. I. R. 1930 Bom. 141=124 I. C. 236=54 Bom. 96.
(6) [1920] 43 Mad. 675=58 I. C. 87 (F. B.).

I do not regard this as a wrongful exercise of existing jurisdiction or an erroneous decision in a case which it had no jurisdiction to deal with. Reverting to *Hriday Nath Roy's* case (2) jurisdiction is the power to hear and determine, and it seems clear to me that the Cuddalore Court had no power to hear and determine anything with regard to the filing of an award of the nature embodied in this decree and I would therefore hold that the decree itself is a nullity and that the executing Court can regard it as a nullity when its badness is patent on the face of it, and I would therefore set aside the order of the trial Court and reject the application by the respondent to execute this decree. The case deals with property of considerable value, and the point is by no means an easy one. I would hold that the respondent must pay the appellant's costs and I would fix the advocate's fee at 10 gold mohurs.

Maung Ba, J.—I agree.

P.N./R.K. *Appeal allowed.*

A. I. R. 1930 Rangoon 342

OTTER AND BAGULEY, JJ.

Panalal Jagannath—Appellant.

v.

Collector of Mandalay and *others*—Respondents.

Civil Misc. Appeal No. 32 of 1929, Decided on 23rd December 1929.

Civil P. C. (1908), O. 33, R. 11, O. 44, R. 1 and S. 73—Appeal in forma pauperis dismissed—Decree directing appellant to give to Government Rs. 700 as court-fees which he would have had to pay if he was not permitted to appeal as pauper—Decree sent to Collector—Appellant filing petition before Collector that his only property was some cinema films and that it was attached by his decree-holder—Collector asking executing Court to set aside Rs. 703 out of sale proceeds of films under S. 45 (1), Upper Burma Land Revenue Regulations—S. 45 (1) is inapplicable—Collector must apply for execution for order under S. 73, Civil P. C., and his request could not be regarded as such application—Upper Burma Land Revenue Regu'ations, S. 45 (1).

Appeal made in forma pauperis was dismissed and the decree was set aside directing the appellant to pay to Government the sum of Rs. 700 which he would have had to pay had he not been permitted to sue as a pauper and it was further ordered that a copy of the decree be sent to Collector for recovery of that sum. Copy of decree was sent accordingly with a note that the copy is sent for "necessary action." Collector then opened revenue proceeding and issued demand notice on the appellant who filed a petition that he had no property except some cinema films which had already been attached by the decree-holder in execution of the decree against him. Collector then wrote a letter asking the executing Court to set aside the sum of Rs. 703 out of the sale proceeds of the films under S. 45 (1), Upper Burma Land Revenue Regulations.

Held: that the wording of the decree "for recovery of that sum," as also of the forwarding letter "for necessary action," was erroneous as the civil Court has no power to issue or suggest any kind of action to the Collector who is the officer in charge of the collection of the Government revenue. [P 343 C 2]

Held further: that S. 45 of Upper Burma Land Revenue Regulation, had no application to the case.

Held also: that the decree ordering pauper appellant to pay the court-fee which he would have had to pay had he not been permitted to appeal as a pauper was a money decree in favour of the Collector and unless an application was made by him to the executing Court, no order could be passed in his favour under S. 73, Civil P. C., and that letter requesting the executing Court to set aside the same under a totally inapplicable section could not be regarded as an application for execution. [P 344 C 2]

Sanyal—for Appellant.

Basu—for Respondents.

Baguley, J.—In Civil Regular No. 77 of 1925 of the District Court of Mandalay the appellant Panalal Jagannath sued five defendants for Rs. 17,500 on a mortgage of moveables and he was given a money decree against four of them. Three of the defendants against whom the decree was passed applied for leave to file an appeal in forma pauperis against the decree. Permission was granted, the appeal was heard and ultimately dismissed, and the decree was drawn up containing a clause to the effect that the three appellants were to pay to Government the sum of Rs. 700 which they would have had to pay had they not been permitted to appeal as paupers, and it was further ordered that a copy of the decree be sent to the Collector for recovery of the sum of Rs. 700 from the appellants. A copy of the decree was sent by the office to the Collector with a covering note signed by the Deputy Registrar, to the effect that the copy was sent under O. 33, R. 14, "for necessary action."

On receipt of this letter and copy of the decree the Collector opened a revenue proceeding and issued demand notices on the three appellants. The three appellants filed petitions in similar terms saying that they had no property except some cinema films which had already been attached by the decree-holder, and

a claim against the decree-holder for damages which was the subject matter of a separate suit that was still pending. The petitioners go on to assert that the court-fees which they were called on to pay were a first charge on the films in question and ask that the court-fees may be realized from those films.

After making further inquiries the Collector wrote a letter which is to be found at p. 20 of the process file of the execution proceedings now under appeal asking that the District Judge would set aside the sum of Rs. 703 out of the sale proceeds of the films under S. 45 (1), Upper Burma Land Revenue Manual, as a first charge upon the sale proceeds. Notice of this letter was given to the decree-holder, who objected to the sum being sent. The District Judge fixed a date for inquiry; the Collector put in no appearance, but the District Judge then passed the order which is the subject of the present appeal, directing the decree-holder to pay into Court the sum of Rs. 703 (he had bought in the films himself and claimed to set off the whole of the purchase price) and ordering that the money should be sent to the Collector. Hence the present appeal.

In my opinion the proceedings show several mistakes. In the first place the wording of the decree is not strictly accurate. By O. 44, Civil P. C., pauper appeals are governed by the same provisions so far as they are applicable, as are pauper suits. These are governed by O. 33. O. 33, R. 8, says that when an application to file a suit as a pauper has been granted the plaintiff shall not be liable to pay any court-fee (other than fees payable for service of process) in respect of any petition, etc. This wording is important. The pauper plaintiff, and therefore the pauper appellant, is not liable to pay the court-fees. The payment of the court-fee as such is not merely suspended; it has not got to be paid at all.

There is, of course, the corresponding disadvantage. As soon as the suit is completed the plaintiff, if successful, suffers the disadvantage imposed by O. 33, R. 10. If he is unsuccessful, as in the present case, he comes within the purview of O. 33, R. 11. The Court then orders the unsuccessful plaintiff to pay the court-fees which he would have had to pay had he not been permitted to sue as a pauper. This court-fee therefore becomes payable under the decree of the trying Court, the decree itself, to that extent, becomes a money decree in favour of the Collector, as is shown by O. 33, R. 13, which, for certain purposes, makes the Government a party to the suit. Further, under R. 14, it is directed that a copy of the decree shall forthwith be sent to the Collector.

In the present case the wording of the decree as drawn up in this office runs:

"It is further ordered that a copy of this decree be sent to the Collector of Mandalay for recovery of the said sum of Rs. 700 from the appellants."

The words "for the recovery of the said sum, etc." are a gloss for which there is no justification. All that the code directs the Court to do is to send to the Collector a copy of the decree which it has passed and which contains an order that the plaintiff shall pay a certain sum to Government. What the Collector does after receipt of the copy of the decree is no concern of the Court unless the Collector files an application for execution of the decree, which will then have to be dealt with by the Court under S. 47 and O. 33, R. 13. The wording of the decree in this case suggests that the Collector is regarded as acting on behalf of the Court in getting in these court-fees. This is entirely wrong. The civil Courts are not concerned with the collection of the revenue, that is a matter for the revenue authorities. The Court informs the revenue authorities that there is a certain sum which a certain party has been ordered to pay to Government. There its interest in the matter ceases until and unless the Collector applies to it for assistance in getting in this sum of money by executing the decree which it has itself passed. There is no question whatsoever of the Collector being asked to do anything for the Court though it is possible that the Court may be asked to do something for the Collector.

The same error appears in the wording of the forwarding letter sent by this Court with the copy of the decree. Here once more the words "for necessary action" suggest that the Court is issuing a kind of order to the Collector to do something. This is erroneous. This Court has no power to issue, or suggest

any kind of action to the Collector. He is the officer in charge of the collection of the Government revenue, and the copy of the decree is merely sent to him to inform him that a money decree has been passed by a civil Court in his favour against someone. If he wishes to realize this money and fails to get payment, that decree is executable by the civil Court which has jurisdiction, if he applies for execution.

With regard to the Collector's action I am in the unfortunate position of not having heard his version of what he did nor his reasons for doing so, as no appearance was made on his behalf either before the District Judge or before us. The letter which he sent to the District Judge, No. 3169—39 R/D-28-29, dated 22nd January 1929, begins by saying that the sum of Rs. 700 plus Rs. 3 was recoverable from the pauper appellants being the court-fees due on the memorandum of appeal. It goes on to ask that the District Judge "will be so good as to set aside the sum of Rs. 703 under S. 45 (i), Upper Burma Land Revenue Manual, as the first charge upon the sale proceeds of the film, and remit it to this office."

So far as I am aware the "Upper Burma Land Revenue Manual" referred to must be the Upper Burma Land Revenue Regulations, and the reference to S. 45 (i) must refer to that section of the Upper Burma Land and Revenue Regulation. This runs as follows:

"When a sale of any property for recovery of an arrear has become absolute the proceeds thereof shall be applied, in the first place, to the payment of the arrear, and in the second place, to the payment of any other arrear, or of any sum recoverable as an arrear under this chapter, which may be due to the Government from the defaulter."

The reference seems to me to be inapt, for this section contemplates a sale of property under Ch. 4 of the Regulation and no such sale was even contemplated; all that was contemplated at the time was a sale under the Civil Procedure Code in execution of a decree. In the second place this amount was due by the pauper appellants to the Government under a money decree from this Court. It was not an arrear at all. The paupers had been exempted from payment of Court-fees, but in place they had, as the event turned out, become judgment-debtors to the Government under a money decree of a civil Court. The Collector has used the words "unusual for a revenue officer first charge." This appears to have come from the petitions put in to him by the paupers and they, in turn, seem to have got the expresssion from O. 33, R. 10. The District Judge pointed out correctly that the court-fees, or money ordered to be paid in lieu thereof, are only a first charge on the subject-matter of the suit when the pauper plaintiff or appellant has won his case. In the present case the pauper appellants lost their appeal, and so there is merely a personal direction to them to pay.

The District Judge then goes on in his order to say that ordinarily S. 73, Civil P. C., would apply, but that this does not affect any right of Government. He seems to have overlooked the fact that S. 73 only applies when more persons than one have made application to the Court for execution of decrees for the payment of money passed against the same judgment-debtor. In the present case there was Panalal Jagannath who had got a decree for money against the judgment-debtors, and the Collector in whose favour a money decree had also been passed against the same persons. The Collector however had not applied for execution against them. I am unable to regard a letter written in the terms used in the Collector's letter and asking the judge to pay money under a totally inapplicable section of the Land and Revenue Regulation as an application for execution. Had there been an application for execution made in the ordinary way by the Collector, it is possible that Crown debts might be entitled to priority, but here there was only one decree being executed, under which property had been attached, and without another application for execution on behalf of some other decree-holder being made, it was the duty of the execution Court to proceed with the sale of the attached property and apply the sale proceeds in satisfaction of the decree that was being executed.

This being the case I am constrained to hold that the lower Court was wrong in passing the order that it did. I would allow this appeal and direct that the Rs. 703 which the appellant had to pay into Court, and which was after-

wards credited to Government, be recovered from Government and paid out to the appellant. As regards costs, it is true that the Collector was not represented in the lower Court or before us but the trouble was due to his original mistake in adopting the wrong procedure for enforcing his claim under the decree passed in his favour and this appeal has been necessitated by the fact that another Government servant has made an unfortunate error in coming to a decision. I would therefore allow the appellant costs as against the Collector; advocate's fee three gold mohurs.

Otter, J.—I agree that this appeal should be allowed. The Collector had in my view no authority to make the request contained in his letter of 28th January 1929. As is pointed out by my learned brother S. 45 (1), Upper Burma Land Revenue Manual, has no application to this case. I agree also that the lower Court had no jurisdiction to make the order appealed against. The matter was not properly before the Court, for the Collector had made no application for execution. I know of no provision giving a Court power to deal with the recovery of a debt to the Crown upon a mere request to take action made on behalf of a revenue authority. I agree with the proposed order as to costs.

P.N./R.K. *Appeal allowed.*

A. I. R. 1930 Rangoon 345

BROWN AND BAGULEY, JJ.

T. C. T. A. R. Firm—Appellant.

v.

Murigal Myouk Co-operative Society—Respondent.

Second Appeal No. 141 of 1930, Decided on 27th August 1930.

Buddhist Law (Burmese)—Joint property—Ordinarily in the case of insolvency of husband whole property of marriage is liable for satisfaction of insolvent's debts — But where receiver merely sells 1/3rd share of husband, subsequent sale by wife of her 2/3rd share in discharge of joint debts with consent of husband is effective to transfer that share to vendee.

Ordinarily it must be held that when a Burman Buddhist husband acts on behalf of the marriage partnership, he can bind the whole of the partnership property. And the partnership property is liable for a debt contracted by the husband alone, if the debt can be held to have been taken in the interests of the partnership. In the case of an insolvency, the whole of the insolvent's property is liable for the whole of his debts. The presumption ordinarily is that the husband in contracting debts is contracting them on behalf of the partnership and it would probably follow that in an ordinary insolvency the whole of the property of the marriage would be liable for the satisfaction of the insolvent's debts. But where a Burmese Buddhist husband is adjudicated an insolvent and the receiver merely sells 1/3rd share of the husband, it cannot be held that the whole partnership interest of husband and wife is sold and consequently where the wife after the discharge of her husband sells her 2/3rds share in discharge of joint debts and with the consent of the husband the sale operates to transfer title of 2/3rds share to the vendee and he is entitled, in a suit against the purchaser of the 1/3rd share, to partition and possession of his 2/3rds share: *A. I. R.* 1927 *Rang.* 209 (*F. B.*) and *A. I. R.* 1927 *Rang.* 274, *Ref.* [P 346 C 1, 2]

Jaganathan—for Appellant.

Eunoose—for Respondent.

Judgment.—One Maung Sein Tun, a Burman Buddhist, applied for adjudication as an insolvent under the provisions of the Provincial Insolvency Act. He was adjudicated insolvent. In his schedule of property he included a third share of a piece of a paddy land the joint property of himself and his wife. Subsequently Sein Tun's right, title and interest in this piece of land were put up for sale by the receiver, and were purchased by the respondent to this appeal. After this sale Ma Pu the wife of Sein Tun executed a sale deed whereby she sold to the appellant Chettyar her share in the same land. The sale deed specifically mentions that what she is selling is her 2/3rds share in the land.

The appellants by virtue of his sale-deed sued the respondent for partition of the land and possession of a 2/3rds share thereof. The two Courts have held that the land in suit must be held to be impartible during the subsistence of the marriage between Sein Tun and Ma Pu and that the appellants could not therefore sue for partition. In the case of *Ma Paing* v. *Maung Shwa Hpaw* (1), it was held that in respect of property of the marriage a Burman Buddhist husband and wife must be considered to be partners and that until the partnership is dissolved by death or divorce neither partner is entitled to separate possession of any share of the partnership property. In the same case *Ma Paing* v. *Mg. Shwe Hpan* (2), at a

(1) A. I. R. 1927 Rang. 209=103 I. C. 568=5 Rang. 296 (F.B.).

(2) A. I. R. 1927 Rang. 274 =104 I. C. 516=5 Rang. 478.

later stage it was held that the interest of one of the partners in any item of property during the subsistence of marriage was not saleable property within the meaning of S. 60, Civil P. C.

The effect of the decision in *Ma Paing's* case (1) on the insolvency of a Burman Buddhist has so far as I know never been decided by this Court. Ordinarily it must now be held that when a Burman Buddhist husband acts on behalf of the marriage partnership he can bind the whole of the partnership property. And the partnership property is liable for a debt contracted by the husband alone, if the debt can be held to have been taken in the interests of the partnership. In the case of an insolvency, the whole of the insolvent's property is liable for the whole of his debts. The presumption ordinarily is that the husband in contracting debts is contracting them on behalf of the partnership and it would probably follow that in an ordinary insolvency the whole of the property of the marriage would be liable for the satisfaction of the insolvent's debts. The difficulty however in the present case is that whether the whole of the land in suit might or might not have been sold by the receiver in insolvency what the receiver actually did sell was the right title and interest of Sein Tun alone. As that interest must be held to be impartible, it might be argued that the respondents acquired no title by the sale. It is quite clear that Sein Tun entered only a one-third share of this property in his schedule in the insolvency proceedings. It is also quite clear that what the receiver sold in those proceedings was the right, title and interest of Sein Tun alone. I do not think in these circumstances it is possible to hold as the District Judge has done that the whole partnership interest of Sein Tun and his wife was sold. The result therefore is that whether anything passed at the sale or not, the sale did not affect Ma Pu's interest. What then was the effect of Ma Pu's sale after the discharge of Sein Tun? The sale was in consideration of the joint debt of husband and wife. Sein Tun was not a party to it, but from his evidence it appears that he agreed to the sale. The sale deed specifically mentions Ma Pu's 2/3rd share in the land. It may be that she was entitled to sell the whole land on behalf of the partnership. She clearly did not do this. I can however see no reason why this sale deed executed by the wife towards the discharge of joint debts, and with the apparent consent of the husband should not operate to transfer title to 2/3rds of the land. Neither husband nor wife now makes any claim to the property, and as between strangers there can be no valid objection to partition. It was to my mind obviously the intention of both husband and wife that a 1/3rd share should be sold in the insolvency proceedings and a 2/3rds share by Ma Pu. I therefore hold that the appellants have acquired a valid title to a two-thirds share in the land. I set aside the decree of the lower Courts and pass a decree for partition of the land, and the delivery of possession of a 2/3rds share therein to the appellant-plaintiff with costs throughout.

P.N./R.K. *Decree set aside.*

* A. I. R. 1930 Rangoon 346

CARR AND CUNLIFFE, JJ.

C. R. M. A. Firm—Appellants

v.

Special Collector of Pegu—Respondent.

First Appeals Nos. 212 and 213 of 1929, Decided on 11th March 1930, from decree of Dist. Judge, Pegu, in Civil Misc. Nos. 117 and 118 of 1927.

(a) Land Acquisition Act (1894), S. 18—Under S. 18 objector taking objection under more than one heads should expressly state each objection.

Under S. 18 the objector must, if he wishes to take different objections falling under more than one of the different heads mentioned in S. 18 (1) expressly state each of his objections and sub-S. (2) requires him to set out the grounds on which his objection is taken. [P 347 C 2]

***(b) Land Acquisition Act (1894), S. 18—Court's jurisdiction to deal with Collector's award is confined to matters referred.**

The Court has jurisdiction to consider the award only by virtue of the reference made by the Collector and its jurisdiction to deal with the award is confined to the matters referred. Therefore, when under S. 18 the objector asks for and obtains a reference only as to the amount of compensation awarded to him the Court cannot hear him on an objection to the measurement of the land acquired: 30 *Bom.* 341; 38 *Cal.* 230, *Diss. from.*

(c) Land Acquisition Act (1894), S. 21—Court should hold separate inquiry and base its decisions on evidence before it.

The Court should hold a separate inquiry and its proceedings are not a mere continuation of that of the Collector's. They are judi-

cial proceedings and the decision must be based on evidence before the Court or on admission made by the opposite party. Evidence before the Collector cannot be considered as evidence before the Court except with the consent of parties : 2 *L. B. R.* 203 and 4 *L. B. R.* 71, *Foll.* [P 349 C 1]

* (d) **Land Acquisition Act (1894), S. 21 —Two distinct parcels acquired—Objection regarding compensation as to one only taken —Court is debarred from considering compensation paid for other.**

If two distinct parcels of property belonging to the same person have been acquired and he objects to the amount of compensation awarded for only one of them, then the Court will be debarred, from taking into account the compensation paid to him for the other : 14 *I. C.* 270 and 1 *Lah.* 352, *Diss. from.* [P 348 C 2]

Aiyangar—for Appellant.

Judgment.—These are appeals under S. 54 arising out of two references under S. 18, Land Acquisition Act 1 of 1894, which were heard together. In both cases objection is taken to the amount of compensation given, on the grounds that the lands have been valued at unduly low rates per acre. In addition to these there is one matter which is peculiar to Appeal No. 213. In this case the Collector purported to acquire an area of 10·9303 acres, for which he awarded compensation at Rs. 350 per acre. In his application to the Collector for a reference under S. 18 the appellant said, in the first paragraph, that the Local Government had under S. 9 (3) of the Act notified its intention to acquire 10·9303 acres out of his holding, the total area of which was 13·46 acres. In para. 5 he objected to the award on the ground that the sum awarded as compensation was too small and that he ought to be allowed Rs. 2,000 per acre on 10·9303 acres plus the statutory allowance of 15 per cent. He then prayed that a reference be made to the Court under S. 18 of the Act, and the reference was made accordingly. It is quite clear on this application that the only objection taken was to the rate per acre at which the land had been valued and that there was no objection to the measurement of the land acquired. But the diary of the case shows that on 13th January 1928, the appellant had, before the Court, taken objection on the area. And we have been referred to Ex. G, which is a letter dated 26th March 1928 from the appellant's legal adviser to the Collector, in which he claimed that the actual area acquired was 13·46 acres, and asked the Collector to rectify the error. There seems to have been no reply to this letter, and although arrangements were made for the Collector to appear before the Court (in person) he never did appear. The District Court admitted evidence as to the area of the land, but the Judge who finally decided the case held that the appellant was not entitled to raise this question and refused to consider it. Grounds 7 to 11 of this appeal resolve themselves into a contention that the District Court should have dealt with the question and that the correct area of the land acquired was 12·910 acres.

We are clearly of opinion that the Judge was right and we have refused to hear appellant's counsel and to consider the evidence as to the area of the land. S. 18 of the Act gave the appellant the right to require the Collector to refer the matter to the Court

"whether his objection be to (a) the measurement of the land, (b) the amount of the compensation, (c) the persons to whom it is payable or (d) the apportionment of the compensation among the persons interested."

The letters in brackets do not appear in the Act itself but have been inserted by us for convenience of reference. It will be observed that provision is made for reference under four distinct heads. These no doubt overlap to some extent. Thus a difference in the measurement of the land will naturally affect the amount of compensation awarded, and differences under heads (c) and (d) might affect the amount of compensation awarded to the objector, while leaving its total amount unchanged. But we think it is clearly the meaning of the section that the objector must if he wishes to take different objections falling under more than one of these heads expressly state each of his objections. And sub-S. (2) requires him to set out the grounds on which his objection is taken. The objector's application now before us complied with these requirements so far as concerned the amount of compensation as determined by the valuation per acre, but it certainly did not state any objection to the measurement of the land or any grounds on which such objection could be based. Nor can we consider that the mention of the total area of the holding in the first

paragraph amounted even to a suggestion that there was any error in the area for which compensation had been awarded. In consequence the reference related solely to the valuation per acre and did not cover any question of measurement. Now the Court has jurisdiction to consider the award only by virtue of the reference made by the Collector, and in our view it follows from that fact, as a matter of general principle, that its jurisdiction to deal with the award is confined to the matters referred. It may be added that the proviso to S. 18 of the Act prescribes a period (in this case six weeks from the date of award) within which an objector must make his application and raise all his objections. If he does not do so within that time then the award becomes final as against him. This affords a further reason (though we think the reason already stated sufficient in itself) why after the lapse of six weeks the objector should not be allowed to raise fresh objections before the Court.

We have been referred to *In the matter of Rustomji B. Jijibhoy* (1) in which a Judge of the Bombay High Court held that because the Act contains no express provision that a claimant shall be restricted to the grounds of objection taken in his application to the Collector, the Court cannot confine him to those grounds. It was argued that it is usual in statutes to find such restrictive provisions, and reference was made in particular to S. 542, Civil P. C., then in force, which laid down that an appellant should not without the leave of the Court be heard in support of any grounds of objection other than those contained in his memorandum of appeal. We cannot say that we are prepared to accept this argument as sound, since it overlooks the important fact that under the Land Acquisition Act, the Court has a limited jurisdiction conferred only by the reference, whereas under the Civil Procedure Code the Court's jurisdiction is general. But the case differs essentially from the present one; the objector was not seeking to raise an entirely new objection which had not been referred but was merely supporting the objection which had been referred on grounds additional to those stated in his application. If the decision is in fact sufficiently wide to apply to the case before us then with all respect to the learned judge we are unable to agree. The next case is *Gangadhara Sastri* v. *Deputy Collector of Madras* (2) in which a Bench of the Madras High Court held that

"when a case is referred under the Land Acquisition Act the whole case is referred, subject to the limitation contained in S. 26, and not merely the particular objection."

This was followed in *Ziauddin* v. *Secretary of State* (3), in which the same dictum was repeated.

In the first of these cases the Collector had placed separate valuations on the land, the superstructure, trees, and allowance for severance. The objector took exception to the valuation under each of these heads. The Judge agreed with the Collector as to one item; as to two others he would have allowed more than the Collector had given; as to two others he would have allowed less than the Collector. On the whole the Judge's valuation of the property was somewhat less than the Collector's and he therefore dismissed the objector's claim. On appeal it was contended that the Judge was bound to allow the claimant the amount by which his estimate of the value of some of the items exceeded the Collector's valuation and could not set off against that the amount by which his valuation of the other items was less than the Collector's. The High Court found that the Judge was bound to consider the valuation of the property as a whole.

In *Ziauddin's* case (3) the facts were very similar—indeed almost identical—and the learned Judges came to the same conclusion. That conclusion was that when the objector has taken exception to the amount of the compensation awarded and a reference of that matter has been made the amount of the compensation has to be considered as a whole and the Court is not confined to an examination of the separate items into which for convenience, the Collector may have split his valuation. Presuming that this refers to a single parcel of property we are prepared to agree with these decisions. But if two distinct parcels of property belonging to the same person have been acquired and he has objected to the amount of com-

(1) [1906] 30 Bom. 341=7 Bom. L. R. 981.

(2) [1912] 14 I. C. 270.

(3) [1920] 1 Lah. 352.

pensation awarded for only one of them then we think that the Court would be debarred from taking into account the compensation paid to him for the other. And when the learned Judges proceeded to deliver the very far-reaching dictum which we have quoted above we think that they went far beyond what was required by the facts of the cases before them and that the dictum was to that extent obiter. And we are not prepared to accept that dictum as good authority on the question before us in the present case. In the two last-mentioned cases, *British India Steam Navigation Co.* v. *Secretary of State* (4) was considered and dissented from. In that case a Bench of the Calcutta High Court laid down that

"the Court of the Land Acquisition Judge is restricted to an examination of the question which has been referred by the Collector for decision under S. 18, and the scope of the inquiry cannot be enlarged at the instance of parties who have not obtained or cannot obtain any order of reference."

The facts of the case were peculiar; the Secretary of State had applied to the Court either to remit the award to the Collector or to quash his proceedings, and it was held that the Court had no power to do either of these things. Here again we think that the first part of the dictum quoted went beyond the needs of the case and was so far obiter. We have been unable to find any decision bearing directly on the question before us, and as the Collector has not been represented before us we have obtained no assistance from him. Confining ourselves to the matter before us we hold that when under S. 18 of the Act the objector has asked for and obtained a reference only as to the amount of compensation awarded to him the Court cannot hear him on an objection to the measurement of the land acquired.

Coming now to the question of the amount of compensation it is necessary to say that the proceedings on the Collector's side have not been very satisfactorily conducted. It was pointed out in *S. T. Mac Intyre* v. *Secretary of State* (5) and again in *Shwe Gaung* v. *Collector* (6) that the intention of the Act is that the Court should hold a separate inquiry and its proceedings are not a mere continuation of the Collector's. They are judicial proceedings and the decision must be based on evidence before the Court or on admissions made by the opposite party. Evidence before the Collector cannot be considered as evidence before the Court except with the consent of the parties. This the Collector does not seem to have realised and he has made no attempt to prove certain sales on which he relied in making his award. The only witness called for him was another claimant who said that he was quite satisfied with the compensation awarded to him. Nor does the Judge seem to have fully realized it, for in his judgment he refers to some sales relied upon by the Collector which have not been proved.

B.V./R.K. *Appeals allowed.*

(4) [1910] 38 Cal. 230=8 I. C. 107.
(5) [1903] 2 L. B. R. 203.
(6) [1907] 4 L. B. R. 71.

* A. I. R. 1930 Rangoon 349

DOYLE, J.

Ali Hossein—Accused—Applicants.

v.

Emperor—Opposite Party.

Criminal Revn. Nos. 174-B to 178-B of 1930, Decided on 11th June 1930.

(a) Criminal P. C., Ss. 412 and 439—High Court in revision may examine record to see if plea of guilty was based on proper conception of facts.

High Court in revision is not bound by S. 412 but may examine the record for the purpose of seeing whether the accused have had a fair trial and whether their plea of guilty was based on a proper conception of the facts. [P 350 C 1,2]

*** (b) Criminal Trial — Accused ignorant and undefended by advocates — Magistrate ought to assist them in putting up obvious defensive pleas.**

It is the duty of the Magistrate, when dealing with ignorant individuals accused of technical offences, to go very thoroughly into the evidence, and where they are not defended by advocates to give them some assistance in putting up obvious defensive pleas. [P 350 C 2]

*** (c) Criminal Trial—Where there is proviso to law which if pleaded would establish sound defence, accused may plead that he was not aware of proviso—Case under S. 19 (1), Arms Act—Quantity of lead found with accused and neighbourhood suggesting that lead was used for fishing purposes—Magistrate should question accused if they were vendors of lead for fishing purposes, especially if they are not defended by advocates—Arms Act, S. 19 (1) and Sch. (2) (7) (a).**

Ignorance of law cannot be pleaded as a defence where the law has been transgressed, but where there is a proviso to the law which if pleaded would establish a sound defence, an accused may under certain circumstances plead that he was not aware of the proviso.

In a case under S. 19 (1), Arms Act, quantity of lead found with the accused and the neigh-

bourhood were such as to suggest that the lead was used for fishing purposes, the Magistrate merely asked each of the accused whether he admitted having the lead for sale without license although they were not represented by counsel and on their pleading guilty convicted them.

Held: that the Magistrate should have in his examination of the accused put some questions with a view to elucidating from them whether they were prima facie vendors of lead for industrial, that is fishing, purposes within the meaning of Arms Act, Sch. 2 (7) (a). [P 350 C 2]

S. Ganguli—for Applicants.

Judgment.—Ali Hossein, Khorban Ali, Ruston Ali, Ali Hossein, and Mahomed Suleiman have in four separate cases been fined under S. 19 (a), Arms Act, for selling military stores without a license. They are all ironmongers in Myaungmya, which is the headquarters of a large fishery industry, and the supposed military stores found in their possession was lead in quantities varying from 14 to 54 viss. In the case of Ali Hossein the lead was described as sheet lead and balls; in Khorban Ali's case the lead consisted of lead labels used for attaching nets, of which he is a vendor; while in the case of two of the three remaining ironmongers the lead was described as sheet and scrap. All except Mahomed Suleiman pleaded guilty, the last mentioned contending that the lead was not exposed for sale. Those who pleaded guilty were fined Rs. 10 each while Mahomed Suleiman was fined Rs. 15.

In the Court of the Fourth Additional Magistrate, Maungmya, they were not represented by counsel and there was no cross-examination of witnesses. The learned Magistrate contented himself with asking each whether he admitted having the lead for sale without a license. Each applied in revision to the Sessions Judge stating that he was a vendor of nets, and that the lead was used for manufacturing nets. The learned Judge held as regards the four who pleaded guilty that no remedy lay as the finding of fact either in appeal or revision, and that if the lead was kept for industrial purposes they must prove it. He refused to take action. The five have now preferred applications in revision to this Court.

The High Court in revision is not bound by S. 412, Criminal P. C., but may examine the record for the purpose of seeing whether the applicants have had a fair trial and whether their plea of guilty was based on a proper conception of the facts. Ignorance of law cannot be pleaded as a defence, where the law has been transgressed; but where there is a proviso to the law which if pleaded would establish a sound defence, an accused may under certain circumstances plead that he was not aware of that proviso.

Schedule 2 (7) (a) provides that lead required in good faith for industrial and manufacturing purposes (other than the manufacture of bullets or birdshot) is excepted from all the prohibitions and directions of the Burma Arms Manual. In the case of at least one of the applicants the prosecuting Sub-Inspector of Police admitted that he sold nets and that the lead found in his possession was in the form of beads for nets. In this case the presumption therefore was that he was selling the lead in good faith for industrial purposes and it is difficult to see what grounds there were for prosecuting him.

In the second case the lead was described as being in sheets and balls, but it was not suggested that it was in the form of ammunition. It is reasonable to suppose that the "balls" correspond to the "beads" mentioned in the other case.

There is ground for supposing that had the applicants known that they were entitled to plead that the lead was used for industrial purposes they would have done so. The learned Magistrate should in his examination of the accused have put some question to them with a view to elucidating whether they were prima facie vendors of lead for industrial, that is, fishing purposes, a circumstance which the quantities found and the neighbourhood would prima facie appear to suggest.

It is the duty of the Magistrate when dealing with ignorant individuals accused of technical offences to go very thoroughly into the evidence, and where they are not defended by advocates to give them some assistance in putting up obvious defensive pleas. The convictions and sentences are set aside and the fines if paid will be refunded. The cases will be classified as "mistaken."

The diary entry in each of the Fourth Additional Magistrate's Court cases

under the 6th February 1930 is incorrect.

P.N./R.K. *Convictions set aside.*

A. I. R. 1930 Rangoon 351

PAGE, C. J., AND DOYLE, J.

U Ba Thein and *another*—Accused—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeals Nos. 338 and 437 of 1930, Decided on 2nd June 1930, from judgment of Otter, J., in Sessions Trial No. 4 of 1930.

(a) Criminal Trial — Practice — Existing practice of taking shorthand note of charge of Rangoon High Court Sessions only in cases of murder strongly deprecated.

The existing practice of taking a shorthand note of the charge of the learned Judge presiding at the Criminal Sessions of the Rangoon High Court only in cases of murder is strongly deprecated. In cases where an appeal lies, or where an application is made to the Government Advocate for a fiat, it is essential that there should henceforward be an official record of the charge that the learned Judge delivered to the jury: *A. I. R.* 1924 *Cal.* 257, *Ref.* [P 352 C 1]

(b) Criminal P. C. (1898), S. 342—Court cannot under S. 342 administer inquisitorial interrogatory to accused or subject him to cross-examination — When once Court is satisfied that accused appreciates salient features of evidence against him, its work is over.

Bearing in mind that the accused is not bound to set up any defence or make any statement, that what he elects to say is not evidence that any explanation that he may proffer, need not be true, and that he does not render himself liable to punishment by refusing to answer any question that the Court may put to him or by giving a false answer to the question, it becomes obvious that the Court is not entitled under S. 342 to administer an inquisitorial interrogatory to the accused or to subject him to cross examination or to ask any questions of him with a view to elicit the truth of the matter, or by a series of supplementary questions to test the accuracy or reliability of the answers that he has been willing to give. An examination on these or similar lines is not within the ambit of S. 342 and all such questions are wholly inadmissible. When once the Court is satisfied that the accused appreciates the salient features of the evidence against him, its function under S. 342 is exhausted and no further examination is permissible: *A. I. R.* 1923 *Cal.* 470, *Ref.* [P 353 C 1, 2]

(c) Criminal P. C. (1898), Ss. 342 and 537 —Accused examined, but not in conformity with provisions of S. 342—S. 537 applies.

Where the accused have been examined, but the examination is not in conformity with the provisions of S. 342, S. 537 applies to such a case and unless a failure of justice thereby has been occasioned, a conviction and sentence ought not for that reason to be disturbed: *A. I. R.* 1927 *P. C.* 44 and *A. I. R.* 1930 *Cal.* 212, *Ref.* [P 354 C 1]

McDonnell—for Appellants.

Page, C. J.—On 24th March 1930, at the Criminal Sessions of the High Court the appellants, Maung Po Chit and U Ba Thein, were tried before Otter, J., and a jury for an alleged offence under S. 420, I. P. C. They were found guilty, Po Chit by a majority of eight jurors to one, and Ba Thein unanimously, of having cheated one H. E. Brown by dishonestly or fraudulently inducing him to deliver property and valuable securities to the amount of Rs. 17,000. Po Chit was sentenced to be imprisoned till the rising of the Court, and also to pay a fine of Rs. 1,000, or in default to suffer one year's rigorous imprisonment and U Ba Thein was sentenced to one year's rigorous imprisonment, and also to pay a fine of Rs. 1,000 or in default to suffer a further term of rigorous imprisonment for one year. Under S. 449, Criminal P. C., Po Chit and Ba Thein presented separate appeals to the High Court both on matters of fact and matters of law. At the hearing of the appeal the Crown was not represented, and no one appeared on behalf of Po Chit, but Mr. McDonell urged the appeal on behalf of Ba Thein.

Three contentions were raised in support of the appeal. Firstly, it was urged that the conviction was against the weight of the evidence, and that on the merits the accused were entitled to be acquitted. As there must be a retrial in this case I propose to say as little as possible about the facts. To dispose of this contention it is enough that we hold that, if the jury believed the witnesses for the Crown, there was ample evidence to justify the conviction of each accused of the offence with which he was charged. The first contention on behalf of the appellants therefore fails. Secondly, it was urged that the learned trial Judge misdirected the jury, because he did not explain in his charge the meaning of the terms "dishonestly" and "fraudulently" as used in connexion with the offence of cheating.

Now, the learned trial Judge possesses a wide and varied experience of the conduct of criminal trials, and it is highly improbable that Otter, J., would fail to direct the jury on so essential an

ingredient in the offence of cheating. Unfortunately, however, there is no record of the charge which the learned Judge delivered to the jury, and the terms in which Otter, J., charged the jury must remain a matter of conjecture. This impasse is the result of the practice which hitherto has obtained of taking a shorthand note of the charge of the learned Judge presiding at the Criminal Sessions of the High Court only in cases of murder. How this practice has been allowed to grow up it is difficult to understand. In cases where an appeal lies, as in the present case, or where an application is made to the Government Advocate for a fiat, which may happen in any case, it is essential that there should be an official record of the charge that the learned Judge delivered to the jury: see *Emperor* v. *Barendra Kumar Ghose* (1), and the only record of what occurred at the trial upon which reliance can be placed is that for which the presiding Judge takes responsibility. In *Barendra Kumar Ghose's* case (1) I pointed out that shorthand writers are not infallible, and emphasized

"the importance of rigidly maintaining the rule that a statement by a learned Judge as to what took place during the course of a trial before him is final and decisive. It is not to be criticized or circumvented; much less is it to be exposed to animadversion."

The present practice at the Criminal Sessions of the High Court will now cease, and in future the charge of the learned Judge is to be taken down in shorthand, and a transcript of the shorthand notes is to be made and tendered to the learned Judge, in order that he may make such corrections therein as may be necessary. The trial Judge will then sign the transcript, and the transcript as amended and signed by the learned Judge will form the record of the charge that was delivered to the jury. No copy of the shorthand note of the charge, whether it has been transcribed or not, is to be issued to anyone except by the order of the trial Judge or of the Chief Justice. In the absence of any record of the terms in which the learned Judge in the present case charged the jury it is impossible for this Court to determine whether there has been any misdirection or not. As it would, I think, be both unreasonable and unfair that the appeal of an accused person should prove of no avail merely because the practice of the Court has rendered it impracticable for him to present his appeal, in my opinion the proper course for this Court to take is to set aside the conviction and sentence in respect of each of the accused and to order that the accused be retried at the next available Criminal Sessions of the High Court.

Thirdly, it was contended that the examination of each of the accused in the Sessions Court was not in compliance with the provisions of S. 342, Criminal P. C. In my opinion this contention must be accepted, and I feel bound to say, with all due deference to the learned trial Judge, that in my opinion the examination of the accused by the Court at the trial was not such an examination as is permitted under S. 342.

It is unnecessary that I should discuss in detail the question to which objection has been taken by the learned advocate for Ba Thein. But as I have observed in other cases that there is a tendency in this country to conduct examinations under S. 342 in a manner that is unwarranted by the terms of that section, it is well that I should explain what I understand to be the scope and effect of S. 342.

In this country an accused person, save in exceptional circumstances, is not at present allowed to give evidence on his own behalf, and, however anxious the accused may be to take his stand in the witness-box and be examined and cross-examined on oath as to the truth of his story, he is deemed incompetent to do so. It is an anachronism against which I have frequently protested, and I hope that before many years have passed it will be swept away. But the mouth of an accused person at his trial is not entirely closed, for, although he is not entitled to give evidence, after the witnesses for the Crown have been heard, he is at liberty, if he so elects, to make a statement to the jury. His statement is not evidence, but the jury may take it into consideration, and give to it such weight as they think it deserves, as Rankin, J., observed in *Pramatha Nath Mukerjee* v. *Emperor* (2):

(1) A. I. R. 1924 Cal. 257=81 I. C. 353=25 Cr. L. J. 817 (F.B.).

(2) A.I.R. 1923 Cal. 470 =71 I.C. 792=24 Cr. L.J. 248=50 Cal. 518.

"In this country it often happens that a prisoner is tried in a language which for one reason or another he understands but indifferently well, and for that reason as well as for other equally grave reasons the intention of the statute is that at a certain stage in the case the Court itself shall put aside all counsel, all pleaders, all witnesses, all representatives, and shall call upon each individual accused with the authority of the Court's own voice to take advantage of the opportunity which then arises to state in his own way anything which he may be desirous of stating."

In these circumstances the legislature enacted S. 342 to ensure that the accused should not remain in the dark with respect to the allegations that have been made against him, and to enable the Court to put such questions to him as will help him to understand the case for the Crown.

Section 342 (1) runs as follows :

"For the purpose of enabling the accused to explain any circumstances appearing in the evidence against him, the Court may, at any stage of any inquiry or trial, without previously warning the accused, put such questions to him as the Court considers necessary, and shall, for the purpose aforesaid, question him generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence."

The section means what it says, and it is for one purpose only that the Court is entitled to examine the accused under S. 342, namely to enable the accused

"to explain any circumstances appearing in the evidence against him."

When the scope and effect of S. 342 is understood the nature of the examination that is permissible thereunder can readily be appreciated. Bearing in mind that the accused is not bound to set up any defence, or make any statement ; that what he elects to say is not evidence ; that any explanation that he may proffer need not be true ; and that he does not render himself liable to punishment by refusing to answer any question that the Court may put to him or by giving a false answer to the question, it becomes obvious that the Court is not entitled under this section to administer an inquisitorial interrogatory to the accused, or to subject him to cross-examination, or to ask any questions of him with a view to elicit the truth of the matter, or by a series of supplementary questions to test the accuracy or reliability of the answers that he has been willing to give. An examination on these or similar lines is not within the ambit of S. 342, and all such questions are wholly inadmissible. I decline to lay down what the form of the examination should be, provided that the object of it is to enable the accused to explain the evidence against him, and the effect of it is that the accused appears to the Court to understand the main points in the evidence of the witnesses for the Crown. In this matter the trial Judge must exercise his discretion according to the circumstances of the particular case that is before him. But when once the Court is satisfied that the accused appreciates the salient features of the evidence against him its function under S. 342 is exhausted, and no further examination is permissible.

Now, what is the effect of an examination that is not in conformity with the provisions of S. 342? It has been decided in some cases that non-compliance with S. 342 ipso facto vitiates the trial; on the other hand there are authorities in which it has been held that unless there has been a failure of justice the defect in procedure is curable under S. 537, Criminal P. C. I do not pause to canvass the earlier decisions on this section because, in my opinion, all the previous authorities must be read in the light of the recent Judgment of the Judicial Committee in the case of *Abdul Rahman* v. *Emperor* (3). In the case of the *Emperor* v. *Erman Ali* (4), which was decided by a Full Bench of the Calcutta High Court, I laid down the test which, in my opinion, ought to be applied in order to determine whether or not a breach of the provisions of the Criminal Procedure Code has vitated the trial, and I venture to repeat it in the present case:

"The test to be applied, in cases where the prescribed rules of procedure have not been followed, to ascertain whether there has been a mistrial is always essentially the same, namely, whether there has been a miscarriage of justice; for if the appeal Court is satisfied in point of fact that the accused has materially been prejudiced by the breach of procedure clearly a failure of justice has occurred; while if by reason of the breach of procedure there has in effect been substituted another mode of trial, for that prescribed by the legislature as affording the best means of obtaining a fair trial it is presumed that a fair trial has not

(3) A. I. R. 1927 P. C. 44=100 I. C. 227=54 I. A. 96=28 Cr. L. J. 259=5 Rang. 53.

(4) A.I.R. 1930 Cal. 212=1930 Cr. C. 212=123 I. C. 664=31 Cr. L. J. 536 (F.B.).

been accorded the accused, and that in that case also there has been a failure of justice. In either case therefore the proceedings pro tanto will be set aside upon the ground that by reason of the breach of the rules of the procedure a miscarriage of justice has been occasioned. On the other hand, if the appeal Court is not satisfied that the breach of procedure falls within one or other of those categories, in my opinion it ought not to hold that the proceedings have become vitiated merely because there has been a transgression of the prescribed rules by which such proceedings are to be regulated. It is ever to be borne in mind that rules and regulations are intended to be the handmaid and not the mistress of the law, and that in criminal proceedings it is of the utmost importance that a decision just and reasonable on the merits should not be disturbed because in the course of the proceedings some flaw can be detected that is not fundamental, and which is not proved to have worked injustice to the accused although it may constitute a breach of the rules of criminal procedure: *Emperor* v. *Erman Ali* (4)."

In this appeal it is unnecessary to decide whether the failure in toto to examine the accused would ipso facto vitiate the trial, as being a breach of procedure going to the root of the trial, and I postpone the determination of that question until the proper occasion arises. In the present case however the accused have been examined, but the examination was not in conformity with the provisions of S. 342. Is the result of this defect in procedure that the trial is vitiated? In my opinion to such a case S. 537 applies, and unless a failure of justice thereby has been occasioned the conviction and sentence ought not for that reason to be disturbed.

It is however undesirable in my opinion that this Court should decide whether in the circumstances of the present case non-compliance with the provisions of S. 342 has occasioned a failure of justice, because in order to determine that question it would be incumbent upon the Court to embark upon a consideration of the facts and merits of the case, a course from which we desire so far as possible to refrain in view of our decision that the case must be retried; and it is also unnecessary that we should do so inasmuch as, in my opinion, the case must be remanded for retrial upon the other ground which I have stated. For these reasons we order that the appeals be allowed, the conviction and sentence upon each of the accused set aside, and the case retried at the next available Criminal Sessions of the High Court.

Doyle, J.—I concur.

B.V./R.K. *Appeals allowed.*

A. I. R. 1930 Rangoon 354

BAGULEY, J.

Nga San Tin—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 550 of 1930, Decided on 30th June 1930, from order of Sess. Judge, Tharrawaddy, D/- 13th May 1930, in Sessions Trial No. 15 of 1930.

Criminal P. C., S. 350—S. 350 has no application to cases tried in a Court of Sessions.

Consent cannot give jurisdiction in a criminal trial. S. 350 only applies to Magistrates and not to cases tried in a Court of Sessions. Where the judgment is written and sentence passed by the Sessions Judge, but practically the whole of the evidence was recorded by the Additional Sessions Judge, the conviction cannot stand even though the accused agrees to the dealing with the case by the Sessions Judge: 26 *Bom.* 50 and 35 *All.* 63, *Rel. on.* [P 354 C 2]

Judgment.—The appellant has been convicted under S. 304, I. P. C., and sentenced to seven years' rigorous imprisonment, and he appeals against the conviction and sentence. It is quite clear that the conviction cannot stand. The judgment was written and sentence passed by the Sessions Judge, but practically the whole of the evidence was recorded by the Additional Sessions Judge who was transferred when only one witness remained to be examined for the defence. The Sessions Judge mentions this fact in his judgment, but says that the accused agreed to his dealing with the case.

Consent cannot give jurisdiction in a criminal trial. The learned Judge appears to have considered himself as acting under S. 350, Criminal P. C., but this section only applies to Magistrates. It has no application to cases tried in a Court of Sessions, and I would draw the learned Judge's attention to *Emperor* v. *Sakharam* (1) and *Emperor* v. *Badri Prasad* (2). I therefore set aside the conviction and sentence and direct that the case be retried by the Additional Sessions Judge of Tharrawaddy.

P.N./R.K. *Conviction set aside.*

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(1) [1902] 26 Bom. 50=3 Bom. L.R. 558.
(2) [1913] 35 All. 63=17 I.C. 797.

A. I. R. 1930 Rangoon 355

Brown and Baguley, JJ.

U Ko Ko Gyi—Applicant.

v.

U San Mya—Opposite Party.

Civil Misc. Appln. No. 5 of 1930, Decided on 24th June 1930, from order of Dist. Judge, Sagaing.

Legal Practitioners Act, S. 13 — Duty of barrister allowing a client to give his version of case in full without warning him that he had not yet accepted the case and that other side had approached him to represent them in the matter, and that he had not declined their offer — Barrister subsequently engaged by other side — Though there is no misconduct Court is justified in refusing to allow Barrister to appear for other side.

A, a Barrister, allowed a client *S* to see him and to give his version of the case in full without warning him that he had not yet accepted the case and therefore could not regard himself as his advocate, and without warning him that the other side had approached him to represent them in the matter, and that he had not declined their offer. Subsequently *A* was engaged by the other side.

Held: that there could be no doubt that *S* reposed confidence in *A* by discussing the case in the way he did,

Held further, that the conduct of *A* could not be regarded as professional misconduct but the case came within the ambit. "Counsel ought not to accept a brief against a party even though the party refuse to retain him, in any case in which he would be embarrassed in the discharge of his duty by reason of confidence reposed in him by that party." And the Court is justified in holding that it would not be fair to *S* to allow *A* to appear for the other side: (1897-01) 2 *U. B. R.* 368; (1910-13) 1 *U. B. R.* 50; 26 *Bom.* 423 and *A. I. R.* 1917 *P. C.* 80, *Ref*; 12 *Bom.* 85, *Dist.* [P 359 C 1]

Lutter—for Applicant.

Chatterjee — for Mandalay Advocates Association.

Baguley, J.—This is an application filed by U Ko Ko Gyi, Bar-at-Law, an advocate of this Court, asking that an order passed by the District Judge of Sagaing refusing to allow him to appear in a certain civil regular suit in his Court may be set aside. The facts of the case have to be sought in affidavits filed by U Ko Ko Gyi himself, by San Mya, the respondent and by one U Sein, a pleader who apparently is in the habit of acting as a junior with U Ko Ko Gyi. San Mya is the husband and authorized agent of one Ma Ma Gale, who is interested in the partition of the estate of Paw Shan, deceased. The partition of this estate has been referred to arbitration, and it would appear that some of the parties concerned took exception to the arbitrator's award and desired to file a suit to have the award set aside. Ma Ma Gale was one of the dissatisfied heirs, and San Mya was charged with the task of seeing to the filing of the suit. On 3rd May 1929 he saw U Sein and asked him to introduce him to U Ko Ko Gyi. U Sein took him to U Ko Ko Gyi's house and, leaving him in the sitting room, went into an inner room to see U Ko Ko Gyi. According to U Ko Ko Gyi's affidavit, U Sein came in to him and told him that San Mya was waiting outside to see him in connexion with Paw Shan's estate, and at the same time told him then that he had already been approached by one of the other heirs to retain U Ko Ko Gyi if litigation arose in connexion with the estate. U Ko Ko Gyi expressed an unwillingness to see San Mya if that were the case, but on U Sein saying that San Mya was a gentleman of some standing, out of courtesy he went to see him with the intention of speaking to him about fees only. He did not mention to San Mya that he had already been approached by the other side. Nevertheless he allowed San Mya to give him an outline of the case, and on U Sein intervening, saying that the fees should be settled first, he said that he would have to know the amount of labour that the case would involve. U Sein or San Mya said that the papers should be shown to U Ko Ko Gyi in order to enable him to settle the fees. The affidavits filed by both sides agree on this point. San Mya left the house in entire ignorance of the fact that U Ko Ko Gyi was considering appearing for the opposite party.

On 5th May San Mya returned again with all the connected papers. He says that when he saw U Ko Ko Gyi, he showed him the file of papers; U Ko Ko Gyi went through the award and some side notes of his and also the deed of submission to arbitration and other papers, and said that they had good grounds. He says that he told U Ko Ko Gyi that he had studied the facts of the whole case and showed him the notes taken by him in the course of his preparation for the B. L. Examination with regard to the law of arbitration. He discussed with U Ko Ko Gyi the terms of the deed of reference and some important aspects of the award and also

told him the line of attack and the probable line of defence coupled with his reasons and arguments. After this U Sein suggested that they had better settle the question of fees as U Ko Ko Gyi had spent about an hour over the case already, and a discussion with regard to fees took place.

Then U Sein advised him to consult the other plaintiffs ; so he left the house. U Ko Ko Gyi's version of this interview is not exactly the same; he says that San Mya started the conversation by talking about the case without making any reference to fees. In the course of the conversation, he admits San Mya showed him the reference to arbitration and the award, which he glanced over and read in parts. He says he did not read the side notes, and in fact, he does not remember seeing any. He says that San Mya brought out four points against the award, which is obviously his way of referring to what San Mya speaks of as "the facts of the whole case ..... the line of attack and the probable line of defence." U Ko Ko Gyi says that the discussion was with regard to the four points generally and not with reference to the particular facts of the case. It is difficult to understand exactly how this could be discussed without reference to the facts of the case, as two of the points, which U Ko Ko Gyi says San Mya brought out were the fact that the arbitratior took Rs. 10,000 as remuneration without the heirs agreeing to it, and further the fact that he misappropriated some valuable articles. U Ko Ko Gyi says that he did not stop San Mya in his expounding of the case, out of delicacy and because of his position, but he did not allow himself to be committed by any statement. He says that he told San Mya that he might have some good points, but that it was difficult to get an award set aside and he admits that he referred San Mya to a ruling in the Rangoon series of Law Reports. He then agrees with San Mya in saying that U Sein, who was present except for a short while, politely stopped San Mya and asked him to settle the fees first; whereupon he felt relieved. He says that he named certain amounts as the fees which he would accept, but San Mya made no offer, and finally went away. After this U Ko Ko Gyi accepted the brief of the other side, and it is because of this that the District Judge has refused him permission to appear.

It will be noted that right up to the time that San Mya left the house on the second occasion there is no suggestion that anyone had given him the least inkling of the fact that the other side had intimated their intention to engage U Ko Ko Gyi on their behalf and that he was considering accepting the brief for the other side.

An affidavit has been filed by U Sein, but it really does not throw much further light on what has happened, and as this affidavit was not filed by U Ko Ko Gyi before the District Judge, it is, to say the least, doubtful whether it ought to be accepted now. The affidavit however is really of little value.

It seems quite clear therefore that U Ko Ko Gyi allowed San Mya to see him and to give him his version of the case in full without warning him that he had not yet accepted the case and therefore could not regard himself as his advocate, and without warning him that the other side had approached him to represent them in this matter and that he had not declined their offer. There can be no doubt whatsoever that U Ko Ko Gyi's action in this matter was not correct; he should never have allowed San Mya to disclose his case in the way in which he did; he should have held him down to a discussion of the terms on which he would accept the brief, and after getting a rough outline of the facts of the case to enable him to see what figure he was prepared to accept for the brief, he should have named his terms and either accepted the brief or rejected it completely. Mr. Lutter who argued this application on behalf of U Ko Ko Gyi admitted that it was unfortunate that his client acted as he did. Mr. Chatterjee who appeared on behalf of the Advocates' Association, Mandalay, went further and said the whole blame lay on San Mya, and that if anything has happened to his detriment he had only himself to blame for disclosing the case before he had briefed U Ko Ko Gyi, paid him his fees and so made him his advocate. This view I am quite unable to accept. San Mya may be a Myook and may have studied for the degree of B. L. but in litigation he was acting as a private party; and in such a case an advocate has no right to

attribute his own mistakes to his client and, as I have stated, his own counsel in this Court did not attempt to do so. I hope Mr. Chatterjee is using his own views in this argument and is not advancing the view as the considered opinion of the Mandalay Bar.

U Ko Ks Gyi's statement that he allowed San Mya to go on out of a feeling of delicacy and beceuse of his position, I am unable to comprehend. San Mya is a Myook and a Township Officer. U Ko Ko Gyi is a Barrister-at-Law of many years standing and for some years occupied the position of a District Judge, and I am unable to understand such a hypersensitive sense of delicacy : it was his duty to prevent him from discussing the case until he had accepted the brief. more particularly when he had it fresh in his mind, for he was warned by U Sein only a minute or two before the first interview, that the other side had already intimated their desire to retain him for the same litigation.

The learned District Judge has refused U Ko Ko Gyi permission to appear following the dictum laid down in *Maung Mya U* v. *Sun Singh* (1), a case in which, it seems to me, the facts were considerably weaker than the facts disclosed by the affidavits in the present case. It is true there is a foot-note by the learned Judicial Commissioner who passed the order to the effect that it had been brought to his notice that the dictum was an obiter, but he states that he could not reconsider the matter tlll it came judicially before him, but that, as at present advised, the rule seemed to him to be an obvious one.

Mr. Lutter for U Ko Ko Gyi drew our attention to *Mr.*—— v. *Tin Byu U* (2), in which an advocate who had appeared on behalf of a client in a certain litigation appeared against that client in another suit connected with the same facts seven years later. It is to be noted however that the head-note merely says that the circumstances did not warrant an order prohibiting the advocate from appearing, showing clearly that this is a ruling on the facts of the case.

Another ruling with regard to advocates is to be found in *Pallonji Merwanji* v. *Kallabhai Lallubhai* (3), but in this case the facts are somewhat different: it was one in which an advocate appeared on behalf of two clients who had subsequently fallen out: and the question decided was whether he could subsequently appear for one of them. As an addendum to this ruling, there is a judgment passed by West, J., as a Judge of Sadar Court in Sind, which gives reference to a large number of English cases which I am unable to consult in original here.

The principle that emerges from all these cases appears to be that if an advocate had appeared on behalf of a client, and had in the course of his employment been made acquainted with any secrets of his client, he is not permitted to appear against that client after the termination of his employment if he might utilize those secrets to his former clients' prejudice.

The difficulty in the present case is that U Ko Ko Gyi was never actually retained on behalf of San Mya, but he did discuss the case to a certain extent when San Mya was under the impression that he might succeed in persuading him to accept the brief. There is authority for saying that a barrister consulted as a friend is not in the same position as a barrister consulted professionally: vide Halsbury's Laws of England, Vol. 2, p. 396; but it cannot be said in this case that San Mya was consulting U Ko Ko Gyi as a friend: he had never met him before the 3rd May and his interview with him was solely with a view to retain him in this case.

On p. 93 of the Bombay ruling before mentioned, it is stated in connexion with the question of whether a barrister may or may not accept a brief:

"..... the barrister must in this as in other matters often be left to the guidance of that sense of duty which Erle, C. J., thought would preserve its sensitiveness more unimpaired the less it was affected by any idea of legal obligation."

It seems to me that this case comes within the ambit of a statement to be found in Halsbury's Laws of England, Vol. 2, para. 661.

"Counsel ought not to accept a brief against a party, even though the party refuse to retain him, in any case in which he would be embarrassed in the discharge of his duty by reason of confidence reposed in him by that party."

(1) [1897-1901] 2 U. B. R. 368.
(2) [1910-13] 1 U. B. R. 50=3 I.C, 1174=12 Cr. L. J. 57.
(3) [1888] 12 Bom. 85.

The same principle is laid down in para. 618, p. 407. The present case is not identical, it is rather the converse; but I think the converse of the principle will apply. There can be no doubt that San Mya did repose confidence in U Ko Ko Gyi by discussing the case in the way in which he did and in the way in which U Ko Ko Gyi allowed him to do, and although in para. 680, before quoted, it is further laid down:

"....there can be no duty towards a person who has not been the client of the counsel, unless the fact of confidence having been reposed is clearly made known to the counsel,"

in this case, it must be held that the fact that confidence had been placed in him was known to U Ko Ko Gyi despite his assertion that he allowed San Mya to go on talking without paying any attention to what he was saying. This he certainly had no right to do, and even though he may not now be aware of all that San Mya said to him. San Mya remembers what he said to U Ko Ko Gyi, and if, in the course of the case, U Ko Ko Gyi by a process of independent thought, did seize upon a point which San Mya had mentioned to him as one of his weak points, San Mya would never be able to get out of his mind the idea that U Ko Ko Gyi got that point from him, and the sense of grievance would certainly remain.

It is true that, judged by the standard laid down in *Damodar Venkatesh* v. *Bhavanishankar Mangesh* (4) U Ko Ko Gyi's conduct in this case does not come below what is described as "the extreme low-water mark of professional conduct" and therefore cannot be regarded as professional misconduct, but these are not disciplinary proceedings, and I think that even when an advocate has not overstepped the line, the Court can still refuse to allow him to appear in the case. The Full Bench in that case definitely laid down that they did not expect this extreme low-water mark of professional conduct to be the standard by which the pleaders of their presidency should regulate their professional behaviour, and with this expectation I am in entire agreement. For these reasons I would dismiss this application. No order as to costs as the respondent has appeared in person and filed a written argument.

(4) [1902] 26 Bom. 423=4 Bom. L. R. 67.

Brown, J.—The District Judge during the pendency of a case before him refused to allow the appellant to appear as an advocate for some of the respondents. The present appeal or application against that order is made, not by any of the parties to the case, but by the advocate personally. It is not clear to me how we have power to issue any order to the District Judge on such an application. Possibly the power is exercisable under the provisions of S. 107, Government of India Act. But however that may be, I do not think it is necessary to decide on this point as I am not satisfied that any case for interference has been made out.

As to the exact details of what happened the parties are at variance, but on certain of the main facts there is no dispute. On 3rd May 1929 the respondent approached the appellant and had an interview with him with regard to the case now pending before the District Court. At that time the appellant knew that there was a probability of his being approached by the other side to represent them in the litigation. He did not however inform the respondent of this fact and heard from him a general outline of the case. The question of fees arose and the appellant said he could not name any amount unless he knew the amount of labour the case might require and he then suggested that he should see some of the papers and settle the fees. Two days later U San Mya came back with certain papers and had another conversation with the appellant over the case. The question in issue between the parties was whether a certain award by arbitrators should be set aside. The respondent's case was that it should be set aside. At this second interview with the appellant he produced the reference and the award. The appellant read the reference and also some part of the award. There was obviously a somewhat lengthy interview and the appellant admits that U San Mya brought out four points which he said would vitiate the award. Firstly that the arbitrator took Rs. 10,000 as his remuneration without the heirs agreeing to it; secondly, that he had misappropriated some valuable articles; thirdly, that he refused to examine witnesses; and fourthly, that his award was not in accordance with the Buddhist

law. U San Mya says that he told the appellant the probable line of attack and the probable line of defence coupled with his reasons and arguments. The appellant does not admit this but he does admit that U San Mya had some discussion with him on the four points generally that he mentioned. He admits that he told him that there might be some good points but that it was rather difficult to get an award set aside and that he referred him to a ruling in the Rangoon series. Finally the question of fees was discussed and the consultation ended. Subsequently, the appellant was engaged by the other side. I do not wish to suggest that the appellant has not to the best of his ability described what took place at the two interviews; but, it is clear that the second interview, at any rate, was of some duration and that various points in connexion with the case were discussed at some length. It is impossible for either side to have an exact recollection of all that passed. But after such consultation it seems to me impossible to hold that the appellant was in a position to take up the case for the other side without making use of what he had heard from the respondent.

The learned District Judge relied on the Upper Burma case of *Maung Mya U* v. *Sun Singh* (1) in which it was held that

> "it is misconduct from a professional point of view for an advocate after being consulted in his capacity of advocate about a case and after learning particulars of the case as stated by one side, to undertake the case in the interest of the opposite party. The fact that there was no definite engagement by the first party makes no difference."

I do not consider that it can be held that the action of the applicant in this case amounts to professional misconduct, but I think that in the circumstances of the case the trial Judge was justified in holding that it would not be fair to the respondent to allow the appellant to appear. It is laid down in para. 661, Halsbury's Laws of England, Vol. 2, that:

> "Counsel ought not to accept a brief against a party, even though the party refuse to retain him, in any case in which he would be embarrassed in the discharge of his duty by reason of confidence reposed in him by that party."

In the case of *Mary Lilian Hira Devi* v. *Kunwar Digbijai Singh* (5) (at p. 1142 of 21 *C. W. N.*), their Lordships of the Privy Council remarked:

> "Before concluding, their Lordships must express their complete assent to the observations of the learned Judges of the High Court on the impropriety of a legal practitioner who has acted for one party in a dispute, such as there was in this case, acting for the other party in subsequent litigation between them relating to or arising out of that dispute. Such conduct is, to say the least of it, open to misconception, and is likely to raise suspicion in the mind of the original client and to embitter the subsequent litigation."

It is true that it has been held that a strong case must be made out before a Court could grant an injunction restraining a pleader from appearing on behalf of a party in a particular case. That was the view taken in the case of *Pallonji Merwanji* v. *Kallabhai Lallubhai* (3). But that was a case for an injunction. The question we have to consider here is not whether we should issue an injunction but whether we should interfere with the action of the District Court in refusing to allow the appellant to appear in that Court. The real test appears to be whether confidential information was acquired by the appellant as the result of the interviews with the respondent which might be of use to him in conducting the case for the other side. The appellant says that there was no such confidential information acquired by him, and I do not wish in any way to question the bona fides of his belief to that effect.

As I have said the interviews between the parties must have been a fairly prolonged one and various points in connexion with the case were clearly discussed at some length. The respondent has not perhaps proved any particular item of confidential information that was imparted, but that would be a difficult matter for him to prove. In the first place, if he did attempt to prove it the confidential information would cease to be confidential; and, in the second place, it would be difficult for him to remember the exact details of all that occurred.

It has been suggested by Mr. Chaterjee who appeared on behalf of the Advocates Association, Mandalay, that the position of advocates will be a difficult one if they are not allowed to hear anything from their respective clients about their cases before accepting a brief on the penalty of being debarred from appear-

(5) A. I. R. 1917 P. C. 80=42 I. C. 236.

ing for the other side. I do not think it is necessary to lay down any such rule for the purposes of this case, nor would I wish to lay down such a rule. But in the present case the appellant at the time he was consulted by the respondent knew that he was likely to be approached by the other side. It would have been an easy matter for him to warn the respondent that this was the case and that the respondent should be careful not to disclose anything confidential to him. He did not give this information but he interviewed the respondent twice and on the second occasion heard the respondent at considerable length. In fact he does not really himself say that it was necessary for him to hear so much about the case in order to decide whether he should accept the brief. What he says in his affidavit is that:

"Out of delicacy and for his position I did not stop him, but I did not allow myself to commit to any statement or answer."

In all the circumstances of the case although there is no direct proof of any confidential information having passed, I think it is a fair presumption that some such communication did pass from the respondent to the appellant. The respondent's action in objecting to the appellant's appearance was taken very promptly. The appellant appeared on 12th September 1929 and the respondent filed this application on 14th September. I am not satisfied that the action taken by the District Judge in the matter was wrong and I therefore agree that this application must be dismissed.

P.N./R.K. *Application dismissed.*

* A. I. R. 1930 Rangoon 360

CUNLIFFE, J.

Chit Hlaing Maung—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 407-B of 1930, Decided on 24th September 1930, from order of First Addl. Magistrate, Thaton, in Criminal Trial No. 97 of 1930.

*** Criminal P. C. (5 of 1898), S. 403—Person acquitted of charge of abduction—His subsequent prosecution for alleged rape of same female during the abduction is barred.**

Where a person has been acquitted of the charge of abduction, he cannot be subsequently prosecuted for the alleged rape of the female involved in the abduction prosecution during the abduction in question. On the grounds of public policy too, non-success in a prosecution for abduction, ought not to entitle the prosecutrix to bring further evidence to support a rape alleged to have been committed during the pendency of the abduction, even when further evidence is relied upon: *A. I. R. 1928 Rang. 252, Appl.* [P 360 C 2]

K. N. Dangali—for Applicant.

Sutherland—for the Crown.

Order.—This is an application to quash a prosecution. The circumstances are as follows. The petitioner together with others was originally put on his trial for abduction. He was acquitted. The present prosecution relates to the alleged rape of the female involved in the abduction prosecution, during the abduction in question. In effect, the argument in the petitioner's behalf is based on the plea of "autrefois acquit." I have already expressed my opinion in the case of *Yeok Kuk* v. *Emperor* (1) that as far as the Criminal Procedure Code is concerned the test of the success of the plea of "autrefois acquit" lies in the similarity of the offences under consideration. I went so far as to say that only distinct offences could be considered to defeat the plea.

Applying the test I do not consider that the offences of the abduction and rape of the same woman are so distinct that an acquittal on the first charge will not bar subsequent proceedings on the second. On the grounds of public policy too, I cannot see that non-success in a prosecution for abduction, ought to entitle the prosecutrix to bring further evidence to support a rape alleged to have been committed during the pendency of the abduction in question, even when further evidence is relied upon. It seems to me that such a proceeding is contrary both to good law and good sense. I therefore accede to the application and order the rape proceedings to be quashed.

P.N./R.K. *Revision allowed.*

(1) A. I. R. 1928 Rang. 252=111 I. C. 850=29 Cr. L. J. 950=6 Rang. 386.

END