

THE  
BURMA LAW JOURNAL.

EDITED BY  
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1924.

## Judges of the High Court at Rangoon, 1924

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(d. June 1924).
- The Honourable Mr. Justice U May Oung, *M.A.*, *LL.M.*,  
*Barrister-at-Law* (Home Member, 12th Nov. 1924).
- The Honourable Mr. Horace Owen Compton Beasley,  
*Barrister-at Law* (Trans. Oct. 1924).
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*N.B.—Burman names beginning with "Ma" or "Maung" are indexed under the letter "M," those beginning with the prefix "Nga" under "N," whilst those beginning with "Ko" or "U" will appear under "K" or "U" as the case may be.*

*Chetty firms are indexed under the initial letter of their marks.*

*Criminal Case titles are in italics.*

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PRESENT :—ROBINSON, C. J. &  
GODFREY, J.  
Maung Pan Maung & one ... *Appel-*  
*lants\**  
v.  
Maung San Saw ... *Res-*  
*pondent.*

*Negotiable Instruments Act (XXVI of 1881), S. 59—On a demand promissory note—When overdue—Claim by maker against payee—Whether right to set off against indorsee available in suit by latter.*

There is no provision in the Negotiable Instruments Act which indicates when a negotiable instrument payable on demand becomes overdue for the purpose of affecting subsequent holders with notice of defect of title.

A set off due by the payee to the maker is not an equity which can be pleaded to a suit by an indorsee of an overdue note.

*Burroughs v. Moss*, 10 B. & C. 558; *Van Ingen v. Dhunna Lall*, 5 M. 108—followed.

Judgment. 8th April, 1924.

*Per* ROBINSON, C. J.:—This appeal and Appeal No. 95 of 1923 are appeals against the judgment and decree of the District Court of Toungoo decreeing two suits on Promissory Notes executed by the appellants in favour of one Po Kaing and endorsed by him to the respondent in exactly similar circumstances. They have accordingly been argued and are now dealt with together.

It appears that the appellants Po Kaing had a series of paddy transactions, in the course of which Po Kaing advanced moneys to the appellants, and the appellants from time to time executed in his favour a number of Promissory Notes of which those in suit are two.

Suits on the paddy transactions were filed by the appellants against Po Kaing and were, in the first instance, dismissed by the District Court as being in the nature of gambling transactions. These judgments, however, were subsequently reversed by the Chief Court in appeal and the suits were decreed, the Chief Court holding them ordinary mercantile transactions.

\* Civil First Appeals Nos. 94 and 95 of 1923.

It was while these appeals were still pending and before they had come to a hearing that the two Promissory Notes, the subject-matter of the present appeals, were endorsed by Po Kaing to the respondent who is, it seems, a partner of the Advocate engaged by Po Kaing to appear for him in the suits and appeals just mentioned.

The respondent thereafter filed his suits on these two Promissory Notes against the appellants, who set up a defence alleging (*inter alia*) that the endorsement was the result of collusion between Po Kaing and the respondent in order to deprive them of "their rights to set up legal defence".

By this, was meant that the appellants had other claims-decrees on their paddy transactions against Po Kaing, which they would have claimed to set off against any suit by Po Kaing on these Promissory Notes. And in these circumstances it is contended on their behalf that the respondent was not a holder in due course of the two Promissory Notes, but took them after maturity and subject to all the equities available against the payee, Po Kaing, who endorsed them to him. And that is the only contention upon which these appeals have proceeded.

It is based upon Section 59 of the Negotiable Instruments Act, which provides that the holder of a negotiable instrument who has acquired it after dishonour, whether by non-acceptance or non-payment with notice thereof, or after maturity, has only, as against the other parties, the rights thereon of his transferor. There is no provision in the Act which indicates when a negotiable instrument payable on demand becomes overdue for the purpose of affecting subsequent holders with notice of defects of title. And, if the test, which was previously adopted, be applied, it is not suggested here either that demands for payment were made by, or that the Promissory Notes had remained for an unreasonable length of time

in the hands of, the original holder before endorsement.

But in any case, there would appear to be no real substance in the appellants' contention since the equities, with which they would seek to subject the respondent are wholly collateral and not arising out of the conditions upon which the Promissory Notes were executed and constitute a set off. And a set off due by the payee to the maker is not an equity, which could be pleaded to a suit by an endorsee of an overdue note. *Burroughs v. Moss* (1) and see *Van Ingen v. Dhunna Lall* (2).

Moreover no set off has in fact been pleaded. It might be added that there appears to be no reason for thinking that the endorsements were the result of collusion as alleged, or that they, any more than the Promissory Notes themselves, were without consideration. In fact, the respondent's evidence goes to show clearly that the Promissory Notes were endorsed in discharge of fees which he had paid Po Kaing's Advocate on Po Kaing's account, and this has been accepted by the lower Court, and we do not understand it to be seriously questioned now.

It follows therefore that these appeals of necessity fail. The decree of the Court below is confirmed and these appeals are dismissed with costs throughout.

PRESENT:—CARR, J.

Mg. Tun E

.. Petitioner

King-Emperor

.. Respondent.

*Criminal Procedure Code (Act V of 1898)*  
S. 110—*H. O. R. A. (Burma Act II of 1919)*  
S. 7—*Associating with bad characters—Not ground for security proceedings.*

Mere association with bad characters is not a ground on which an order could be passed under S. 110, Criminal Procedure Code, and therefore is not a ground for an order under the H. O. R. A.

\*Cr. Rev. No. 477-B of 1924 being review of the Order of the Sub-divisional Magistrate, Dedaye, in Cr. M. Trial No. 8 of 1923.

1. 10 B. & C. 558.

2. 5 M. 108.

Judgment. 25th Aug. 1924.

The petitioner has been restricted to Pyapon Town by an order under Section 7 of the Burma Habitual Offenders Restriction Act. The District Magistrate dismissed his appeal in a judgment in which he gave no reasons for his finding and which therefore was not a proper judgment.

The petitioner is a returned transportee. When he returned is not clear, but it appears that for a year or two prior to July, 1923, he lived in Rangoon and that he then removed to Dedaye, which seems to be his native place. These proceedings were instituted on November 30, 1923, obviously at the instance of the C. I. D.

The first witness is a C. I. D. officer of Rangoon who says that while in Rangoon petitioner associated with bad characters, who he names. Two of these men were convicted and hanged for the Kandawgyi robbery with murder. The witness then goes on to speak of the contents of a letter alleged to have been written by one of these men and of statements made by both of them, while under sentence, to another police officer, who is not a witness. I am unable to see how this is evidence admissible as against the petitioner. It is not a matter of repute but a statement of fact. And if it were admissible at all it would require to be properly proved, which has not been done. It would be necessary to produce the letter and to prove that it was written by the man named. And obviously a statement to one police officer cannot be proved by the mere hearsay of another. Section 162, Criminal Procedure Code, also bars evidence of this statement.

This witness also alleges that along with his criminal associates the petitioner formed a secret society, to which he acted as adviser. This again is a statement of fact and not of repute. It cannot be accepted on the bald allegation of this witness, who has not explained how he knows these things. The witness also states that he received information that accused was

concerned in several cases of robbery, theft and house-breaking in Rangoon. Why action was not taken against the petitioner while he was still in Rangoon is not explained.

Next we have a ward headman of Rangoon who says that petitioner had the reputation of being a thief, robber and dacoit, and that he associated with bad characters. But in cross-examination he admits that "I did not receive information that the accused himself commit the offences on his return from transportation" and that in fact he heard nothing against him except in connection with the Kandawgyi case, in which accused's house was searched.

Next we have another ward headman who merely says that accused's reputation was that he associated with bad characters. This information he received from the police.

Next is an Inspector of Police of Pyapon who knows nothing against the petitioner beyond what he has seen in his history sheet. Then we have a Rangoon Head Constable who also says that petitioner associated with bad characters and was suspected of having something to do with the Kandawgyi case.

The last witness bought a ring from petitioner. This was seized by the police on suspicion but was returned to the witness.

Thus the most that can be said to be proved against the petitioner is that while in Rangoon he associated with bad characters. Mere association with bad characters is not a ground on which an order could be passed under Section 110, Criminal Procedure Code, and therefore is not a ground for an order under the H. O. R. A.

I set aside the order of restriction passed on Nga Tun B and direct that he be discharged.

*M. Z. Y. a* for applicant.

PRESENT.—BROWN, J.

1. A. Dawson and
  2. C. R. Nandan ... *Appellants*<sup>\*</sup>
- v.
- King-Emperor ... *Respondent*.

*Penal Code (Act XLV of 1860), Ss. 323, 342<sup>a</sup> and 348—Magistrate taking cognizance of case under above sections—Evidence indicating offence also under S. 330—Whether Magistrate precluded from trying case.*

A Magistrate is not precluded from taking cognizance of and trying cases in respect of offences which he has jurisdiction to try merely because the proceedings disclose a more-serious offence which is triable exclusively by a Sessions Court. There is no illegality in his doing so, but the propriety of his procedure may be questioned.

*Mir Mose and another v. King-Emperor, 23 C. W. N. 1031; Lekhray v. The Crown, Punjab Record, 1910, Criminal No. 31—discussed.*

*Queen-Empress v. Gundaya, 13 B. 501; King-Emperor v. Vellayappa Uddan, 24 M. 675—approved.*

*Subramania Aiyar v. King-Emperor, 25 M. 61—explained.*

Judgment. . . 3rd July, 1924.

In September last the first appellant Dawson was a Sub-Inspector of Police in the Detective Department in Rangoon, and the second appellant Nandan, a Police constable. They have both been found guilty of causing hurt to a boy Yenkaswamy, and of wrongfully confining him for the purpose of extorting a confession from him. Dawson has also been found guilty of wrongfully confining the boy on a further charge. Dawson has been sentenced to three concurrent terms of one year's rigorous imprisonment under the provisions of sections 323, 342 and 348 of the Indian Penal Code, and Nandan to two concurrent terms of six months rigorous imprisonment under sections 323 and 348. Both appellants entirely deny their guilt, and a number of legal points have been raised on their behalf. The evidence on which they have been convicted is to the effect that they caused hurt to the boy for the purpose of extorting from him a confession. If

<sup>\*</sup>Cr. Appeal No. 485 of 1924 from the Order of the W. S. D. M., Rangoon, in Cr. Reg. No. 1588 of 1923.

that evidence is believed then the appellants are guilty of an offence under the provisions of section 330 of the Indian Penal Code. That is an offence which is triable only by a Court of Session, and it is contended that as the Magistrate had no jurisdiction to try an offence under section 330, his whole proceedings must be regarded as void. Two authorities have been cited in support of this contention. In the case of *Mir Moze and another v. The King-Emperor* (1) the evidence against certain accused persons, if believed, would have established a charge of rape. A first-class Magistrate enquired into the case, and came to the conclusion that the story of rape was probably an exaggeration. He accordingly tried the case himself and convicted the accused of offences under the provisions of section 354 of the Indian Penal Code and of various other minor offences.

It was held that the accused ought to have been committed to sessions, and the Magistrate was directed to draw up charges with regard to the alleged rape and to commit the accused to the Court of Session for trial. In the case of *Lekhiraj v. The Crown* (2) an accused person had been convicted under the provisions of sections 420 and 468 of the Indian Penal Code by a first-class Magistrate for forging a *hundi*. It was held that as a *hundi* is a valuable security, the offence charged really fell under section 467 which is only triable by the Court of Session. The whole proceedings of the Magistrate were set aside as far back as and including the charge.

The view taken was that the fact that the offence included a minor offence did not give the Magistrate power to deal with the case. In neither of these cases was it definitely laid down that the proceedings of the Magistrate were void, nor is it easy to see how it is possible to take that view. Section 530 of the Code of Criminal Procedure lays down that if any Magistrate, not

being empowered by law in this behalf, tries an offender, his proceedings shall be void.

In the present case the Magistrate has tried an offender for offences under the provisions of sections 323, 342 and 348 of the Indian Penal Code, all of which offences he was empowered to try. It may be that the appellants committed a more serious offence punishable under the provisions of section 330, but it was not an offence under that section which the Magistrate actually did try. If he found that there was a *prima facie* case of causing hurt in order to extort a confession, then the Magistrate's proper course was obviously to commit the case to the Court of Session, and if it can be shown that the appellants have suffered any injustice from the procedure adopted by the Magistrate, the convictions would have to be set aside. But that is a very different thing from the proceedings being absolutely void. This view of the law has been taken by the High Courts of Bombay and Madras in the cases of *Queen-Empress v. Gundaya* (3) and *King-Emperor v. Ayyan and Vellayappa Uddan* (4). In the latter of these cases an accused person had been convicted by a Magistrate of the first class under the provisions of section 193, and the convictions were set aside by the Sessions Judge on the ground that the offence disclosed was an offence under section 195 of the Code which was exclusively triable by the Court of Session. Their Lordships in the course of their judgment on revision remarked: "In the present case the Deputy Magistrate did not try accused for an offence beyond his jurisdiction. He tried him for an offence punishable under section 193, Indian Penal Code, *i.e.*, for an offence triable by a First Class Magistrate and therefore within his jurisdiction. His proceedings were not void, and the Sessions Judge was wrong in treating

1. 23 C. W. N. 1031

2. Punjab Record, 1910, Criminal No. 31.

3. 13 B. 501.

4. 24 M. 675.

them as void where the facts disclose an offence within the jurisdiction of the Magistrate, it seems to us a complete fallacy to say he is not empowered by law to try the person charged for the offence which is within his jurisdiction because the facts disclose a more serious offence which is beyond his jurisdiction. He is expressly so empowered. Whether in so doing he adopts a proper course is another question. No doubt it is improper on the part of a Magistrate to intentionally ignore circumstances of aggravation which show that an offence beyond his jurisdiction, as for instance if a second class Magistrate should ignore the violence used in committing theft (section 379), instead of sending the accused before a First Class Magistrate to be tried for robbery (section 392). Here the action of the second class Magistrate would be improper, but his proceedings would not be void.

This is a very lucid and to me very convincing exposition of the law on the subject. It has been suggested on behalf of the appellants that this decision was prior to the ruling of their Lordships of the Privy Council in the case of *Subramania Aiyar v. King Emperor* (5). But I am unable to see how that ruling is in any way pertinent to the point at present in issue. What their Lordships laid down was that a disregard of a clear rule of law as to a mode of trial could not be regarded as a mere irregularity which could be cured by the provisions of section 537 of the Code of Criminal Procedure.

In the present case there is no clear rule of law which has been disregarded. I am of opinion that the proceedings of the Magistrate are not void on this ground.

*Villa* (with him *Vaharia* and *Keith*) for appellants.

*Government Advocate* for the Crown.

25 M. 61

PRESENT:—YOUNG, J.

Saya Nyan & one ... Appellants\*

v.

Mg. Sein Daing ... Respondent.

*Civil Procedure Code (Act V of 1908), S. 100*  
—Second appeal—Misconception of evidence  
no ground for appeal.

Where the lower Court has misread or misconceived the evidence it is ground for an application for review but not ground for interference in Second Appeal.

*Ananda Chandra Sen*, 4 C. L. J. 198—followed.

Judgment. 4th July, 1924.

The sole point for determination in this appeal is whether the plaintiff was the owner of the house in suit. Both the lower Courts have found he was. It is urged that the District Court misread or misconceived the evidence of the Thugyi, but that, as pointed out in *Ananda Chandra Sen* (1) is ground for an application of review of judgment but no ground for interference in second appeal. Besides the rest of the judgment to which no exception was taken convinces me that the finding was correct even omitting the passage referred to.

*Ray* for appellants.

*Kalyanwala* for respondent.

PRESENT:—BAGULEY, J.

Nga Po Tin *alias* Nga

Tin ... Appellants

v.

King Emperor ... Respondent.

*Arms Act (XI of 1878), S. 19 (f) and S. 20*  
—Double conviction under both sections illegal.

A double conviction under Sections 19 (f) and 20 of the Arms Act cannot be sustained. S. 20 refers to aggravated offences under S. 19 and if a man is convicted under S. 20 he cannot be also convicted under S. 19 (f) on the same offence.

*Pointed out.*—A Magistrate who after having seized a case changes his office during its

Civil Second Appeal No. 306 of 1923 from the District Court of Myaungmya. In C. A. No. 436 of 1922.

1 Cr. Appeal No. 755 of 1924 against the Order of the S. P. M. of Henzada in Cr. Reg. No. 10 of 1924.

37, 4 C. L. J. 198.

pendency and has the same case formally transferred to him is not required to commence the case *de novo* but may continue it from the point he left off.

Judgment. 8th Aug. 1924.

On the evidence there can be no possible doubt that the accused was found sleeping under a blanket with the gun in question concealed under the same blanket. This appeal was only admitted, because there had been a double conviction.

His defence is that the gun was placed where it was found by the owner of the house, Nga Tin.

According to the prosecution evidence, Nga Tin is, and has been for some time, absconding from arrest, and several of the defence witnesses testify to the same effect. It was certainly incumbent upon the accused to explain satisfactorily how this gun came to be under the blanket under which he was found asleep; he has failed to do so.

However, a double conviction under sections 19 (f) and 20 of the Arms Act cannot be sustained. Section 20 refers to aggravated offences under section 19, and if a man is convicted under section 20, he cannot be also convicted under section 19 (f) on the same offence.

I set aside the conviction and sentence under section 19 (f) but the conviction and sentence under section 20 will stand.

[NOTE.—I observe that this Magistrate started the trial of the case as Third Additional Magistrate, Henzada; during the pendency of the case, he became Second Additional Magistrate, Henzada, and the case was formally transferred to his file as Second Additional Magistrate by the District Magistrate, Henzada. He proceeded to try the whole case *de novo*. There was no necessity for this; the Magistrate was the same individual throughout. Even if he had changed his office, the trial would have been quite legal, had he continued the case as though there had been no change of office at all.]

PRESENT :—CARR, J.

Ma E Yin ... Appellant

v.

Ma Sein Kin & one ... Respondents.

*Probate and Administration Act (V of 1881), S. 4—Administrator's right to possession against co-heirs—Duties of administrator.*

An administrator is entitled to possession of property even as against co-heirs.

Duties of administrator referred to.

*Ma Shwe Ein v. Ma Su Ma*, P. J. 40; *Maung Ye Gyan v. Ma Hmi*, 1 L. B. R. 155—explained.

*Ma Pe v. Ma Thein*, 4 L. B. R. 287 at 288—approved.

Judgment. 18th July, 1924.

No evidence whatever was taken in this suit and it is unsatisfactory that it should have been pending for seven months. There were some adjournments with a view to a settlement out of Court, at which I do not cavil. But there were far too many adjournments because the Sub-divisional Judge was on tour, and there were two totally unnecessary adjournments of three weeks or more for framing of issues, which might very well have been framed without any adjournment at all.

The facts disclosed are that the plaintiff is the daughter of Maung Aung Mwe, deceased, and has obtained Letters of Administration to his estate. The first defendant is Aung Mwe's daughter by another wife and is living with her husband, the second defendant, and her minor brothers and sisters, in a house belonging to Aung Mwe's estate. The plaintiff, claiming solely as administratrix, sues for possession of the house and to eject the defendants therefrom. She had not joined the minors as defendants.

The question is whether in such circumstances she is entitled to this remedy. The Sub-divisional Judge found that she was; the District Judge that she was not.

The District Judge has misrepresented the decision in *Ma Shwe Ein v.*

\*Special Civil Second Appeal No. 1373 of 1923 against the decree of the District Court of Tavoy and Mergui in C. A. No. 10 of 1923.

*Ma Su Ma* (1), saying that two opposing parties were granted Letters to the same estate. This was not so. The opposing parties held (or were granted) Letters to two different estates. The dispute was whether certain property belonged to the one estate or to the other. It was held that this question could be decided only by regular suit, but that the property should be entered in both schedules.

The other case quoted by the District Judge, *Maung Ye Gyan v. Ma Hmi* (2) again decides only that the question whether certain property belongs to the estate or not is not one to be decided in proceedings for the grant of Letters of Administration.

I have been unable to find any authority similar to the present case. But section 4 of the Probate and Administration Act clearly lays down that the administrator of a deceased person is his legal representative for all purposes and that all the property of the deceased person vests in him. One exception is provided where the property would otherwise pass to some other person by survivorship.

Under this it seems clear to me that the administrator is entitled to possession of the property even as against co-heirs. This does not, of course, mean that the administrator is the beneficial owner of the property. He is entitled to possession merely for the purpose of administering the estate. His duties are laid down in *Ma Pe v. Ma Thein Yin* (3) as follows:—"The object of a proceeding under the Act is to enable a representative of the deceased to be appointed to exercise the powers and to perform the duties imposed on such representative by the Act, and no more. Such powers are set out in Chapter VI of the Act and such duties are set out in Chapter VII.

An administrator is bound to collect with reasonable diligence the property

of the deceased and the debts which were due to him; he has to pay first of all funeral expenses to a reasonable amount, death-bed charges and board and lodging for a month if anything is due for the latter; he then has to pay the expenses of obtaining Letters, and then wages to labourers, artisans and domestic servants which accrued within three months next preceding the deceased's death, after payment of the foregoing he has to pay the other debts of the deceased. *After all debts are paid he is bound to distribute the remaining property among the persons entitled to it under the Law of Inheritance applicable to the deceased.*"

If he fails to do this, the heirs may sue him for administration of the estate.

The appeal is allowed and a decree is granted to plaintiff-appellant for possession of the house and land in suit. The costs throughout of both parties will be paid out of the estate.

*Hay* for appellant.

*Ba Thein* for respondents.

PRESENT — LENTAGNE, J.

Ma Dwe Byu . . . . . *Petitioner*\*

1. Ma Bwin  
2. Ma Hla Kye . . . . . *Respondents.*

*Contract Act (IX of 1872), ss. 151 and 230—Loan of cooking pot—Stolen whilst in possession of bailee—Bailee not made party in appeal—Party in second appeal under O. 41, R. 33.*

The first respondent borrowed a cooking pot for the use of the second respondent during a funeral ceremony. The pot was stolen. The petitioner sued the respondents and obtained a decree against the first respondent. The decree was set aside on appeal. The second respondent was not made a party.

On second appeal the High Court added the second respondent as a party respondent and passed a decree against the second respondent holding that she as the principal had not proved to have taken the care required of a bailee under section 151, Contract Act, and that she could be added as a party in second appeal or revision.

\*Civil Revision No. 204 of 1923 from the decree of the District Court of Pegu in C.A. No. 101 of 1923.

1. P. J. 40.  
2. L. B. R. 155.  
3. 4 L. B. R. 287 at 288.

*Yussoof Oosman Bros. & Co. v. Win Ne Ya and others*, (1920) 10 L. B. R. 191—followed.

Judgment. 26th June, 1924.

The plaintiff, Ma Dwe Byu, who is the applicant in this proceeding, kept a large copper pot, said to weigh 12½ viss, which was used for cooking rice in large quantities at funerals and other ceremonial occasions. The first defendant, Ma Bwin, obtained the loan of this pot from the plaintiff in January 1923, for use at a funeral and on the promise that she would return it in about 5 days. The plaintiff states that she was not then informed that it was required for use at the funeral of the husband of the second defendant, Ma Hla Kye. It was so used at such funeral, but disappeared, and was clearly stolen and, consequently, Ma Bwin was unable to return it to plaintiff.

Plaintiff sued Ma Bwin, claiming Rs. 87-8-0 as the value of the copper pot, but Ma Bwin in her written statement alleged that she had informed the plaintiff at the time of obtaining the loan, that she was borrowing the cooking pot at the request of, and for the use of, Ma Hla Kye, at the said funeral, and that she had subsequently taken plaintiff to Ma Hla Kye, who had then admitted the loss of the cooking pot and promised to make good the loss. On this, the Township Judge directed that Ma Hla Kye be made a party defendant.

Ma Hla Kye filed a written statement alleging that the plaintiff had no cause of action against Ma Bwin, and she admitted that Ma Bwin had, at her request, obtained the loan of the cooking pot, and she disputed the value as alleged by plaintiff.

It was proved at the hearing that the pot was being used at the funeral, and that it disappeared on the night of the burial. Ma Bwin also deposed to the fact that she had borrowed the cooking pot at the request of Ma Hla Kye. Ma Hla Kye, however, then contradicted her written statement and

denied having requested Ma Bwin to obtain the loan of the cooking pot though admitting that she had been given a general request to Ma Bwin to get pots and plates, etc., for use at the funeral, and that she did hear that the pot was stolen.

The Trial Judge assessed the value of the pot at Rs. 4-8 per viss and a valued at Rs. 56-4, and held that, as Ma Bwin had not made over the pot to Ma Hla Kye, Ma Bwin was liable on the ground that she had not taken the care required under section 151 of the Contract Act. He granted a decree against Ma Bwin and dismissed the suit as against Ma Hla Kye.

Ma Bwin appealed, but she did not make Ma Hla Kye a party to the appeal, and the District Judge held that Ma Hla Kye would obviously have been responsible for things used at the funeral and not Ma Bwin, and he then allowed the appeal and dismissed the suit with costs as against Ma Bwin. He did not pass any order as against Ma Hla Kye, who was not a party to the appeal, but, on his finding that Ma Hla Kye was the person responsible for things used at the funeral, he should have directed that Ma Hla Kye be joined as a party to the appeal and on her being so joined he should have then proceeded to consider the case against her. That point was discussed in the case of *Yussoof Oosman Bros. & Co. v. Win Ne Ya and others* (1) where it was pointed out that, under such circumstances, it was clear that the Appellate Judge had power to join the other party as a respondent under Order 41, Rule 33 of the Code of 1908 which contained a new power on a point which had been the subject of difference of opinion under the Code of 1882.

The plaintiff then filed the present application for revision of the proceedings of the lower Appellate Court, and when the case came before me, I directed that Ma Hla Kye be made

party to this proceeding. I passed this order in accordance with the precedents discussed in *Yosoof Oosman Bros. & Co. v. Win Ne Ya and others* (1) which I regard as equally applicable on a second appeal, or on a revision proceeding. I have now heard the advocates for the plaintiff and for Ma Hla Kye. If Ma Hla Kye had not filed her written statement before the trial Court, admitting that she had authorised Ma Bwin to borrow the cooking pot, I would have held that it was the duty of Ma Bwin, as the person who had borrowed the cooking pot, to prove that she had taken the care of it required under section 151 of the Indian Contract Act. But, having regard to the admission made by Ma Hla Kye, it must be held that Ma Hla Kye was the bailee of the cooking pot. Consequently, I must hold that the onus lay on Ma Hla Kye to prove that she took as much care of the cooking pot as a man of prudence would under similar circumstances take of his own goods of the same bulk and quantity as this large cooking pot.

As the funeral was that of Ma Hla Kye's husband, the presumption is that she was in charge of all arrangements and that all persons employed in supervising the cooking and the charge of cooking pots were her employees. It does not matter whether they were paid, or voluntary, employees, she would be equally responsible for their negligence in either case. It is obvious that a large cooking pot, weighing 12½ viss, could not be stolen if any reasonable care and watch was kept over the articles which were being used. Moreover, I must hold that Ma Hla Kye has made no effort to comply with the onus which lay on her to prove that she took the required care of the article in question. Under these circumstances, it necessarily follows that she was liable, having regard to her admission, when she did not also produce the necessary evidence in her defence.

L. (1920) 10 L. B. R. 191.

Under Section 230 of the Contract Act, 1872, an agent is not personally liable for contracts made on behalf of a principal except in certain cases, and in this case the agent, Ma Bwin, may possibly have disclosed the name of the principal before the loan; and it is clear that she did make the disclosure afterwards, more especially after the institution of the suit. This is a sound reason for making the principal, and not the agent, liable for the stolen article. But I am not satisfied that the agent, Ma Bwin, made the disclosure in sufficient time to save the plaintiff from unnecessary loss in the shape of costs; and I think that it is clear that each of the defendants was trying to create a situation in which plaintiff might fail against both defendants. The failure of Ma Bwin to make Ma Hla Kye a party to the appeal is an instance in point. Having regard to this aspect of the case, I do not think that Ma Bwin should be allowed any costs.

For these reasons, I think that only one of the defendants should be made liable. I, therefore, set aside the decrees of both the lower Courts, and direct that instead a decree be passed against Ma Hla Kye for Rs. 56-4, the value of the cooking pot, which is not now disputed, together with costs in the trial Court and in this Court, in favour of the plaintiff, Ma Dwe Byu.

As regards the case against Ma Bwin, I direct that the suit be dismissed as against Ma Bwin, but that she bear her own costs in all three Courts.

*Thein Maung* for petitioner.

*Mg. Kin* for second respondent.

PRESENT — LENTAINNE, J.  
Nga Po E ... Appellant

King Emperor ... Respondent.

*Penal Code (Act XLV of 1860), S. 307 — Fight with dangerous weapons between two persons — Charge under S. 307, I.P.C. not sustainable — Conviction under S. 326.*

\*Cr. Appeal No. 738 of 1924 from the Order of the First Additional S. P. M. of Bassein in Cr. Reg. No. 68 of 1924.

Where the appellant and another fought with dangerous weapons, the one with a dah and the other a sharp pointed knife, inflicting dangerous wounds upon each other, which but for timely medical relief would have resulted in death and were both convicted of an offence under section 307, I. P. C.

*Held*, that the conviction under section 307, I. P. C., was wrong in that it would be necessary to give both accused the benefit of the doubt and that equally the plea as to exercise of the right of private defence could not be proved by either accused, and that the only conviction possible was under section 326, I.P.C.

**JUDGMENT.** 8th Aug. 1924.

It is clear that the above appellant, Nga Po E and Nga Po Thint had a fight with each other on the night of the 28th October, 1923, at some time about 10 of 11 P. M., and that one used a dah and the other used either a pointed knife or some weapon of that description; but there were no other witnesses to the occurrence, and each appellant has been convicted on the evidence of the wounds caused to the opponent and the admissions of the appellant that he was himself wounded in the occurrence. Nga Po Thint received about seven or eight wounds, and Nga Po E received at least five wounds, and each would have died if he had not received early medical attendance. In each case, the condition of the wounded man was so bad that his dying deposition was taken. They were first tried by a Magistrate, who got into difficulties in attempting the impossible task of deciding which was the aggressor; but his orders of discharge were set aside by the Sessions Judge, and the appellants were then tried in two separate trials, each on the charge that he had committed the offence of attempt at murder under section 307, Indian Penal Code, in trying to kill the other. In the trial of each accused, the accused was convicted of that offence under section 307, Indian Penal Code, and each was sentenced to a term of five years rigorous imprisonment. Each appellant now appeals against the conviction and sentence passed against him in his trial.

The first question for determination is whether either can be convicted of

the offence under section 307, Indian Penal Code. In my opinion, the conviction for an offence under that section was not permissible in either case. That section provides for the punishment of an offender who "does any act with such intention or knowledge, and under such circumstances that if he, by that act, caused death, he would be guilty of murder." Now, if either of the appellants had died in consequence of his wounds, it would not have been permissible to convict the other of murder on the facts as established, because he would be entitled to the benefit of a reasonable doubt and to plead that the case came within Exception 4 to Section 300, and that the offence had been committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel, and without the offender having taken undue advantage or acted in a cruel or unusual manner. That being so, it is clear that neither appellant can be legally convicted under section 307, Indian Penal Code, having regard to the duty of the Court to accord to each the benefit of a reasonable doubt.

It is also clear that neither appellant can establish the defence that, what he did, was done in the exercise of the right of private defence, because, under section 105 of the Indian Evidence Act, 1872, the burden of proof would lie on the accused in each case to prove the necessary facts for such defence, and it is obvious that neither accused can prove the necessary facts for such defence in his case.

The same difficulties arise as regards the defence that, what each appellant did, was due to the fact that he had been deprived of the power of self-control by grave and sudden provocation. The burden of proof would lie on each appellant to establish this defence under section 105 of the Indian Evidence Act, 1872. It is, however, probable that one of the combatants would be entitled to raise such defence, though even that cannot be certain. Assuming, however, that one appellant could

establish such defence, his case would come within the provisions of Section 335 of the Indian Penal Code, which prescribes the penalty for voluntarily causing grievous hurt on grave and sudden provocation. The term of rigorous imprisonment punishable under that section would be four years.

There can be no question that each appellant caused grievous hurt to the other by means of a dangerous weapon, such as a dah or dagger, and I think that I am bound to convict each appellant under section 326 of the Indian Penal Code. In the case now before me, each appellant has already received a severe punishment in the shape of the wounds which he received from the other; but, nevertheless, it is necessary to teach men that they cannot fight in such a manner and escape imprisonment. Taking all the facts into consideration, I think that a sentence to a term of two and a half years rigorous imprisonment would meet the ends of justice in each case.

For the above reasons, in Criminal Appeal No. 738 of 1924, I set aside the conviction and sentence passed against Nga Po E under section 307, Indian Penal Code, and, instead, I direct that Nga Po E be convicted of the offence of voluntarily causing grievous hurt to Nga Po Thint by means of an instrument of stabbing, or cutting, which used as a weapon of offence, was likely to cause death, an offence punishable under section 326, Indian Penal Code, and I direct that the said Nga Po E do undergo a sentence of two and a half years rigorous imprisonment.

PRESENT:—BAGULEY, J.

King-Emperor . . . . . *Petitioner*\*

Nga San Myaing and  
two . . . . . *Respondents*.

*H. O. R. A. (Burma Act II of 1919), S. 7—  
Motor-car driver.—Order of restriction—  
Extent of.*

\* Cr. Rev. No. 443-A of 1924 being review of the Order of the Sub-divisional Magistrate of Minbu in Cr. M. Trial No. 6 of 1924.

A motor-car driver in regular work is not a suitable subject for H. O. R. A. restriction. In such a case, as long as the offender is working honestly, the restriction order might be altogether suspended by giving the area of the district under section 11 with a warning that it will be closed down if he ceases to work honestly.

Order. 5th Aug. 1924.

The reference to S. 565, Criminal Procedure Code, in the judgment is not understood. These proceedings are under section 3, Habitual Offenders Restriction Act, not under section 9, as there is no substantive conviction here.

If a man is intended to earn his living by driving a motor-car from one town to another the area allowed to him will have to be those two towns together with the road from one to the other.

On page 6 of my *H. O. R. A. Manual* there is no Rule 2 (b) nor any other rule that enables a Subordinate Magistrate to vary an order of restriction once passed. This can only be done by the District Magistrate under section 11 of the Act.

I would recommend this case to the personal notice of the D. M. A motor-car driver in regular work is not a suitable subject for H. O. R. A. restriction. If the man's employer wants the car driven out of the town the driver has either got to lose his job or risk imprisonment, for my experience shows that many Subordinate Magistrates are quite ready to give 6 months rigorous imprisonment for what might be termed an imminent infringement of a restriction order.

So long as the man is working honestly it is probable that the restriction orders might be altogether suspended by giving the area of the district under section 11, together with a warning that it will be closed down if he ceases to work honestly.

## BOOK REVIEWS.

*Diaries.*—Messrs. M. C. Sarkar & Sons, Law Book-sellers and Publishers, 90/2 A. Harrison Road, Calcutta, have issued the Lawyers' Diary for 1925 compiled by Mr. J. N. Ghosh and also the "Gem" Diary by the same compiler. The former is priced at Rs. 1-4-0 and contains a great deal of useful information for the general practitioner in India. Tables of exchange, registration and stamp fees, trade, official, professional and street directories, are given in this book as also forms of mortgages, conveyances, etc. The Gem Diary is suitable for the vest pocket and is priced at As. 8; both these will be found useful. There is also an advance posting up till January 1926.

We have also pleasure to acknowledge receipt of the Lawyers' Companion Diary (Madras) for 1925 which contains useful information incidental to these books. There are the stamp and registration laws, tables of income, interest tables, Postal information and also directions for making Wills. A list of the Imperial Acts in daily reference is given and advance posting is provided for until March 1926. (Published by the Lawyers' Companion Office, Law Publishers, Mount Road, Madras.)

The get up of the Diary is excellent and the paper used is of good and lasting quality so that entries in ink can be made.

*The Law of Municipal Corporations in British India*, by the late P. Duraiswami Aiyangar, B. A., B. L. Edited by S. Rangaswami Aiyangar, B. A., B. L. and P. Chakrapani Aiyangar, B. A., B. L. Published by P. Chakrapani Aiyangar. Rs. 20.

The volume before us is the Second Edition of the work on the Law of Municipal Corporations which was nearly completed at the time of the lamented death of its talented author, the late Mr. Duraiswami Aiyangar. The work

will always stand as a monument of contemporary legal writings, evidencing the painstaking assiduity and genius of its author. English and Indian Law Reports and American authorities have been ransacked to provide the fundamental principles on the subject, and these, with the strong nervous style of the author, has combined to make the book the most lucid and comprehensive work on the subject.

The subject of Local Self-Government has received considerable impetus since the advent of the Reforms and it is necessary that the large mass of people who are interested as electors or members of corporations or local bodies should have such a work as the present at hand for reference and guidance. It is needed by every Municipal and local body and members thereof, by landlords, and those engaging in trade which are in constant conflict with Municipal bodies. It is needed in every Court, Bar Library and ought to be in the hands of every lawyer who wishes to specialise in the subject. The power of the Court to issue writs of mandamus has not yet been made use of in this province in connection with the performance of municipal duties. As the scope of the writ is more understood it will no doubt be applied for to secure the performance of public duties. The present work contains nearly all there is to be said on the subject.

The Chapters on Town Planning and Education have been written by the Editors of the present Edition. The printing and get up of the book is excellent and has been done at the press of our learned contemporary, the *Madras Law Journal*, which is a guarantee for accuracy and finish. We hope the profession will avail itself of the opportunity to obtain copies of the present Edition before it is sold out.

*The Indian Succession Act, 1865*, by M. C. Majumdar. Edited by M. Krishnamachariar, M. A., M. L., Ph. D.

(Messrs. R. Cambray & Co., Law Publishers, Calcutta and Madras.)

This comprehensive commentary on the Indian Succession Act, 1865, is the completed posthumous work of the late Mr. M. C. Majumdar and has been brought up to date, before publication, by the Editor Mr. M. Krishnamachariar. We cordially welcome this book firstly because the available works do not deal exhaustively with this vast subject; and secondly, because it is the most complete work of the kind that we have seen. The arrangement under the various sections are most systematic and the sub-titles have been selected with great care. First of all there is a list of the sub-titles, and next the "Scope of the section," then come the commentaries themselves under the various sub-titles, which are exceedingly well written and are supported by authority throughout. The work in our opinion may justly occupy the same position in India as "Williams on Executors" at Home and should be in every library. The author has consulted every available English authority and the research involved in the writing of the commentaries must have been enormous. There are also appendices containing the text of the Hindu Wills Act, The Parsi Intestate Succession Act, The District Delegates Act, The Legal Representatives Suits Act and the Fatal Accidents Act, and though the entire work runs into considerably more than 1000 pages, yet, owing to the Publisher's selection of a light though durable paper, weighs not more than one-third of many books of its size—a great advantage as it enables a practitioner to use the book in Court.

We consider the book will be of immense use to the practitioner not only for practical purposes but as a storehouse of legal principles and precedents on the subject. We congratulate Messrs. Cambray & Co. on the printing and binding and their enterprise in bringing out such a valuable and useful work.

*The Trial of Adolph Beck* (Notable British Trials Series), by Eric Watson, LL. B. (Messrs. Butterworth & Co., Ltd., London and Calcutta.)

The astounding case of Adolph Beck who was charged in 1895 and convicted of defrauding several women of jewellery and petty larceny and sentenced to seven years' penal servitude and who was again charged in 1904 for similar offences and was convicted but released before sentence, is here set forth. The case furnishes one of the most extraordinary instances of mistaken identity which was supported by evidence of an handwriting expert.

A series of frauds upon women was perpetrated in 1877, the work of a person who was convicted under the name of Wyatt *alias* Smith. In 1894-95 similar frauds were committed and from the testimony of several women who were the victims, Beck was identified and charged. The instructions to Counsel for the Crown were that the frauds were similar to those of 1877 and the handwriting of the letters in the 1895 case was the same as in the 1875 case, and that the prisoner Beck was identical with Smith. The Crown laid an indictment for misdemeanour on 12 counts in which case the previous conviction could not be gone into. There were also four felony indictments laid. Counsel for the defence unsuccessfully tried to plead that the handwriting of the letters evidencing the frauds of 1877 (which were in Court but were not produced by the prosecution) was the same as the documentary evidence produced in the case, and insisted upon one of the four felony indictments being tried, which would have enabled him to put the question of non-identity in issue and thus to have raised pleas exonerating Beck. The Crown entered a *noble prosequi* on the four felony indictments and the question of non-identity became irrelevant and Counsel's objection was thus overruled. Beck was convicted on the evidence of identification the charges being limited

to the 1895 frauds on the misdemeanour indictment, and sentenced to seven years' penal servitude.

The re-arrest of Beck for similar frauds in 1904, his trial and conviction and release; the arrest of Smith in 1904 and the public enquiry which followed the free pardon granted to Beck and the compensation of 5,000 pounds sterling awarded by the Crown are fully set out.

The book contains the record of the trial, the addresses of Counsel and the

proceedings of the Committee appointed by the Home Office, and should be read by every lawyer as the leading case on mistaken identity. We congratulate Messrs. Butterworth & Co., Ltd., on the excellent style and production of the book and the portraits of the parties and the very clear reproductions of the specimens of handwriting. The compilation is a worthy addition to the Library of Notable British Trials and may be expected to form a permanent adjunct to every library.



*A significant point with respect to these two letters is that they are type written on paper of the same size and quality as Ex J, the entire method of typing, including the datiny, is also similar.*

There is no such letter on the file addressed to the agents of the Yorkshire Company, but in all probability one was sent to them as well.

Exhibits U, Z and DD are fire or loss claims on the three companies, signed and forwarded by Po Hmyin. They are on printed forms and all contain a declaration to the effect that 75,040 baskets of paddy, valued at Rs. 1,72,558 were destroyed or damaged by the fire which consumed the mill.

These declarations formed the basis of three charges of attempted cheating against Po Hmyin, the case for the prosecution being that the declarations were false. The 2nd appellant was charged with abetment of the three offences. Both were convicted and sentenced to suffer two years' rigorous imprisonment on each charge, the sentences to run concurrently. Both appeal.

The first point taken is one of law, viz. that even assuming the falsity of the declaration, there was no "attempt" as contemplated by section 511, Indian Penal Code. That section provides that whoever attempts to commit an offence and in such attempt *does any act towards the commission of the offence* shall be punished. It has been judicially held that a mere act of preparation for the commission of an offence is not such an act towards its commission as amounts to an attempt. Learned Counsel contends that Po Hmyin's acts in this case did not amount to more than preparation for an attempt to cheat.

Whether any given act or series of acts amounts to an attempt of which the law will take notice, or merely to preparation, is a question of fact in each case; *In the matter of R. Mac Crea...*(1)

In the same case, Knox J. said "It is no doubt most difficult to frame a satisfactory and exhaustive definition which shall lay down for all cases where preparation to commit an offence ends and where attempt to commit that offence begins. The question is not one of mere proximity in time or place. Many offences can easily be conceived where with all necessary preparations made, a long interval will still elapse between the hour when the attempt to commit the offence commences and the hour when it is completed. The offence of cheating and inducing delivery is an offence in point. The time that may elapse between the moment when the preparations made for committing the fraud are brought to bear upon the mind of the person to be deceived and the moment when he yields to the deception practised upon him may be a very considerable interval of time. There may be the interposition of inquiries and other acts upon his part. The acts whereby those preparations may be brought to bear upon the mind may be several in point of number, and yet the first act after preparation completed will, if criminal in itself, be beyond all doubt, equally an attempt with the ninety and nine acts of the series."

These weighty and apposite observations exactly fit the case before me. It is urged that the act of Po Hmyin in approaching the insurance companies with his claim represented only and another stage in his

(1) 15 A. 173.

preparation to cheat them and that the real attempt would have begun when, the companies having called upon him to produce his evidence in support of his claim, he proceeded to do so.

In support of this contention Counsel points out that insured persons who have suffered loss or damage by fire often put forward exaggerated or inflated claims, that insurance companies do not admit such claims forthwith but invariably institute inquiries with a view to assessing the damage, and that therefore an attempt to deceive them does not take place until false testimony in support of the claim is adduced.

This argument would, I have little doubt, carry considerable weight in cases where the insured has merely over-valued his property in his claim. But the allegation in the present case was not that the claimant had grossly misrepresented the value of his stock in the mill, but that his statement as to the quantity of paddy he had stocked before the fire was false. According to him, he had 75,040 baskets; according to the prosecution he could not possibly have had one-fifth of that quantity, since the mill godown could not contain much more. Hence if the Crown had succeeded in establishing its case, Po Hmyin, when he presented his claims to the insurance companies, made a deliberately false statement. This was an act done in pursuance of the preparations he had made for committing a fraud and it was an act which was brought to bear upon the mind of the persons to be deceived. The appellant might have held back after he had sent Exhibits V and Y, the notices regarding the fire; the sending of these notices was another act of preparation. But when he followed up these notices with the actual claim papers, he, in my view, definitely "crossed the Rubicon" and committed himself to a representation of fact which, if proved to be false to his knowledge, must be regarded as an overt act towards the commission of the offence of cheating, an act which had gone beyond the stage of preparation.

I hold, therefore, provided the necessary facts are established, that Po Hmyin attempted to cheat the insurance companies.

As to the facts, one of the outstanding features of the case, one which was strongly relied upon by the appellants, was the assessor's report when the claim papers were presented. The companies acting in consultation, appointed an assessor to proceed to the scene of the fire and to report on the loss caused. He did so and his firm submitted the report, Exhibit O, which contains the following passage;—"On our arrival there we found the mill and godowns completely gutted and the paddy still blazing. The paddy was in three different piles and in our opinion must have been well over 65,000 baskets." There is also a quotation from the owners' "Stock Book" showing a total of 75,040 baskets, which the assessor valued at Rs. 1,58,632.

I am unable to place any reliance on this report. The evidence shows that the inquiry, if it can be called an inquiry was most perfunctory, and it is more than probable that the assessor's estimate of the quantity of burnt and burning paddy was based very largely on what he saw in the Stock Book. In any case, the estimate was that of a person who, I cannot, on the evidence, regard as an expert. He does not give any satisfactory explanation as to how he arrived at his figure. He took no measurements himself, either of the heaps of burning paddy or

of the godowns, the outlines of which he saw, and he made no notes of what he observed. Only two hours were spent at the place; part of this was taken up in making inquiries as to the origin of the fire.

The most important point is in connection with the godowns, of which there were three. The 2nd appellant admitted that he had handed a ground plan of the mill buildings to Messrs Gillanders Arbuthnot at or about the time he insured them, and Mr. Griggs of that firm deposed that Exhibit A is the plan. Tun Aung denied it but I see no reason to disbelieve the witness, who is in no way interested, seeing that the cover notes for the mill were cancelled before the fire. This plan shows two godowns, each measuring 50 feet by 10 feet, and a third measuring 61 feet by 35 1/2 feet. Elevations are not given, but the evidence establishes the fact that the godowns were not more than 12 feet high, while the two smaller ones sloped down to 9 feet. Taking these measurements and judging by the estimates given by Mr. Thon, an engineer of Messrs Steel Brothers and Company who has had long experience of mill godowns, the capacity of the Impalwe godowns could not have been much more than 15,000 baskets. There is a considerable body of evidence in support of this estimate, the most notable of the witnesses being Po Hlaing and Ba Gyaw, the former owners of the mill. They both swear that the two small godowns could not hold more than 3,000 baskets each, and in this they are corroborated by others. As to the large godown, the most liberal estimate places it at 10,500 baskets.

We have it then that the three godowns, when full, were capable of holding some 15 or 16 thousand baskets of paddy. Of these there were at least 4,000 baskets belonging to various small traders, thus leaving some 12 thousand as Po Hmyin's as compared with his claim of 75 thousand.

The latter figure appears, it is true, in Po Hmyin's Stock Book, but there is no entry in this of the place where the paddy was stored, and since Po Hmyin is a resident of Daiku, which is far away from Impalwe, it is more than possible that a large portion of his stock was at the former place. Be that as it may, I am unable in the face of the conclusive evidence as to the size of the godowns, to accept the statement that such a large quantity of paddy was stored in a small out of the way mill.

For the same reason I must reject the evidence for the defence relating to alleged extensive purchases of paddy made by Po Hmyin. Rebutting evidence has been adduced to show the falsity of much of this defence evidence, but in the circumstances, it is in my view, unnecessary to consider it.

I should mention here that the defence at a very late hour deputed a surveyor to prepare a plan of the mill buildings; this was done in January 1923, about 9 months after the fire and no weight can be attached to it.

On the evidence I hold it fully proved that Po Hmyin had less than 15,000 baskets of paddy at the mill when the fire took place and that he must have known this. His declaration that he had 75,949 baskets was therefore deliberately false and I must confirm the convictions.

The 2nd appellant was held guilty of abetment in that he (1) let Po Hmyin use his mill for storing paddy (2) lent him his cover notes on the mill, (3) stated to witnesses that 75,000 baskets of Po Hmyin's

paddy were in the mill when it was burnt, and (4) stocked 'kauk-hmaw' (refuse) in the godowns and pretended it was paddy. Of these points, it is unnecessary to deal with any besides the third. It is quite clear that Tun Aung told several persons that Po Hmyin had stored 75,000 baskets and to the police he said (when reporting the fire)—“over 68,000 and about 70,000” knowing the capacity of his godown as he must have done, it must be held that he also was stating what he knew to be false. Remembering also the remarkable similarity between Ex. J. and V and Y, as pointed out above, I am irresistibly led to the conclusion that he engaged with Po Hmyin in a conspiracy to cheat the insurance companies; and since an act (i.e. the making of the claim by Po Hmyin) took place in pursuance of the conspiracy and in order to the cheating, he was guilty of abetment under the second clause of section 107. The convictions in his case also will therefore be confirmed.

As to the sentences, the claim was an impudent one for a very large sum of money and there can be no doubt that a substantial sentence of imprisonment was called for. I have been asked to consider the facts that the appellants were for a long time under trial that they have suffered mentally, and that they have incurred much expense; they were, however, on bail during the trial and these sufferings were brought on themselves by their own act.

At the same time, I take into consideration the circumstance that this appears to be the first prosecution of its kind, at least in this province, and the fact that the appellants belong to a class of society to whom even a short term of rigorous imprisonment would be a severe deterrent.

In the case of each appellant therefore I reduce the sentence on each charge to one year's rigorous imprisonment, the sentences to run concurrently.

The appellants will be called upon to surrender to their bail and will be recommitted to prison,

*de Glanville*—For appellant.

*The Government Advocate*—For the Crown.

*Appeal dismissed.*

Present:—HEALD &amp; LENTAIGNE J.J.

* U Po San, Mg. Saw Myaing	..	<i>Appellants.</i>
	<i>vs.</i>	
Ma Ngwe Hnit	..	<i>Respondent.</i>

*Arbitrator—Payment of money into hands of arbitrator to satisfy award—Misappropriation by arbitrator—Execution of decree—refusal of executing Court to recognise payment.*

An arbitrator as such is not such an officer of the Court as is authorised to receive on behalf of the Court deposits of money made by parties. A payment of the amount awarded made to him for deposit in Court does not operate as a payment into Court.

Judgment, 18th December 1923.

*Per HEALD J.*—This is an appeal against an order for the sale of a rice mill in execution of a decree passed in terms of an award of three arbitrators appointed by court in pending litigation. The decree was passed on the 29th September 1922. The decree holder, who is the present respondent, applied for its execution on the 24th October 1922. On the 13th February 1923 the 1st appellant judgment-debtor applied for stay of execution on the sole ground that there was a pending appeal against a mortgage decree on the said rice mill, the result of which appeal would affect the execution proceedings. The Lower Court therefore ordered the sale of the mill subject to the mortgage decree.

There are several grounds set out in the memorandum of appeal, but they fall under only two heads, namely, (1) that the order for the sale subject to the mortgage decree should not have been made while the appeal against the mortgage decree was still pending and (2) that the judgment-debtors had already paid the decretal amount Rs. 16,000 to one of the arbitrators Mg. Ba Thaw, for payment into Court, and an enquiry should have been held into the matter and Mg. Ba Thaw called upon to deposit the amount in Court.

The appeal against the mortgage decree has been dismissed, and the mortgage decree on the mill stands. The first ground therefore fails.

The second ground was never raised by the judgment debtors in the Lower Court. It has been raised for the first time in this appeal. It is argued that Mg. Ba Thaw as an arbitrator was an officer of the court and an enquiry should therefore be held into the alleged payment of the decretal amount to him. This payment was according to the appellants' own case made to Mg. Ba Thaw to be deposited in court and he never did so. It was neither a payment into court nor could it operate as such. An Arbitrator as such does not appear to be such an officer of the court as is authorized to receive on behalf of the court.

\* Civil Misc. Appeal No. 24 of 1923 from the District Court of Myaungmya in Civil Execution No. 37 of 1923.

deposits of money made by the parties. He is appointed to arbitrate on matters in dispute, make his award and file it in court. The affidavit of the 1st appellant does not show when it was that this payment was made to Mg. Ba Thaw. His learned Counsel Mr. Burjorjee stated in the course of his argument that it was made before the 14th July 1922, i.e. before the decree was passed on the award.

There was no deposit in court when the decree was passed. The decree is still subsisting and stands unsatisfied. It should be enforced by execution of the decree. No enquiry is therefore necessary into the alleged payment.

The appeal is dismissed with costs.

*Burjorjee*—For Appellants.

*Appeal dismissed.*

Present:—HEALD AND MAY OUNG J.J.

\* 1. Mg. Po Thet  
2. U. Kumaya

*Appellants.*

*vs.*

Mg. Min Din

*Respondent.*

*Squatter land—Private Zayat—occupation by Methila—oral gift—gift by Methila to phongyi—Subsequent oral gift by phongyi to another phongyi—re-erection of zayat by last phongyi—Invalid as private trust or gift without registered deed.*

Where a Methila or female lay devotee made an oral gift of certain squatter land and private zayat to a phongyi and subsequently renounced her vows and married, and the donee made an oral gift of the same to another phongyi who pulled down the private zayat and put up a new building and lived there.

Held—that the property was not religious property.

Held also—the original transfer failed as a gift for want of a registered deed and equally failed as a private trust for the same reason; but that had the property been religious property the question of a trust created orally might conceivably arise.

*Judgment.*

*4th December 1923.*

MAY OUNG J.—The plaintiff (now Respondent) sues as the surviving husband and sole legal representative of one Ma E Thi, for possession of a piece of land, which the latter had held on a squatter tenure. When she became the registered occupier, Ma E Thi was a *Methila* or female lay devotee. She put up on the land a small residence for herself: this is referred to as a *Zayat*, but this word does not here mean a public rest-house or similar building within the precincts of a monastery or cemetery. For the purpose of this case, the building was an ordinary dwelling house and it did not stand on religious land.

Subsequently, Ma E Thi gave up her vows and married. The couple lived for some time in the *Zayat* and then moved to Kemmendine, leaving Ma E Thi's sister, Ma Shwe Ma, in occupation.

Earlier, it is alleged, Ma E Thi made a gift of the house and site to a monk, who has since left the priesthood, and is now Manng Po Thet, the 1st Defendant. Moug Po Thet in his turn, before he became a layman, is alleged to have made a gift of the same to U Kumaya, the 2nd defendant, who is now in occupation. Recently, U Kumaya dismantled the old building and erected a new one. Hence the suit.

Ma E Thi's original title is unchallenged. Moug Po Thet admitted it. And although U Kumaya did not, he claims through Moug B Thet and urges that Ma E Thi's gift, though it may be invalid as such, is good as a trust.

It is not contended that the alleged gifts are valid. They were obviously not, since no deed was executed.

Hence, Ma E Thi's title subsisted, unless it can be shown that she lost it by her own act, or by lapse of time. As to the latter, it is sufficient to note that "adverse possession" was not pleaded, and it is clear that neither Ma E Thi's nor her legal representative's right was barred.

As to the alleged trust set up here again as there was no deed, there could have been no *valid private* trust and there is nothing to show that Ma E Thi at any time intended to effect a *public* trust. The contention of the defendants was that she made a *poggalika* gift, i.e. a gift to an individual who could thereafter dispose of it as he pleased; and it is significant that Maung Po Thet professed to have the right to give the property to U Kumaya.

Had the property been of a religious nature, some question of a trust might conceivably have arisen, but this was not religious property and the question does not therefore arise.

I see no reason to disturb the finding of the trial court and would therefore dismiss the appeal with costs.

HEALD J.—I concur.

Mr. Chari—For Appellant.

Mr. Halkar—For Respondent.

*Appeal dismissed.*

Present:—YOUNG, OFFG. C.J., MAY OUNG & CARR J.J.\*

* Nang Mun	..	..	Petitioner.
			<i>vs.</i>
Labya Naw	..	..	Respondent.

*Divorce Act (IV of 1869) Section 10—Kachin Christian reverting to Animism after marriage—Living with Shan woman—request to wife to live in same house as lesser wife—indignity as legal cruelty.*

Where a Kachin Christian reverted to Animism after marriage and lived with a Shan woman and refused to let his wife live with him except as a lesser wife under the orders of the Shan woman.

Held—that the conduct of the husband was such as to degrade the wife and subject her to indignity which she could not bear, and amounted to legal cruelty and she was entitled to a divorce upon that ground coupled with adultery.

*Swatman vs. Swatman* 4 S. & T. 135=164 E.R. 1467—followed.

Judgment. 11th December 1923.

*Per* YOUNG OFFG. C. J.—In this reference for confirmation of a decree for divorce the parties are Kachins, and were, as found also by the trial judge, Christians at the time of marriage, though the respondent declares that he reverted to Animism a short time before the marriage.

Yet whatever he has done since, he was shortly before the marriage a Christian and asked to be married according to Christian rites. We think he was a Christian at the time of marriage.

Shortly after his marriage, he left his wife and went to Rangoon to get veterinary training there.

The course lasted three years, presumably till May 1921, and though in the first two years he had one month's holiday in each year, he did not spend it either with his wife or contribute to her support.

At the expiration of the three years, i.e. about May 1921, he returned to Bhamo as a veterinary assistant and soon afterwards proceeded to live with a Shan woman named Ma Tin.

About a year ago the petitioner went and stayed for about 9 days with the respondent and Ma Tin: she however quarrelled with Ma Tin, whereupon she says respondent kicked her and slapped her drawing blood: she however continued to live in the house about 4 days and then finding that she was expected to live as the lesser wife and be under Ma Tin's orders, she left the house for good, being unable to bear the indignity. On these grounds she seeks for a divorce, which the learned judge granted to her on the ground of desertion coupled with the fact that he was a Christian when he married the respondent and that he had since exchanged Christianity for Animism, and was living in adultery with Ma Tin. The desertion prior to her return to her husband if it was an abandonment contrary to her wish, was condoned by her return

\* Civil Reference No. 8 of 1923.

to her husband's house, and though I should be prepared to hold that he had deserted her by refusing to let her live with him unless Ma Tin lived with them as the chief wife, the date of this refusal was only about a year ago therefore there was no desertion for the statutory period of two years.

The adultery is similarly condoned, though I should hold that the offence was revived by the continuance of the relations with Ma Tin, after petitioner left the respondent's house. So far, therefore, the suit is premature. It remains to consider the last of the grounds found by the learned judge, which is, that he had exchanged Christianity for another religion, and also, whether the divorce can be granted on facts not relied on by the trial court. The change of religion is no ground for a divorce: it would be absurd if it were, nor is mere change of religion coupled with adultery a ground of divorce; there has to be a change of religion coupled with the respondent having gone through a form of marriage with some other woman, a clause inserted in consequence of a Madras decision to the effect that a Hindu, who, after his conversion to Christianity and contraction of a Hindu marriage, reverted to Hinduism and re-acquired his rights of polygamy. If the fact that the respondent and Ma Tin lived together openly as husband and wife constitutes marriage amongst Kachins, as it would do if the parties were Burmans, I should be prepared to hold that there was a ground of divorce even though there was no actual marriage form gone through, but I think the decree may be supported on the ground of adultery coupled with cruelty, the cruelty being the refusal to let her live with him and Ma Tin except as a lesser wife under the orders of Ma Tin, an indignity which the petitioner says she could not bear, and so preferred to leave the house. "The court will take into consideration the husband's general conduct towards the wife and if this be of a character tending to degrade her, and subjecting her to a course of annoyance and indignity injurious to her health, will feel itself at liberty to hold the cruelty proved." *Swatman vs. Swatman* (1).

I would confirm the decree.

*Decree confirmed.*

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(1). 4 S. & T. 135=164 E.R. 1467.

## Full Bench.

Present:—YOUNG, OFFG. C.J., HEALD &amp; MAY OUNG J.J.

* Nga Myin	..	..	Petitioner.
		vs.	
King Emperor	..	..	Respondent.

*Evidence Act (Act I of 1872) Section 25—Cr. Pro. Code (Act V of 1898) Section 65—Lower Burma Village Act (Burma Act III of 1889) Upper Burma Village Regulation (XIV of 1887) Lower Burma Village Act (VI of 1907)—Village Headman—whether "Police officer."*

*Per Curiam*—A Village Headman who is clothed with power of arrest of certain offenders under the Lower Burma Village Act 1907 is not a "Police officer" for the purposes of Section 25 of the Evidence Act.

A confession made to a Village Headman is admissible in evidence against the person making the confession.

May Oung J.—Where a Village Headman is shown to have taken an active part in the investigation of an offence in conjunction with the Police a confession alleged to have been made to him in the course of such investigation should be received with the utmost caution.

*Crown vs. Po Hlaing* 1 L.B.R. 65—approved.

Judgment. 12th December 1923.

YOUNG, OFFG. C. J.—I have had the advantage of reading the judgments of my brothers Heald and May Oung in this case and have little to add.

A village headman has very multifarious duties and would seem to be for certain defined purposes, a Civil Judge, a Magistrate, and a Revenue officer, besides having the duties of a health officer. It is now sought to classify him also as a police officer because he is given practically the the same powers of arrest without a warrant as are given to a police officer, but these powers are also given to a Magistrate under the Criminal Procedure Code Section 65, and it is not contended that a Magistrate is a Police Officer. The mere bestowal, therefore, of the same powers cannot constitute the headman a police officer, they would seem rather to be an addition to his magisterial powers, given expressly because he is a magistrate only for certain purposes, and has no power to issue a warrant.

The order appointing him is careful to specify him as a Headman, not as a rural policeman, and I would hold that the mere bestowal of the some powers of arrest as are given to a police officer does not make him a police officer any more than it makes a magistrate a police officer.

A confession, therefore, made to him is not inadmissible in evidence, but the weight to be attached to such will depend on the circumstances of the case and the part he has taken in the elucidation of the crime.

\* Criminal Reference No. 66 of 1923 on order of May Oung J. in Cr. Rev. 416B  
† 1923.

KEALD J.—The question whether a Village Headman is a Police officer, and whether, therefore, proof of a confession made to him is prohibited by section 25 of the Evidence Act has been referred to us as a Full Bench.

The wording of the section itself is clear and unambiguous. It says:—"No confession made to a Police officer shall be proved as against a person accused of any offence." If a Village Headman is a "Police officer" that section prohibits proof of any confession made to him. If he is not a Police officer, that section does not apply. We have therefore to decide merely whether or not a Village Headman is a Police officer.

The ruling which is at present binding on the Courts in Lower Burma is a decision of a Bench of the late Chief Court on a similar reference in the case of the *Crown vs. Po Hlaing*. (1) It seems never to have been suggested in Upper Burma a Village Headman is a Police officer.

The learned judge who made the reference said that the decision of the Bench of the Chief Court was based on the provisions of the Lower Burma Village Act of 1889 and he went on to say—"This statute was however superseded in 1907 by the Burma Act which is now in force, but the question has not apparently been re-examined since that year." He also said that in his opinion it was difficult to avoid the conclusion that a Village Headman is, so far as criminal cases are concerned, a police officer, not in the strict technical sense of the term, but according to its more comprehensive and popular meaning, but that, as the question was not free from doubt it should be reconsidered.

The first point for consideration is whether or not there has been any material alteration in the law since the date of the Chief Court's decision which might affect the decision as to whether or not a Village Headman is a Police officer.

Section 3 of the old Lower Burma Village Act said:—"The Deputy Commissioner shall appoint a Headman in every village. In appointing a Headman the Deputy Commissioner shall have regard so far as circumstances admit, to any established custom which may exist respecting the right of nomination or succession or otherwise, and to claims based thereon."

The corresponding provisions of section 3 of the old Upper Burma Village Regulation (XIV of 1887) were identical except that for the word "village" the words "village or group of villages" were substituted.

The wording of the corresponding section of the present Act which applies to both Upper and Lower Burma is the same, except that "village tract" is substituted for "village" and "village or group of villages."

Section 5 of the Lower Burma Act and Section 5 of the Upper Burma Regulation, which imposed certain duties on Village Headmen in respect of the communication of information to the nearest magistrate, or to the officer in charge of the nearest police station or military post, were identical and are reproduced in section 7 of the present Act, except that the reference to military posts is omitted.

Section 6 of the Lower Burma Act and Section 5 of the Regulation which imposed certain public duties on Village Headmen were identical

(1) 1 L.B.R. 65.

with the exception, that in Upper Burma the Headman was not allowed to allot lands for cultivation, the wording of the Regulation, which was originally identical with that of the Act, having been altered by the omission of two words in 1896.

Section 8 of the present Act, apart from verbal alterations, is similar, except that the reference to "military posts" has been omitted, that provision was made for the supply of carriage or means of transport for a journey of more than 12 hours, that the duty of allotting land whether for cultivation or house building was taken away, and that the duties of regulating the slaughter of cattle and of disarming persons found in possession of prohibited weapons at *pwas* and the power to arrest persons committing offences under section 510 of the Indian Penal Code were added. Under Section 22 of the Lower Burma Act and 8 B of the Regulation, the Local Government was given power to make rules conferring on a headman any power or privilege which may be exercised or are enjoyed by police officers under any enactment for the time being in force.

The rules made under those powers which were in force in Lower and Upper Burma respectively at the time of the Chief Court's decision are contained in Local Government Notification Nos. 337 of 1897 and 283 of 1896. Both these Notifications merely empowered a Village Headmen to search for and arrest any person who was liable to be arrested by a police officer under any of the circumstances mentioned in Section 54 of the Code of Criminal Procedure.

Section 29 of the present Act re-enacted the provisions of Section 22 of the old Act and 8 B of the Regulation, and the rules under the present Act are identical with those under the old enactments.

It seems therefore that the only alteration in the law which could possibly be regarded as affecting the question whether or not a Village Headman is a police officer, is that which gives him the power to arrest a drunken person who is guilty of misconduct either in public or in a place in which he is a trespasser, and I do not think that it could reasonably be argued that such an alteration could convert a Headman into a police officer if he was not a Police Officer before.

But it is possible that the Chief Court's decision that he was not a Policeman under the old law was mistaken and as doubts as to its correctness have been suggested, it is perhaps desirable that the question should be considered afresh.

We have the following facts.

A Headman is a villager chosen by the Deputy Commissioner having regard to custom, right of nomination or succession, to exercise powers and to perform certain duties. He has power to take cognisance of certain minor offences committed within his jurisdiction and to pass certain very light sentences. He can be empowered to try, under certain circumstances, certain civil suits in which the amount in dispute does not exceed Rs. 20/-. He has many public duties connected with the collection of revenue, the maintenance of communications, the protection of his village, sanitation, vital statistics, and the like which have no connection whatever with the police. He has, however, to report to the nearest magistrate or police station certain information affecting the maintenance of order or the prevention of crime, and he has to investigate certain specified offences if they occur in his village tract,

namely murder, culpable homicide not amounting to murder, dacoity, robbery, offences under the Arms Act, and any other offence respecting which the Deputy Commissioner by general or special order, made with the previous sanction of the Commissioner, directs. He is bound to search for and arrest any person whom he has reason to believe to have been concerned in the commission of such an offence and to recover if possible any property taken by such person. He has power to arrest any person found working within the limits of his village tract who cannot give a satisfactory account of himself and any intoxicated person who misconducts himself in public or whilst trespassing. He may also arrest any person who has been concerned in any cognisable offence, or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists of his having been so concerned, any person having in his possession without lawful excuse, the burden of proving which excuse shall be on such person, any implement of house breaking, any person who has been proclaimed as an offender either under the Code of Criminal Procedure or by order of the Local Government: any person in whose possession anything is found which may reasonably be suspected to be stolen property and who may reasonably be suspected of having committed an offence with reference to such thing: any person who obstructs a police-officer while in the execution of his duty, or who has escaped: or attempts to escape, from lawful custody: any person reasonably suspected of being a deserter from His Majesty's Army or Navy or of belonging to His Majesty's Indian Maritime Service and being illegally absent from that service; any person who has been concerned in or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been concerned in, any act committed at any place out of British India, which, if committed in British India, would have been punishable as an offence, and for which he is, under any law relating to extradition or under the Fugitive Offenders Act 1881, or otherwise, liable to be apprehended or detained in custody in British India: any released convict committing a breach of any rule made under section 565, sub-section (3) of the Code of Criminal Procedure and any person for whose arrest a requisition has been received from a police officer, provided that the requisition specifies the person to be arrested and the offence or other cause for which the arrest is to be made and it appears therefore that the person might lawfully be arrested without a warrant by the officer who issued the requisition. He is bound to forward any person arrested by him or made over to his custody together with any weapon or other article likely to be useful as evidence to the nearest Police Station as soon as possible.

It is clear therefore that a Headman has certain powers of arrest which are identical with those possessed by police officers, and he has also duties of investigation in respect of certain offences which are in some respects similar to those of Police officer's, and the question to be decided is whether, because he has those powers and duties, he must be held to be a Police officer.

There can be no doubt that the Legislature when it enacted the Village Act did not regard the Headman as a police officer, since it provided separately in the same section of the Act for the appointment

of a village Headman and the appointment of one or more rural policemen for a village tract. We have not been referred to any rulings later than those which were considered by the learned Judges who decided the question in 1901, and I can find none in the commentaries on section 25 of the Evidence Act. I have considered those rulings and I am not prepared to hold that the decision of the Chief Court was mistaken. To the best of my knowledge and belief a Village Headman is not popularly regarded as a police officer, and he is certainly not so regarded in the Village Act. For over 20 years it has been regarded as settled law in this province that a Village Headman is not a Police Officer and that confessions made to them are not excluded from proof by the provisions of Section 25 of the Evidence Act, and I am not satisfied that that view of the law is mistaken.

I would therefore accept the decision of the Bench of the Chief Court in the case of the *Crown vs. Po Hlaing* as good law, and answer the reference accordingly.

MAY OUNG J.—The case of *Crown vs. Po Hlaing* dealt with a statute in force in Lower Burma and was decided by the Chief Court of Lower Burma, which could not and did not take into consideration conditions prevailing in Upper Burma. The Burma Village Act 1907, was enacted for both parts of the province, and it was therefore necessary to re-consider the ruling in question, more especially because the case out of which this reference arose occurred in Upper Burma. As to the legal position under the Act, I have had the advantage of reading the judgment written by my brother Heald, and I agree that the Village Headman was never intended to be a Police officer. In Lower Burma, he is carefully distinguished from the rural policeman, usually called a ten-house gaung: the latter, it is true, is his subordinate, but this fact in itself does not place the head of the village within the category of a police officer. In Upper Burma, there is no rural policeman, and it seemed to me at first sight that the headman would, of necessity, be called upon to perform the functions of that officer. This does not, however, appear to be the case. Since the hearing, I have referred to the Upper Burma Village Headman's Manual which defines the *ywathugyi's* duties, powers and privileges, and these are identical with those of the same official in Lower Burma. The most important point however, in this connection is the fact that, so far at least as the more important crimes, homicide, dacoity, robbery and so on, are concerned, the headman must not only communicate information to the nearest magistrate, or police station, but must enquire into the offence, search for and arrest any person believed to have been concerned, and recover if possible any property taken by such person.

All this is clearly the work of a Police officer, and experience shows that even after the Police have arrived at the scene of crime, the headman almost invariably forms one of the police party responsible for the investigation of the crime. He is usually an active assistant of the police up to the time the final report is submitted. In these circumstances, I consider that it would be unsafe in such cases to attach much credence to an alleged confession made to a headman and were it not for a consideration which I set forth below, I should strongly be inclined to rule out such a confession altogether. However, it is not

in all criminal cases that the headman acts as if he were a police officer, and all that can be laid down is that where a village headman is shown to have taken an active part in the investigation of an offence in conjunction with the police, a confession alleged to have been made to him in the course of such investigation should be received with the utmost caution.

The consideration which, to my mind, disposes of the matter is one which was not dealt with in *Crown vs. Po Hlaing*, and was not brought out in argument, and it is the fact that the Legislature itself has given a clear indication of its intention in the matter. Section 26, Indian Evidence Act, a cognate section, bars a confession made by any person whilst he is in the custody of a Police officer unless it is made in the immediate presence of a Magistrate. The Explanation, added by Act III of 1891, lays down that the word "Magistrate" in this section does not include the head of a village discharging magisterial functions...in Burma unless such headman is a Magistrate exercising the powers of a Magistrate under the Code of Criminal Procedure.

Here the Village Headman is ruled out as an individual in whose presence a confession can lawfully be made by a person in police custody, but he is thereby clearly distinguished from a police officer, and the legislature evidently did not intend that he should be classed as one.

I therefore concur in the view that a Village Headman in Burma is not a Police officer within the meaning of Section 25, Indian Evidence Act.

*E. Higinbotham*—For the Crown.

PRESENT:—MAY OUNG J.

\* KING EMPEROR .. .. Applicant.,  
 vs.  
 NGA KYAUNG (a) KWIN KYAUNG .. Respondent.

*Opium Law Amendment Act (Burma Act VII of 1909) Section 3—allegation of earning livelihood by unlawful sale of opium—Whether action under Section 3 Burma Habitual Offender's Restriction Act may be taken.*

A person who earns his livelihood wholly or in part by the unlawful sale of opium comes within the purview of Section 3 of the Opium Law Amendment Act and may be dealt with under the provisions of the Burma Habitual Offenders Restriction Act.

*Against order under section 7 Burma Habitual Offenders Restriction Act.*

## REFERENCE.

Reference made by the District Magistrate, Pyapon in his Cr. Rev. No. 338 of 1923 dated 21st December 1923.

In this case the accused was sent up for trial before the Sub-divisional Magistrate, Kyaiklat under section 3 of the Opium Law Amendment Act. It has been proved that accused is a notorious opium trafficker and all the bad characters of the locality of the Mayangwa village resorted to his house and the Sub-divisional Magistrate, Kyaiklat, instead of proceeding against him under that section, ordered the restriction of his movements under section 3 of the Burma Habitual Offenders Restriction Act.

I do not think the Burma Habitual Offenders Restriction Act can be applied in such a case, but whether my view is correct or not a ruling of the High Court would be useful for future guidance and I submit the proceedings for favour of orders.

ORDER.

3rd January 1924.

The respondent, Nga Kyaung, was ordered under section 7, Burma Habitual Offenders' Restriction Act, to reside at Mawlamyaingyun for a period of two years and to report himself once a week at the police station. The ground alleged against him was that he earned a livelihood wholly or in part by the unlawful sale of opium, within the meaning of section 3, Burma Opium Law Amendment Act. Under that section, such a person may be dealt with as nearly as may be as if the information received about him were of the description mentioned in section 110, Code of Criminal Procedure, in other words, such a person may be required by a Magistrate, under the provisions of section 110, to show cause why he should not be ordered to execute a bond for his

\* Cr. Rev. No. 769 B of 1923 1925 of the High Court being review of the order of the Sub-divisional Magistrate of Kyaiklat in Cr. Mis. Case No. 62 of 1923.

good behaviour. In effect, therefore the Legislature added another ground to the six set out in section 110.

Section 3 of the Habitual Offenders' Restriction Act lays down that whenever the provisions of section 110 can be applied, the Magistrate may proceed under the Act.

Holding as I do that the effect of section 3, Opium Law Amendment Act is to introduce an additional ground on which section 110 of the Code can be applied, it follows that the order in the case under consideration was perfectly legal. It is therefore confirmed.

*Order confirmed.*

PRESENT:—LENTAIGNE J.

\* TA PU .. .. . Petitioner.

vs.

KING EMPEROR .. .. . Respondent.

*Criminal Procedure Code (Act V of 1898) Sections 421, 422, 423—  
appeal admitted—bail granted—Order dismissing appeal without notice  
of hearing given to advocate.*

Where a criminal appeal has been filed through an advocate and has been admitted, the appeal must be set down for hearing and notice of date of hearing should be given to the advocate in accordance with sections 421 and 422 Cr. Pro. Code. An order passed on the appeal without notice of the hearing being given to the advocate is invalid.

Once the Court has admitted a criminal appeal its power to dismiss it summarily under Section 421 comes to an end, and Section 421 ceases to apply to the case.

*Against conviction under Section 411 I.P.C.*

#### REFERENCE.

Reference made by U Hla Baw Esq. Sessions Judge of Amherst and Salween Districts in his Cr. Revision No. 179 of 1923 dated 23rd October 1923—

The applicant was convicted by the Township (2nd class) Magistrate of Kawkezeik under section 411 Indian Penal Code and was sentenced to 5 months rigorous imprisonment. He appealed through his counsel to the District Magistrate and the latter dismissed the appeal. The applicant brings this application in revision on the ground that his counsel was never heard on his appeal and that the lower appellate Court erred in law in not complying with the proviso to section 421 Criminal Procedure Code.

Section 421 Criminal Procedure Code enacts that no appeal which is presented by the appellant's pleader shall be dismissed unless the pleader has had a reasonable opportunity of being heard in support of the same.

\* Cr. Revision No. 623 of 1923 of the High Court being review of the order of District Magistrate of Amherst passed in Cr. Appeal No. 77 of 1923.

In the present case it appears from the diary of the District Magistrate's appeal proceedings (No. 77 of 1923) and the affidavit of Mr. Sutherland, counsel for the appellant, that when the appeal was filed on the 7th September Mr. Sutherland only argued for bail but did not then argue the appeal on its merits. The District Magistrate admitted the appeal and granted bail on the 8th September before receiving the record of the case. He dismissed the appeal on the merits. Moreover, no notice was given to the appellant or his pleader of the time and place of hearing the appeal. The District Magistrate has thus contravened the provisions of sections 421 and 422 Criminal Procedure Code. The proceedings are therefore submitted to their Lordships the Judges of the High Court with the recommendation that the Order dismissing the appeal be set aside and the appeal be re-heard.

ORDER.

3rd December 1923.

I have read the record of the Court of Sessions, Amherst and Salween District, in Criminal Revision No. 179 of 1923 of that Court and I have referred to the proceedings of the District Magistrate Amherst in his Criminal Appeal No. 77 of 1923. The facts appear to be correctly stated in the order of the Sessions Judge dated the 23rd October 1923.

Mr. Sutherland as Advocate for the appellant Ta Pu filed in the Court of the District Magistrate a petition of appeal against a conviction and sentence to 5 months R. I. under section 411 I.P.C. passed by the Township Magistrate of Kawkerik. The District Magistrate heard Mr. Sutherland on the 7th September and then passed an order in the diary admitting the appeal but deferring his order as to bail until he had read the judgment. On the 8th September the District Magistrate passed an order in the diary allowing bail. On the 15th September the District Magistrate wrote an unnecessary Order, headed "Preliminary Order," in which he apparently discussed the facts as they struck him on his perusal of the judgment and record and then ended with the remark—"It seems fairly clear that Ebrahim and Appellant were working together all along to effect this sale and the alleged sale by Ebrahim to appellant must be taken very much *cum grano*. The case in which Ebrahim was convicted must be called for and put up before I can pass my final orders."

On the 24th September the District Magistrate wrote a short order below his previous preliminary Order of the 15th and stating that he had read the connected case, and then stated *inter alia* that he saw no reason to change his opinion and he dismissed the appeal.

Mr. Sutherland then filed an application for revision of this order before the Sessions Court and that Court has forwarded the proceedings to this Court with a recommendation that the order of the District Magistrate be set aside and the appeal be re-heard. Mr. Sutherland when applying for revision to the Sessions Court, filed his own affidavit stating that at the time of filing the appeal before the District Magistrate on the 7th September, he only argued his 3rd ground for the purpose of getting bail, that he had not argued the appeal on the merits, that the District Magistrate did not hear him on the merits since the 7th September. This affidavit confirms the fact apparent on the record

that the case had never been put in the list for hearing after the admission of the appeal, and that the Magistrate had not given the Appellant's Advocate any notice of any date fixed for hearing or any opportunity of being heard after the admission of the appeal.

The procedure of the District Magistrate was illegal under section 421 as well as under section 422 and also under section 423 of the Criminal Procedure Code.

Under Section 421 the District Magistrate had no power to dismiss the appeal without hearing the advocate for the appellant and such hearing should have been on all points. When the Magistrate admitted the appeal, it became unnecessary for the Advocate to address him further, so that the argument could not be deemed to have been complete. Moreover, once the appeal is admitted, the power of the District Magistrate to dismiss the appeal summarily under Section 421 came to an end and section 421 ceases to apply to the case.

The provisions of Section 422 then become mandatory, and it is the duty of the Court *inter alia* to cause notice to be given to the appellant or his pleader of the time and place at which such appeal will be heard. Under such circumstances Section 423 also applies and only confers the power to dismiss the appeal after hearing the appellant, or his pleader if he appears, and the public prosecutor if he appears, besides perusing the record.

The District Magistrate has ignored these provisions and after first admitting the appeal, has dismissed this appeal without giving the necessary notice to the Advocate and without hearing the Advocate. These irregularities are very serious irregularities which render the dismissal order invalid.

For the above reasons I set aside the orders of the District Magistrate dismissing the appeal and I direct that the records be at once returned to the Court of the District Magistrate of Amherst, and I further direct that that Court shall at once re-admit the appeal and issue the necessary notices under Section 422 of the Criminal Procedure Code, and hear the Advocate for the appellant if he appears, and comply with the other provisions of section 422 before disposing of the appeal and passing any order on the merits of the appeal.

*Rehearing ordered*

PRESENT:—YOUNG J.

\* MAUNG PO GYI .. Appellant.  
*vs.*  
 MAUNG PO SAING AND OTHERS .. Respondents.

*Buddhist Law—Pre-emption—Applicability of law of Pre-emption to sales of undivided property before partition.*

The Buddhist law of pre-emption applies to a sale by a co-heir of his share in undivided ancestral estate.

The decision in *Ye Nan O vs. Aung Myat San* (8 L.B.R. 466) does not alter the rule laid down in *Mo Thi vs. Tha Kwe* (4 L.B.R. 128) that the law of pre-emption applies to sale by co-heirs before partition.

*Mo Thi vs. Tha Kwe*, 4 L.B.R. 128.

*Ye Nan O & one vs. Aung Myat San*, 8 L.B.R. 466—referred to and explained.

Judgment. 3rd January 1924.

This was a suit for a right of pre-emption in respect of a piece of land which originally belonged to the 1st defendant Ma Hmu and her deceased husband Maung Shwe Kye, and was sold by her after his death and the sole question argued before this Court was whether the lower courts were right in holding that a right of pre-emption existed in favour of Maung Po Saing and Maung Sin U, the sons of Ma Hmu's deceased husband U Shwe Kye by a former marriage.

In *Mo Thi & one vs. Tha Kwe* (1) it was held that the rule regarding the right of a Buddhist widow to dispose of family property after her husband's death, viz., that she has an absolute right of disposal over her own share and a life interest in the remainder does not affect, but is subject to, the general rule regarding the right of all co-heirs to pre-emption, and that therefore Thwa Kwe had a right of pre-emption over the whole property. This case is recited in the head-note to the Full Bench case of *Ye Nan O & one vs. Aung Myat San* (2) as having been dissented from and Ormond J. in his judgment in the latter case states, that the case decided that when a widow after partition sold her share to a stranger, her son had the right of pre-emption as to the whole. If this is correct *Ye Nan O's* case certainly over-ruled that of *Mo Thi's* case so far as the question of the rights to pre-emption after partition is concerned, but from the judgment I am unable to see that there was anything about partition in the case, and in any event the case was only overruled so far as concerned the rights to pre-emption after partition and did not touch the authority of the case for the proposition laid down in the head-note and we have

\* Civil 2nd Appeal No. 28 of 1923 of the High Court from the decree of the District Court of Tharrawaddy in C.A. No. 59 of 1922.

(1) 4 L.B.R. 128.

(2) 8 L.B.R. 466.

not to travel farther than *Ye Nan O's* case itself to see that pre-emption in the case of co-heirs is recognised before, though not after partition: Fox C.J. citing with approval the view of the law laid down in *Sparks Code* that if a person wish to sell his share in an undivided ancestral estate, he should first offer it to all the co-heirs.

It is admitted by learned counsel for the appellants that Maung Po Saing and Maung Sein U are co-heirs and it is not contended that there has been any partition, it follows therefore on the authority of *Mo Thi's* case and *Sparks' Code* that Ma Hmu should not have sold the whole or any portion of the undivided family property without offering it first to them and that the appeal must be dismissed.

*Maung Lat*—For Appellant.

*Thein Maung*—For Respondents.

*Appeal dismissed.*

PRESENT:—HEALD & MAY OUNG J.J.

\* AHMED MOOLLA DAWOOD AND ONE *Appellants.*

*vs.*

S.R.M.M.C.T. PERELNAN CHETTY FIRM *Respondent.*

*Forged cheque—payment by Banker—whether banker liable for loss—negligence of customer.*

Where a Banker honours a forged cheque he must bear the loss unless he can prove negligence on the part of his customer, which negligence must be in or intimately connected with the transaction itself and must have been the proximate cause of the loss.

L.R. (1918) Appeal Cases 777. L.R. (1906) H.L.C. 559.—referred to.

*Kepettigalla Rubber Estates Ltd. vs. The National Bank of India Ltd.* (1909) 2 K.B.D. 1010. *Punjab National Bank Ltd. vs. The Mercantile Bank of India Ltd.* 36 B 455. *Governor and Company of the Bank of Ireland vs. The Trustees of Evans' Charities in Ireland* (1855) 5 H.L.C. 389—followed.

Judgment.

7th January 1924.

*Per HEALD J.*—Appellants, who are executors of Yacoob Abdul Gunny's estate sued respondents, a firm of Chetty brokers to recover Rs. 3,741-9-9 which they alleged to be the amount standing to Yacoob Abdul Gunny's credit of his account with respondents. They said that a cheque for Rs. 7500, with which respondents claim to debit the account was a forgery.

Respondents denied that the cheque was a forgery and said that the amount standing to Yacoob Abdul Gunny's credit was only Rs. 241-9-9 which amount they paid into court.

\* Civil First Appeal No. 26 of 1923 from the decree of the Original Side of the Court in C.R. No. 677 of 1921.

The learned Judge on the Original Side found that appellant failed to prove that the cheque was a forgery and gave them a decree for Rs. 241-9-9 only, allowing special costs against them.

The appellants appeal on the ground that they succeeded in proving that the cheque was a forgery and that respondents were negligent in cashing it.

On the first of these grounds we may say at once that we are of opinion that the cheque was in fact a forgery, it was torn out together with the counterfoil and apparently also with the next following cheque and counterfoil from the end of appellant's cheque book. We have examined the signature carefully comparing it with the large number of undoubted signatures of Lodhia which are on the record and we find that it bears all the marks of a forgery. The loop in the middle of the initial "H" the upstroke of the initial "V" the break between the "v" and "l" the break in the upstroke of the letter "d"; the break between that letter and the following letter "h", all these peculiarities distinguish it from the genuine signatures of H. K. Lodhia which are all written with a break from the last stroke of the "h" to the finish of the penultimate "writing" and they are all in our opinion indications of efforts in effecting the forgery. The spelling of the word "hundred" does not occur in any of the genuine cheques and although the body of the cheques may usually have been filled in by a clerk and not by Lodhia himself the difference indicates that the cheque was not written up by the usual clerk, or in the usual manner, renders it probable that the forger was an Indian, since the short "u" sound in English is written by Indians with an "a".

We therefore find that the cheque which respondents cashed was a forgery and we have to consider whether they or appellants must bear the loss.

There are divergences of opinion between The House of Lords (1) and the Privy Council (2) as to the extent of a customer's duty to his banker, but it seems to be well settled that before a banker can debit his customer's account with the amount of a forged cheque he must prove negligence on the part of his customer which was intimately connected with the drawing or encashment of the cheque which was the proximate cause of the loss.

In the case of the *Kepittigalla Rubber Estates Limited vs. The National Bank of India Limited* (3) in which the facts were similar to those of the present case, it was said that in order to make the customer liable for the loss the neglect on his part must be in or intimately connected with the transaction itself and must have been the proximate cause of the loss, and it was suggested that there was no authority for the proposition that beyond the care which must be taken in the transaction itself a customer must in the course of carrying on his business take reasonable precautions to prevent his servants from forging his signature.

(1) L.R. (1918) A.C. 777.

(2) L.R. (1906) H.L.C. 559.

(3) (1909) 2 K.B.D. 1010.

In the case of the *Punjab National Bank Limited vs. The Mercantile Bank of India Limited* (4) the manager of the former Bank used to leave the Accountant with blank drafts and blank letters of advice ready signed by him for use as occasion required and the Accountant filled up these documents fraudulently with the result that the Mercantile Bank cashed certain drafts, it was held that it was not incumbent on the customer to contemplate the perpetration of such a crime as a forgery or theft and that the negligent act of the Manager was not the proximate cause of the draft being cashed, and it was decided that the Mercantile Bank must bear the loss.

In the case of the *Governor and Company of the Bank of Ireland vs. The Trustees of Evans' Charities in Ireland* (5) the House of Lords says: "If a man who loses his cheque book or neglects to lock the desk in which it was kept and a servant or stranger should take it up it is impossible in our opinion to contend the banker paying his forged cheque would be expected to charge his customer with that payment."

We are of opinion that the principle laid down in this case is sufficient for the disposal of this appeal. All that was alleged against appellants on the score of negligence was that they or their agent were negligent in the custody of their cheque book and of their rubber stamps which were used on their cheques. Even if that were proved it would not, on the authorities which we have cited, be sufficient to charge appellants with the loss which resulted from the forgery of a cheque stolen from their cheque book and the fraudulent use of their stamps. There can in our opinion be no doubt that the cheque in this case was so stolen and forged, and as the respondents cashed the forged cheque and have not been able to establish such negligence as would in law render appellants liable, they must bear the loss.

We therefore set aside the judgment and decree in the suit and give judgment for appellants for the amount claimed, namely Rs. 3,741-9-9 with interest at the court rate on the full amount up to date and the payment of Rs. 241-0-9 into court and thereafter on the balance, namely, Rs. 3,500 up to date of payment with costs on Rs. 3,500 for appellants in both courts.

*Cowanjee*—For Appellants.

*Leach*—For Respondents.

*Appeal allowed.*

(4) 36 B. 455.

(5) 5 (1855) H.L.C. 389.

### The Law's Delays.

THE Government of India has passed a resolution appointing a committee to enquire into the question of the delay in the disposal of Civil suits civil revisions and other litigation and with a view to ascertain and report as to what changes should be made so as to provide for the more speedy and economical disposal of the business transacted in the courts. Remarks have been frequently made by the Privy Council as to the long delays attending civil litigation in India. We, in this province are more fortunately situated with the speeding up of the different departments in our own High Court. It is possible for an ordinary appeal, where the translation work is not heavy and the record is not too big to come on for hearing within 4 to 5 months from the filing of an appeal. We think that the principal delay so far as our High Court is concerned, consists in the time taken up in translating vernacular documents for the record and the time expended in making inspection of the record and also of the paying in of translation fees. It is impossible for Counsel when filing the appeal to estimate the cost of translations as the appellants in most cases only supply copies of the judgments appealed from and Counsel have no means of knowing what part of the record is in the vernacular. And even after translation estimates are served on Counsel there is the long drawn out delay of communicating with the client who is often in some remote hamlet with which postal communication is difficult and uncertain, resulting in delay in payment of translation fees. Occasionally also delays occur through applications made by Practitioners who are not ready to go on with their appellate work.

We think some of these delays may be obviated if the learned Judges of the court were to see fit to adopt the following suggestions:—

(1) All proceedings in the lower court should be written in English.

(2) All documents filed in the lower court should as far as possible be translated when filed.

This will greatly facilitate the work of the translators in the High Court and expedite the hearing.

With regard to adjournments, it is matter for regret that these are usually applied for by certain members of the Bar who take up more work than they can conveniently handle at a very low rate of fees. In this way the excuse is always made that they are "boxed up" somewhere else and cannot attend. It is a time-honoured tradition of the Bar that where a practitioner's services are much sought after by the public, his fees ought to be raised so that his work might be reduced and the deficiency made up by taking up less work of a more paying character. We regret to see that this tradition has been ignored. If Practitioners will persist in accepting reduced fees for appeals when the labour involved justifies a fee of three or four times the amount charged, they have only themselves to blame if they are not ready to appear when the case is posted on the list. Exceptions may be allowed for when all one's work is suddenly listed for hearing. In such a case the Registrar should have power to put some of the cases out of the list.

There is one method, which, if adopted, we venture to suggest would be the means of not only saving judicial time very considerably but will also save the time of the Bar as well. It is usual when there is a long list of cases on the board for counsel to attend and await their turn. Counsel may have very important business elsewhere and they are obliged to attend a particular court for the purpose of a particular case. Why should not a system of written arguments be allowed in the case of Civil 2nd appeals and Civil Revisions on the appellate side which will do away with the necessity for personal attendance?

The plan which we would suggest is that after appearance has been entered and the translations have been completed, a certain time should be fixed for counsel for the appellant to write and send in his argument. Counsel for the respondent should then be required within a time to be fixed, to give in a written reply, and further time allowed for counsel for the appellant to put in a rejoinder if necessary.

This, we think, would save a considerable amount of time that just now is unnecessarily taken up in counsel having to attend in courts and in addressing the court. No speech however well made can

take the place of careful writing and if the practice of filing written arguments were adopted the judge who is to decide the case would decide it on the arguments before him at the time of writing the judgment and not upon a mere fragment of that argument after arguments have been delivered. The judge will peruse the record and pass judgment in Chambers and the case would then be posted on the list. If it were specially desired to speak to the minutes of the judgment, there would be a hearing in Court. We think that if this method were adopted in all single judge civil appeals and revisions it would save the time of the Bar and enable them to attend to the multifarious duties common to the profession and no adjournments need be asked for.

In the case of Criminal Appeals Criminal Revisions and Criminal Applications we do not advocate this system. The existing system may be advantageously continued. So far as Original Side cases are concerned we consider that pleadings ought to be considerably shortened. Prolixity of pleadings is made the occasion for useless contention. The more petty and niggling the objections made the more the client swells with pride and satisfaction—pride that he has given his adversary trouble and satisfaction that he is getting full value from his lawyer.

Quite apart from this the rules as to pleading should be modified so as to admit of shortening them. Where is the sense, for instance, of putting in a clause "the cause of action arose on—at Rangoon and this Court has jurisdiction"? Surely the pleadings will have already shown that. Then why should not the last parafo the plaint be modified or omitted altogether? In most cases other paras of a pleading might very well be cut down thus, "The plaintiff's claim is for rupees 5000 for work done particulars of which are herewith attached," or "The plaintiff's claim is for rupees 5,000/- due to him on a promissory note dated (copy of which is herewith attached) and for interest thereon as per account herewith." The verification should be omitted altogether and counsel might sign all pleadings themselves as is done in England. A schedule of forms of short pleadings might be drafted and added to the Civil Procedure Code. We might also with advantage adopt the short procedure of

dealing with most cases by Originating Summons.

Then, a great deal of time is wasted by process servers. They cannot possibly get through the work of service and clients have considerable trouble in making appointments with them. The Registrar's time is wasted by hearing cases put on time after time on the list, the clerks are needlessly kept busy making entries in the diary and counsel have to attend every now and then to keep abreast of their work when they ought to be devoting that time to study of cases which are getting ripe for hearing. To obviate delay the system of serving summonses and notices of motion obtaining in England by a Lawyer's clerk (or say by a third grade pleader) might with advantage be adopted. The practice in England is that process except warrants are served by the clerk of the solicitor concerned and an affidavit of service is filed. This is the established practice in the Madras High Court for service of notices of motion and judge's summonses to attend in Chambers. A motion is very often brought on after giving 3 clear days' notice from date of service and delay is thus avoided.

These are a few of the ways in which the work in our Courts may be expedited. Other means will doubtless occur to members of the Bar.

### New Criminal Procedure Code

*High Court Circular No. 1 of 1924 dated 4th January 1924.*

The following circular has been drafted by Mr. Justice May Oung and approved by the Chief Justice and the Hon'ble Judges of the High Court of Judicature at Rangoon, for the purpose of making clear the effect of the amendments to the Criminal Procedure Code which came into force on the 1st September 1923:—

To All Sessions Judges and Magistrates.

The recent amendments of the Code of Criminal Procedure, 1898, came into force on the 1st September 1923.

The amending Acts are:—

The Criminal Procedure Code Amendment Act, XVIII of 1923.

The Criminal Procedure (Second Amendment) Act, XXXVII of 1923.

The Criminal Procedure (Further Amendment) Act XXXV of 1923.

The Criminal-Law Amendment Act (the Racial Distinction Act) XII of 1923.

The following are the principal changes that have been effected:—

*European British Subjects.*—The definition in clause (1) of section 4 (1) has been altered. The new section 29A ousts the jurisdiction of Second and Third Class Magistrates over European British Subjects who claim to be tried as such, except in cases punishable only with fine not exceeding Rs. 50. Section 34A prescribes the sentences which Courts of Session and Magistrates may pass on them. Section 111 dealing with European vagrants has been repealed. Section 275 provides for the constitution of juries, and section 284A for the selection of Assessors of the accused's nationality. Section 285-A deals with cases in which Indians and Europeans or Americans are to be tried jointly. Section 326 provides for the summoning of Jurors and Assessors by the District Magistrate. Section 416, which gave a special right of appeal, has been repealed. Chapter XXXIII, Sections 443 to 449 inclusive, now lay down special provisions relating to cases in which European and Indian, British subjects are concerned, and Chapter XLIVA gives supplementary provisions. A consequential amendment has been made in section 534.

2. *Trial of Juveniles.*—Section 29B, is an important provision relating to jurisdiction in the case of juveniles (under 15 years.)

3. *Attachment of Absconder's Property.*—Section 88 has been enlarged so as to enable a Court to investigate and determine a claim or objection.

4. *Searches.*—The amended Section 103 (1) and the new sub-section (5) provide for the issue of an order in writing to persons called upon to attend and witness a search; a person who refuses or neglects to comply with such a written order is liable to prosecution for an offence under Section 187, Indian Penal Code.

Sections 165 and 166 have been enlarged and require attention.

5. *Security Proceedings.*—Under the new Section 340 (2) an accused person in a case under Section 107 can give evidence.

Chapter VIII contains several amendments among these Sections 106 and 110 have been enlarged and the new sub-

Section (3) of Section 117 enables a Magistrate to make an *ad interim* order for security.

The new Section 122 dealing with the power to reject sureties is particularly important. Courts of Session should note sub-Sections (3A) and (3B) of Section 123. In sub-Section (6) of the same the option to inflict rigorous imprisonment in proceedings taken under Sections 108 and 109 has been taken away.

Section 124, relating to the release of persons imprisoned for failing to give security, has been enlarged.

Section 126A modifies the old sub-Section (3) of Section 126.

More appeals are now allowed (see sections 406 and 406A.)

6. *Public Nuisances.*—Section 133 has considerably widened the powers of the Court, and a new section 189A, laying down the procedure in cases wherein the existence of an alleged public right is denied, has been added.

Under the new section 340 (6), the accused can, in these cases, give evidence.

7. *Urgent cases of Nuisances or Danger.*—The new sub-section (5) of section 141 gives the person against whom an order has been passed an opportunity to show cause, and section 340 (2) enables him to give evidence.

8. *Disputes as to Immoveable Property.*—Here also the accused may give evidence under section 340 (2). Note in particular the new sub-sections (7) to (11) of section 153, the new provisions in section 146 and the entirely re-drafted section 147. Under section 148 (3), a Court can now award costs of witness and pleader's fees.

9. *Statement to Police and Police Papers.*—Sub-section (1) of section 152 has been entirely re-drafted. An accused person now has a right to copies of statements made by prosecution witnesses to police and recorded by them but these second provisions should be carefully noted. The prosecution has now no power to contradict, by means of police diaries or other records, a witness who has turned hostile or who has gone back on his statement to the police. The spirit of the law is that no court should read police papers except for the purposes indicated in the two provisions.

10. *Confessions.*—Section 164. Statements and confessions can now be recorded only by Presidency and First Class

Magistrates, and by specially empowered Second Class Magistrates (not being Police officers) Sub-section (3) lays down a statutory obligation giving effect to instructions issued by Government, and a new form of certificate is prescribed.

11. *Detention and Report by Police*.—An important proviso has been added to section 167 (c) whereby Third Class Magistrates and Second Class Magistrates not specially empowered are deprived of the power to authorise detention of an accused person in custody by the police.

Section 173 dealing with Police Reports has been enlarged. The new section 120 (1) (b) provides that a police report must be in writing.

12. *Jurisdiction of Criminal Courts*.—Section 181 (3) now deals with "theft" instead of "stealing." Section 185, under which the High Court decides in cases of doubt, has been enlarged.

Section 193 (2) now empowers a Sessions Judge to make over cases to an Additional Sessions Judge.

13. *Sanction to prosecute*.—Section 195, the new section 196B and section 197 require careful attention. Reference should also be made to Sections 476, 476A and 476B.

Sanction to private individuals has entirely been done away with and the procedure simplified. See also sections 200 proviso (a a), 202, proviso (b), 244 (1), proviso, 252 (1), proviso.

In section 197, which has been enlarged in several respects, note particularly that the words "is accused as such Judge or public servant" have been replaced by "if accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty."

14. *Inquiry before issue of process*.—Sections 202 and 203 have been enlarged and Third Class Magistrates may now postpone issue of process and hold a preliminary enquiry.

15. *Committal Proceedings*.—Third Class Magistrates cannot now be empowered to commit for trial.

16. *Charges and Previous Convictions*.—As to the procedure in cases where an accused person has been previously convicted see the amendment of section 221 (7) and the new section 255A. Also, for Sessions Trials, the amended section 810.

By the new proviso to section 234 (2), an offence under section 397 Indian

Penal Code, shall be deemed to be an offence of the same kind as one under section 330 and "attempts" may also be similarly deemed.

Section 237 (2) has been omitted but has been re-enacted as 268 (2A.)

17. *Joinder of Accused Persons*.—Section 239 has been entirely recast and requires careful study.

18. *Frivolous Accusations*.—Section 250 has been re-cast and amplified. The Magistrate must now be satisfied that the accusation was (1) false and (2) frivolous or vexatious. The amount of compensation which Magistrates other than Third Class Magistrates can award has been increased to Rs. 100.

An appeal from an order of compensation is now allowed only where (1) it has been made by a Second or Third Class Magistrate, or (2) the amount exceeds Rs. 50.

19. *Absence of Complainant*.—When the complainant is absent in any case instituted by complaint the Magistrate may discharge the accused if the offence may be lawfully compounded or is not a cognizable offence. (This does not prevent a revival on a fresh complaint.)

20. *Jury and Assessors in Sessions Trials*.—The number of jurors shall be uneven and not less than five or more than nine. Where an accused person is charged with an offence punishable with death, the jury shall consist of not less than seven persons, and if practicable, of nine persons: section 274 (2).

There must be three, and if practicable four assessors in trials held with the aid of assessors: section 284. See also section 309 (1) as to the opinions of assessors.

21. *Summoning Jurors and Assessors*.—Section 326 has been amplified.

22. *Pardons to Accomplices*.—Section 337 has been considerably altered, its scope broadened and the procedure relating to tender of pardon fully set out.

An approver must be examined as a witness in the Court of the Magistrate taking cognizance and in the subsequent trial, if any.

No case in which there is an approver can be tried by any Magistrate. If the Magistrate does not discharge the accused, he must commit him to Sessions: Section 337 (2A).

Section 339 dealing with the case for

an approver who goes back on his statement, has also been enlarged. The certificate of the Public Prosecutor is necessary for his prosecution.

23. *Compounding Offences.*—Section 345 has been enlarged, more offences can now be compounded, notably cheating, using of the trade mark, and bigamy

24. *Record of Evidence.*—A new subsection 2A has been included in section 356.

25. *Levy of Fines and Imprisonment in Default.*—Section 386 has been re-drafted and enlarged. Immoveable property may now be proceeded against by execution according to civil process.

Section 338 has also been amplified.

26. *Whipping.*—Section 391 has been altered, whereby whipping cannot be inflicted until the expiry of 15 days from the date of the sentence or, if an appeal is made within that time, until sentence is confirmed by the Appellate Court, when the accused—(a) is sentenced to whipping only and furnishes bail for his appearance, (b) is sentenced to whipping in addition to imprisonment.

Hence, where the accused is sentenced to whipping only :—

If he appeals within 15 days and furnishes bail for his appearance, he must be released. If he appeals but does not furnish bail, he must be kept in custody until the Appellate Court disposes of the appeal.

If he does not appeal, and does not furnish bail, he may, subject to the provisions of paragraph 390 of the Code be whipped at once. Magistrates should ask the accused whether or not he wishes to appeal, and if he states that he will not appeal, he should be whipped at once, if he does not appeal, but does furnish bail, the whipping must be postponed for 15 days, he being released in the interim.

An appeal now lies from sentences of whipping only passed by Courts of Session and Magistrates. Where the accused is sentenced to whipping in addition to imprisonment, the 15 days must expire in any case, and if there is an appeal, the order of the Appellate Court must be awaited.

27. *Concurrent Sentences.*—The addition of a clause at the end of the main section 397 enables a Court to

direct that a subsequent sentence shall run concurrently with a previous sentence. The second proviso is new.

28. *Appeals.*—Section 408, proviso (b) now allows an appeal to the High Court to all or any of the accused convicted by an Assistant Sessions Judge or Special Power Magistrate if any one accused is sentenced to imprisonment, for a term exceeding four years or to transportation.

Under section 413 as amended the sentences that are not appealable are.

(1) a sentence of one month's imprisonment passed by a Court of Session.

(2) a sentence of fine not exceeding Rs. 50, inflicted by a First Class Magistrate.

In summary trials, unless the sentence is one of fine only, not exceeding Rs. 200, appeals now lie; section 414. Both sections 413 and 414 are as before subject to the provisions of section 415.

Section 415A is new and gives a special right of appeal where more persons than one are convicted and an appealable judgment or order has been passed in respect of any one of such persons. Section 418 (2) is also new, where any person is sentenced to death, any other person convicted in the same trial may appeal on a question of fact.

29. *Revision.*—When calling for a record under section 435, the execution of any sentence may now be suspended. By the new explanation all Magistrates are now declared to be inferior to the Sessions Judge for the purposes of this section and section 437. Before ordering further inquiry under section 436, notice must now always be issued to the accused.

30. *Lunatics.*—Several changes have been made in the sections relating to insane persons accused of offences.

31. *Maintenance.*—A sum of Rs. 100 may now be awarded under section 488. Note also that the wording in sub-section (3) has been altered from "wilfully neglects to comply with the order" to "fails without sufficient cause to comply with the order. Arrears of maintenance can be recovered for only one year. Sub-section (7) has been omitted but has been reenacted in section 340 (7). Section 48 (2) is new.

32. *Bail.*—Section 497 now gives the Court a wide discretion to grant bail in non-bailable cases except where the offence

is punishable with death or transportation for life; even where the offence is so punishable, if the accused is under sixteen or is a woman or infirm, the same discretion is allowed. Reasons must be recorded and the High Court or Court of Session may review the order granting bail.

33. *Forfeiture of Bonds.*---Alterations and additions have been made in Chapter XLII.

34. *Disposal of Property.*---The new section 516A contains statutory provision for the custody and disposal of property pending the trial. By section 517 (4) which is also new, interim delivery may be made on the claimant giving security.

35. *Transfer of Cases.*---Sub-section (8) of section 526 has been amended and a new sub-section (9) added. The law now provides for compulsory adjournment at any stage of an inquiry or trial; but a Court of Session may refuse to adjourn when it is of opinion that the application has been unreasonably delayed.

Section 528 has been enlarged by the addition of new subsections (1) and (4).

36. *Absence of Accused in certain cases.*---Section 540A is new and requires attention.

37. *Compensation out of Fine.*---The new clause (c) to section 545 (1) enables the Court to pay Compensation in certain cases to innocent third parties.

38. *Complainant's Costs.*---Section 546A is new and provides for the allowance of certain fees paid by the complainant in non-cognizable cases.

39. *Power of Successors in Office.*---Section 559 now provides that the powers and duties of a Judge or Magistrate may be exercised or performed by his Successor in Office.

40. *First Offenders.*---Section 562 has been considerably enlarged. In the case of persons under 21 and women convicted of any offence not punishable with death or transportation for life, and in the case of persons not under 21 convicted of an offence punishable with imprisonment for not more than 7 years, the accused may, in certain circumstances, be released on probation. The new sub-section (1A) also provides for release with an admonition.

41. *Previously Convicted offenders.*---Section 565 has been amended and enlarged.

42. *Other changes.*---Numerous other alterations and additions of minor importance have also been made.

*High Court Circular No. 2 of 1924, dated 8th January 1924.*

To

ALL MAGISTRATES.

The attention of all Magistrates is drawn to the necessity for a careful and detailed examination of a complainant under Section 200 Code of Criminal Procedure. It is not sufficient that the Complainant should merely speak to what is set out in his written Complaint, but it must appear from his examination that the essential ingredients of a criminal charge are present, and that there is a prospect of its being made out. Especially is care necessary in cases wherein the dispute is of a quasi-civil nature concerning the possession of land or agricultural produce, such cases are sometimes contested at length and often result in the unnecessary harassing of agriculturists and labourers when they are required for work on their fields.

PRESENT BY LENTAIGNE AND CARR, JJ.

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Ma Ma Gun . . . . . *Appellant.*  
*vs.*  
 Maung Bo Than . . . . . *Respondent.*

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*Administrator—Tenants—Wrongful Collection of rents by claimants—  
 Action in tort by administrator against claimant.*

Where the appellant, an administrator, let out certain lands to tenants and the rents were collected by the respondent claiming to be the beneficial owner of the properties.

*Held* that an action lay against the respondent in tort for wrongful collection of the rent which was quite distinct from the appellant's right of action against the tenants for recovery of the rent.

Judgment. 11th February, 1924.

*Per* LENTAIGNE, J.—The plaintiff-appellant is the widow of U Yaw and administratrix of his estate. She alleged that their joint estate included a large area of land in the Pegu District. The defendants had wrongfully collected the rents of the land from those tenants. She sued to recover the rents so collected.

The Additional Judge of the District Court held that on these allegations the plaintiff had no cause of action against the defendants. Her remedy he considered was against the tenants only.

We are clearly of opinion that she was wrong. No doubt such payment as is alleged would not discharge the tenants from their liability to the plaintiff under their contracts. But the plaintiff's suit against the defendants is based not on contract but on tort, and if they have in fact wrongfully collected money due to the plaintiff she is entitled to recover that money from them. This is the only question that we have to decide.

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Civil 1st Appeal No. 133 of 1923 from the decree of the District Court of Pegu in C. R. No. 10 of 1923.

The order of the District Court rejecting the plaint and the decree of that Court are set aside. The suit is remanded to the District Court with a direction that the plaint is admitted.

The appellant will be given a certificate for the refund of the court fee paid on this appeal.

The other costs in this appeal will be costs in the suit and follow its result.

*Keith* for Appellant.

*Dantra* for Respondent.

*Suit remanded.*

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PRESENT.—MAY OUNG, J.

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Sya Kyaw	...	<i>Petitioner.</i>
vs.		
King Emperor	...	<i>Respondent.</i>

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*Criminal Procedure Code (Act V of 1898) Section 250—Compensation—Failure of Court to examine witnesses of Complainant—Order for compensation invalid. Against conviction under section 250 Criminal Procedure Code.*

Compensation under Sec. 250, Cr. Pro. Code, can only be awarded after the complainant has had an opportunity of producing all his evidence including those witnesses whose names are not contained in the list but are brought to Court without summons.

Order, 18th October, 1923.

Compensation under section 250 can be awarded only after the complainant has had an opportunity of producing all his evidence. In this case, the trial Court refused to examine two witnesses whose names did not appear in the list filed but who were brought to the Court by the complainant in order

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Cr. Rev. No. 471-B of 1923 of the High Court being review of the order of the Township Magistrate of Kawa in Cr. Reg. No. 10 of 1923.

to save expense. Thus the complainant was illegally prevented from putting forward his whole case.

On the merits, also, there appears to have been a genuine dispute as to the boundaries of the land, and it is possible that the complainant acted on a mistaken belief.

Be that as it may, the failure of the Township Magistrate to comply with the law vitiates his order for compensation, and I must set it aside.

*Mg Tsain* for petitioner.

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PRESENT.—CARR, J.

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On Pe

*Petitioner.*

vs.

King Emperor

*Respondent.*

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*Burma Habitual Offenders Restriction Act 1919—Conviction under section 7—Disobedience of Order—Prosecution for disobedience under section 18. Whether Court can go behind the conviction under section 7 in proceedings under S.18.*

Where an offender has been convicted under section 7, H. O. R. Act and an order has been made restricting his movements the validity of the conviction cannot be questioned in any subsequent proceedings launched against him for disobedience of the order under section 18 of the same act. To hold otherwise would be entirely subversive of the principle of the finality of judicial orders.

Charged under section 7 H. O. R. Act.

#### Reference.

The following reference was forwarded by the Sessions Judge Insein to the Registrar of the High Court :—

I have the honour to submit for the perusal of the Hon'ble Judges the proceedings of the Sub-divisional Magistrate of Insein, Maung So Min in his Criminal Miscellaneous No. 39 of 1923. The proceedings came to my notice in connection with an appeal by the same respondent, On Pe in my Criminal Appeal No. 4 of 1924 against the order of the Sub-divisional Magistrate

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Cr. Rev. No. 26-B of 1924 of the High Court reviewing the order of the Sub-divisional Magistrate of Insein, passed in his Cr. M. No. 39 of 1923.

(Maung Ba U 2) Insein in his Criminal Regular No. 68 of 1923 wherein On Pe was sentenced to six months Rigorous Imprisonment under section 18. H. O. R. A. for failure to betake himself to the area to which his movements were restricted in the former case. Assuming the correctness of the order in the first case there can be no doubt as to the correctness of the order of the latter case. On Pe did not appeal against the first order but I consider that the case in which he was ordered to restrict his movements was most inadequately tried, and that if he had appealed the order must have been set aside, and a fresh inquiry directed. If that order now be set aside, I suppose that the appeal against the conviction under section 18 H. O. R. A. would succeed, but it might be argued that the order was valid until set aside and the appellant ought not to have taken it upon himself to disobey it. I would be grateful to learn the opinion of the Hon'ble Judges on this point, if they agree that the former order should be set aside. With regard to that order it will be seen that the respondent was alleged to have three previous convictions but no attempt was made to prove them. Two witnesses were examined. One was a Head Constable in charge of an outpost who stated that On Pe was a surveillance criminal, associated with the registered criminals and was suspected of participation in certain cases.

The other witness describes himself as a cultivator, and states that On Pe is reputed to be a thief or robber by habit was suspected of participation in thefts of cattle and other property and in particular theft of buffaloes from the witness and associated with certain bad characters. This witness is a headman, but the Magistrate did not trouble to inquire.

The respondent stated he had nothing to say and no witness to offer, also that he had no cause to show against the passing of restriction order. This is a peculiarity of most of the respondents who appeared before this Magistrate under H. O. R. A. The police sent up other witnesses but the Magistrate dispensed with them.

I do not consider that there has been an adequate inquiry and I would recommend that the order be set aside, and a fresh inquiry directed.

Order. *22nd January, 1924.*

This reference under S. 438, Cr. P Code, is made in the form of a letter to the Registrar of this Court. This form is not appropriate. Such reference should be made by a judicial order.

As regards the substance of the reference the facts are as follows. On the 25th May 1923 in his Cr. Misc. No. 39 of 1923 the Sub-divisional Magistrate of Insein passed an order under S. 7 of the Burma Habitual Offenders Restriction Act, restricting Nga On Pe to the village of Tawlate for three years. On Pe did not appeal against the order but chose rather to disobey it. He never went to Tawlate at all but

instead went and lived in the Thongwa Township of the Hanthawaddy District. He was arrested towards the end of November and was prosecuted under S. 18 of the Act for disobeying the restriction order. He pleaded guilty to the charge and was sentenced to six months rigorous imprisonment. He then appealed to the Sessions Court. The Sessions Judge has gone back to the original proceedings and considers that they were inadequately tried and that had On Pe appealed the order must have been set aside and a further enquiry have been ordered. He recommends that this should be done now in revision.

He further remarks that if this were done he supposes that On Pe's present appeal against his conviction would succeed, though he admits that it is arguable that the order was valid until set aside and that the appellant ought not to have taken it upon himself to disobey it.

He has overlooked the fact that under S. 412, Cr. P. Code On Pe has no right of appeal against his conviction, but can appeal only as to the extent or legality of the sentence. Even on the supposition that On Pe had not pleaded guilty I am of opinion that his appeal against the conviction could not succeed. The order was undoubtedly in force at the time of his disobedience, which therefore constituted the offence of which he has been convicted. To hold otherwise would be entirely subversive of the principle of the finality of judicial orders. It would make it possible in proceedings under S. 514 or 563 Cr. P. Code to question the correctness of the original order or conviction. It would enable a convict charged with escaping from jail to question his conviction, and a person charged under S. 75, I. P. C. could contend that his former conviction should not have been had. These are only a few instances of the deplorable results of such a decision.

In view of these considerations I am not prepared to interfere. The proceedings may be returned.

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PRESENT :—ROBINSON, C. J. AND MAY OUNG, J.

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D. L. Saklat and others	...	<i>Appellants.</i>
vs.		
Bella and one.	...	<i>Respondents.</i>

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*Civil Procedure Code, (Act V of 1908) O. 45—Privy Council appeal—Death of 2nd respondent—Abatement—Application for certificate declaring who are deceased respondent's legal representatives—Refusal of certificate—Delay in preparation of record—Enquiry ordered.*

Where an appeal abates as against a party to a Privy Council appeal it abates as regards all orders regarding costs incidental thereto as a consequence.

*Josiam Tiruvengadachariar v. Sarwmi Iyengar alias Venkatachariar* ; 34 M. 76 followed.

A delay of three years having occurred in the preparation of the record of the appeal for His Majesty in Council, the office was directed to report the reasons for the delay and to show how far that delay was due to inaction and want of prosecution on the part of the appellants with a view to action being taken by the Court under rule 70 of the rules relating to appeals to the Privy Council.

Judgment. 21st January, 1924.

These are two applications to bring the legal representatives of a deceased respondent on the record. The Original suit was filed by the plaintiffs, (the present petitioners) against the defendants.

1. For a declaration that the first defendant was not entitled to the use and benefit of the Parsee Fire Temple or to attend at or participate in any of the religious ceremonies performed therein.

2. For an injunction restraining the first defendant from entering the said premises and repeating the trespass complained of, and

3. For an injunction restraining the 2nd defendant from taking the first defendant into the said Fire Temple premises.

The suit was dismissed with costs by the Judge on the Original side of this Court on the 23rd of April 1918. The 2nd

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Civil Mis. Application No. 68 of 1920 arising out of Civil 1st Appeal No. 4 of 1919 of the High Court.

defendant applied for and obtained permission to withdraw a sum of Rs. 10,211-10-8, decreed as costs, and undertook personally as well as the guardian of the 1st defendant to refund the same in the event of this Honourable Court so directing. An appeal was filed against the decree but was dismissed on the 28th of July 1920. The decree contained an order directing the plaintiff-appellant to pay to the defendant respondent the sum of Rs. 10,211-10-8. Leave to appeal to His Majesty in Council was granted and the appeal was admitted on the 17th of March 1921. The appeal has not however yet been transmitted to His Majesty in Council. The 2nd respondent died on the 4th of July 1923 and on the 28th September 1923 the present applications were filed.

It is admitted now that the first defendant is of age and that the presence of her guardian on the record is no longer necessary. It is not denied that the suit as against the 2nd defendant for an injunction has abated by reason of his death, and it is urged, he having withdrawn the sum awarded as costs, his estate would be liable to refund those costs in the event of the appeal to His Majesty in Council being successful, and that therefore the appellants are entitled to a certificate declaring who his legal representatives are.

Under R. 71 of this Court's Rules relating to appeals to the Privy Council the applications have been properly filed in this Court. The question for decision is whether the suit and appeal having abated in respect of the 2nd respondent any rights remain as regards the incidental orders as to costs. The orders as to these costs, awarded them to the defendants, and even if the appeal to His Majesty in Council be successful it will be open to the present petitioners to recover those costs from the 1st respondent. Moreover it is admitted before us that the 2nd defendant died leaving a will under which the first defendant will succeed to a large estate.

It has been held in the case of *Josiam Thiruvengadachariar v. Sawmy Iyengar* alias *Venkatachariar* (1) that if an action fails what is incidental fails also and if an appeal abates as regards an injunction sought for, it abates as regards the costs incurred by the appellant as a consequence of the

dismissal of his suit. This authority is exactly in point and with the reasons on which it is based, we entirely agree.

The application will therefore stand dismissed with costs, advocates fees, three gold Mohurs.

We note we regret, that there appears to have been a most inordinate delay in preparing this record for transmission to His Majesty in Council. The record no doubt is a heavy one but it seems hard to suppose that so long a period as three years was necessary or can be justified in getting the record ready for transmission. The office will report to us the reasons for this great delay and the report will show how far that delay is due to inaction and want of prosecution on the part of the appellants. On receipt of that report we will consider whether any notice should issue to the appellants to show cause why a certificate should not be issued that the appeal has not been effectually prosecuted by the appellants in accordance the provisions of R. 70 of our Rules.

*Das* for appellant.

*Mr. Doctor* for respondents.

*Application dismissed.*

PRESENT.—CARR, J.

King Emperor

*vs.*

Nga Po Thaung

*Petitioner.*

*Respondent.*

*Criminal Procedure Code (Act V of 1898), Section 397—Sentences passed on same day in separate trials—Concurrent sentences—Whether legal.*

Where the accused was convicted in two separate trials on the same day the cases being numbered 145 and 146 and the sentences were ordered to run concurrently.

Cr. Rev. No. 675 of 1923 of the High Court being review of the order of the Township Magistrate of Kyaiklat in Cr. Reg. Nos. 145 and 146 of 1923.

*Held*, that on the presumption that the sentence in case 145 was passed first the accused had already begun to undergo that sentence from the moment it was pronounced and the provisions of section 397 Cr. Pro. Code applied and that the order for concurrent sentences was proper.

## REFERENCE

Reference made by the District Magistrate Pyapon in his Cr. Rev. Nos. 321 and 322 of 1923.

In this case the accused was sentenced to suffer one year R. I. by Maung Po Ywet, 1st Class Township Magistrate Kyaiklat under section 379 I. P. C. on the 11th September 1923 and to run concurrently with the sentence passed in Cr. Trial No. 145 of 1923 which is also submitted for reference.

Under section 379 of the amended Cr. P. C., the concurrent sentence can only be passed in a case where the accused is undergoing sentence passed in another case.

The sentences in both cases were passed on the same date *i. e.*, 11th September, 1923 and I do not think that the sentence passed in both cases can run concurrently as accused was not undergoing any sentence when the sentence was passed in both cases and the sentence passed at separate trials must run consecutively under para. 325 L. B. Courts Manuals.

Accused does not appeal in both cases which are now submitted to the High Court with a recommendation that the sentence in Criminal Regular Trial No. 146 of 1923 may be altered to run consecutively with the sentence passed in Criminal Regular Trial No. 145 of 1923 under section 379, I. P. C.

Order. 20th Decemebr, 1923.

The respondent was convicted in two separate trials on the same day by the same Magistrate. In each case he was sentenced to rigorous imprisonment for one year. In case No. 146 the Magistrate ordered that the sentence should run concurrently with that passed in No. 145. I think it is a reasonable presumption that sentence was passed first in No. 145.

The District Magistrate has referred the case with a recommendation that the sentence should be ordered to run consecutively. He does not go into the merits or suggest that the effective sentence of one year for the two offences was inadequate. I have read the judgments and in my opinion the sentences are sufficient as they stand.

The District Magistrate's ground for this recommendation is that as the two sentences were passed on the same day the respondent, at the time when sentence was passed in No. 146, was not "already undergoing a sentence of imprisonment" within the meaning of S. 397, Cr. P. C.

I am unable to agree. The respondent was in custody and in my view in such circumstances he began to undergo the

sentence in No. 145 from the moment at which that sentence was pronounced. I hold therefore that the Magistrate's order was a proper one under S. 397, Cr. P. C.

No action is called for. The proceedings may be returned.

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PRESENT.—HEALD, J.

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Wazir Chand	...	<i>Petitioner.</i>
v.		
B. M. Bharadwaza	...	<i>Respondent.</i>

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*Civil Procedure Code (Act V of 1908) Order 9 Rule 13 wrong date given by Small Cause Court Bench Clerk—Ex-parte decree—Application—to set aside decree refused—Order set aside in revision.*

Where the Small Causes Court Bench Clerk gave a wrong date to the petitioner (defendant) as that on which the case was fixed for hearing and an *ex parte* decree was passed in consequence.

*Pointed out*—That the procedure in the S. C. Court under which the clerk fixes dates for cases which are ripe for hearing, lends itself to such a misunderstanding as was alleged by petitioner and the *ex parte* decree should have been set aside and the High Court accordingly set aside the decree and ordered a re-hearing, costs to be costs in the cause.

Judgment. 7th February, 1924.

Respondent filed a suit in the Court of Small Causes against petitioner and another.

The date fixed for return of summons to the defendant was the 19th December 1922 and on that date the suit appeared in the Cause list of the Court with a note that summons was not duly served.

As a matter of fact the petitioner was served but the other defendant was unserved.

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Civil Rev. No. 124 of 1923 of the High Court against the Order of the Judge, Rangoon Small Causes Court in C. R. No. 7794 of 1922.

It is admitted that it is one of the duties of the clerk of the Court to fix fresh date for cases in which the defendants have not duly been served but that he performed that duty between 10-30 and 11 in the morning before the Judge or Registrar came into Court.

Petitioner's case is that in accordance with this procedure the clerk fixed the 9th of January as the date to which the case was adjourned and that after he had left the Court the respondent taking advantage of his absence, withdrew his claim against the defendant who was unserved so that the case might be ripe for hearing and might be heard *ex parte*.

According to the case diary when the case was called before the Registrar of the Court on the 19th December, 1922 respondent appeared in person and waived his claim against the 2nd defendant, petitioner was absent and was declared to have been duly served and the case was put down for order, next day. Next day when the case was called respondent was present and petitioner absent, and the case was put down for hearing on the 21st of December. On that date the case was put down for proof of claim on the 8th of January 1923 and on that date a decree was given *ex parte* for respondent.

On the 10th January petitioner filed an application to have the *ex parte* decree set aside on the ground that he had been warned by the clerk to appear only on the 9th of January and that when he appeared on that date he found that the suit had already been decreed *ex parte*.

He filed an affidavit in support of that application.

Respondent objected on the ground that the application was made merely for the purpose of delay and that the statements in it were false, but he filed no affidavit.

The clerk was called on for a report and said that he did not think that it was true that petitioner was in Court on the 19th of December and was told to appear again on the 9th of January.

On that material the Judge said that he did not think that petitioner's statement was true and that in any case petitioner should not have relied on the Bench Clerk's statement but should have waited till the case was called in Court. Petitioner's application was accordingly rejected.

The order rejecting the application was passed on the 5th of March, 1923 and on the 1st of June petitioner applied to this Court in revision.

His delay in applying for revision lends colour to the suggestion that his object was delay but on the other hand the procedure under which the clerk fixed cases which are not ripe for hearing lends itself to such a misunderstanding as that which petitioner alleges and I think that under the circumstances the *ex parte* decree should have been set aside.

I therefore set aside the *ex parte* decree and direct that the Court appoint a day for proceeding with the suit.

As for the costs of this application I direct that they should abide the final order in the suit. Advocate's fee on either side to be 2 gold mohurs.

*Revision allowed.*

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PRESENT :—LENTAIGNE AND CARR, JJ.

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Azee Meah . . . . . *Appellant.*

vs.

Jeewa . . . . . *Respondent.*

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*Rangoon Rent Act (Burma Act II of 1920), Amended S. 10—Tenant on daily rent letting to sub-tenant—Whether tenant is landlord and entitled to recover premises in ejectment from sub-tenant.*

A tenant on daily rent is a transferee for valuable consideration within the meaning of amended S. 10 of the Rangoon Rent Act, 1920, and may maintain a suit to recover the demised premises in ejectment from his sub-tenant. Where such premises are required for the use of the tenant's workmen for the purpose of his business it is equivalent to an occupation by himself.

*Cf. Transfer of Property Act, 1882, Ss. 105, 106, 107; Rangoon Rent (Amendment) Act (Burma Act I of 1922), S. 7.*

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Civil 1st Appeal No. 112 of 1923 from the decree of the Court on the Original Side in C. R. No. 528 of 1922.

Judgment. 18th January, 1924.

This is a suit to eject a tenant and its decision turns mainly on the construction of certain provisions of the Rangoon Rent Act (Burma Act II of 1920) as amended by Burma Act I of 1922.

The plaintiff is tenant of eight rooms in Fraser Street, Rangoon, under a verbal agreement and on a daily rent. He has been the tenant for 16 years or more and for the last six years or more the defendant has been his sub-tenant of one of the rooms, also on a daily rent and under a verbal agreement.

The relevant provisions of the Rent Act are :—

1. S. 2 (c), the definition of "landlord" for the purposes of the Act generally. This definition specifically includes "a tenant who sub-lets any premises" and it is admitted that the plaintiff is a "landlord" within this definition.

2. S. 10 (1), which restricts the right of a landlord to eject his tenant but in the proviso allows him to do so "where the premises are reasonably and *bona fide* required by the landlord for occupation by himself. . . . ."

3. S. 10 (5), which reads as follows :—"For the purposes of this section, notwithstanding anything contained in cl. (c) of S. 2, the term "landlord" shall not include any person who has become landlord otherwise than by a *bona fide* transfer thereof for value or by the devolution of the premises upon him under a testamentary disposition or intestacy or a settlement made before the first day of April, 1918."

The plaintiff is a tailor employing a number of men and he claimed that owing to expansion of his business he had to employ additional men and that he required the room occupied by the defendant as a work-room for these additional men. The learned Judge on the Original Side found that the plaintiff had established this claim and that he did "reasonably and *bona fide* require the premises for occupation by himself." But he held that the agreement under which the plaintiff held the premises was not a *bona fide* transfer of the premises to him for value and the plaintiff was

therefore not entitled to the benefit of the proviso to S. 10 (1) Accordingly dismissed the suit.

The learned Judge held apparently, that a lease is a transfer of the premises but said that in this case there was no lease and found himself unable to hold "that a right of occupying a room for 24 hours on payment of a rent of Rs. 7 a day can be construed as a *bona fide* transfer of the premises for value."

It may be noted that the *bona fides* of the transaction is not in question.

I am of opinion that the decision was wrong. Having regard to the terms of Ss. 105, 106 and 107 of the Transfer of Property Act, I think it must be held that the plaintiff has a lease of the premises. And if any lease, say a lease for a term of years, is a transfer of the premises for value, I think that all leases, for whatever term, are equally transfers for value, provided, of course, that rent is payable, as in this case it is.

Mr. Das, for the respondent, does not really contest this proposition. He argues that a lease is not a transfer of the premises, but merely a transfer of a right to enjoy them. He contends that the word "thereof" in S. 10 (5) must mean "of the premises" and, though as it stands the word is grammatically meaningless, I agree with him that it cannot possibly mean anything else. But I hold that though a lease is a limited transfer of the premises yet it is a transfer thereof and that a lessee is a transferee for value within the meaning of S. 10 (5) and is therefore entitled to the benefit of the proviso to S. 10 (1).

Mr. Das supports the decision on other grounds also. He contends first that the plaintiff has not proved that he reasonably and *bona fide* requires the room for the purposes of his business. He lays much stress on the fact that the plaintiff did not produce his books, which according to the evidence would have proved his employment of additional men. No doubt these books might have strengthened the plaintiff's case, or might on the other hand have broken it down. But the plaintiff was not called upon to produce them and I do not think we can draw any inference adverse to them. Without them there is on the record evidence sufficient, if believed, to prove

the contention. The learned Judge who heard the witnesses has believed them and I see no sufficient ground for differing from his finding.

Mr. Das further contends that if the plaintiff does require the room for the occupation of his journeymen that is not "occupation by himself" within the meaning of the proviso to S. 10 (1). To allow this contention would, I think, be to place too restricted a meaning on the words. A person occupying residential premises also occupies the kitchen and servants' quarters attached thereto though he in person may never enter them. Occupation of the dwelling house necessarily involves occupation of the necessary offices. The Act applies equally to business premises and where premises are occupied for the purposes of a person's business they are occupied by that person himself even though he may himself only occasionally enter any particular part of them.

I would therefore set aside the judgment and decree of the Court below and give judgment for the plaintiff as claimed with costs in both Courts.

Advocates fee ten gold mohurs allowed.

The respondent is allowed time until the 15th April, 1924, to vacate the premises.

*Sen* for Appellant.

*Das* for Respondent.

*Appeal allowed.*

PRESENT :—ROBINSON, C. J. AND MAY OUNG, J.

Kwa Hai . . . . . *Appellant.*

vs.

The Northern Assurance Co., Ltd. . . . . *Respondents.*

*Agency—Fire Insurance proposal—Canvasser granting receipt for initial premium—Whether operates as interim cover note pending formal acceptance of proposal—Extent of authority.*

A Canvasser of a Fire Insurance Office who is entrusted with a bundle of proposal forms and a receipt book for the purpose of canvassing business and granting receipts for the initial premium and who grants such a receipt under his signature with the addition of the Agent's name underneath is not an Agent *per se* with implied authority to accept an insurance so as to bind the Company. All that it indicates is that such a person may be trusted to submit the proposals made and any money deposited with him to the agents. To enable such an agent to accept an insurance so as to bind the Company there must be special authority given him.

*Lingford v. The Provincial Horse and Cattle Insurance Company*, 55 E. R. 647 followed.

A contract of insurance is not binding on the insurers before a policy is delivered unless the circumstances point to an acceptance of the proposal. The acceptance of premium does not of itself show that the insurers have accepted the proposal. It is, however, essential that the premium should have been agreed upon.

*Christie v. North British Insurance Company*, (1825) 3 Shaw (Ct of Sess) 519 referred to.

Judgment. 19th February, 1924.

The Northern Assurance Company, Limited (Incorporated in Great Britain) had as their Burma Agents Messrs. V. Zollikofer & Co. of Rangoon. The latter, whom I will refer to later on in this judgment as their Agents, employed one of their clerks, Mg. So Hlaing, who has no experience whatever of insurance business, to go out and canvass for proposals. They gave him a bundle of proposal forms and a book of ordinary receipt forms, as their method of business was only to consider proposals covered by premium. They also gave him a visiting card containing the name of the

Civil First Appeal No. 65 of 1923 from the decree of the District Court, Pegu, in C. R. No. 19 of 1922.

Assurance Company, and underneath "Agency, V. Zollikofer & Co." with the Rangoon address, and in the corner "represented by Mg. So Hline."

On the 19th January, 1922 So Hlaing went to Daiku, and there he got six proposals. The plaintiff's proposal was filled up by him, but it appears, incorrectly. He gave plaintiff a receipt for Rs. 200, the sum that he received as the premium. He had been given a book containing the ordinary rates charged to study, and he specified to the proposers the premium they would have to pay based on his recollection of the rates specified in this book. After the words "dwelling house" in the proposal form, Ex. 1, the Agents have added "with retail shop (hazardous)", and, after the description of the materials of the building, they have added "surrounded by houses of same risk."

On his return So Hlaing gave them the proposal, and they questioned him with reference to it, and learning that the plaintiff carried on a shop in this building and sold such things as kerosine oil, they made this addition to the proposal. The result was that the rate of premium that had to be charged for this insurance was double that specified by So Hlaing. So Hlaing was sent back to Daiku, and told to inform the plaintiff of this which amounts to a counter offer by the Agents to the plaintiff before there could be any binding contract between them.

So Hlaing did return to Daiku, and was there on the 24th or 25th January. We see no reason to doubt the evidence that he went to the plaintiff's house and saw one of his sons, a young man of 22. He was told that plaintiff was seriously ill and that he could not see him. But he informed the son of the facts, and was told that the son could not decide such an important matter, and he apparently left, telling him to communicate with him when they had considered whether they would accept the increased premium.

Nothing was heard from the plaintiff, and on the 27th January his house was burnt down. The fire originated in another house further off, and spread to plaintiff's house. There is no question of liability had there been a completed contract of insurance.

The lower court has dismissed plaintiff's suit, and it is now argued on appeal that So Hlaing was held out by the Agents as having authority provisionally to accept the proposal, and that the result of that fact, coupled with the acceptance of the money as premium or part thereof, is that the Agents must be taken to have promised that the proposer should be deemed to be insured until such time as they reject his proposal or issue a policy. In short the argument is that the position is the same as if the Agents had issued an interim protection note.

It is further argued that So Hlaing informed the proposer that, having paid the premium demanded, his property would be insured as from that date.

The first point for consideration is—What was the authority of So Hlaing ?

The authority of any Agent varies according to circumstances. An Agent employed merely to introduce business to the insurers is not in any real sense of the word their Agent. His business is merely to obtain proposals and transmit them to the insurer. That is the whole extent of his authority. He can neither accept any proposal nor issue a cover note, and, in so far as he filled up the proposal form for the proposer, he is to be regarded as the Agent of the proposer, and not the Agent of the Agents. The granting to him of a bundle of proposal forms does not in any way imply the grant of any particular authority to him. The grant of a book of receipt forms, not specially worded, does not give rise to any implied authority. He signed the receipt that was given to the plaintiff in his own name, under which he wrote "V. Zollikofer & Co." He was receiving the money to take it on behalf of the proposer and pay it to V. Zollikofer & Co. who had sent him out, and the addition of the Agent's name underneath his own gives rise to no implied authority, nor does the visiting card, which is only to indicate that he may be trusted to submit the proposals and any money deposited to the Agents.

The question is whether the proposal has been to any degree accepted by the Agents. Acceptance by them may be shown in various ways. The acceptance of the premium does not of itself show that they have accepted the offer. There

must be circumstances, besides the mere acceptance of the premium, pointing to such acceptance. What facts will constitute an acceptance on the part of the insurers will depend on the circumstances of a particular case. It is, however, essential that the premium should have been fixed, as, until it is fixed, it is impossible to hold that there is a complete contract.

In *Christie v. The North British Insurance Co.* (1) (a Scotch case) it was said: "It is impossible to assent to the doctrine that without a delivered policy there is no insurance. If the premium in this case has been agreed upon, the insurance would have been effected, although no policy was delivered; but the premises here cannot be held to have been insured, the premium never having been determined on, and never having been fixed by the Phoenix Office."

Now the facts of this particular case show that, owing to the statement by the proposer in the proposal, the wrong premium was presumed and that the Company cannot be held to be bound by a completed contract since they must be taken to have said—"we cannot accept this proposal on a premium of Rs. 200 but we are prepared to insure your house if you will agree to pay a premium of Rs. 400. In other words, the matter was still in the stage of negotiation. The deposit of Rs. 200 cannot compel the Agents to a contract, nor can the action of an Agent occupying no higher position than So Hlaing occupied make them liable to the plaintiff.

In *Linford v. The Provincial Horse and Cattle Insurance Company* (2) an ordinary local Agent received the plaintiff's proposal. He retained the annual premium, misapplied the money, and never forwarded the proposal to the company. It was held "in the absence of proof of special authority to the Agents, that the Company were not bound to grant the policy."

There is no proof of any special authority to So Hlaing in this case, and the acceptance of the so-called premium by him cannot bind the company. Had the plaintiff accepted the Agent's offer, they would, no doubt, have given him an interim protection note until the policy was prepared. But there is nothing in this case to show that in the absence of this special contract for interim protection, there was any contract at all.

1. (1825) 3 Shaw (Ct. of Sess.), 519.

2. 55 E. R. 647.

between the parties on which plaintiff could recover damages. So Hlaing's statement to the plaintiff that if he paid Rs. 200 his property would be insured as from that date was made absolutely without authority.

The sole question therefore in this case is whether there is any completed contract to insure or to insure for a limited period. We are unable to find any ground for holding that there was. The decree of the Court below will be confirmed, and the appeal dismissed with costs throughout.

Mr. Chari— for Appellant.

Mr. Paget— for Respondents.

*Appeal dismissed.*

PRESENT.—LENTAIGNE AND CARR, JJ.

Maung Pe Gyi

*Appellant.*

*Versus.*

Hakim Ally

*Respondent.*

*Sale with agreement for re-purchase—Registered deed—Amount of purchase price omitted—Suit for rectification of deed or cancellation—Evidence as to purchase price admissible under S. 92 (4), Evidence Act.*

Where a deed of sale had been executed and registered containing an agreement for re-purchase but leaving the amount of purchase money blank, and the respondent brought a suit for specific performance and rectification of the deed, or in the alternative for cancellation thereof.

*Held*, that under the provisions of S. 92 (1), Evidence Act oral evidence was admissible as to the amount agreed upon on the ground of fraud or mistake of law or fact, that the omission to enter the price was either due to the fraud of the appellant or to a mutual mistake and that the document could be rectified by the Courts under S. 31, Specific Relief Act so as to bring it into accord with the real intention of the parties.

*Held* also that the respondent was entitled to treat the document as a mortgage by conditional sale as defined in S. 58 (e), Transfer of Property Act and could therefore redeem the property on payment of the mortgage money under S. 60 of the Act.

Judgment.

28th January, 1924.

*Per* CARR, J.—On the 30th April 1920, by the registered deed Ex. 1 the plaintiff-respondent conveyed his land, measur-

Civil 1st Appeal No. 60 of 1923 against the decree of the District Court of Myaungmya in C. R. No. 9 of 1922.

ing 33.98 acres to the defendants for a sum of Rs. 600. The deed contained also an agreement for re-purchase by the plaintiff within three years. The amount to be paid for the re-purchase was, however, left blank.

The plaintiff sued for specific performance of this agreement and for rectification of the deed or in the alternative for its cancellation. He also alleged that the defendants had disposed him of an adjoining holding which is referred to as an "extension" but which in fact is larger in area than the original holding. This land he alleged that he had himself cleared and brought under cultivation. He prayed for possession of this land. His contention as regards the re-purchase was that that the price was to be the original sum paid by him, he paying interest in the meantime and remaining in possession of the land.

The defendant alleged that the land was to be re-purchased at the market price obtaining at the time of re-purchase, and he alleged that plaintiff remained in possession as their tenant paying rent, not interest. As regards the adjoining holding they alleged that they themselves cleared and brought it under cultivation. The District Judge gave the plaintiff a decree as prayed and the defendants now appeal.

The 6th ground of appeal alleges that plaintiff did not exercise his right of purchase within three years. This is obviously wrong, since the suit was filed within two years of the date of deed.

The 5th ground is that the Court (wrongly described as the Appellate Court) erred in finding that the "extension" was made by the respondent.

On this question I have no hesitation in agreeing with the District Judge that the extension was made by the plaintiff-respondent. His story is strongly supported by his witnesses, who are all persons likely to have a knowledge of the facts. On the other hand the Appellant's story as to his clearing is extremely vague and unsatisfactory, as is the evidence of his witnesses. The appellant did not in fact work the purchased land himself and it is unlikely that he would employ coolies to clear the adjacent land. He himself has a very inadequate knowledge of how much land he got cleared and how much it cost him. His witnesses, too, appear to know very little about

the matter. The impression created by their evidence is that they had been asked to point out the land to which they refer the majority of them would have been unable to do so. And they all live (except Po Tun) a very considerable distance from the land.

The first ground is to the effect that the lower Court should not have admitted oral evidence to fill up the blank. S. 93 of the Evidence Act is relied upon and that section read with illustration (b) certainly seems to bear directly on this case. On the other hand proviso 1 to S. 92 allows proof of any fact which will entitle any person to any decree or order relating to the document "such as fraud \* \* \* \* or mistake in fact or law." And S. 31 of the Specific Relief Act entitles a party on the ground of fraud or mistake to have a document rectified so as to bring it into accord with the real intention of the parties. Reading these provisions together I am of opinion that if either fraud or mistake be established evidence to fill the blank can be admitted.

Rendered freely the relevant part of the deed reads as follows :—“(8) will resell to the vendor at his request within three years for Rs. . . . .” The amount is all that is omitted. The only possible reference from this is that it was intended to insert the amount of the price for repurchase. And the omission to insert it can be attributed to only one of two reasons. Either it was omitted owing to an oversight of both parties, which would amount to a common or “mutual” mistake, or it was intentionally omitted by the defendant, on whose instructions the deed was prepared in order that he might subsequently take advantage of the omission as against the plaintiff. That would amount to fraud on his part.

I am of opinion therefore that evidence on this point may be admitted. And on the evidence on the record I have no hesitation in agreeing with the finding of the District Judge that the plaintiff's version is correct, and that the amount agreed upon was Rs. 600 the same as the consideration for the original sale.

In my view therefore the appeal fails.

The deed may be looked upon in another light. On the face of it the deed is clearly a mortgage by conditional sale as

defined in S. 58 (c) of the Transfer of Property Act. That being so in the absence of a specific agreement as to the payment of a different sum for redemption the mortgagor is entitled to redeem on payment of "the mortgage money" under S. 60 of the Act. The mortgage money in such circumstances means only the amount actually due under the deed, in this instance the amount of the original loan. From this point of view also the plaintiff is entitled to the relief sought.

I would therefore dismiss this appeal with costs.

*Mr. Surty* for Appellant.

*M. C. Naidu* for Respondent.

*Appeal dismissed.*

PRESENT.—LENTAIGNE AND CARR, JJ.

Mrs. S. G. M. Samson and 3 others ... *Appellants.*

v.

Silvaran and 2 others ... *Respondents.*

*Civil Procedure Code (Act V of 1908) section 151—Suit dismissed for default in absence of both parties owing to re-organisation of Courts and change of venue—Application to restore case filed out of time—Whether Court has power under section 151 C. P. C., where no grounds available under section 5 limitation Act to excuse delay.*

The provisions of section 151 Civil Procedure Code cannot be invoked in cases in which a party has had a definite remedy open to him but has failed to resort to it within the time allowed by law and so has lost it.

Judgment. 25th February, 1924.

*Per CARR, J.*—The appellants were the plaintiffs in a suit pending before an Additional Judge of the District Court of Yamethin, sitting at Pyinmana. It appears that from the 18th December 1922, consequent on the re-organisation of the Courts, this Judge ceased to sit at Pyinmana and that all cases before him had to go before the District Court at Yamethin, where the District Judge and another Additional Judge sat.

• C. M. Appeal No. 38 of 1923, from the Order of the District Court of Yamethin in C. R. No. 5 of 1923.

The plaintiff's case was fixed for the 22nd December and on that date it was called by the Additional District Judge at Yamethin. Neither party appearing the suit was dismissed for default. In the circumstances the Judge would have exercised a sounder discretion had he postponed orders until he had ascertained that the failure to appear was not due to a mistake arising out of the change of venue. But it may be noted that the suit had been adjourned to give the parties time to negotiate a compromise. On the 29th January, 1923, the appellant filed an application, supported by an affidavit, to reopen the case. This was allowed by the Judge on the 8th February, *ex parte*, without notice to the respondent. Notice for hearing of the suit was then issued. The first notice being unserved a fresh one was issued for the 21st March. On that date the respondent filed an application for review of the order setting aside the dismissal for default.

The Additional District Judge was then very ill and he afterwards died, with the result that the application was heard by his successor. The review was allowed and the order setting aside the dismissal of the suit was itself set aside. This order was based on the fact that the application to set aside the dismissal was time-barred under Art. 163, Limitation Act.

It is clear the application was in fact time-barred, and it is also clear that section 5 of the Limitation Act does not apply to such an application and that the Court had the inherent power under S. 151 of the Civil Procedure Code to set aside the dismissal of the suit. I do not think that that power extends to a case in which the aggrieved party had had a definite remedy open to him but has failed to resort to it within the time allowed by law and so has lost it.

Moreover on the petition of the 29th January it does not appear that the appellants are entitled to relief. It is clear from that petition itself and from the affidavit annexed to it that the appellants were fully aware that all suits were to be taken up at Yamethin, and that their pleader was in fact at Yamethin on the 22nd December and attended the Court of the Additional District Judge. He could very easily have found out by which Judge the suit would be heard and even if he failed to do so before it had been dismissed either he or the appellants themselves could very easily have dis-

covered afterwards that it had been dismissed and have filed the application within the period allowed by law.

It is noticeable that no affidavit by the pleader himself was filed.

I would dismiss this appeal with costs, Advocate's fee three gold Mohurs.

*Mr. Halkar* for Appellant.

*Mr. P. N. Chari* for Respondent.

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PRESENT.—MAY OUNG, J.

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Nga Son Min and 18 others . . . *Appellants\**

v.

King Emperor . . . *Respondent.*

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*Penal Code (Act XLV of 1860) section 147-325, riot resulting in offence under S. 325, I. P. C.—Whether all accused liable under section 149 to separate conviction and sentence under section 325.*

In cases of rioting under section 147 I. P. C. resulting in grievous hurt within the definition of section 325 I. P. C., convictions and separate sentences under section 325 are legal against all the accused who actually joined in the assault. Some of these assaults may have resulted in simple hurt, others in grievous hurt, but all the actual assailants are under section 149 I. P. C. liable for all the results. *Queen Empress v. Bana Punja and others*, (1892) 17 B. 260 (F. B.) followed.

Judgment. . . . 6th November, 1923.

This is a case which presents many extraordinary features not the least of which was the extreme laxity of the police-officers concerned. On the morning of the 16th October, 1922 a gang of about 30 villagers, armed with sticks, spears and dahs went across the river in two big sampans to the little town of Bogale in the Pyapon District. It was about

\*Cr. Appeal No. 622 of 1923 from the Order of the Sessions Judge of Pyapon in Sessions Trial No. 9 of 1923.

7 o' clock, when most people would be up and about, and many either joining to or returning from the bazaar. U Shwe Lon (2 P. W.) a Karen Christian, aged 62 years and the local opium licensee, was on his way to his shop near the bazaar, when he saw the gang, for whom indeed he had to make way as they marched past. Every member of the gang had a piece of white cloth tied round his head and all or nearly all wore white undervests, their longyis being of different colours. Prominent amongst them was the 1st appellant, San Min, who apparently was a well known man in the Township.

The gang came up from the river bund, marched south along the strand bund and then turned east into a side road which separates the bazaar from a row of houses, in some of which were Chinese shops. Their main object was the eating house of one Pauk Si.

Two days previously, San Min's younger brother, Po Hnin 2nd appellant, had visited the same shop and therein had an altercation and fight with Amine, one of the shop assistants. When it was over, Po Hnin complained to the Police that he had been robbed of a watch chain with a dollar pendant, and some official enquiry was made, resulting in nothing.

San Min and his men were therefore out for revenge, their resentment being directed towards the inmates of Pauk Si's shop in particular and all Chinamen in general. It should be mentioned that there were some Burman shop servants in Pauk Si's shop.

The gang began operation as soon as they turned into the side road. At least three Chinamen, who were not near the street corner and who had no connection with Pauk Si, were struck down by some. Others, including the ring-leaders, entered Pauk Si's shop, and started to assault every one therein. The victims included one Shwe Sin, an innocent customer, who soon afterwards died of his injuries. It has been urged before us that this man was probably struck by inmates of the shop itself, while they were resisting the attack. This, however, is pure conjecture. There is no evidence of any resistance and, in the circumstances it is extremely improbable that resistance was even thought of. The attacking force was a large one and they took the people in the shop by surprise.

There was, necessarily, big commotion and it can well be understood that the news of most unusual incident such as this taking place near the bazaar, would spread with great rapidity, all over the little town. The police station is only half a mile away from the shop. Yet, the gang, when they had completed their work, marched back along the public road to their sampans and rowed away across the river without let or hindrance.

It was not till the 27th that the inspector acting under orders from the D. S. P. took over the case from Maung Po Se.

As a result of the investigation 29 persons were committed to the Sessions. Of these, nine were acquitted, one a boy of 16 was sentenced to imprisonment till the rising of the Court, 14 were convicted of rioting under section 147, and sentenced to suffer one year's R. I. each, and 5 were convicted of causing grievous hurt and rioting and sentenced to 5 years and one year the sentences to run concurrently. These 19 have appealed.

Learned Counsel for both parties dealt with the evidence against each appellant in detail and I have taken time to study the depositions for the prosecution and the defence.

The two most reliable witnesses for the prosecution (besides U Shwe Lon already mentioned) were Kan Ye (18 P.W.) and Po Tha (19 P.W.). There the evidence of these two support that of witnesses who saw the riot in and near Pauk Si's shop. I consider that the identity of the two rioters was well established. Kan Ye made one mistake, as regards Hla Saung, who was acquitted.

Adopting this view, I find that two of the appellants were not satisfactorily identified, namely, Po Hnit and Pan Bu. A third man, Po Thi was also unnoticed by Kan Ye and Po Tha, but there is otherwise a strong array of witnesses against him and as he appears to have taken a prominent part in the attack I see no reason to disbelieve the evidence against him.

Po Hnit and Pan Bu (4th and 5th appellants) were, as stated above, not satisfactorily identified. Sit Phaung said that he was struck by the former, but he had never seen his assailant before and, as there was no identification parade (another serious omission by the police), his statement must be received with caution; Maung Thin and Lu Bu who said that Po

Hnit was a member of the gang were disbelieved by the trial Court. So far Pan Bu, the evidence was conflicting, and the prosecution witnesses who named him tried to place him at several spots at the same time. I therefore set aside the convictions of the 4th and 5th appellants and direct that they be acquitted.

The convictions of the 17 remaining appellants for the offence of rioting are confirmed.

Charges under sections 325 and 452 read with section 149 had also been framed against each of them, but the learned Sessions Judge, on a consideration of certain decisions of Indian High Courts, came to the conclusion that they could not be convicted under these sections in addition to the conviction under section 147. The authorities on this point are conflicting and there does not seem to have been a case on all fours with the present one. The question, however, is largely one of the sentence to be passed, and as I am unable in the circumstances to hold that a case for enhancing any of the sentences in revision has been made out, it is unnecessary to discuss the legal point in connection with those who have been convicted only of rioting. The appeal of the 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 16th, 17th, 18th and 19th appellants are dismissed.

There remain the cases of the 1st, 2nd, 3rd, 6th and 15th appellants. These men were also charged under Ss. 302 and 325 in the alternative with respect to the deceased Mg Shwe Sin; in addition San Min was charged under sections 326 and 325 (in the alternative) with respect to Chit Tha, the charges under sections 302 and 326 were not substantiated.

As regards the assailants of Shwe Sin, the evidence is very clear against San Min and Kyaw Hla. These two were named both by Amine and by Shwe Sin himself to his wife before he became speechless. The latter also mentioned Po Hnin but this appellant was attacking Amine and there is much force in the contention that he could not have joined in the assault on Shwe Sin, especially when it is borne in mind that the deceased had really only two injuries.

Hence, as regards Po Hnin, Po Thi and San Win, I am not satisfied with the evidence that they joined in the attack on

Shwe Sin. I accept the evidence that they were active participators in the riot and that they actually struck one or more of the injured persons other than Shwe Sin. In this view, it becomes necessary to consider whether they are not liable under section 149. That they may be convicted of voluntarily causing hurt in addition to the conviction for rioting is undisputed, but where it is sought also to convict him under section 325 read with section 149, the decisions of the High Court's are in conflict. A Full Bench of the Bombay High Court in *Queen Empress v. Bana Punja and others* (1) favoured the view which I propose to adopt, namely that such convictions and separate sentences are legal where it is shown that the accused actually joined in the assaults; some of these assaults may have resulted in simple hurt others in grievous hurt but all the actual assailants are, under section 149, liable for all the results. I therefore alter the convictions in these three cases to convictions under section 325 read with section 149 and reduce the sentences on each to three years R. I. The convictions and sentences under section 147 will stand, but the sentences passed on each appellant will run concurrently.

As regards San Min and Kyaw Hla, I confirm the convictions and sentences under Ss. 325 and 147, the sentences to run concurrently. The additional charge against San Min under section 325 with respect to Chit Tha depended on the statement of Chit Tha alone and there was little or no corroboration. I give San Min the benefit of the doubt and the conviction and sentence under this charge are set aside.

In the result, San Min and Kyaw Hla will suffer 5 years' R. I. each; Po Hnin, Po Thi and San Win, 3 years' R. I. each; and the remaining appellants (except the two whom I have acquitted) 1 year's R. I. each.

*Brown* for Appellants.

*Government Advocate* for Respondents.

PRESENT.—HEALD AND LENTAIGNE, JJ.

Maung Thwe . . . Appellant\*  
 v.  
 Ma Shwe Pon . . . Respondent.

*Civil Procedure Code (Act V of 1908) S. 11—Prior mortgage suit—Appellant and Respondent impleaded as Co-defendants—Contest between Mortgagee and Appellant as to Respondent's title in mortgage suit—Whether decision is res judicata in subsequent suit for possession by Respondent against Appellant.*

Where there has been a conflict of interest between co-defendants and an adjudication was necessary to give the appropriate relief to a party, or a co-defendant has a common interest with the plaintiff and has actively supported him against the other defendant, the decision will operate as *res judicata* in a subsequent suit.

*Khandijil Cheriya Chandee v. The Zamorin of Calicut*, (1906) 29 M. 515; *Ramachandra Narayan v. Narayan Mahadev*, (1887) 11 B 216; *Cottingham v. Earl of Shrewsbury* (1843) 3 Hare 627; *Sukh Dial and others v. Mt Bopi and others*, 71 I. C. 481; A. I. R. (1923) Lah 186 Referred to.

Judgment. 21st January, 1924.

*Heald* :—The matters which led to the present dispute have been before the Court many times and may be summarised as follows : There were two claimants to the estate of Shwe Mya and his wife Ma Shwe I, namely Maung Thwe, the present appellant, and Tun Pe, who is now dead. Both claimed to be adopted sons and ultimately the Privy Council held both had established their claims and that they were co-heirs. The Chief Court had held that Tun Pe was the sole heir and while the appeal to the Privy Council was pending, Tun Pe, who had been appointed Administrator to the estate sold certain lands to the present respondent Ma Shwe Pon. Appellant was in possession of the lands and refused to recognise respondent's title, so respondent filed a suit to recover the lands, and obtained a decree for possession. Before she obtained the decree she

\*Civil 1st Appeal No. 123 of 1923 from the decree of the District Court of Tharrawaddy in C R No. 51 of 1923.

had already mortgaged the lands to a Chetty and to Mr. Robertson, who now appears as her Advocate. The Chetty sued on the mortgage and impleaded both respondent and appellant, as well as the second mortgagee. Appellant, who by that time had succeeded to the interest of Tun Pe, pleaded that Tun Pe was not owner of the land, and that in any case the sale was ineffective as having been made *pendente lite*. The Chief Court held that, because Tun Pe was Administrator of the estate at the time when he sold the lands the sale was effective, and a mortgage decree recognising both the mortgagees was passed. Before the final Judgment in the mortgage suit had been given in the Chief Court, respondent, who had been ousted from possession of the lands, had filed another suit against appellant claiming possession on the strength of the sale of them to her by Tun Pe and mesne profits. Appellant again disputed respondent's title on the ground that transfer by Tun Pe was fraudulent; and that an order for possession which he had obtained in certain miscellaneous proceedings of 1918 barred the suit in being *res judicata*. He also pleaded that the mortgagees ought to have been made parties to the present suit, and he denied that respondent had any right to the mesne profits. The lower Court held that because the question whether or not the sale by Tun Pe to respondent was fraudulent had been decided between the parties in respondent's first suit against appellant to recover the lands that question was *res judicata* and appellant could not be allowed to raise it again as a defence in the present suit. It also found that because the mortgagees had been paid off there was no need for them to be joined in the present suit. It held that the order which appellant had obtained in the miscellaneous proceedings was only an interlocutory order which did not finally declare appellant's title to the land, and finding that respondent was owner of the lands, and that therefore she was entitled to mesne profits and to interest thereon, it gave her a decree for possession and for Rs. 5,561 with interest thereon from the date of the institution of the suit to the date of realization with costs.

Appellant appeals against that decree on the grounds that the lower Court was wrong in holding that the sale by Tun Pe conferred any title on respondent, that in spite of the decision

of the Chief Court he was still entitled to impugn the transfer by Tun Pe, that that transfer was void as having been effected *pendente lite* and that he was rightfully in possession of the lands as owner.

Respondent filed a cross-objection to the Court's assessment of the mesne profits. Appellant's learned Advocate admitted that all the questions raised in the appeal were decided in the judgment of the Chief Court in the mortgage suit ; but he suggested that they were not *res judicata* because appellant was a party to that suit not in his personal capacity but merely as heir of Tun Pe, and also because that suit was not a suit between him and respondent, but between the Chetty on the one side and him and respondent on the other. I do not think that there is any substance in these suggestions. The substantial issues in the former suit were exactly those which appellant raises in the present suit. Respondent was practically a formal party to the mortgage suit ; she did not deny the mortgage or the Chetty's right to a mortgage decree. The Chetty as against appellant represented respondent and the matter in dispute was respondent's title. So far as appellant was concerned the decision in that suit finally decided that respondent and not appellant was owner of the lands, and appellant is bound by that decision both in his personal and in his representative capacity. He could not in his representative capacity have raised the issues which he did not raise in that suit because he would have been estopped and it is clear that he actually raised the questions in his personal capacity, the same capacity in which he now desires to raise them again.

I would therefore hold that the appeal fails and must be dismissed with costs.

The cross objection has not been pressed though it has not been abandoned.

The matter of interest is in the Court's discretion. I see no reason to think that the lower Court exercised its discretion wrongly.

The question of the amount of mesne profits which should have been decreed for the season 1918-19 has not been argued and I see no reason to hold that the decision of the lower Court was mistaken.

I would therefore dismiss the above objection but make no order for costs in respect of it.

LENTAIGNE, J.—I concur in the judgment of my brother, Heald in this case. I am satisfied that the appellant Maung Thwe was made a defendant in the previous mortgage suit Civil Regular No. 10 of 1919 not merely as an heir of Tun Pe deceased but also in his personal capacity and this is made clear on a perusal of paragraph 7 of the plaint in that suit. It is also clear that the question in issue in that suit between Maung Thwe and the other parties were mainly issues which could only arise in his personal capacity. I am satisfied that Ma Shwe Pon and the Chetty were in effect making common cause against Maung Thwe in that suit. Ma Shwe Pon admitted the Chetty's claim against her and against Maung Thwe and that claim was based on Ma Shwe Pon's alleged rights as purchaser of the property both as against Maung Thwe and the exclusion of Maung Thwe. Though she was not taking an active part in the conduct of the case, she knew that the Chetty had a common interest with her and was actively prosecuting her claim and she was justified in allowing him to do so.

The decision in *Kandyil Cheriya Chandu v. The Zamorin of Calicut* (1) is authority for the proposition that the previous decision would operate as *res judicata* if the co-defendant had actively supported the plaintiff in the previous case as against the other defendant; and I see no reason why the same principle should not apply where the active support was limited to filing a written statement admitting the plaintiff's claim and leaving it to the plaintiff to press the claim in which both he and such defendant were jointly interested.

In the case of *Ramachandra Narayan v. Narayan Mahadev* (2) West, J., pointed out that, "where an adjudication between the defendants is necessary to give the appropriate relief to the plaintiff, there must be such an adjudication—*Cottingham v. Earl of Shrewsbury* (3), and in such a case the adjudication will be *res judicata* between the defendants as well as between the plaintiff and the defendants. But for this effect to arise, there must be a conflict of interest amongst the

1. (1906) I.L.R. 29 M. 515.

3. (1843) 3 Hare 627.

2. (1887) I.L.R. 11 Bom 216.

defendants and a judgment, defining the real rights and obligations of the defendants *inter se* without necessity the judgment will not be *res judicata* amongst the defendants, nor will it be *res judicata* amongst them by mere inference from the fact that they have collectively been defeated in resisting a claim to a share made against them as a group." Though these remarks were *obiter*, I think that they correctly represent the law and I find they have been adopted by another Judge in a case reported in an unofficial report *Sukh Dial and others v. Mussumat Bopi and others* (4). In the previous case in which Maung Thwe and Ma Shwe Pon were defendants, it was necessary that the rights of Maung Thwe and Ma Shwe Pon should be decided *inter se* to enable the Court to grant the Chetty the decree.

For the above reasons and as it is admitted that all questions raised on this appeal were decided by the Chief Court in that suit against the appellant Maung Thwe, I concur in holding that the present appeal fails and must be dismissed with costs.

*Cowasjee and Das* for Appellant.

*Robertson* for Respondent.

*Appeal dismissed.*

PRESENT.—LENTAIGNE AND CARR, JJ.

Maung Pe

\*Appellant.

v.

Ma Hnit and 2 others

Respondents

*Civil Procedure Code (Act V of 1908), Ss. 34-151—Damages or interest as damages by way of restitution—No jurisdiction to allow in cases where interest not awarded by the decree.*

4. (1923) 71 I C 481 : A I R (1923) Lah 186.

\*Civil Miscellaneous Appeal No. 85 of 1923 from the Order of the District Court of Magwe in C R No. 15 of 1919.

The Court has no inherent jurisdiction under S. 151 C. P. C., to award interest or damages in lieu of interest on the decretal amount from the date of decree where no interest has been specifically awarded by the decree.

A decree-holder is not entitled in execution proceedings to interest by way of restitution under S. 144, C. P. Code in cases where the decretal amount has never in fact been realised, though he will be entitled to such restitution on amounts realised and reimbursed to the opposite party for the period he was kept out of the use of the money.

Judgment. *6th March, 1924.*

*Per CARR, J.*—In Civil Regular Suit No. 28 of 1912 of the District Court Magwe, before the Additional Judge at Yenangyaung, the respondent obtained a decree for Rs. 42,899-8-0 against the appellant with costs. The decree was dated the 23rd September, 1913. It directed payment of interest on the sum decreed at 6 per cent. per annum from the commencement of the suit to the date of judgment, which was the same as the date of decree.

The appellant appealed to the Judicial Commissioner of Upper Burma in Civil Appeal No. 415 of 1913, which was not decided until the 8th March 1917, when the decree was set aside and the suit dismissed. Meanwhile, in Civil Execution No. 19 of 1913, of the District Court, the respondent had applied for execution and certain property was attached. It is noted in the diary under date 8th December, 1913, that the appellant applied for stay of execution under O. 41, R. 6. This appears to have been an oral application, for no written application is on the file. After considerable delay sale was stayed, the appellant furnishing security, on the 17th August, 1914. The Judge then ordered "attachment may be removed." On the Judicial Commissioner setting aside the decree, the execution proceedings were closed on the 16th April, 1914.

The respondents appealed to the Privy Council, who on the 30th May, set aside the decree of the Judicial Commissioner and restored that of the District Court.

On the 18th December, 1919, the respondents again took out execution in Civil Execution No. 15 of 1919 of the District Court. In this application they claimed interest at 6 per cent. per annum from the date of institution of the suit

to the date of the judgment of the Privy Council. The appellant, the judgment-debtor objected that interest was payable only from the date of institution to the date of the decree of the District Court.

On the 14th June 1920, the Additional Judge directed the appellant to pay into Court the sum of Rs. 49,645-2-0 decretal amount and costs, including interest up to the date of the decree of the District Court. The subsequent interest claimed was disallowed, but no reasons were given for this order. This money was paid in and was afterwards disbursed to the respondents on the 15th July, 1920, and the proceedings were closed.

The respondents then appealed to the Judicial Commissioner in Civil 1st Appeal No. 580 of 1920.

The learned Judicial Commissioner in his judgment said :

“The Appellants claim in execution not only interest up to the date of the District Court's decree which was allowed them by that decree, but also interest up to the date of the Privy Council's judgment. The District Courts's judgment is silent as to interest after decree and such interest appears to have been claimed in the application for execution under a misapprehension. However when it was discovered that the decree did not allow this interest it was contended that appellants were nevertheless entitled to it on the ground that at the instance of the respondent the District Court had improperly stayed execution after the appeal to this Court had been filed, which it had no power to do, and which resulted in the appellants being kept out of their money for a long time.”

I would note here that the fact of this contention being raised does not appear on the record of Execution No. 19 of 1913. It may be presumed that the fact was stated to the Judicial Commissioner by the Advocates for both sides who were the same who had appeared before the District Court.

The learned Judicial Commissioner said later.—

“On the merits I would say in the first place that the appellants' claim, though calculated on the basis of

interest in the application for execution has been altered verbally into a claim to interest, as interest could not be entertained either in execution or in a separate suit, as such a claim is barred under S. 34. What the appellants allege is that by an order passed by the District Court at the instance of the respondent they were debarred from reaping the fruit of their decree for several years and they claim damages on that account."

The learned Judge held that the question between the parties was one for decision under S. 47, of the Civil Procedure Code and recommended the case to the District Court. There was a delay of several months in taking up the case again, due partly to the neglect of the District Court itself and partly to the failure of the respondents to move that Court to proceed with the case.

The District Court then framed and tried issues and finally gave the respondents a decree for Rs. 17,445-12-0 as damages. The damages assessed were equivalent to interest at the rate of 6 per cent. per annum on the amount decreed from the date of the District Court's original decree to the date of payment—3rd July, 1920.

Against this decree the appellants now appeal.

Regarded as one for damages the respondent's claim seems to me entirely unsustainable. Leaving aside the general question of a party's liability for an erroneous order of a Court passed at his instance we find in this case that the order was not passed at his instance. He applied under O. 41, R. 6 (2) for stay of sale. The Court, as the Judicial Commissioner has pointed out, was bound to stay the sale on the appellant furnishing security, which he did. That the Court went beyond this and removed the attachment was no fault of the appellant.

Moreover this erroneous order of the Court was not what delayed the realization of their money by the respondents. It had, in fact, no effect whatever on that. The sale, as I have said, must have been stayed, and when the Judicial Commissioner reversed the decree of the District Court, the attachment, had it still subsisted, must necessarily have been removed.

The delay, was in fact, due solely to the length of time occupied in the appeals to the Judicial Commissioner and the Privy Council.

Mr. Higinbotham has not supported the decree as one for damages. He urges that the question should be regarded as one in the nature of restitution. His argument is that had the respondents been able to realize the amount decreed within a short period after the original decree they would since have been enjoying the money and should be put into the same position as if they had so realized it. He has cited certain decisions but they all were in cases where actual restitution was in question and not merely hypothetical restitution. They might have been applicable to this case if the respondents had succeeded in realising the amount decreed and had then on the reversal of the decree by the Judicial Commissioner, been compelled to repay the money to the appellant. That, however, did not happen. I am unable to regard this case as one of restitution or as coming within the scope of S. 144 of the Civil Procedure Code.

When all is said the reality is that the Court, in execution has granted interest on the decretal amount from the date of decree to the date of payment, such interest not having been allowed in the original decree. But for S. 34 of the Civil Procedure Code I should have been inclined to hold that it is within the inherent power of the Court to do this. But S. 34 (2) expressly says that where interest subsequent to the decree is not allowed in the decree it shall be deemed to have been refused. I do not think the Court could be held to have inherent power to do anything which would have the effect of nullifying an express provision of law.

I would allow this appeal and set aside the decree of the District Court, but would direct both parties to bear their own costs throughout.

*Ormiston* for Appellant.

*Higinbotham* for Respondent.

*Appeal allowed.*

PRESENT :—CARR, J.

Mg Hoe Kyin . . . \*Appellant.

vs.

Pe Hla Gyi . . . Respondent.

*Transfer of Property Act (Act IV of 1882), S. 54—Transfer of undivided share of immoveable property—Tangible immoveable property—Oral sale under Rs. 100 to be accompanied by delivery of possession.*

A share in undivided immoveable property is "tangible immoveable property" within the meaning of S. 54, Transfer of Property Act and if the purchase price of such share is under Rs. 100 the agreement for sale must be accompanied by delivery of possession.

*Peare Lal v. Lala, (1911) 11 I C 673 followed.*

Judgment. 3rd January, 1924.

The property in suit is a house and its site in Tavoy, belonging originally to Mg. Shwe Yon and Ma Yon. This couple died leaving four children—the two plaintiffs, \*Ma Shwe Hme, the mother of the 2nd and 3rd defendants, and Mg. Su. When the old couple died is not stated but both must have been dead by 1906. Ma Shwe Hme is also dead and here again the date of death is not stated. As to what has become of Mg. Su we have no information. It may perhaps be presumed that the two are dead and have left no heirs other than brothers and sisters.

Ma Shwe Hme's husband, and the father of the 2nd and 3rd defendants, was Mg. To Hlaing. He mortgaged the house to the 1st defendant-appellant, Hoe Kyin, and afterwards died. Here again we are not told when the mortgage was executed or when To Hlaing died. But in suit No. 247 of 1921 of the Township Court, Tavoy, Hoe Kyin obtained a decree on his mortgage.

\*Special Civil 2nd Appeal No. 83 of 1923 from the decree of the District Court of Tavoy in C. A. No. 3 of 1923.

The plaintiffs first joined the 2nd and 3rd defendants as co-plaintiffs and prayed for a declaration that they four were entitled to five-sixths of the property and that this five-sixths was not subject to the mortgage decree.

The 2nd and 3rd defendants refused to be joined as plaintiffs and were made defendants but the prayer remained the same.

The defence was that in 1906 the two plaintiffs and Mg. Su sold their shares to Mg. To Hlaing and Ma Shwe Hme and thereafter had no further interest in the property.

The Sub-divisional Judge upheld this defence and dismissed the suit. On appeal the District Judge reversed this finding and gave the plaintiffs a decree as prayed. He failed to consider whether the plaintiffs had any right to a declaration in respect of the shares of the 2nd and 3rd defendants. Nor did he consider whether the shares had been correctly calculated. His decision was based on a finding that since the sales were effected by unregistered deed and there was no proof of delivery of possession, the sales were not effective. He did not question the Sub-divisional Court's finding that the plaintiffs had executed the deeds, but did not in terms accept it. In this appeal objection has been taken that the plaintiffs being out of possession could not sue for a mere declaration without asking for consequential relief.

In the fourth paragraph of the plaint, there is an allegation that at the time of suit the property was in possession of the first plaintiff, Pe Hla Gyi, and para. 1 of the written statement admits the correctness of the first five paras. of the plaint. Looking at the record as a whole it seems probable that the allegation of Pe Hla Gyi's possession was untrue and that the admission in the written statement was made inadvertently. But at this stage of the proceedings we cannot go behind these statements in the pleadings and consequently this objection must be dismissed.

The next question that arises is whether an undivided share of immovable property is "tangible immovable property" within the meaning of S. 54 of the Transfer of Property Act, or not. I have no doubt that it is. When the sole owner of immovable property sells that property what

he transfers is his right of ownership. When a part owner sells his share what he transfers is his right of ownership of that share. I see no reason whatever for holding that in the other case it is intangible. The only direct authority on the question that I can find is in the case of *Peare Lal v. Lala* (1), in which it was held that an undivided share of immoveable property is tangible immoveable property. I agree with the reasoning on which that decision was based.

The effect of this finding is that the sale deeds, Exs. 1 and 2, are admissible in evidence. By these deeds each of the plaintiffs separately sold his share of the house for Rs. 95. The share being tangible property, the sale in each case could be effected by delivery of possession alone and a registered deed was not essential. Delivery of possession must necessarily be accompanied by an agreement. This may be oral but the parties may, if they wish, reduce it to writing. Where the property is tangible and the value is under Rs. 100, the written agreement is not compulsorily registrable under S. 17 of the Registration Act, and there is therefore nothing to prevent its admission in evidence to prove the nature of the transaction between the parties. The only effect of non-registration is that the written deed itself does not effect a valid transfer for which purpose delivery of possession still remains necessary.

I have discussed these questions at some length because the admissibility of the two deeds is important in relation to the question whether the sales are proved. The District Judge having omitted to discuss this question I think it desirable that I should do so.

The deeds themselves appear to be genuine. They were made over to the appellant, To Hlaing, at the time of execution of the mortgage. To prove their execution, we have the evidence of Mg. E Mya who wrote the deeds and also signed as a witness, and who swears that the plaintiffs executed them and received payment of the consideration. Of other witnesses, two are dead. The other, U Chu Sein, a retired Myothugyi, does not actually remember the transaction, but says that the signatures on the deeds which purport to be his appear in fact to be his. And after reading the deeds he said that they appeared to be of his drafting. In addition to this

we have U Kyaing and U Ton who say that the plaintiffs told them that they had sold their shares. The former adds that one of the plaintiffs told him after To Hlaing's death, that, though he had sold his share, he would be able to get it back, because the document was not registered. Against all this we have only the bare denials of the plaintiffs, coupled with the fact that the property still stands in the revenue registers in the name of Mg. Shwe Yon and Ma Yon. This fact is not of very great importance for people very frequently omit to obtain mutation of names in such cases. On this evidence I think that the Sub-divisional Judge was right in finding that the plaintiffs did sell their shares and execute the deeds.

There remains the question whether there was delivery of possession such as was necessary to make the sales effective. There is no direct evidence of delivery, and indeed there cannot have been actual physical delivery, for Ma Hme and To Hlaing have occupied the house ever since the deaths of Mg. Shwe Yon and Ma Yon. All along they alone have paid the taxes. And the deeds themselves say that Ma Hme and To Hlaing were in possession and occupation of the house at the time of the transaction. In such circumstances, I am of opinion that constructive delivery of possession is all that is necessary, and this there has been. Both plaintiffs say that they lived in the house with Ma Shwe Hme. Pe Hla Gyi admits having left it fifteen years ago, which would take us back to 1907. Po Pe puts his own departure later and says it is about eight years since he left. The defence evidence suggests that he has been out of the house considerably longer than this but it is not sufficiently definite to admit of any exact finding. Neither of them suggest that since he left the house he has derived any profit or benefit of any kind from it.

On these facts I think we are justified in holding that there has been delivery of possession and that the sales are effective.

I therefore set aside the Judgment and decree of the District Court and dismiss the plaintiff's suit with costs in all Courts. Advocate's fee in this Court' 5 gold mohurs.

*Leach* for appellant.

*Paget* for respondent.

PRESENT :—HEALD AND MAY ÖUNG, JJ.

Lim Chwe Htaw

... Appellant\*

vs.

Lu Tyaw Tat

... Respondent.

*Rangoon Rent Act (Burma Act 11 of 1920), Section 10—Partnership business—Removal of—Premises not required for personal use—Mainly required for partner's separate business and landlord's own business.*

Where the premises sought to be recovered in ejection are not required for the residence of the landlord or any other member of his family but for the landlord's and the separate business of his managing partner and his family and partly for the partnership business of the landlord the premises cannot be said to be reasonably and *bona fide* required by the landlord within the meaning of S. 10 of the Rangoon Rent Act.

Judgment. 7th January, 1924.

*Per Heald, J.* :—The respondent is owner of a house in Strand Road, Rangoon, and appellant is his monthly tenant. The respondent sued to eject appellant and appellant pleaded that he could not be ejected because the premises were not reasonably and *bona fide* required for occupation by respondent himself or any member of his family.

The original Court gave respondent a decree.

Appellant appeals on his original plea.

There is no dispute about the facts. Respondent is one of three parties who carry on business as brokers in a house in Crisp Street where the managing partner lives. The house in Crisp Street has to be re-built and the business has therefore to be moved elsewhere. Respondent proposes to move it into his house in Strand Road. It is admitted that the 3rd partner has a house in Crisp Street which is vacant, but it is alleged that it is not suitable for the business of the partnership because the ground-floor has been designed as a garage. It is also admitted that the premises in suit are required more for the respondent's, and separate business of the managing partner and his family, than for the purpose of the partnership business, and that neither respondent nor any member of his family propose to live in them.

\*Civil 1st Appeal No. 92 of 1923 from the decree of the Court on the Original Side in C. R. No. 320 of 1922.

The learned Judge on the Original Side was of opinion that because respondent had a one-third share in the partnership and the partnership proposes to occupy part of the premises for the purpose of its business, the premises might be regarded as being required for occupation by respondent himself.

We have read the records and heard the learned Advocates on both sides and we are of opinion that the premises cannot be regarded as being reasonably and *bona fide* required for occupation by the respondent within the meaning and intention of S. 10 of the Rangoon Rent Act.

We therefore set aside the decree of the Original Side and dismiss respondent's suit with costs for appellant throughout.

*Das* for appellant.

*Leach* for respondent.

PRESENT.—LENTAIGNE AND CARR, JJ.

U Shwe Min and one . . . *Appellants\**

v.

Maung Maung Gyi and one . . . *Respondents.*

\* *Probate and Administration Act (V of 1881). Ss. 71 and 83—Objection—Necessity for filing caveat—Non-observance of rules relating to pleadings—remand.*

In contentious proceedings under the Probate and Administration Act, 1881 a caveat in accordance with S. 71 of that Act should be filed, and the grounds of objection, as well as any petition in reply, should take the form of pleadings and should be verified in accordance with the provisions of O. 6, R. 15. The further proceedings thereafter should be conducted in the same way as a suit according to the provisions of the Civil Procedure Code.

Their Lordships remanded the application for hearing owing to neglect to observe the prescribed form and procedure.

Judgment. 26th March 1924.

This appeal is against an order passed in the Original Jurisdiction of the High Court refusing Letters of Administration to appellants, who claim to be the father and younger

\*Civil 1st Appeal No. 29 of 1923 against the order of the Original Side in C. M. No. 4 of 1923.

sister of one Ma Han who died on the 20th July, 1922. The main objections to the order are that it was passed merely on statements made in Court which have not been deposed to on oath : that appellants being the father and younger sister of the deceased were the natural parties to whom letters should in the ordinary course have been granted and no evidence had been produced to disqualify them : and that as appellants would give security in the event of obtaining Letters of Administration, such security would safeguard any rival claimants.

Apparently Ma Han was living with one Krishunswamy as his wife, or at least the appellants describe Krishunswamy as her husband, and they state that Ma Han jointly carried on business with her husband Krishunswamy and acquired properties as stall-keepers in Surtee Barra Bazar in stalls which were described in their petition as Nos. 249-A, 250, 251 and 205, but in their petition they omitted No. 250.

The objectors are Ma Thuza, an elder sister of the deceased Ma Han, and Maung Aung Gyi, an uncle of the deceased Ma Han. It was pointed out that the latter as uncle had no *locus standi*, and that objection was accepted by the Court, but I notice that in the original application filed by these objectors in Civil Miscellaneous No. 202 of 1922 in which they had applied that the Administrator General be directed to collect the assets of the deceased and to realize the same under the direction of the Court ; Maung Aung Gyi also claimed to be a creditor of the estate to the extent of Rs. 350 and if he can substantiate such claim, he too would have as creditor right to be heard on the question in dispute.

There appears to be a dispute as to what are the assets of the estate of Ma Han. The objectors in the original application referred to some stalls of which only two are referred to against the four in the first application of appellants, and the objectors also referred to such six stalls as completely belonging to the estate. On the other hand Krishunswamy in a petition of opposition stated that the deceased had no property at all and that 3 of such six stalls did not belong either to him or to the deceased, that two belonged solely to him (Krishunswamy) and that the other two Nos. 250 and 251 were in his name, and it may be that considerable significance should be at-

tached to that differentiation between stalls belonging to him and stalls in his name.

It would seem possible that this unavailing opposition of Krishunswamy in Civil Miscellaneous No. 202 of 1922 was the cause of appellants coming on the scene in the same record where the Advocate for Krishunswamy is recorded as supporting the application as against the Administrator General.

The appellants then filed the application, Civil Miscellaneous No. 4 of 1923, which gave rise to the order which is now appealed against. The respondents filed an unverified petition of opposition and the appellants then filed an unverified petition in reply to such opposition, and it was on the unverified petition that the order appealed against was passed.

The objectors ignored the provisions of Ss. 70 and 71 of the Probate and Administration Act as to the practice of filing a caveat and the form which such caveat should take. The objectors have also ignored the provisions of S. 83 of that Act which prescribed the procedure which should have been adopted in contentious cases : under that provision the grounds of objection should have been in the form of a pleading and properly verified in accordance with the provisions of O. 6 R. 15. Similarly the reply of the appellants should have been properly verified, and the proceedings should then have taken the form of a suit in which an issue should be framed and the parties should be examined on oath.

An objection has been taken to this absence of formality and the failure to prove the allegation on oath. I think that we are bound to remand the case for trial in the ordinary course in accordance with these provisions of the Probate and Administration Act, read with the Code of Civil Procedure. This order does not imply that we are expressing any opinion as to the merits of the case. I would let each party bear his own costs in both Courts up to date.

*Keith* for appellants.

*N. N. Sen* for respondents.

PRESENT.—ROBINSON, C. J. AND HEALD, J.

T. C. Bose Appellant\*  
 v.  
 O. R. Chowdhury Respondent.

*Civil Procedure Code (Act V of 1908) O. 21, R. 97—Application for possession by auction purchaser—"Resistance" or "obstruction"—Appellant absent at time of delivery of possession—Subsequent suit by appellant for possession—Article 11 A Limitation Act inapplicable.*

The Court purported to give possession to an auction purchaser under O. 21, R. 97 of certain land which was in possession of the appellant as purchaser from the mortgagor. The appellant was absent at the time of delivery of possession. He brought a suit for recovery of possession which was dismissed as being barred under Article 11 A of the Limitation Act.

*Held* that Article 11 A did not apply to the case.

The "resistance" or "obstruction" contemplated in O. 21, R. 97 is some overt act of "resistance" or "obstruction" to the giving of possession by some person who is present at the time.

Judgment. 26th March 1924.

The owner of the two properties mortgaged them to one Po Kyaw on the 16th of March 1914. On the 12th of September, 1918 he sold these properties to Mr. Bose, the present appellant. U Po Kyaw filed a mortgage suit and obtained a decree, but he did not make Mr. Bose a party to that suit. A mortgage decree having been passed, the property was brought to sale and purchased by the respondent Chowdhury. On the 1st of November, 1920, Chowdhury applied under Order 21, R. 95, of the Code of Civil Procedure, to be put into possession. On this, the Court ordered notice to issue to Mr. Bose's tenants. The Court examined them, and also Mr. Bose himself, but without any investigation of the title Mr. Bose set up, passed an order that, as the men were only coolies they had no right to be in possession, and that they should vacate the land within one month. This order was passed on the 31st of January, 1921. On the 3rd February, 1921, Mr. Bose applied alleging that he was in possession as owner, and prayed that his possession should not be disturbed, without investigation. Notice was ordered to issue to

\*Civil 1st Appeal No. 323 of 1922 from the District Court of Maubin in C. R. No. 8 of 1922.

Chowdhury. On the 3rd of March, 1921, the Court dismissed Mr. Bose's application. The application was dismissed on the ground that Mr. Bose's possession has not yet been disturbed. On the 24th of July, 1921, Chowdhury was given possession in accordance with the order originally passed. Mr. Bose again applied on the 17th of August, 1921 pleading that he was the owner and that his possession should be restored after investigation, but on the 1st September, 1921 the Court rejected his application. Mr. Bose then filed a suit on the 3rd of May, 1922, praying for a declaration that the decree in the mortgage suit brought by U Po Kyaw was not binding on him, for a declaration that he Chowdhury had acquired no title to the lands, for possession of the lands and for mesne profits. The suit has been dismissed as barred by limitation, the Court holding that Article 11 A of the limitation Act applied, and that the suit must have been brought within one year from the date of the order of the 31st January, 1921. Against that decision an appeal has been filed.

It is clear that none of the proceedings taken before the Court were under O. 21, R. 97, of the Code of Civil Procedure. The "resistance" or obstruction there contemplated is some overt act of "resistance" or obstruction to the giving of possession by some person who is present at the time.

There was no allegation of any such "resistance" or "obstruction" and it is clear that the suit that is provided for in cases of such "resistance" or obstruction is not a suit which could have been filed in the present case.

Article 11 A of the Limitation Act is perfectly clear, and provides a period of limitation only for that class of suit. The present suit is an entirely different case. It seeks reliefs other than those contemplated and it is clearly within time under the general period of limitation.

The appeal will be accepted and the suit remanded to the District Court for disposal on the merits.

The respondent will pay the costs of the appellant in this appeal and we direct that a certificate may issue for the refund of the full Court fees paid in connection with this appeal.

We fix the Advocate's fee at 2 gold mohurs.

*Das* for appellant.

*Mr. Chari* for respondent.

PRESENT :—HEALD, J.

Maung Pe . . . . . *Petitioner\**

vs.

King Emperor . . . . . *Respondent.*

*(Lower) Burma Land and Revenue Act (II of 1876), Rule 69—Planting of rubber trees on waste land—Subsequent notification as grazing ground—Order for removal of trees—Conviction under R. 69 illegal.*

The petitioner planted rubber trees on State waste land pending his application for a grant and paid assessment thereon. The grant was refused and the land notified as a grazing ground whereupon petitioner applied for refund of the tax paid.

The Deputy Commissioner passed an order that the petitioner do vacate the land and remove the rubber trees and that until that was done the petitioner had not vacated the land. The revenue paid was ordered to be refunded when petitioner vacated.

Petitioner having failed to remove the trees was prosecuted under R. 69 of the Lower Burma Land and Revenue Act and fined Rs. 50 for occupying a finally demarcated grazing ground and convicted on his admission that the rubber trees planted by him were still on the land.

*Held*, that R. 69 did not empower the revenue authorities to order petitioner to remove the trees he had planted and the mere fact that the trees remained on the ground did not constitute occupation of the grazing ground.

The Magistrate's order that the rubber trees must be cut down root and branch within a month was set aside as being made without jurisdiction.

Judgment. 24th March, 1924.

On the 19th of May 1917, Maung Pe applied for a grant of an area of some 13 acres of State waste land for rubber cultivation.

Notice of his application was duly published and no objections were received.

\*Criminal Revision No. 12-B of 1924 upon reference made by J. P. Doyle, Esq., I. C. S., Sessions Judge of Tavoy and Margui for review of the order of the Sub-divisional Magistrate of Margui in his Cr. Reg. Trial No. 83 of 1923.

In anticipation of the issue of a grant he brought part of the land under cultivation.

On the 30th of August, 1918, the Township Officer recommended the issue of the grant.

On the 26th of March, 1919, the Deputy Commissioner refused the grant on the ground that the land ought to be reserved as a grazing ground. At the same time he ordered that steps be taken to reserve the land as a grazing ground.

Apparently the land was notified as a grazing ground in Grazing Ground Proceedings No. 7 of 1918—19 of the Mergui District Office.

On the 8th of March, 1920, Maung Pe filed an objection to the notification on the ground that he had actually been assessed to revenue on his cultivation of the land and had paid Rs. 48-9-0 as land revenue. His objection was rejected.

On the 17th of April, 1920, he applied for a refund of the land revenue which he had paid for the year 1919—20. The Deputy Commissioner said that he was prepared to remit the revenue if Maung Pe vacated the land and that the only way he could vacate the land was to remove the rubber trees.

On the 20th of August, 1920, the Deputy Commissioner recorded that Maung Pe must vacate the land at once and that until he had removed the rubber trees, he had not vacated. When he vacated the revenue will be refunded.

On the 6th of September, 1920, the Sub-divisional Officer was directed to see that the land was vacated.

The matter was allowed to drag on until May 1923, when Maung Pe's prosecution under R. 69 of the Rules under the Lower Burma Land and Revenue Act for occupying a finally demarcated grazing ground was ordered. It then appeared that the land had never been shown on the maps of the Land Records Department as grazing ground and a dispute arose between the Deputy Commissioner's Revenue and Land Records Offices, which suggests that even then the land had not been finally demarcated as a grazing ground.

On the 3rd September, 1923, a complaint of an offence under R. 69 was filed against Maung Pe.

No evidence was offered to show that the grazing ground had ever been finally demarcated but Maung Pe was convicted

on his admission that rubber trees planted by him were still on the land. He was fined Rs. 50 which he paid. He was also ordered to cut down the trees root and branch within a month.

He applied in revision to the Sessions Judge who has reported the case to this Court with a recommendation that the conviction be set aside and the fine refunded, and that the order to cut down the trees be set aside.

It is perfectly clear that the conviction cannot be justified and in my opinion the action of the Revenue authorities was entirely misconceived. Under R. 51, Maung Pe was liable to pay revenue and was also liable to ejection. But I see no reason to believe that that rule empowered the revenue authorities to order him to remove the trees which he had planted. A mere fear that he might subsequently trespass on the grazing ground and tap the trees would not justify such an order, and if he did so, after the grazing ground had been finally demarcated, he would be liable to prosecution under R. 69. The mere fact that trees, which he had planted before the grazing ground was ever constituted or ever thought of, remained on the ground after he had been ejected could not possibly constitute occupation of the grazing ground by him.

The conviction and sentences are set aside and the fine which has been paid will be refunded. The Magistrate's order that the rubber trees must be cut down root and branch within a month is also set aside, as being made without jurisdiction.

PRESENT :—YOUNG, J.

Doo Doo Meah and one . . . Appellants\*

vs.

Kasim Ali and one . . . Respondents. \*

*Contract Act (IX of 1872), S. 10—Lease granted by minor—Cancellation—Specific Relief Act (I of 1877), S. 41—Compensation to lessee.*

Where a minor, acting as manager of the family property, granted a perpetual lease of certain land to the appellants and the property was subsequently partitioned to other members of the family who sold the same to the respondents and the respondents sued for a declaration and ejection.

*Held*, that the lease being void should be cancelled, and the appellants were bound to vacate, but that they should be paid the value of the houses erected on the land and the value of any fruit-garden raised by them, and of any hunds erected, such valuation to be made as at the date of eviction, and that appellants should also be entitled to the crops sown by them when ripe and to free ingress and egress to gather and carry them.

*Mohori Bibi v. Dharmodas Ghose*, 30 C 539 ; *Dattaram v. Vinayak*, 28 B 181 followed.

Judgment. 17th March, 1924.

In this appeal the plaintiffs seek to recover possession of certain lands from the defendants 1 and 2 under the following circumstances :

They allege that they bought the lands from defendants 4, 5 and 6, defendant 4 being the wife of plaintiff 1, defendants 5 and 6 being respectively the mother and aunt of plaintiff 2, who had acquired the property on partition, it being part of the property of one Fazar Ali.

The defendants 1 and 2 claim to be in possession under a perpetual lease granted to them by the 3rd defendant on the 30th March, 1906. At this time the 3rd defendant was a minor : he gave his own age in 1922 as 29, which would have made him 13 in 1906, the date of the lease, and the 1st defendant admits that he was only 15 or 16 at the time.

\*Special Civil 2nd Appeal No. 216 of 1923 from the decree of the District Court of Akyab in Civil Appeal No. 5 of 1923.

Such being the case the contract of lease was not voidable but void and the defendants are in under a void lease. *Mohori Bibi v. Dharmadas Ghose* (1); *Dattaram Govindabhai Guzar v. Vinayak Balkrishna Agashe* (2), and the rightful owner could eject them at any time. Are the plaintiffs the rightful owners? They claim through the 4th, 5th and 6th defendants, who themselves claim through the 3rd defendant as manager. All these defendants make common cause with the plaintiffs. The plaintiffs' case is that the land belonged originally to one Fazar Ali who died about 20 years ago leaving defendants 3, 4, 5, 6 and another daughter as heirs. Defendant 3 managed the estate though a minor and admittedly leased out this portion. When defendants 4 to 6 came of age in 1910-11, there was a division of the inheritance and this portion of it fell to defendants 4, 5 and 6. This partition is testified to by Sultan, the headman and Shor Ali, his uncle, neither of whom is related to the plaintiffs and both of whom seem to be independent witnesses, and I accept their evidence.

Defendants 4, 5 and 6 sold the lands in suit by a duly registered deed of sale to the plaintiffs who have brought this suit. This sale deed was attacked in argument, but the vendors themselves do not dispute it and they are the only persons concerned. Defendants 4, 5 and 6 might just as well have been joined as plaintiffs, and in my opinion the attacks are irrelevant.

The learned Judge of the lower appellate Court was correct in giving the plaintiffs a declaration and moreover against this portion of the Judgment, there has been no cross-appeal; such being the case, I see no answer to their claim for possession, the defendants being under a void lease, and the defendants must vacate. The lease must be cancelled and under the Specific Relief Act, S. 41, the defendants are entitled to remove or have the houses erected by them on the land valued and have the proceeds paid to them, also to have any bunds erected by them and any fruit garden raised by them valued, and the proceeds paid to them, such value in all cases being

1. 30 C 539 (P. C).

2. 28 B 181.

the estimated value at the time of erection and further if they have planted or sown on the property crops which are growing at the time of eviction, they are entitled to such crops when ripe and to free ingress and egress to gather and carry them.

*Lambert* (Junior) for Appellants.

*Bose* for Respondents.

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FULL BENCH.

PRESENT :—ROBINSON, C. J., HEALD, MAY OUNG,  
LENTAIGNE AND CARR, JJ.

Mg Myat Tha Zan and two others . . . . . *Appellants\**

vs.

Ma Dun and one . . . . . *Respondents.*

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*Transfer of Property Act, (IV of 1882), S. 54—Contract of sale—Possession—No registered deed—Suit for possession—Right of defendant to resist suit.*

*Per Curiam* :—(1) Where a purchaser of immoveable property has been given possession by the legal owner under a contract of sale as defined in S. 54, Transfer of Property Act, without any registered deed being executed, or has been given possession of the same by the legal owner in a transaction which purported to be a sale, and which would have been a sale but for the fact that no registered deed was executed, he may legally resist a suit by the legal owner for recovery of possession.

(2) Evidence of a prior contract of sale is admissible in cases where a sale has failed to take effect for want of a registered deed.

*Per Carr, J. (dissenting)* :—Where the transaction has gone beyond a mere contract for sale and amounts to an abortive sale, no oral evidence can be let in under S. 91, Evidence Act, to prove the sale.

*Vizagapatam Sugar Development Co. v. Muthuramiah*, 46 M 919 (F B), *Immudipattam Thirugnana Kondama Naik v. Periya Dorasami*, 24 M 377 (P C), *Mahomed Musa v. Aghore Kumar Ganguli*, 42 C 801 (P C) ; followed.

*Bapu Apaji v. Kashinath*, 41 B 438, *Pucha v. Kunj Behari*, 17 C W N 445, *Akbar Fakir v. Intail Sayal*, 29 I C 707, *Shafkal v. Krishna Govinda*, 23 C W N 284, and *Karamath Khan v. Latchmi Achi*, 10 L B 241 referred.

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\*Civil Reference No. 1 of 1924 upon reference by Carr, J. in Civil 2nd Appeal No. 82 of 1923.

Reference Order by Justice Carr, under R. 1 (c) of the rules of the High Court in notification No. 10-general, dated 18th December, 1922.

Questions referred :—(1) To a suit by the legal owner for possession of immoveable property of a value of Rs. 100 or upwards is it a valid defence that the defendant was given possession of the property by the legal owner under a contract for sale as defined in S. 54 of the Transfer of Property Act ?

(2) To such a suit is it a valid defence that the defendant was given possession of the property by the legal owner in a transaction which purported to be a sale and which would have been a sale but for the fact that no registered instrument was executed as required by S. 54 of the Transfer of Property Act ?

(3) Does S. 91 of the Evidence Act prohibit the admission, in order to prove a prior contract for sale of evidence of a transaction which purported to be a sale of immoveable property of the value of Rs. 100 or upwards but which was not effected by a registered instrument as required by S. 54 of the Transfer of Property Act ?

Judgment. 24th March, 1924.

ROBINSON, C. J. : (*May Oung*, J. concurring) — The questions that have been referred for decision by a Full Bench are as follows : (His Lordship read the questions referred set out above.)

The authorities are all quoted in the order of reference with the exception of *Vizagapatam Sugar Development Company v. Muthuramareddi* (1).

By this Full Bench decision the previous decisions to the contrary of the Madras High Court were overruled, with the result that the position now is that all the High Courts in India hold the same view of the questions now before us. That is a very strong point to which full weight must be given : the opinion of a Full Bench of this Court was to the same effect. We are now asked to resile from the opinion previously expressed, and to differ from every other High Court in India.

The facts of this case are that plaintiffs sued for possession of certain land which admittedly had been the property of their mother. The defendants who are also heirs replied that the land had been sold to them for Rs. 1,200 that the consideration had been paid : that they had been put into possession and have long been in possession : that mutation of names had been effected in the Revenue Registers that no registered deed of

sale had been executed because the mother's eye sight was bad and that the execution of the conveyance had been postponed the mother dying before it was executed.

The decisions are based some on principles of Equity (the equity of part performance) ; some on the ground that the Court would not lend itself to aid the plaintiff in effecting a fraud, and some on the ground of a fiduciary relation which was created between the parties by the facts. In my opinion the case might be adequately disposed of on any one of these grounds.

In the case of *Immudipattam Thirugnana Kondama Naik v. Periya Dorasami* (2) their Lordships of the Privy Council uttered a dictum which clearly supports the view now universally held. In the course of their judgment it is said :—  
“It is contended that though the mortgage may fall short of an actual transfer it shows a good contract for one and that the defendant may now call upon Ovala's heir to implement that contract. Certainly if such a right exists it would be an answer to the plaintiff's claim and the exact form which it could be enforced need not be considered.

In the present case the right to sue for specific performance still exists, and may be enforced. The payment of the money, the granting of possession and the mutation of names in the Revenue Registers all amount to part performance, and it is in my mind clear that the defence to a claim for possession under these circumstances is clearly held to be good by their Lordships.

In another case, *Mohamed Musa v. Aghore Kumar Ganguli* (3) their Lordships again dealt with the application of the equities applicable to these cases. After referring to the case of *Maddison v. Alderson* and the fact that the parties had acted on the contract to sell, they observed :—“Their Lordships do not think that there is anything either in the law of India or of England inconsistent with it, but, upon the contrary, that these laws follow the same rule. In a suit, said Lord Selborne in *Maddison v. Alderson* founded on such part performance (and the part performance referred to was

2. 24 M 377.

3. 42 Cal 802.

that of a parol contract concerning land) the defendant is really "charged" upon the equities resulting from the acts done in execution of the contract, and not (within the meaning of the Statute of Frauds) upon the contract itself. If such equities were excluded, injustice of a kind which the statute cannot be thought to have had in contemplation would follow."

Returning to the ground of fraud, I think there can be no doubt that an attempt by the plaintiffs in this case to go back upon the contract itself after having received the purchase price, and after possession had been given, clearly amounts to an attempt at fraud which the Courts in this country cannot and should not aid.

It has been urged that in this case there is no mention in the pleadings of any contract, and that what is alleged is an abortive sale. But it is clear from the first Privy Council judgment quoted that what has to be dealt with in these cases is the contract to sell that the Courts are not dealing with the abortive sale itself : that, whether the sale be void or merely voidable, there must be in each case, prior to the execution of the document, an agreement for sale : and that the mere fact that the pleadings do not specifically refer to it does not compel the Courts to treat it as if it were non-existent.

Section 54 of the Transfer of Property Act may render the transfer illegal if not evidenced by a document in writing registered : but the section clearly contemplates the contract for sale and the possibility of cases existing in which there is not a duly registered conveyance. In these cases the Courts always have to deal with the contracts for sale : and all that S. 54 lays down with reference to them is that they do not of themselves create any interest in or charge on, such property. The contract in the present case does not of itself create any interest in the property, but in addition to the contract, we have the acts of the parties and the possession following the payment of the purchase price and the mutation of names which, coupled with the contract, do create an interest in the property. It cannot be necessary that the parties should have to be forced to a suit for specific performance of a contract for sale before

they can be given any relief against fraudulent and inequitable claim for possession. In my opinion, therefore, the first two questions referred should be answered in the affirmative.

As regards S. 91 of the Evidence Act, it appears to me that it does not apply in this case at all. It deals with cases when the terms of a contract have been reduced to the form of a document, and to cases in which any matter is required by law to be reduced to the form of a document. If we were dealing with a deed of sale that was in existence, or with a contract for sale which was required by law to be reduced to the form of a document, some such question might arise but we are dealing here with a contract for sale which the law does not require to be reduced to the form of a document. An agreement to sell may be an oral agreement, and no question, therefore, of the admissibility of the evidence, I think, arises. It is not the transaction of sale that is in question, but the agreement to sell, which must, and always does, precede the execution of the contract for sale. By Explanation 3 to the section, even if a statement was made in a document of sale, which was not registered, of the prior oral agreement to sell, evidence as to that prior oral agreement is excluded from the provisions of the section.

I understand from the order of reference that in this case the evidence given was that of a sale : but it appears to me that, upon a just consideration of that evidence, it must be held that the evidence was not given of a sale, but of a prior contract for sale. If all the evidence that was given was evidence of the contemplated sale, that evidence might be inadmissible, but if inadmissible on that ground, seeing that the intention of the witnesses was to establish a prior oral contract for sale, the Court would be justified in remanding the case in order that evidence should be given in a manner which does not technically interfere with the rule of evidence.

HEALD, J.—The only question which seems to me to arise for decision by us in the suit in respect of which this reference has been made is whether or not in a case where there has been an agreement for the sale and purchase of land by the purchaser to the seller and possession has been given by the seller to the

purchaser but where no instrument has been written or executed or registered the seller can succeed in a suit for possession on the strength of his legal title when his suit is brought within the period of limitation allowed for a suit by the purchaser for specific performance of the agreement to sell.

In view of the decisions of the High Court of Bombay in the Full Bench case of *Babu Apaji v. Kashinath* (4), of Calcutta in the cases of *Pucha v. Kunj Behari* (5), *Akbar Fakir v. Intail Sayal* (6) and *Shafikal v. Krishna Govinda* (7) and of Madras in the Full Bench case of *Vizagapatam Sugar Development Company v. Muthuramareddi* (1) and of the remarks of the Privy Council in the case of *Mahomed Musa v. Aghore Kumar Ganguli* (3) I am of opinion that as held by the Chief Court of Lower Burma in *Karamath Khan v. Latchmi Achi* (8) it should now be regarded as settled law that proof of a valid agreement for sale is a good defence to a suit for possession brought by the seller against the purchaser in a case where owing to failure to execute and register an instrument, there has been no legal conveyance of title from seller to purchaser, and where as in this case a suit for specific performance of the agreement for sale would not be barred by limitation.

I do not think that any question of the operation of S. 91 of the Evidence Act arises in this case because the agreement for sale was not in writing and such agreements are not required by law to be reduced to the form of a document.

LENTAIGNE, J :—I concur in the opinion that the first question referred for our decision must be answered in the affirmative, and that the defence of part performance by delivery of possession under an oral agreement for sale of immovable property is a good defence in a suit for recovery of possession under the circumstances stated in the question. I think that this Court should follow the series of Full Bench decisions of various High Courts in favour of the defence which have been cited in the Order of Reference, including the decision

4. 41 B 438.

5. 17 C W N 445.

6. 29 I C 707.

7. 23 C W N 284.

8. 10 L B R 241.

of the late Chief Court of Lower Burma in *Karamath Khan v. S. N. L. Latchmi Achi* (8). As the High Court of Madras has resiled from the previous decisions of that Court and came to a similar conclusion in the case of *Vizagapatam Sugar Development Company v. Muthuramareddi* (1) it would appear that the more ancient High Courts are now unanimous on the point : and I think that the conclusion also necessarily follows on a consideration of the two decisions of the Privy Council cited in the Judgment of the Honourable Chief Justice.

I would also answer the second question in the affirmative on the facts of the present case. It is stated that the contract alleged in the present case was not described as a contract to sell but an oral sale. It is admitted that the parties had not complied with the provisions of S. 54 of the Transfer of Property Act, 1882, and that consequently the oral sale was invalid in law, because it lacked the necessary formality of a registered deed embodying the sale. That being so, the oral contract was, in my opinion, at most an executory contract to sell, which had not been completely performed. On this view of the contract the position is similar to that in the various cases decided by the Full Bench decisions referred to above : the contract to sell had been partly performed by a delivery of possession and by a payment of the purchase money but in another important respect it had not been carried out, because in law the parties must presumably have contemplated both the execution of a deed completing the sale and the registration of such deed in accordance with law : and the Order of Reference shows that there was a failure to perform in this respect.

As regards the third question raised in the Order of Reference : the answer is simple on the facts of this case, where there is merely an oral contract coupled with a subsequent payment of the price and delivery of possession of the immoveable property. As there is no law prohibiting an oral contract to sell immoveable property, there is no provision in S. 91 of the Indian Evidence Act, 1872 which prohibits the admission of evidence of such oral contract, the terms of which have not been reduced to the form of a document. Therefore, the answer

to the third question, so far as this case is concerned, should be in the negative.

CARR, J.—In view of the fact that the High Courts in India are now unanimous on this question, I agree that the first two questions should be answered in the affirmative.

In regard to the third question I find more difficulty. In my view the transaction has gone beyond a mere contract for sale and amounts to an abortive sale. I think that S. 91 of the Evidence Act is applicable and would answer the third question also in the affirmative.

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PRESENT :—ROBINSON, C. J. AND MAY OUNG, J.

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Eugene Hugh Conrad Lecun . . . Appellant\*

vs.

Mrs. May Julia Lecun . . . Respondent.

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*Advancement—Presumption—Applicable to Anglo-Indians in the same way as Europeans.*

The presumption of advancement as it is known in English Law, applies to Anglo-Indians in cases where a husband transfers property into the name of his wife.

*Gopee Kristo Gosain v. Gunga Persaid Gosain*, (1854) 6 Moo. I. A. 53. *Moulvie Sayyad Uzhur Ali v. Mussammat Beebee Ultaf Fatima*, (1869) 13 Moo. I. A. 232 ; *Meyappa Chetty and one v. Maung Ba Bu*, 3 B L T 62 ; approved and referred to.

*Kerwick v. Kerwick*, 48 C 260 : 10 L B R 335 : 1 B L J 4 (P C) followed.

Judgment. 11th March, 1924.

*Per* ROBINSON, C. J. :—This was a suit brought by the plaintiff-respondent, Mrs. Lecun, against her husband defendant-appellant for possession of a house which had been gifted to her by her husband in 1908. It is necessary for the purpose of our decision to set out the facts in some detail.

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\*Civil 1st Appeal No. 191 of 1923 against the decree of the Original Side in C R No. 172 of 1923.

Appellant was originally in the Public Works Department but owing to his superior not approving certain measurements in a contract which he had passed, he was dismissed and set up a business on his own account. He obtained a valuable contract from the Burma Rice and Trading Company to erect for them a mill at Bassein. In 1904 he bought a piece of land in Rangoon and for the purchase-price or part of it he executed a mortgage on the land in favour of the vendor. In the year 1906 or 1907 he built a house on part of this land. In the latter year he paid off the vendor's mortgage borrowing money from one Ma Ma Gyi to do so. To her he gave a mortgage on the house and land. He had a dispute with one of his sub-contractors, and on the 6th April, 1907 this man filed a suit against him for Rs. 16,000 odd. Appellant then paid into Court Rs. 5,749 and joined issue as to the balance. The sub-contractor attached the money due to him by the Burma Rice and Trading Company, but appellant gave security and got the attachment removed. While that suit was pending he married the respondent on the 3rd of June, 1908. He alleges that acting under advice he paid off Ma Ma Gyi's mortgage with money that he had, and fearing that the same sub-contractor in execution of the decree that he was likely to get might attach this house, he decided to put it in his wife's name, and to that end in order to save his property from the risk of attachment he executed a deed of gift dated the 23rd of June, 1908 in favour of his wife. The parties lived in this house and have done so all along until the disputes arose which led to a separation and to the bringing of the present suit.

On the 4th of September, 1908, part of the site originally bought was sold to Sir A. Jamal by Ex. C for Rs. 7,500. The deed of sale was executed by the respondent as vendor. Both parties claim to have taken the money. The other bits of this land were sold in the same or the next year to Messrs. Burjorjee and one Vertannes, but the deeds of conveyance have not been produced nor have any certified copies of them. It has not been proved whether these two sales took place before the marriage or after though it seems more than probable that they were after the marriage. There was in 1911, a

boundary dispute between Messrs. Lecun and Burjorjee. Appellant naturally negotiated the sales and gave instructions in respect of the boundary dispute. Judgment was delivered in the sub-contractor's suit on the 8th of March, 1909 and a decree passed for Rs. 4,505 and costs in his favour in addition to the sum paid into Court by appellant. The decree was confirmed on appeal, and on the 20th of March, 1911, appellant paid the decretal amount. To do this he raised money from his wife's uncle who had been his Counsel in the case. The title-deeds of the property were handed over to him and pro-notes executed by both the husband and the wife for the amount advanced. These pro-notes had been renewed from time to time ; they were last renewed on the 25th of October, 1921 for Rs. 13,500.

After living happily together until 1922, various differences arose between the husband and wife. She found letters of a compromising character written by a lady, who had been living with them, to her husband. Appellant had apparently been told by this lady that his wife was misconducting herself with one Lambert and he taxed her with it. She strenuously denied it and brought a counter charge against him with reference to the other lady. On the 26th of July, 1922, she left him and went to her mother's house. On the 27th of July there was a meeting between the husband and the wife. There appears to have been some sort of settlement arrived at by which the appellant was to take his wife back, and she was to execute a document transferring to her children this house or a document by which she was to be trustee for her children. However, on the next day, her husband sent Lambert to the house having heard from him a confession of his misconduct with the respondent. He followed and confronted his wife with Lambert. Lambert admitted the misconduct, but his wife denied it, and there was evidently a stormy interview. On the 29th of July, respondent wrote a letter to appellant expressing her disappointment that he had not come the previous day and taken her back as he had promised to do so on certain conditions, the chief of which was that the children were to have shares in the house. Appellant had a document prepared for execution by his wife which sets out that the husband was

absolutely entitled to the land and buildings the subject of the gift of the 23rd of June, 1908 in favour of the wife, and that the property had been held by her in trust for her husband during his lifetime and upon his death for the benefit of his children. The document then declares the trust as set out above in favour of the husband and three children who were named—these three to take the property after the husband's death in such shares as may be directed by the Will of her husband. Respondent refused to execute such a document. She would not apparently agree to the allegation that she had all along held the property on trust for her husband, and she did not approve of the house going to the three children then living as she was in the family way, and that child ought also to share. Apparently appellant was not satisfied that he was the father of that child, but whatever the reasons may be, all these negotiations fell through. On the 17th of August, appellant's Counsel wrote to her a letter calling upon her to acknowledge that she was merely a benamidar in respect of the property in suit and requesting her to fix a date when she would execute a re-conveyance of the property in favour of her husband. No answer was sent to this letter, and on the 7th February, 1923, respondent wrote through her Counsel calling upon appellant to deliver possession by ejectment, if necessary, and for mesne profits. Plaintiff-respondent bases her claim on the deed of gift of the 23rd June, 1908. She had been in possession of the house living there with her husband ever since, and it is urged on her behalf, that the parties being Anglo-Indians, the same exception to the general rule as regards resulting trusts applied in this case as it would in the case of Europeans under the law as administered by the Court of Chancery at Home. It is urged that the *prima facie* presumption is that this property was gifted to her by way of advancement, and that the onus lies on the appellant to establish that that was not his intention at the time the deed was executed.

For the appellant it is urged that the general law in India is the same as the general law in England as regards resulting trusts; and that, having regard to the facts as regards the nationality or race, domicile and residence of the parties, the

presumption of advancement does not apply, but that, on the contrary, the primary presumption is that the gift was made benami without any intention of transferring the beneficial ownership to the respondent.

Reliance is placed on the facts set out at the beginning of this judgment which occurred at the time the deed was executed. Further, reliance is placed on the facts that throughout appellant has been dealing with the property as owner exercising all those rights that he would exercise if he had never ceased to be the beneficial owner of it. Lastly, reliance is placed on the happening on the 26th of July, 1922 and the following days.

There is little doubt as to the law in respect of resulting trusts and the presumption of advancement in India. As regards Hindus, the law has been laid down in the case of *Gopeekristo Gosain v. Gungapersaud Gosain* (1); and in respect of Mohammedans in the case of *Moulvie Sayyud Uzthur Ali v. Mussumat Beebee Ultaf Fatima* (2). The same rules have been held to apply in the case of Burmans in *Meeyappa Chetty and one v. Maung Ba Bu* (3).

As regards this last case we desire to express no opinion at present. It may be necessary to give this question of law further consideration in the case of Burman Buddhists; but the two former cases are decisions by their Lordships of the Privy Council. In the case of Europeans who had been born and had a permanent residence in India, the law has also been laid down by their Lordships of the Privy Council in *Kerwick v. Kerwick* (4).

Lord Atkinson in delivering the judgment of their Lordships said:—"The general rule and principle of the Indian law as to resulting trusts differs but little, if at all, from the general rule of English Law upon the same subject, but in their Lordships' view it has been established by the decisions in the case of *Gopeekrito Gosain v. Gungapersaud Gosain* and *Uzthur Ali v. Ultaf Fatima*, that owing to the widespread and persistent practice which prevails amongst the natives of India, whether Mahomedans or Hindus, for owners of property to make

1. (1854) 6 Moo. I. A. 53.

2. (1869) 13 Moo. I. A. 232.

3. 3 B L T 62.

4. 48 C 260 : 10 L B R 335 : 1 B L J 4 (P C).

grants and transfers of it benami for no obvious reason or apparent purpose, without the slightest intention of vesting in the donee any beneficial interest in the property granted or transferred, as well as the usages which these natives have adopted and which have been protected by statute, no exception has ever been engrafted on the general law of India negating the presumption of a resulting trust in favour of the person providing the purchase-money, such as has, by the Courts of Chancery in the exercise of their equitable jurisdiction, been engrafted on the corresponding law in England in those cases where a husband or father pays the money and the purchase is taken in the name of a wife or child. In such a case there is, under the general law in India, no presumption of an intended advancement as there is in England. The question which of the two principles of law is to be applied to a transaction such as the present which takes place between two persons, born in India of British parents, and who have resided practically all their lives in India is of general importance." It was further stated: "It is a mistake to suppose that according to the cases already cited the determination which rule of law is in any given case to apply in India entirely depends on race, place of birth, domicile or residence. These were not to be treated as being *per se* decisive. What were treated as infinitely more important were the widespread and persistent usages and practices of the native inhabitants." Their Lordships then held that the presumption of advancement did apply in the case with which they were dealing. In that case the parties were of pure European descent, though both had been born in India and had resided in the East ever since. Whether the same presumption arises in the case of Anglo-Indians of the descent of the parties in this suit is the first point we have to decide. It is clear that race, place of birth, domicile or residence are all matters to be taken into consideration, but they are not the only grounds on which a decision may be based and indeed the more important grounds are widespread and persistent usages and practices of executing documents benami to transfer lands to wives or children without any intention of conferring on them the beneficial ownership. Even if the presumption be held to arise, it would be open to the party against whom that presumption is made to rebut it and show that the intention of the donor or transferor

was at the time the transfer was made. In *Kerwick v. Kerwick* (4), after examining the facts which are all of the same character as those we have before us in this case, their Lordships held that the husband had rebutted the presumption and the decision is of the utmost value in dealing with the facts that arise in the present suit.

Appellant's father was a Frenchman and his mother an Anglo-Indian lady; her father was an Anglo-Indian and her mother a Burmese lady. Respondent's father was an Englishman, and her mother an Anglo-Indian, and her maternal grandmother a Shan lady. So far, therefore, as the respondent is concerned, as far as descent governs the matter, there is no good reason for holding that the presumption of advancement will arise. Appellant must be described as an Anglo-Indian. Both appellant and respondent were born in Burma, they have always lived here; they are educated here; and they are by religion Roman Catholic. They follow English customs as regards dress and manner of living. No evidence has been given, and we are not prepared to hold that there is any widespread and persistent usage and practice amongst Anglo-Indians, in Burma of transferring lands benami in the way there is amongst Hindus and Mohamedans. Some of them may at times resort to such a practice with a fraudulent attempt to save property from the hands of creditors, but we have no ground for holding that there is any such common practice prevailing as a common rule for all general purposes. The rule, therefore, which in our opinion is to be applied in the present case, is that the presumption of advancement arises in this suit. It is a rule which, having regard to the status of the parties it would be, in our opinion, a rule of equity and good conscience.

This being our finding, the further question remains whether the appellant has succeeded in establishing that, at the time he made this deed of gift in favour of his wife, he had no intention of parting with the beneficial ownership and that he intended her to be merely a trustee for himself; his own bare statement that this was his intention advances his case little, if at all. It is a statement which he was bound to make and which so vitally affects his interests that it must be

received with the utmost caution and all the more so, as the appellant has shown that he is not the person whose allegations and motives can be readily accepted. Such a statement was held by their Lordships in *Kerwick v. Kerwick* (4) to be of little avail, unless he establishes at the same time with reasonable clearness that he had other and different motives for the action he took.

At the time this deed of gift was made appellant had but one creditor, the sub-contractor, to whom he had to pay at most Rs. 5,000 over and above the amount he had already paid into Court. He had at that time apparently some Rs. 18,000 in cash. The property was mortgaged for an amount practically equal to that sum, and seeing that, when he had to pay the decretal amount, he was able without difficulty to borrow the money from a relation shows that he could have had but little fear of the attachment and sale of the house, if he had still kept it in his own name. This is further shown by the fact that he preferred to use his ready money in redeeming the mortgage. Appellant was at that time a man of about 35 years of age or so. It is clear that he fell much in love with respondent who was then 18 or 19. He gave her jewellery worth, it is said, Rs. 5,000 or thereabouts, but it is urged, that by this deed of gift he deprived himself of every scrap of property he possessed in the world. He had this contract, and he knew that the use and benefit of the house would still be his even if he transferred the real ownership to his wife. It is necessary that the Courts should regard documents executed in a solemn form as primarily expressing the intention of the executant according to their tenor, and it is therefore clearly necessary that, ordinarily speaking, evidence should be forthcoming of a strong motive for acting with an intention contrary to that which the document indicates; and in addition to that, there is in this particular case a presumption of advancement. We are unable therefore to hold that any such strong motive has been established in this case, as it must be established, if we are to go against the express terms of the document. Moreover, all fear of any action on the part of the sub-contractor had passed away when his decree was satisfied on the 20th

4. 48 C 260 : 10 L B R 335 : 1 B L J 4 (P C).

March, 1911. It is not shown that thereafter appellant was in fear of creditors, or had any motive in allowing the position created by the deed of gift to continue, and yet he never sought for 11 years to alter that position in the slightest degree, and it was not until the trouble arose between his wife and himself that he ever put forward any claim or contested the validity of the deed of gift. It was not an unnatural act on the part of a man marrying a girl very much younger than himself with whom he was infatuated, and it was a right and proper thing for him to have done to make provision for his wife at an early date in their married life. This we hold, was the motive which led him to execute the deed of gift.

It has been urged that he sold the various strips of land and took the purchase-money for his own use, although the money really belonged to his wife. It is urged that he spent a large sum of money, according to him one Rs. 26,000 on additions and repairs to the house. It is said that he always paid the rates and taxes, that he installed electric lights at his own expense, and that he has thoroughly exercised rights of ownership, whereas the wife has never done so. In reply it is urged that it is only acts and conduct at or about the time of the deed of gift that are relevant, and that evidence of subsequent acts and conduct is inadmissible. That may be so in England, but we do not think that this evidence is inadmissible in India, and similar acts were considered by their Lordships in *Kerwick v. Kerwick* (4) but we do not think that any of these acts avail to any extent to establish the proposition, the burden of which is on the appellant. He was living happily with his wife in this house, and he spent large sums in repairs and improvements. The ordinary presumption as to those would be that, if the gift had been by way of advancement, these expenditures would also have been by way of advancement. His negotiations of the sale of the land is referred to, but the transfers were executed by the wife, and it is to be noted that, when money was borrowed to pay off the decree from her uncle, she also executed the promissory-note in his favour. Lastly, the events that occurred after she had left appellant's house are relied on. At that time the feeling of the parties towards each other were very embittered, and we

o4. 48 C 260 : 10 L B R 335 : 1 B L J 4 (P C).

are unable to see in their acts and conduct at that time anything that lends great support to the appellant's case. She was charged with adultery, and the alleged adulterer was admitting misconduct. She was anxious to be reconciled to her husband on this account and for the sake of the children. The parties were Roman Catholics and their religion forbade a divorce. She might well agree to execute a document transferring this property for the benefit of the children without being taken thereby to admit that she had never had any ownership of it. When Ex. 4 was put to her, a document whereby her rights in the property were denied, she strenuously refused to execute it.

On a consideration of all the facts and circumstances of this case, we hold that the presumption of advancement arises and that the appellant has failed to rebut that presumption. The decree of the lower Court below was correct and will be confirmed, and this appeal will stand dismissed with costs throughout. We certify for two Counsels. We further direct that this decree be not executed for one month on the appellant undertaking to vacate the premises within that time and provided further that he pays into Court Rs. 200 per mensem he was ordered to pay as rent which he has not yet done within one week.

*Ormiston* for appellant.

*Villa* (with him *Higinbotham*) for respondent.

PRESENT :—LENTAIGNE AND CARR, JJ.

Mg. San Chein . . . Appellant\*

vs.

Ma Daung U and three others . . . Respondents.

*Mortgage—Forfeiture Clause—Mortgagee in possession—Adverse ownership for 12 years—Suit for redemption not maintainable.*

A mortgagee is not entitled to acquire absolute ownership under a forfeiture clause in the mortgage deed ; but if he takes over the land and holds the property in adverse possession for 12 years claiming to be the owner, a suit for redemption under the mortgage is not maintainable.

*Ma Min Byu v. Maung Chit Pe*, 1 R 419 : 3 B L J Suppl VII referred to.

Judgment. 21st March, 1924.

*Per* CARR, J. :—This suit arises out of a registered mortgage deed the terms of which are unusual. This deed, Ex. 1, was executed on the 7th September, 1905. The mortgagors were the plaintiffs, San Chein and one Maung Po Gyi, deceased. The mortgagee was Mg. Tha Byaw, original defendant, who died after filing his written statement, after which his representatives were substituted.

The deed expressly says that the mortgage was one with possession. But there is a further provision for payment of interest at 2 1/2 per cent. per mensem.

It is agreed that the interest shall be paid annually and there is a clause providing that if interest is not paid in any year the mortgagee shall take over the land as owner. Nothing is said about the usufruct.

The plaint alleges that Po Gyi was a prior mortgagee who was paid off out of the money borrowed on this mortgage, and that he joined in executing the deed because the land was assessed in his name.

\*Civil 2nd Appeal No. 105 of 1923 against the decree of the Divisional Court of Myaunmya in C. A. No. 144 of 1922.

The written statement alleges that plaintiff was not the owner of the land, having previously sold it to Po Gyi, and that he joined in executing the deed because the land was assessed in *his* name.

A map of the land for the year 1904-05 is on the file. This shows Po Gyi's name as owner with the plaintiff San Chein as tenant. It certainly supports the plaintiff's version.

The principal defence was that the defendant had taken over the land as owner in 1906 and that ever since then he had been in adverse possession.

The plaintiff worked the land for the first year after the mortgage and paid rent. Thereafter he never worked it again and admittedly has paid no interest since then.

Both the lower Courts have found that the defendant took over the land as owner under the forfeiture clause. They held that S. 60 of the Transfer of Property Act was not then in force, that clause was effective. The rulings cited by them support this view : but they have been over-ruled by a Bench of this Court in a later case *Ma Min Byu v. Maung Chit Pe* (1) and the Bench decision is binding on us.

But I do not think that the question whether the forfeiture clause was effective or not is important in this case. On the facts I have no doubt that it was in fact enforced in 1906 and that ever since then Tha Byaw has been holding the land as owner and that the plaintiff was fully aware of this. Tha Byaw has thus been in adverse possession as owner, and not as mortgagee, for over twelve years.

In my view the plaintiff's suit was time-barred.

I would therefore dismiss this appeal with costs.

*Burjorjee* for appellant.

*Hay* for respondent.

MAY PART

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PRESENT :—HEALD, J.

Thomas A. Chapple . . . . . *Petitioner\**

vs.

E. Y. Mamsa Brothers . . . . . *Respondents.*

*Civil Procedure Code (Act V of 1908), O. 21, R. 11 (2)—Payment by instalments—Order to be made when means of livelihood would be thereby preserved to debtor.*

It is the intention of the law that debtors should be compelled to pay their just debts, but it is not reasonable to compel them to do so by means which will deprive them of their means of livelihood if there is available an alternative method of enforcing payment which will be reasonably fair to the creditor.

Judgment. 25th February, 1924.

Respondent sued petitioner for a balance of rent and compensation for use and occupation of his premises and obtained a decree for Rs. 665 with Rs. 71-14-0 as costs. In execution of that decree he attached the furniture and fittings of a Commercial School which petitioner kept and by which he earned his living.

Petitioner applied for an order for payment of the decretal amount by instalments of Rs. 50 a month. The learned Judge after hearing the Advocates on both sides said that he saw no reason for allowing payment by instalments, and dismissed the application with costs.

Petitioner applied for a review of that order on the ground that if the equipment of his school was sold he would lose his means of livelihood. The learned Judge said that he saw no reason for changing his mind.

Petitioner then applied to this Court in revision and asked for stay of execution. His application for revision was admitted for hearing and on his application for stay this Court made an interim order *ex parte* for stay of sale of the furniture

\*Civil Rev. No. 263 of 1923 against the decree of the Court of Small Causes, Rangoon, in Civil Suit No. 985 of 1923.

and fittings of his school on condition that Rs. 100 should be paid into Court before the 15th of December, 1923 and that thereafter Rs. 50 should be paid into Court on the 2nd of each month.

In accordance with those orders Rs. 100 was paid into Court on the 15th of December, Rs. 50 on the 3rd of January, and Rs. 100 on the 9th January, so that Rs. 250 out of the decretal amount has been paid.

The application for stay was put down for hearing in this Court on the 11th of January, 1924 but when the case was called on that date, petitioner was absent and his application was dismissed for default.

Petitioner then filed an affidavit saying that he had no notice that the hearing had been fixed for the 11th January, and that his absence was due to a mistake on the part of his Advocate or his clerk and on that affidavit this Court restored the application for stay.

Both the applications for revision and the application for stay are before me to-day and I have heard the learned Advocates on both sides. Petitioner's learned Advocate now states that owing to a change in his circumstances he is now able to pay instalments of Rs. 75 a month instead of Rs. 50.

The Court does not usually interfere in revision in cases where there is a real exercise of discretion in the lower Court but it seems to me that this is one of those rare cases in which interference can be justified. It is clearly the intention of the law that debtors should be compelled to pay their just debts, but it is not reasonable to compel them to do so by means which will deprive them of their means of livelihood if there is available an alternative method of enforcing payment which will be reasonably fair to the creditor. There is no sense in killing the goose which lays the golden egg. Petitioner now owes respondent about Rs. 500 which respondent is entitled to recover as soon as possible. But the Court has a discretion to allow payment by instalments and I am of opinion that in this case it should do so.

I therefore direct under the provisions of O. 20, R. 11 (2) that the amount standing in respect of the decree in Civil Regular Suit No. 6857 of 1923 of the Court of Small Causes

be paid by instalments of Rs. 100, such instalments to be paid within the first seven days of each month beginning from March 1924.

The attachment will be removed and the parties will bear their own costs in this Court and on petitioner's application to be allowed to pay by instalments. The order for costs on his application for review will stand.

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PRESENT :—YOUNG, J.

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Ma Ta Din ... Appellant\*

vs.

V. K. Shivalkar ... Respondent.

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*Civil Procedure Code (Act V of 1908)—Surety—Notice to show cause—Time given to produce judgment-debtor—Allegation as to false affidavit of illness—Subsequent production of judgment-debtor—Whether surety's obligation discharged.*

Where a surety obtains time to produce the judgment-debtor upon swearing an affidavit as to the latter's illness, and the Court allows the time, the surety must be taken to have discharged his obligation under the surety bond if he produces the judgment-debtor on the adjourned date.

If, however, it is proved the affidavit was false and the grounds for further time wrong that may be a ground for proceeding against the surety.

Judgment. 10th March, 1924.

This is an appeal against an order passed by the Additional Judge of the District Court of Meiktila in a security-bond matter. The material portion of the security-bond runs as follows :—

We will make the judgment-debtor, Lachinaran pay the decretal amount to the decree-holder, Shivalkar, in monthly instalments of Rs. 39. Should the judgment-debtor fail to pay the instalment monthly, we sureties will produce the

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\*Civil Miscellaneous Appeal No. 92 of 1923 against the decree of the District Court of Meiktila in Civil Appeal No. 26 of 1923.

judgment-debtor whenever required by the Court. Should we be unable to produce the judgment-debtor, then we, the sureties, will pay the whole decretal amount. Thus undertaking we set our signatures.

The judgment-debtor paid in six instalments, and, on the 9th January, 1923, he defaulted. On the 30th of January, 1923, the decree-holder and the surety were present in Court. The surety said that he would bring the judgment-debtor within fifteen days. The decree-holder said that he agreed if the judgment-debtor was brought the next day. The Court, however, ordered that the surety must bring the judgment-debtor on the 14th of February, 1923, the decree-holder and the surety were again present. The surety saying that the judgment-debtor was laid up with fever, asked for more time, saying that he himself would go and bring the judgment-debtor next time. The decree-holder agreed, and the case was adjourned till the 2nd of March, 1923.

On the 2nd of March, 1923, the parties (by which it must be understood to mean the judgment-debtor, the decree-holder, and the surety) were present. The decree-holder filed an affidavit challenging the correctness of the affidavit filed by the surety with regard to the judgment-debtor's illness. That is immaterial under the circumstances, if time was given and the decree-holder and the judgment-debtor were present on the appointed day.

If the affidavit was false, and the grounds for further time wrong, that may be a ground for proceeding against the surety. But, for the purposes of the present application, the terms of the surety bond were complied with.

Such being the case, the Judgment of the Lower Appellate Court must be set aside, and the appeal allowed with costs Rs. 34 in each Court.

PRESENT :—YOUNG, J.

Maung Shwe Hla . . . \*Appellant

vs.

Soolay Naidu . . . Respondents.

*Civil Procedure Code (Act V of 1908), O. 41, R. 21—Absence of respondent in lower appellate Court—Application by respondent to re-open appeal—Refusal of lower appellate Court—Appeal from order of refusal.*

The unrebutted oath of the person to be served, that he never was served and knew nothing of the case, is sufficient to require the re-opening of the case.

*Sunder Spinner and another v. Makan Bhula*, 46 B 130, *K. S. Dasi v. N. C. Saha*, 19 C W N 1231 followed.

Judgment. 24th March, 1924.

It is in the highest degree improbable that the appellant, who was unsuccessful in the trial Court, would not have been present to resist the appellant if he had known anything about it, and this circumstance should have weighed with the Judge in considering the weight to be attached to the appellant's sworn statement that he knew nothing of the appeal and he had never received the summons.

The case of *Sunder Spinner v. Makan Bhula* (1) and *K. S. Dasi v. N. C. Sabha* (2) are analogous cases showing that, under circumstances more or less similar the un-rebutted oath of the person to be served that he never was served and knew nothing of the case is sufficient to require the re-opening of the case.

These were both cases of non-appearance before a Court of first instance.

This is the case of an appeal, where the appellant has the advantage of a decree in his favour, rendering it all the more

\*Civil Misc. Appeal No. 100 of 1923 against the order of the District Court of Pegu in Civil Appeal No. 41 of 1923.

1. 46 B 130.

2. 19 C W N 1231.

improbable that he would not have appeared to support the decree, had he known anything about it.

The appeal is allowed with costs of two gold mohurs, and the case must be re-opened.

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PRESENT :—ROBINSON, C. J. AND MAY OUNG, J.

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Laljee Jaising

... *Appellant*

vs.

S. P. Tewari

...

*Respondent.*

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*Arbitration Act (IX of 1899), S. 11—Award invalid unless made in writing and signed by arbitrators.*

An award under the Indian Arbitration Act, must under S. 11, be in writing and signed.

Before reducing their award to writing, the arbitrators must no doubt arrive at their decision, but having done so, they are bound to make their award in writing and signing of the award is not a mere formality.

*Gotha v. Thatha*, 5 I C 374 : 7 M L T 355 followed.

Judgment. 10th January, 1924.

*Per* ROBINSON, C. J. :—The plaintiff in this suit sued on a promissory-note for Rs. 800. The defence at first was a denial of execution, and the matter was, by consent, referred to the Expert in hand-writing, together with certain admitted signatures of the defendant. The Expert's opinion was that the promissory-note had been executed by the defendant. Thereupon, without abandoning the plea of non-execution, the defendant raised the defence that all matters in dispute between the parties had been referred to arbitration ; that the arbitrators had come to a decision; and that the suit was, therefore, barred. The learned Judge of the Small Cause Court held that the suit was barred.

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\*Special 1st Appeal No. 101 of 1923 from the Decree and Judgment in C. R. No. 1901 of 1922, of the Rangoon Small Cause Court.

There is no doubt that all matters in dispute between the parties were referred to the arbitration of Mr. N. C. Sen and one Ganesh Das. We can see no reason to doubt that the liability on the promissory-note in suit was included in the submission. It appears to us that the defendant was the plaintiff's Agent, managing his business, and the accounts between the parties were very long. Ganesh Das understood the Nagari character in which the accounts were kept; and according to him, both the parties brought their accounts to him. He appears to have looked at them, and thereafter, on the 2nd of October, (a Sunday), the parties met the arbitrators at Mr. Sen's house. It was then suggested to the parties that the plaintiff should pay the defendant Rs. 2,000 and that this should be in satisfaction of all claims between them. It is clear from the evidence of both the arbitrators that this was merely a settlement proposed to relieve the arbitrators of the labour in going through the long and complicated accounts and a possibly lengthy hearing.

It would appear that the defendant at first agreed to a settlement on these lines. The parties were told to come back in two days, bring the necessary stamp paper, but they never appeared, and they were finally sent for when the defendant declined to agree to any such settlement, and demanded that the reference should be properly heard. Thereupon the arbitrators appear to have sent them away and declined to do anything further in the matter.

There can be no question that this was not in any way a performance of their duties as arbitrators. The attempt at settlement failed, and they should, therefore, have gone into the accounts and considered the promissory-note and other matters before arriving at a decision.

To call this suggestion of a settlement an award under the Indian Arbitration Act appears to us to be untenable. An award under the Act must, by S. 11, be in writing and signed. Before reducing their award to writing, the arbitrators must no doubt arrive at their decision; but having done so, they are bound to make an award in writing and signing of the award is not a mere formality, *Gotha v. Thatha* (1).

Under the circumstances we must hold that the learned Chief Judge of the Small Cause Court was wrong in holding that there was an award which barred the present suit.

The defendant has now admitted execution, but there has been no decision on the question of his liability on the promissory-note and the case must be remanded to the Small Cause Court for hearing on the merits.

The decree of the Court below is set aside and the appeal accepted. The plaintiff will get his costs in this Court, and the costs of the original hearing will abide by the result of the suit.

*Das* for Appellant.

*Base* for Respondent.

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PRESENT :—MAY OUNG.

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G. Rainey and one . . . Plaintiffs\*

vs.

The Burma Fire and Marine Insurance  
Company, Limited . . . Defendants.

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*Contract Act (IX of 1872), S. 28—Fire Insurance policy—Condition as to forfeiture by limiting time to file suit—Whether condition repugnant to S. 28.*

A condition in a Fire Insurance Policy that if an action is not commenced by the insured within 3 months after the rejection of the claim by the Insurers all benefit under the policy shall be forfeited, is valid and is not repugnant to S. 28, Contract Act.

*The Baroda Spinning and Weaving Company, Limited v. The Salynarayan Marine and Fire Insurance Company, Limited, 38 B 344 followed.*

(See contra *Ma Ywet v. China Mutual Life Assurance Company, 4 B L T 173—*not cited. Ed.)

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\*Original Side C. R. No. 175 of 1923.

Judgment. 28th March, 1924.

The plaintiffs sue to recover a sum of Rs. 20,000 on a Fire Insurance Policy. The insured building was partially destroyed and damaged by fire, and a claim was duly made. The defendants repudiated the claim on the 20th September, 1922, and this suit was instituted on the 5th April, 1923, more than three months after the rejection of the claim. Condition 12 of the Policy sets out *inter alia* that, if the claim be made and rejected and an action or suit be not commenced within three months after such rejection, all benefit under the Policy shall be forfeited.

The defendant-company, therefore, contend that the suit is not maintainable. The plaintiffs rely on S. 28, Indian Contract Act, and urge that the above-mentioned condition in the Policy cannot be enforced.

In *The Baroda Spinning and Weaving Company, Ltd. v. The Salyanarayan Marine and Fire Insurance Company Limited* (1), it was held that a condition of forfeiture in a Fire Insurance Policy is not within the scope of S. 28.

I agree with the decision of the Bench in that case, and accordingly hold that the plaintiffs' suit is not maintainable. It is, therefore, dismissed with costs.

*Campagnac* for Plaintiffs.

*Cowasjee* for Defendants.

PRESENT:—HEALD, J.

Ma San Hla Me and one . . . Plaintiffs-appellants\*

vs.

Ma Tun Me and one . . . Defendants-Respondents.

*Joint-owners—Adverse possession by one—Burden of proof.*

Where one or more of several joint owners are in possession of property, they are presumed to hold that possession on behalf of the whole body of joint owners and the burden of proving that their possession had become adverse is on them.

I. 38 B 344.

\*Special Civil 2nd Appeal No. 282 of 1923.

*Hardit Singh v. Gurmukh Singh*, 20 Bom L R 1064 (P C). *Hari Pru v. Mi Aung Kraw Zan*, 10 L B R 45 : 12 B L T 129 followed.

Judgment. 24th March, 1924.

Appellants' case was that Shwe Zan had four wives, namely, Ma Da Nyo, whom he divorced, Ma Mya Thwin, whom also he divorced, Ma Da U, by whom he had two children, the present respondents, and Ma San Hla Me, the present 1st appellant, by whom he had one son, the present 2nd appellant, that before any of the marriages Shwe Zan inherited half the property in suit from his parents, that during his marriage with the 1st appellant he bought the other half of the property, that after his death the property remained undivided in the joint possession of the parties as his heirs, and that appellants were entitled to partition and possession of their shares, which they allege to be three-quarters of the property. They have, however, in this Court, admitted that the share to which they were entitled would be one-half and not three-quarters.

Respondents replied that what Shwe Zan inherited from his father was two-thirds of the property and what he bought was only one-third, that the property was acquired by Shwe Zan during his coverture with their mother Ma Da U so that they would be entitled to three-fourths and the 1st appellant to only one-fourth, and that appellants' claim to that one-fourth was time-barred. They later amended that written statement so as to allege that what Shwe Zan inherited from his parents was only one-third of the property, that he inherited that share during his marriage with their mother Ma Da U, that subsequently he and his sister who had also inherited a similar share bought the third share of another sister jointly so that they became owners of a half share each, that Shwe Zan's half share was "lettetpwa" of his marriage with their mother, so that they would be entitled to three-quarters of it and the first appellant to one-quarter, that they had been in adverse possession for over 20 years; and that therefore appellants' suit was time-barred. The trial Court found that Shwe Zan inherited the whole of the property from his parents and that the parties as representatives of the two marriages of which there was issue should divide it equally between them. He also held that the suit was not barred by limitation and he gave the appellants a decree for half the property.

Respondents appealed and the lower appellate Court held that the suit was time-barred.

Appellants now come to this Court in second appeal on the grounds that the lower appellate Court wrongly placed on them the burden of proving that they were in joint possession of the lands along with respondents and was wrong in finding that the suit was time-barred.

There can be no doubt that the lower appellate Court did place the burden of proof wrongly. Where one or more of several joint owners are in possession of property, they are presumed to hold that possession on behalf of the whole body of joint owners, and the burden of proving that their possession had become adverse is on them. That was the rule laid down by the Privy Council in *Hardit Singh v. Surmukh Singh* (1) and followed by a Bench of the Chief Court in *Hari Pru v. Mi Aung Kraw Zan* (2).

In this case neither of the respondents gave evidence and there was no proof that their possession ever became adverse.

The suit was therefore not barred by limitation, and as the lower appellate Court disposed of the appeal on this preliminary point, its decree is reversed and the appeal is remanded to that Court for a decision on the merits.

Respondents will pay appellants' costs in this Court on the uncontested scale.

A certificate for the refund of the Court-fees paid on this appeal will issue to appellants.

PRESENT :—HEALD AND MAY OUNG, JJ.

H. Mahomed Ahmin . . . *Appellant\**

vs.

Ma Kyan and two others . . . *Respondents*

*Burmese Buddhist Law—Adopted son—Whether can claim as orasa—"Mya-  
nge"—Definition of the term.*

The question whether a Kittima adopted son was entitled to claim a one-fourth share as *Orasa* was discussed in this case but not decided.

The term "*Mya-nge*" does not necessarily mean a lesser wife, it is often used as a term of reproach. Where a claim is put forward by or through a lesser wife, it must be proved that the relationship of husband and wife actually subsisted.

*Maung So So v. Mi Han*, II U. B. R. 1892-96 p. 171; *Ma Thein v. Ma Wa Yon*, 2 L B R 255 (F B) referred to.

Judgment. 22nd January, 1924.

*Per* HEALD, J :—One Maung Bwin, deceased, is said to have been adopted as Kittima son by U Wunna, deceased, and Ma Kyan, the 1st respondent. Maung Bwin died after U Wunna, and it is therefore claimed that he, as the only son and therefore the *orasa* was entitled to a quarter of the joint parental estate before his death. At his death he is said to have left only one heir, namely, his wife, Ma Shwe Bwin, who assigned her rights to the plaintiff-appellant.

The plaintiff sued (1) for half the properties left by Wunna, on the ground, that Maung Bwin was Wunna's partner, and (2) for a quarter of the remaining half as Maung Bwin's *orasa* share.

The partnership was not proved and it is not put forward in this appeal.

\*Civil 1st Appeal No. 116 of 1922 against the decree of the District Judge of Toungoo in C R No. 1 of 1922.

In order to succeed, the plaintiff had to prove (1) that Maung Bwin was a Kittima son, (2) that Maung Bwin had divorced one Ma Nan, who was admittedly his wife for a long time before Ma Shwe Bwin appeared on the scene, and (3) that Maung Bwin and Ma Shwe Bwin were man and wife according to law. The last of these points was decided in the plaintiff's favour but the trial Court held that neither the adoption nor the divorce had been established and, therefore, dismissed the suit.

There was a further point, one of pure law, which was not raised or discussed, namely, whether a Kittima can ever claim the *orasa's* quarter from the surviving parent, even if he or she is the only child. That he is entitled appears to have been accepted in *Maung So So v. Me Han* (1), but the position was there admitted and the point was not discussed. The case of *Ma Thein v. Ma Wa Yon* (2) is different in that the claim was of an entirely different nature.

The matter is therefore not concluded by definite authority and, in our view, the alleged right seems to be open to doubt. It is, however, unnecessary in the circumstances of the present case, to decide the point.

The crucial point, to our minds, is the alleged marriage of Ma Shwe Bwin. If this cannot be established, the plaintiff, who acquired the rights, if any, has no *locus standi*.

The deciding factor, as it appeared to the learned trial Judge, was, that the prior wife, Ma Nan, when she applied to a Magistrate for an order of maintenance against Maung Bwin, stated on oath that he had taken a second wife (Ex. 27). This is how it was recorded in English. What Ma Nan most probably said in Burmese was that what she stated in her written application, that is, that Maung Bwin was living with a *Mya Nge* or lesser wife. Now, the expression *Mya Nge*, is an extremely loose one, and, as is well known, is indiscriminately applied by a Burmese woman (generally as abusive epithet) to any other woman with whom her husband may have sexual intercourse. At the time when she made her application, Ma Nan was living apart from her husband and

1. U. B. R. 1892-96, II, 171.

2. II L. B. R. 255.

may have heard of a liaison between him and Ma Shwe Bwin, and therefore described the latter as a lesser wife, probably to strengthen her case. We are therefore unable to hold that Ma Nan's said statement in Court carries the plaintiff's case much further.

The evidence in support of a marriage was extremely scanty. The direct evidence is, as pointed out in the trial Court's Judgment, interested and unreliable. That there was fairly intimate *social* intercourse between Maung Bwin and Ma Shwe Bwin is not at all surprising. They were connected by marriage, Maung Bwin's brother having married an aunt of Ma Shwe Bwin. Their houses were not far apart; and Maung Bwin was old enough to be Ma Shwe Bwin's father. It is quite possible, after Ma Nan's departure, Ma Shwe Bwin, herself *eindaungyi*, frequently visited Maung Bwin's house, where also dwelt Maung Bwin's aged *mother*, and that at some time there was a more or less secret intrigue between the two. But that the position ever developed into one in which they could be said to have become husband and wife according to law, is extremely improbable. In any case, the period was a very short one and few, if any, independent residents of the small village came to know of the alleged union; it is noteworthy that the headman never heard of it.

In these circumstances, we are unable to hold that the alleged marriage was proved, and this being so, the plaintiff's case must fail.

We therefore, though on different grounds, confirm the decree of the lower Court dismissing the suit, and dismiss this appeal with costs.

Keith for Appellant.

Ormiston for Respondent.

PRESENT :—HEALD, J.

Mi Hla Zan . . . . . *Appellant\**

v.

Pa Pa Ye . . . . . *Respondent.*

*Transfer of Property Act (IV of 1882) Section 123—Gift by registered deed without delivery of possession—Whether valid.*

A gift of immovable property made by registered deed in places where section 123, Transfer of Property Act is in force is perfectly valid without delivery of possession being given.

*Maung Ni v. Po Min*, S. J. 44.

*Ma Thi v. Ma Nu*, S. J. 70.

*Shwe Thwe v. Ma Saing*, II U. B. R. 1897-1901 p. 59. dissented from.

Judgment. 2nd May, 1924.

On the 16th of September 1913 Mi Ein Pu gave certain lands to her son Kyun Chi by registered deed. Mi Ein Pu died in 1922 and Kyun Chi died after her. After their death Kyun Chi's widow, the present appellant, claimed possession of the lands from respondents, who is Kyun Chi's sister, and her husband.

They resisted the claim on the ground that the gift, being without possession, was invalid under Burmese Buddhist Law.

The trial Court held that the gift was valid and gave appellant a decree for possession.

The lower Appellate Court held that because possession was not given the gift was invalid.

The sole question raised in this appeal is whether or not possession was necessary to validate the gift.

This question is decided at once by the terms of S. 123 of the Transfer of Property Act which has been in force in Lower Burma since 1905. That section shows that possession is not necessary, and it follows that the rulings in the cases of *Maung Ni v. Po Min* (1); *Ma Thi v. Ma Nu* (2) and *Shwe Thwe v. Ma Saing* (3) are obsolete in places where section 123 of the Transfer of Property Act is in force in so

\*Special Civil 2nd Appeal No. 208 of 1923 from the Decree of the District Court of Kyankpyu in Civil Appeal No. 6 of 1923.

1. S. J. 44.

2. S. J. 20.

3. II U B R 1897-1901 p. 59.

Far as they lay down that delivery of possession is an indispensable condition to the validity of a gift.

There may possibly be kinds of gifts to which Burmese Buddhist Law applies and makes possession necessary for their validity, but the present is certainly not such a gift.

The judgment and decree of the lower Appellate Court are set aside and the decree of the trial Court is restored with costs for appellant throughout.

*Ba Dun* for appellant.

*Mg Lat* for respondents.

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PRESENT.—YOUNG, J.

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Maung Sein	...	<i>Appellants*</i>
v.		
Ma Saw	...	<i>Respondent.</i>

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*Evidence Act (I of 1872) Section 92 proviso 1—Admissibility of evidence that party signed pro-note as surety and not as principal debtor.*

Where a person executes a joint and several promissory note with others and the promisee himself knows at the time of taking his signature that he signed only as a surety evidence of the fact may be let in under S. 92 proviso 1 Evidence Act.

In the present case the promisee having waived his claim against the other signatories the suit was dismissed against the surety.

Cf. *Ameer Ali & Woodroffe* on Evidence, 3rd Edition p. 745 referred to.

Judgment. 30th April, 1924.

The sole question in these two appeals is whether when several persons have signed a pro-note jointly and severally it is permissible for one of them to lead evidence that he signed only as surety.

Stated broadly as above the answer I think must be in the negative under S. 92 of the Evidence Act, but if the promisee himself knew at the time of taking his signature that he signed only as surety, then proviso 1 would operate to let in the evidence. cf. *Amir Ali and Woodroffe* on Evidence 3rd Edition, p. 745.

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\*Civil 2nd Appeal Nos. 194 and 195 of 1923 from the District Court of Meiktila in C. A. Nos 20 and 21 of 1922.

In this case the 1st appellant admitted that he knew that the respondent was signing only as surety when he took her signature and in my opinion the evidence was admissible and as the appellants have waived their claim against the other signatories and it is not contended that the surety consented to such conduct, her liability under the note is discharged and I dismiss the appeals with costs.

*Christopher* for appellant.

*Barnabas* for respondents.

PRESENT :—HEALD, J.

Nga Ba Sein

*Petitioner\**

v.

King Emperor

*Respondent.*

*Penal Code (Act XLV of 1860) Sections 467, 471—Making false receipt to cover misappropriation.*

Where a Bench Clerk received a sum of money paid in as fine and misappropriated it, and made a false receipt to cover up such misappropriation.

*Held* that the offence came under the provisions of section 467 and 471 I. P. C.

*Jyotish Chandra Mukerjee*, 36 C. 955 ; *Jwanand's case* 5 A. 221 ;

*Girdhari Lal's case*, 8 A. 653 ; doubted and not followed.

*Sabapati's case* 11 M. 411—applied.

Judgment. 29th April, 1924.

Petitioner was Bench Clerk to the Subdivisional Magistrate of Myanaung.

On the 5th of December, 1922, one Maung Tin was fined Rs. 100 and was given 10 days within which to pay the fine.

On the 14th of December Rs. 20 was paid into the Treasury as part of the fine.

On the 15th of December the balance of the fine was paid to petitioner, and on the same day what purported to be the Bailiff's receipt for the whole amount of the fine was put before the Magistrate who signed an entry in case-diary as follows " 15—12—22. Fine Rs. 100 realised and will be credited into

\*Cr. Rev. No. 218 B. of 1924 being review of the order of the Special Power Magistrate of Henzada in Cr. Reg. 138 of 1923.

"Treasury by Deputy Bailiff to-morrow 16—12—22." This note is in petitioner's hand writing except the words "to-morrow" and the date 16—12—22 which were added by the Magistrate when he signed the entry, presumably because he knew that the Bailiff was absent from Myanaung that day.

On the 17th or 18th of December the Subdivisional Magistrate discovered that what purported to be the Bailiff's signature on the receipt was a forgery and that only Rs. 20 had been paid into the Treasury on account of the fine. By that time petitioner had apparently left the office and gone on leave, but on the 19th his wife paid up the Rs. 80 which was credited into the Treasury on account of the fine.

Petitioner was prosecuted for criminal breach of trust and sentenced to six weeks rigorous rigorous imprisonment.

The Senior Magistrate who tried the case found that there was evidence to support charges of forgery under Ss. 466 and 467 of the Indian Penal Code and referred the matter to the Special Power Magistrate for trial.

Petitioner was tried on charges under sections 467 and 471 of the Indian Penal Code and was convicted on both charges and sentenced to one year's rigorous imprisonment on the first charge and nine months' rigorous imprisonment on the second charge, the sentences to run concurrently.

He appealed and the sentences were reduced to concurrent sentences of six month's rigorous imprisonment.

He now comes to this Court in revision on the ground that because the false document was made for the purpose of concealing a misappropriation already effected it did not amount to forgery.

His learned advocate has cited a number of cases as showing that the making of a false document for the purpose of concealing misappropriation already effected is not forgery.

In the case of *Jyotish Chandra Mukerjee* (1) it was held that the alteration of accounts so as to show the receipt of a sum of money criminally misappropriated and in order to remove evidence of such misappropriation was not forgery because there was no intent to commit fraud at the time when the

false entries in the accounts were made, the fraud having already been effected.

In *Juvanand's case* (2) where a clerk who had committed criminal breach of trust subsequently made false entries in an account book with the intention of concealing his offence it was held by a single Judge of the High Court of Allahabad that because the fraud had already been committed the false entries could not have been made with intent to commit the fraud and that therefore the making of the false entries did not amount to forgery. That case was followed by the same High Court in *Girdhari Lal's case* (3).

With all due respect for the opinions of the learned Judges who decided those cases I cannot help feeling that there is a doubt as to whether or not they were correctly decided, but however that may be, I do not think that the decision in them can be applied to the facts of the present case.

It is clear that so far as concerns the Rs. 80 which was paid to petitioner on the 15th of December, the false receipt which he made was made for the purpose of enabling him to misappropriate that money and not for the purpose of concealing a misappropriation which had already been effected. *Sabapathi's case* (4), where a postmaster misappropriated a sum of money and at the same time made a false receipt purporting to be signed by the person to whom the money was payable is more nearly parallel, and in that case the conviction for forgery was upheld.

I have no doubt that petitioner was rightly convicted both of forgery of the receipt and of using the forged receipt dishonestly, and as practically only one sentence has been passed for the two offences and I do not consider that sentence unduly severe, I dismiss the application.

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2. 5 All. 221.

3. 8 All. 653.

4. 11 Mad. 411.

PRESENT :—BEASLEY, J.

Ramagiri Guruvaya Naidu . . . *Petitioner\**

v.

Govindammah and three others . . . *Respondents.*

*Probate and Administration Act (V of 1881) S. 23—Joint Hindu family—Alleged joint property—Application for letters of administration by one of alleged joint family to alleged joint-family property—No locus standi.*

The deceased was alleged to be a member of a joint Hindu family and to have left joint property. The petitioner claiming to be a son of deceased's brother and a member of the joint-family applied for letters of administration to the deceased's estate with the consent of his father then in India.

*Held* that the petitioner had no *locus standi* to apply for administration to the property left by the deceased as if the property left by the deceased was joint family property as alleged, the interest of the deceased terminated at his death and the property vested in the surviving co-parceners but that where there was a sole surviving co-parcener letters may be granted.

*Desu Manavala Chetty* 33 M. 93 discussed and explained.

*Mayne on Hindu Law and Usage* 9 Edn. p. 582, 583, cited.

*Abhiram Dass v. Gopal Dass* 17 C. 48 applied.

Order. 9th April, 1924.

This is an application by Ramagiri Guruvaya Naidu for Letters of Administration to the estate of Ramagiri Lingaya Naidu. There is also a rival application, civil miscellaneous No. 228 of 1923, on behalf of the alleged son of the deceased in whose favour, it is alleged, a will has been made by the deceased.

The fact that the applicant in the latter case is the son of the deceased is denied by the applicant in this case and the fact that a will has been made in his favour or at all, is disputed.

This application of Ramagiri Guruvaya Naidu comes before me for decision upon the preliminary point as to whether the petitioner has any *locus standi* to apply for Letters of Administration or to oppose the grant of Letters of Administration to the alleged son of the deceased.

Mr. Naidu's contention on behalf of the petitioner is that his client is the member of a joint Hindu family being a son of

\*Civil Mis. No. 44 of 1924 of the Original side.

the only surviving brother of the deceased and he claims that by S. 23 of the Probate and Administration Act he is entitled to administer the deceased's estate. For the purposes of this application only it is assumed that the family is a joint Hindu family and that the property in respect of which Letters of Administration are applied for is ancestral property.

The alleged son denies both these allegations and claims that the family is not a joint Hindu family, and, secondly, that the property was self-acquired property of the deceased.

In support of Mr. Naidu's argument that a coparcener, because it is assumed for the purpose of the argument in this case that the petitioner is a coparcener, can apply for Letters of Administration my attention has been drawn to *Desu Manavala Chetty* (1) in which it was held that the applicant in that case was a person to whom Letters of Administration could be granted under S. 23 of the Probate and Administration Act. In that case the petitioner was the only surviving coparcener and it was held that where a surviving coparcener governed by the Mitakshara Law, applies for Letters of Administration in respect of property standing in the name of a deceased coparcener which was a joint family property of the applicant and the deceased he is bound to include in the valuation of the property, the value of the share to which the deceased was entitled at the moment of his death and he cannot, under S. 19 sub-section 1 (1) of the Court Fees Act, obtain Letters of Administration to the joint family property, unless he includes such share in the valuation and pay the proper *ad valorem* court fees upon it.

This was a case in which the matter went for decision to the Appellate Side of the Court, it being contended on the one side by the coparcener that such property, being the property of a joint Hindu family, was not subject to the duty upon Letters of Administration being obtained; and, on the other side, by the Advocate General on behalf of the Madras Government that the property was so subject to that duty.

I have read through the case and I have come to the conclusion that this decision was mainly a decision deciding the

question as to whether or not the property was subject to this duty. The question as to whether or not the coparcener was a person who might apply for Letters of Administration is dealt with in a very few lines. I refer to the judgment of Mr. Justice Miller on page 97 where he states : " I have no doubt that the applicant is a person to whom Letters of Administration may be granted under section 23 of the Probate and Administration Act. He is a person who would be entitled to the whole or part of the estate of the deceased. He would take his father's property if his father died intestate leaving property."

And " It seems clear to me that the ancestral joint family property passing to the applicant by survivorship, is ' property of the deceased ' within the meaning of the Act (section 4), and therefore included in the ' property and credits ' of S. 77, that is to say, in the ' estate ' of the definition of administration in S. 3. Inasmuch then as this property does not in the present case ' pass by survivorship ' to any one other than the applicant, there seems to be no doubt that the applicant is entitled to Letters of Administration which will vest it in him."

I think the important point to be observed about this judgment is that the decision as to whether or not a coparcener may apply for Letters of Administration is contained in a very few lines and, moreover, an important point is made of the fact that the applicant in that case was the sole survivor.

No other case has been quoted by Mr. Naidu in which Letters of Administration has been granted to one of several coparceners of a joint Hindu family where the property has not, first of all, been partitioned. Having regard to the fact that in the Madras case already referred to the judgment which is not a short one dealt almost entirely with the point as to whether or not such property would, upon Letters of Administration being granted, be subject to the duty or not, I do not take this as a judgment which lays down the principle that a coparcener, where there are others and there has been no division of the property, can apply for Letters of Administration.

On behalf of the widow and the alleged son, it was argued that S. 23 of the Probate and Administration Act, which is the

only section under which this application is made only enables Letters of Administration to be granted in a case where the deceased has died intestate and it is argued that in this case there can be no intestacy, because, with regard to the coparcenary property, it is said there can be no such thing as intestacy. The owner or the possessor of an undivided share in a joint Hindu family can neither be testate nor intestate, as it is argued that a coparcener cannot, during his lifetime dispose of his undivided share by will and therefore he cannot be said to be testate. When he dies his undivided share becomes part of the coparcenary property, with regard to the ability of a coparcener to bequeath or alienate this undivided share. Mayne, on p. 582 of the 9th Edition, on Hindu Law and Usage says :- "The extent of the testamentary power, after being subject to much discussion, has at length been finally settled by decisions, and by express legislation. Whatever property is so completely under the control of the testator that he may give it away *in specie* during his life time, he may also devise by will. Hence a man may bequeath his separate, or his self-acquired property, and one who, by the extinction of coparceners, holds all his property in severalty, may devise it, even in Malabar and in Canara under Alyasantana Law, so as to defeat the claims of remote heirs. The rule is however not universal and though a manager can dispose of a small portion of the family property in favour of the female members of the family by gift, *inter vivos*, he cannot do so by will. The Madras High Court in one case, acting on an *obiter dictum* of the Privy Council has held that a disposition by will of coparcenary property can be upheld, if the consent of all the coparceners, being adults, has been obtained. This "decision sounds equitable enough, but it seems very questionable whether it is logically defensible, because, as has been pointed out, the testator's interest in the property was extinct at the moment from which his will speaks. Its correctness has been questioned in a later Madras case." And on page 583, it is said :—"A member of an undivided family cannot bequeath even his own share of the joint property, because 'at the moment of death, the right by survivorship is at conflict with the right by devise.'" In my view, according to the authority already quoted, it seems to me that a coparcener cannot make a will of his undivided share in a

joint Hindu family and, under these circumstances, when he dies, he cannot be said to be intestate. S. 23 deals only with the administration of the estate of an intestate person and therefore, I think the contention on this ground put forward on behalf of the widow and the son is sound and that the application under S. 23 must fail.

It is further pointed out that according to a decision in *Abhiram Dass v. Gopal Dass* (2) that the petitioner here would have no *locus standi* at all. On page 48 the headnote reads as follows :—“ A person not claiming any of the property of the testator, but disputing the right of the testator to deal with certain property as his own, has not such an interest in the estate of the testator as entitles him to come in and oppose the grant of probate.”

On page 52, in the judgment of the Court, it is said :—“ The action of such person is rather that of one claiming to have an adverse interest.”

In this case, according to Mr. Naidu the property is the property of the joint Hindu family and he is not claiming therefore any property of the deceased but is disputing his right to deal with his property as his own. He has not therefore such an interest in the estate of the deceased as entitles him either to oppose a grant of Letters of Administration to the alleged son or himself to ask for Letters of Administration.

Under these circumstances, in my view, this application for grant of Letters of Administration must fail upon the preliminary point. After the grant of Probate to the other applicant he will have his proper remedy by suit.

The application is accordingly dismissed with costs, I allow advocate's fee 3 gold mohurs to the widow, who has been cited, and to the alleged son, the applicant in Civil Miscellaneous No. 228 of 1923.

“ *B. K. Naidu* for applicant  
 “ *A. B. Banerji* for applicant's father.  
*Burjorji* for the widow (respondent) deceased.  
*Robertson* (with him *M. C. Naidu*) for the son (respondant).

PRESENT :—HEALD, J.

Nga Chit Kyaw

Petitioner\*.

v.

King Emperor

*Cr. Pro. Code (Act V. of 1898) Sections 190 (c), 191, 556—Magistrate taking cognisance of case on his own knowledge—Subsequently trying the case—Whether trial regular.*

A Magistrate is not precluded from trying a case of which he has taken cognisance on his own knowledge under section 190 (c) of the Criminal Procedure Code provided he has complied with the provisions of section 191 of the Code. In such a case section 556 ceases to operate.

## Reference.

Reference made by E. B. Holme Esq., I. C. S., District Magistrate, Amherst in his Cr. Rev. No. 40 of 1924.

In this case the 1st Class Sub-Divisional Magistrate Maung Tin Tut himself arrested the accused, tried the case and convicted the accused and sentenced him to pay a fine or one month's rigorous imprisonment.

Under section 556 of the Cr. Procedure Code the Magistrate is debarred from trying this case and therefore the sentence passed by him is illegal.

Under section 438 Code of Criminal Procedure the record is submitted to the High Court with the recommendation that the conviction and sentence be set aside and the fine refunded to accused.

Order. 11th April, 1924.

Accused, who is a driver of a taxi-car in Moulmein was prosecuted for driving his car on a public way in a manner so rash or negligent as to endanger human life or to be likely to cause hurt or injury to any other person.

It was alleged that he overloaded his car by allowing 19 persons to ride in it or on it and that he drove so negligently as to endanger human life.

He pleaded guilty, admitting that he overloaded his car, and he was fined Rs. 25 which he paid.

\*Cr. Rev. No. 179 B of 1924 being review of the order of the Sub-Divisional Magistrate of Amherst in Cr. Reg. No. 26 of 1924.

The District Magistrate has reported the case to this Court with a recommendation that the conviction and sentence be set aside on the ground that the Magistrate was debarred by the provisions of Section 556 of the Code of Criminal Procedure from trying the case.

The mere fact that a Magistrate takes cognisance of a case on his own knowledge under section 190 (c) of the Code does not bring the case within the operation of section 556 and so long as the Magistrate complied with the provisions of section 191 of the Code, which he did, he was entitled to try the case.

There is nothing to show that the Magistrate was personally interested in the case more than every member of the public is interested in the prevention of offences.

In any case interference by this Court in revision is always discretionary, and I see no reason to believe that this is a case in which the High Court ought to interfere.

The papers may be returned.

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PRESENT :—ROBINSON, C. J. AND BROWN, J.

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The Himalaya Assurance Co., Ltd. by its  
Managing Agent, C. M. Alibhoy . . . . *Appellants\**

v.

The Burma Fire and Marine Insurance Co., Ltd.  
by its Secretary, G. H. W. Clay . . . . *Respondents.*

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*Fire Insurance policy—Re-Insurance—Condition in original policy that right of suit lapses if suit not filed within three months of rejection of claim—Whether condition applies to contract of re-Insurance.*

Where a contract of fire-insurance contains a condition providing that the claim shall lapse if a suit be not commenced by the insured within three months of the rejection of the claim and a contract of re-insurance is effected by the Insurers, the condition will not apply to the contract of re-insurance.

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\*Civil First Appeal No. 118 of 1923 against the decree of this Court on the O. S. in Civil Regular No. 443 of 1922.

*Home Insurance Company of New York v. Victoria Montreal Fire Insurance Company*, L. R. 1907 A. C. p. 59 followed.

Judgment. 5th May 1924.

*Per* ROBINSON, C. J.—The respondents—The Burma Fire and Marine Insurance Company, Limited—insured the goods of one Hajee Hashim Hajee Khan Mohamed for Rs. 50,000, and the Insurance Company re-insured Rs. 20,000 of their liability with the Himalaya Assurance Company Limited, the appellants.

The original Insurance Policy contains a condition that, if the Insured makes a claim and the Company rejects that claim and an action or suit be not commenced within three months after such rejection, “any benefit under this policy shall be forfeited.”

The Policy of re-Insurance is typed on one of the ordinary forms of an original insurance, and two questions arise for decision in this appeal, namely.

(1) Whether the printed conditions on the back of the ordinary form are, or rather, this particular condition is, legally valid? and

(2) If valid, whether it governs the policy of re-insurance?

In the view we take of the second point it is unnecessary for us to decide the first point.

The policy of re-Insurance sets out, amongst other things the following :—

“It is hereby declared and agreed that this insurance of Rs. 20,000, being partial re-Insurance of the Burma Fire and Marine Insurance Company Ltd. Policy No. 1832 for Rs. 50,000 is subject to all the terms, conditions and warranties thereof and to settlement thereunder in the event of loss \* \* \* \*”

If the conditions, of which there are twenty, attached to the ordinary form of Policy be considered, it will be seen that every one of them is a condition applicable to an original Insurance Policy only: that all of them would be contrary to the scheme and intendment of a policy of re-Insurance and that the particular condition in question in this case could not be

held to be applicable to a policy of re-Insurance, unless the express provision relied on was severed from its context and taken out of its position amongst the conditions. It is contained in condition 13, which deals with fraudulent claims, false declarations in support thereof the use of fraudulent means or devices by the Insured or any one acting on his behalf, and the occasioning of the loss or damage by the wilful act or with the connivance of the Insured, or the obstruction by the Insured, or any one on his behalf to the company, or the doing of any of the acts referred to in a previous condition. All these must apply to the original Insurer and cannot apply to a person claiming benefit under the policy of re-Insurance.

Primarily, therefore, the succeeding clause about bringing a suit within three months of the rejection of a claim must be held to apply to the original Insurer also. Moreover, such a provision as this is entirely foreign to the contract of re-Insurance.

The appellants bound themselves to accept a settlement of any claim made by Hajee Hashim Hajee Khan Mohamed, and it is obvious that the respondent company could not make a claim on them until the matter of their liability to Hajee Hashim Hajee Khan Mohamed had been decided, either by settlement or by a decree in an action brought. In either case, they would be unable, by any exertion on their part, to lay a claim against the appellants within the short period specified in this condition.

The Lordships of the Privy Council have dealt with a very similar condition in the case of *Home Insurance Company of New York v. Victoria Montreal Fire Insurance Company* (1).

It has been pointed out that such a provision could not be regarded as applying to a contract of re-Insurance, and that, to hold otherwise, would be to adhere to the letter without paying due attention to the spirit and intention of the contract. In that case also the conditions of the re-Insurance were typed and attached to an ordinary policy form, and it has been pointed out that the respondent company would be helpless because they cannot sue until the direct loss is ascertained between parties over whom the respondent company have no control and in proceedings in which they cannot intervene.

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1. L. R. Appeal Cases (1907) p. 59.

Therefore, having regard to the spirit of the contract of re-Insurance, and to the intention of the parties to it, we are of opinion that this clause, even if valid and legally binding, does not, and was not intended to, apply to the contract of re-Insurance.

The appeal, therefore, fails, the decree of the Court below is confirmed, and the appeal dismissed with costs throughout.

*Mr. Chari* for appellant.

*Das* for respondents.

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PRESENT :—HEALD, J.

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U. Nge	...	<i>Petitioner*</i>
v.		
Mg Tun Hlaing	...	<i>Respondent.</i>

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*Civil Procedure Code (Act V of 1908) S. 115—Trial Court rejecting application to allow further evidence—Failure to exercise judicial discretion—Lower appellate court failing to consider ground of appeal.*

Where, at the trial, after the evidence of both sides had been heard the petitioner applied to be allowed to produce further witnesses and the trial judge rejected the application without exercising a judicial discretion, and the lower appellate court omitted to consider the ground of appeal based thereon.

*Held* that the Judgments of the lower courts should be set aside and the case remanded and the petitioner be allowed an opportunity of producing further evidence ; that the trial Judge should write a new Judgment and the parties should have a right of appeal to the lower appellate court thereafter.

Judgment 21st March, 1924.

Respondent sued petitioner and others to recover the amount which he had to pay under a decree on a promissory note executed by himself and the defendant jointly.

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\*Civil Revision No. 25 of 1923 from the decree of the District Court of Magwe in C. A. No. 120 of 1922.

The Trial Court gave a decree for the full amount claimed against petitioner and Po Sin jointly.

Petitioner appealed and one of his grounds of appeal was that the trial Court had not allowed him to call certain witnesses whom he wanted to call.

The Judge in the Appellate Court either did not read this ground or read it carelessly and misunderstood it, since he said "The appeal is made solely on the ground of want of cogent evidence". He altered the decree as against petitioner to one of half the amount claimed, leaving it in force against Po Sin apparently for the whole amount.

No second appeal lies but petitioner asks me to interfere in revision on the ground that evidence which he desired to call was wrongly excluded.

According to the trial Court's diary of the 14th of September 1922, after all the witnesses for both sides who were present had been examined petitioner applied to be allowed to call further evidence and the Judge refused him to do so.

There was, so far as I can see, no justification for that refusal. It was of course in the discretion of the Court to refuse an adjournment, but there is nothing in the Judge's order to suggest that there was any proper exercise of that discretion.

It is difficult for the High Court to know what to do where neither of the lower courts has dealt with the case properly, but I think that the best thing to be done in the present case will be to set aside the judgments and decrees of both the lower courts and to remand the case to the trial court with directions to take up the trial from the point reached on the 14th September 1922, giving petitioner an opportunity of producing further evidence. The trial court will then deliver a new judgment after considering all the evidence, and a new appeal will of course lie against the decree passed on that judgment. The costs in all three courts will be shown in the decree of this court, and will abide the final orders in the case.

PRESENT :—YOUNG, J.

Maung Lee Gale . . . . . *Petitioner\**  
*v.*  
 Prohtado Barickan . . . . . *Respondent*

*Civil Procedure Code (Act V of 1908) S. 115—Omitting to consider prior decision of Court—Suit on pro-note—Failure to prove execution against one defendant—Whether plaintiff can fall back on cause of action for money lent against that defendant.*

The omission by a lower Court to consider the effect of a prior decision is a good ground for revision.

*Zaya v. Mi On Krazan*, 2 L. B. R. 333 followed.

Where money is lent and at the same time a promissory note is given therefor the creditor can sue for the money due as on the original contract of loan.

(Following *Maung Gyi v. Ma Ma Gale* 10 L. B. R. 55.)

But where a suit is filed on a promissory note and the plaintiff fails to prove execution against one of the defendants he cannot in the same suit fall back on his cause of action as if it were a suit for money lent. There must be a plea to that effect.

*Maung Gyi v. Ma Ma Gale*, 10 L. B. R. 55 : 12 B. L. T. 137 (F. B.) distinguished.

Judgment. 30th April, 1924.

The questions in this application for revision are : (1) whether the omission to consider the effect of a prior decision bearing on the question in issue affords grounds for revision ; (2) whether in a suit on a promissory note the plaintiff can sue on the original cause of action. The first point must be decided in the affirmative on the authority of *Zaya v. Mi On Krazan* (1), which decided that if the facts and the law applicable to the case have been duly considered by the lower court, then although its decision may be erroneous, the error cannot be corrected on revision. If on the other hand the lower court has failed to consider the law or the facts it has acted illegally and its decision may be revised. Here the alleged illegality was the failure to consider the effect of the Full Bench decision of *Maung Gyi v. Ma Ma Gale* (2) which

\*Civil Revision No. 188 of 1923 against the decree of the District Court of Yamethin in C. A. No. 10 of 1923.

(1). 2 L B R 333 fol.

(2). 10 L B R 55 : 12 B L T 137 (F B).

decided that where money is lent and at the same time a promissory note is given therefor, the creditor can sue for the money due as on the original contract of loan, if the promissory note cannot be proved.

Here the suit was upon a promissory note alleged to have been executed by 3 promisors and it was found that the respondent had signed as a witness, and the question is, whether in one and the same suit on a promissory note the plaintiffs can sue two defendants on the promissory note and the 3rd defendant on the original cause of action?

The decision in *Maung Gyi v. Ma Ma Gale* (2) does not seem to me to decide that you can, and I have no hesitation in holding that it is impossible in one and the same suit suddenly in the case of one defendant only to switch from a pleaded to an unpleaded cause of action. I would dismiss the application with costs.

PRESENT :—YOUNG, J.

Sit Sae and 6 others	...	<i>Petitioners*</i>
v.		
Ma Thin	...	<i>Respondent.</i>

*Court Fees Act (VII of 1870) S. 7 (IV) (c)—Schedule II, Art. 17—Deed of gift—Value of relief—Whether court fees payable on subject matter or value of relief.*

The subject matter of the suit was a deed of gift the value of the properties in which was computed at Rs. 20,000 and the value of the relief sought was Rs. 1,200. The plaint was stamped on Rs. 1,200.

Held that in cases falling under S. 7 IV (c) the plaintiff must value in his plaint the relief sought and the plaint must be stamped according to such valuation.

*Maung Kyin v. Po Thin*, 2 L. B. R. 266 commented on.

*Chennamal v. Malura Rowther*, 27 M. 480 approved.

\*Civil Revision No. 199 of 1923 against the decree of the District Court of Tavoy in C. A. No. 47 of 1923.

2. 10. L. B. R. 55. 12 B. L. T. 137 (F. B.).

JUNE PART

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Judgment. 9th May, 1924.

This application raised the question as to the right amount of stamp to be placed on a plaint praying for a declaration that a certain deed was valid and might be cancelled.

Both parties agreed that the question was to be determined by S. 7 IV, (c) of the Indian Court Fees Act which provides that in suits to obtain a declaratory decree or order where consequential relief is prayed the amount of fee payable under the Act is to be computed according to the amount at which the relief sought is valued in the plaint and that in such a suit the plaintiff is to state the amount at which he values the relief sought.

The plaintiff in the case had valued his relief at Rs. 1,200 and stamped his plaint accordingly, and brought his suit in the Court of the Subdivisional Judge of Tavoy who however held on the authority of *Maung Kyin v. Po Thin* (1) that the suit must be valued on the subject matter of the suit, and that as the deed of gift was of properties valued at Rs. 20,000 the plaint must be valued accordingly.

The case relied on was however merely a decision on the question whether the suit in question which was for the setting aside of 2 documents affecting land of the value of Rs. 800 fell under Article 17 of Schedule (ii) of the same Act and was properly stamped with a fixed fee of Rs. 10 or under S. 7 (iv) (c), as involving consequential relief. The learned Judge who decided the case expressed his entire agreement with a decision of the Madras High Court, which decided that to a suit to declare a sale deed invalid S. 7 (iv) (c) of the Act must be taken to apply and a Court fee was ordered to be paid on the value which the plaintiff had himself placed on the subject of the suit, but then went on to order that the appeal was to be valued on the subject matter of the suit, viz., Rs. 800.

This latter part of the Judgment was quite inconsistent with the former in which, the learned Judge had expressed his entire concurrence with the Madras High Court, which had ordered that Court fee stamp should be paid on the value which the plaintiff had placed on the subject matter of the suit, was inconsistent with the words of the section which provides

1. 2 L B R 266.

that the plaintiff is to state in his plaint the amount at which he values the relief sought and that the fee payable is to be computed according to that valuation, and moreover completely *obiter*, as the learned Judge was not asked to decide what fee was to be paid, which *ex hypothesi* was to be determined on the plaintiff's valuation of the relief sought, but was only asked to decide whether the valuation fell under Schedule (ii) Art. 17 or under S. 7 (iv) (c). I cannot agree with this last portion of the Judgment which was probably a slip, and not feeling myself bound by it as it is *obiter dictum*, I do not think it worth while to refer the matter to a Full Bench but hold that in cases falling under S. 7 IV (c) the plaintiff must value in his plaint the relief sought and that the plaint must be stamped according to such valuation. cf. *Chinnamal v. Madura Rowther* (2).

Here the relief sought was valued by the plaintiff at Rs. 1,200, it must be stamped according to that valuation and the subdivisional Court will have jurisdiction.

*N. C. Sen* for appellants.

*Clifton* for respondents.

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PRESENT :—LENTAIGNE AND CARR, JJ.

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Maung Tun Ya	...	<i>Appellant*</i>
v.		
Mg Aung Dun and Ma Min	...	<i>Respondents.</i>

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*Oral Usufructuary mortgage—Transfer of possession—Subsequent purchaser with notice—Suit by purchaser for possession—Oral mortgagee entitled to retain possession until payment—Doctrine of part performance.*

Where possession of immoveable property has been given under an invalid usufructuary mortgage although the mortgagee does not obtain a charge on the land he is entitled to resist a suit for possession and to retain possession of the property until the mortgage debt is paid off.

*Ma Htwe v. Mg Lun*, 8 L. B. R. 334 (1916) F. B : 9 B. L. T. 114 (F.B.) referred to.

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\*Letters Patent Appeal No. 54 of 1923 from the Decree of the Court in its Appellate side in Special 2nd Appeal No. 121 of 1922.

*Nabin Chand Naskar v. Raj Coomar Sarkar* 9 C. W. N. 1001 (1905); *Debendra Chandra Roy v. Behari Lal Mukerjee* 16 C. W. N. 1075 (1912), *Samoo Pattar v. Abdul Sammad Saheb* 31 M. 337 (1908); *Collector of Mirzapur v. Bhagwan Prasad* 35 A 164 (1913); *Param Huns v. Randhir Singh* 38 A 461 (1916) distinguished.

*Nadapena Appamma v. Saripilli Chinnavadu* (1923) M W N 825 approved.

*Royzuddin Sheik v. Kali Nath Mookerjee*, 33 C 985 (1906) dissented from.

*Maung Myat Tha Zan v. Ma Dun*, Civil Reference 1 of 1924, reported in 3 B. L. J 78 applied.

The doctrine of part performance approved of in *Maung Myat Tha Zan v. Ma Dun* in regard to incomplete sales applies equally to the case of incomplete mortgages where an agreement to mortgage is specifically enforceable.

... *Taylor v. Eckersley*, (1876) 2 Ch. 302. *Ashton v. Carrington*, (1871) 13 Eq. 76. *Hermann v. Hodges*, (1873) 16 Eq. 18. *Sreenath Roy v. Kally Dass Ghose*, (1875) 5 C. 82. *M. P. Currie v. M. Chatty* (1869) 11 W. R. 520. *His Highness Maharajah Holkar v. Dadhabhoy*, (1890) 14 B. 353.

Cf. Ghose on Mortgages 5th Edn., pp. 1475 referred to.

A mortgagor who has given possession to the mortgagee under an invalid mortgage cannot maintain a suit for "redemption" but may do so for recovery of possession on the basis of his title. The decree in such a case will provide for possession within a time to be fixed by the Court on condition of repayment of the amount due.

(See *Maung Aung and one v. Maung Shwe Lin and one*, 1 B. L. J 203 where the same principle has been laid down by Pratt, J.—Ed.)

Judgment. 11th April 1924.

*Per CARR, J.*—This is an appeal under S. 13 of the Letters Patent of this Court. The facts involved are as follows:—

Mg Tun Myaing and Mg Po Yun took a loan of over Rs. 200 from the respondent, Mg Mg Aung Dun, and handed over the land in suit as security therefor, by way of usufructuary mortgage. But no registered deed was executed and there was therefore no valid mortgage.

Subsequently Tun Myaing and Po Yun agreed to sell the land to the appellant Tun Ya for Rs. 292. The money was paid. Subsequently Tun Myaing and Po Yun failed to complete the transaction and in suit No. 29 of 1921 of the Township Court of Shwedaung Tun Ya sued for specific performance of the agreement. The suit was instituted on the 4th March, 1921, and was dismissed on the 3rd May. On appeal to the District Court the decision was reversed and a decree for specific performance was granted to Tun Ya on the 21st June, 1921.

On the 18th July 1921, Tun Myaing alone executed a registered mortgage deed in favour of Aung Dun for Rs. 300.

On the 3rd September 1921, both Tun Myaung and Po Tun executed a registered conveyance in favour of Tun Ya in compliance with the decree of the District Court.

Tun Ya then instituted the present suit to recover possession of the land from Aung Dun and Ma Min Si.

From the proceedings in suit No. 29 it is clear that Tun Ya was aware of the transaction between his vendor and Aung Dun was also aware of their transaction with Tun Ya. In fact Tun Myaing after receiving the money from Tun Ya went and offered to redeem the land from Aung Dun but Aung Dun would not accept unless certain sums subsequently borrowed from him were repaid as well as the original mortgage debt.

When the present suit came up for framing of issues the plaintiff, Tun Ya, was questioned. He said "Defendant Ko Aung Dun was working the land before I bought it. The owner, Mg Tun Myaing, told me that he had mortgaged it with Mg Aung Dun when he sold it to me."

On this the Township Judge dismissed the suit. He seems to have held that the registered mortgage was valid. He held that the plaintiff had acquired nothing more than the right to redeem the land from Aung Dun.

On appeal the District Judge held, rightly I think, that the registered mortgage was not effective as against the plaintiff. He accordingly gave the plaintiff a decree for possession. He does not appear to have considered the effect of the first unregistered transaction between Tun Myaing and Po Yun on the one part and Aung on the other.

On second appeal to this Court the learned Judge held that the appellants (Aung Dun and Ma Min Si) had a charge on the land and that Tun Ya was not entitled to recover possession without paying off the debt. He accordingly set aside the Judgment and decree of the District Court and restored those of the Township Court. He has certified the case as a fit one for appeal.

As I have already said I think that in the circumstances disclosed Aung Dun's registered mortgage cannot be held good

as against the appellant. The sole question therefore is what is the effect of the oral mortgage.

In *Bon Lon v. Po Lu* (1) Maung Kin, J. held that a transaction similar to this one did not create a charge. He found on the facts that there was clearly a usufructuary mortgage which was invalid for want of a registered deed. The Judge quoted a number of decisions of the Calcutta, Madras and Bombay High Courts to this effect. These I do not propose to recapitulate. There are also the following cases:—

*Nabin Chand Naskar v. Raj Coomar Sarkar* (2) *Debendra Chandra Roy v. Behari Lal Mukerjee* (3) *Samoo Pather v. Abdul Summad Saheb* (4) *Collector of Mirzapur v. Bhagwan Prasad* (5) *Param Huns v. Randhir Singh* (6).

In all these cases the same view was held. They were all cases in which there was a registered mortgage deed which was invalid for want of due attestation. But they were also all cases of simple mortgages on which the mortgagees sued for mortgage decrees. Thus there had been no delivery of possession to the mortgagee.

In *Ma Htwe v. Mg Tun* (7) a Full Bench of the Chief Court of Lower Burma held that a plaintiff suing to redeem an oral usufructuary mortgage could not be allowed to prove the mortgage and must therefore fail. It was suggested (p. 335) that had she sued for possession on her title only she might have been entitled to a decree without paying anything. The point, however, did not arise and was not decided.

Against this there is the case of *Nadepena Appamma v. Saripilli Chinnavadu* (8) in which two Judges of the Madras High Court (a third Judge dissenting) held that a suit to redeem a usufructuary mortgage is in substance a suit for possession. The effect of this decision is that a plaintiff can sue to redeem an unregistered usufructuary mortgage.

And this view seems to receive support from the doctrine of part performance which in its application to sales has now been universally accepted in India as enabling a purchaser in

1. (1916) 8 L B R 553.

2. (1905) 9 C W N 1001.

3. (1912) 16 C W N 1075.

4. (1908) 31 M 337.

5. (1913) 35 A 164.

6. (1916) 38 A 461.

7. (1916) 8 L B R 334: 9 B L T 144 (F B)

8. (1923) M W N 825.

possession under an invalid sale to resist a suit for possession by his vendor. This has very recently been discussed and accepted by this Court in *Maung Myat Tha Zan v. Ma Dun* (9) and it is not necessary to go through it again.

In this connection I would refer to *Royzuddi Sheikv.Kali Nath Mukerjee* (10), which was quoted by Maung Kin, J. Mukerjee J., said "It is an established doctrine that equity will not contravene the positive enactments or requirements of law, and defeat its policy by supplying, under the guise of amending defective instruments, those deficient elements of form without which the agreement is absolutely void even as between the parties to it." This dictum I am unable to reconcile with the application of the doctrine of part performance referred to above. But that application is now firmly established and if the doctrine of part performance is applicable to sales I can see no reason why it should not be equally applicable to usufructuary mortgages. If it is so applicable then it would seem that a mortgagee in possession under an invalid mortgage is entitled to retain possession until the mortgage debt is paid off. He can therefore resist a suit for possession, based merely on title, by his mortgagor. But if the mortgagor sues to recover possession offering to repay the debt then he is suing to redeem an invalid mortgage and on the authority of *Ma Htwe's case* (7) he must fail. The mortgagor therefore has no legal remedy open to him and unless his mortgagee will allow redemption he loses his property altogether. The result is obviously inequitable.

It may be noted that in this case the plaintiff admittedly had notice of Aung Dun's claim and so stands entirely in the shoes of his vendors.

Whether the doctrine of part performance should be applied to a transaction of the nature of an usufructuary mortgage seems to depend on the answer to the question whether the agreement to mortgage is specifically enforceable.

The rule appears to be that when the loan has actually been made the agreement will be specifically enforced by compelling

9. Civil Ref. No. 1 of 1924 reported in 3 B L J 78.

10. (1906) 1 L R 33 C. 985.

7. (1916) 8 L B R 334; 9 B L T 144 (F.B).

the borrower to execute a valid deed of mortgage. (See Ghose on the law of mortgages in India, 5th edition, pp. 14-75).

English cases in support of this view are *Taylor v. Eckersley* (11) *Ashton v. Carrington* (12) and *Hermann v. Hodges* (13). Indian cases are—*Sreenath Roy v. Kally Dass Ghose* (14), *M. P. Currie v. M. Chetty* (15) and *Halkar v. Dadabhoy* (16).

I would hold therefore, that while the respondent Aung Dun has not a charge on the land within the meaning of S. 100 of the Transfer of Property Act yet he is equitably entitled to retain possession of the land until his debt has been repaid. But I do not think that it follows that the plaintiff's suit should be dismissed because he has relied solely on his title and has not offered to repay the money. The effect of the finding is that the plaintiff is entitled to possession on fulfilling a certain condition and he should be given a decree accordingly.

It appears that Aung Dun's mortgage covered more land than was bought by the plaintiff. Since there is in fact no legal mortgage the technical rules relating to partial redemption of a mortgage are not applicable and in my view the plaintiff should be required to repay only in proportion to the actual amount of the mortgage debt which was due at the time of the plaintiff's purchase.

So far as Aung Dun is concerned, therefore, I would remand the case to the Court of First Instance with a direction that the Court do proceed to determine the amount of the debt due at the time of the plaintiff's purchase and the portion of it payable by the plaintiff in proportion to the area bought by him and do then proceed to pass a decree in favour of the plaintiff for possession on his paying, within a time to be fixed by the Court, the sum so found payable by him.

There remains the defendant Ma Min Si. Throughout all the earlier proceedings it appears to have been assumed that the interests of Aung Dun and Ma Min Si are the same. At any rate I cannot find in any of the Judgments any reference to a difference.

11. (1876) 2 Ch. 302.

12. (1871) 13 Eq. 76.

13. (1893) 16 Eq. 18

14. (1875) 5 C 82.

15. (1869) 11 W R 520.

16. (1890) 14 B 353.

But their cases are in fact different. The plaint merely alleges that the defendants are in possession of the land and will not give it up. Ma Min Si's written statement, summarised, is as follows :—

That on the 10th Lasan of Tabodwe, 1282 (the day before the alleged agreement by Tun Myaing and Po Yun to sell to the plaintiff) she gave these two a piece of her own land and received from them in exchange a part of the land in suit, measuring 35 cents and entered upon it. Later defendant Aung Dun said that Tun Myaing and Po Yun had mortgaged the land to him, and would not allow her to work this piece. Now Tun Myaing and Po Yun have included in registered conveyance to the plaintiff the land which they received from her in exchange, with the result that she has lost possession of both pieces of land.

It would seem from this statement that there is probably a mis-joinder of parties and causes of action, but since no enquiry has been made into the facts it is not possible to decide this question definitely at present.

I would therefore in remanding the case add a direction that the Court of First Instance do also enquire into Ma Min Si's defence.

If it is found that there is a mis-joinder of parties she should be struck off the record, being given such costs as the Court may find justly due to her.

The final order I propose is therefore that the judgment and decree appealed from be set aside and that the suit be remanded to the Court of First Instance for decision on its merits having regard to the instructions given above.

I would give the appellant a certificate for the refund of the Court Fee paid on this appeal and direct that the other costs of this appeal and all the costs in the two earlier appeals in the District Court and in this Court, be costs in the suit and be apportioned by the Township Court in its decree.

*Villa* for appellant.

*Thein Maung* for respondent.

PRESENT :—HEALD, J.

Maung Kyi Hlaing and one	...	<i>Appellants*</i>
v.		
Maung Tun Lin	...	<i>Respondent.</i>

*Buddhist Law—Inheritance—Competition between half blood of nearer degree to whole blood of more distant degree.*

A Younger half brother or half sister takes in preference to the son of an elder brother.

*Taung Mro v. Aung Nyun*, Civil 2nd Appeal No. 123 of 1916 of Chief Court—dissented from.

*Kyaw Sein v. Ma Min Yin*, 4 U B R 20, *Nge Son v. Ma Myo*, 2 U B R. 1897-01, p. 531 ; *Ma Gun Bon v. Mg Po Kywe*, 2 U B R 1897-01, p. 66 approved.

Judgment. 30th April 1924.

Respondent sued for the administration of the estate of Tha Zi and Ma Hnin Ban by the Court and for partition and possession of his share of that estate.

Tha Zi and Ma Hnin Ban were husband and wife. They died within a few hours of each other in a fire. They left no children.

Respondent claimed a share in the estate as being a half brother of Tha Zi, being a son of Tha Zi's father by a second wife. He alleged that he and his two sisters were Tha Zi's heirs to the exclusion of the children of Tha Zi's own elder brother and that they and the present 2nd appellant Ma Ok Kyi who is Ma Hnin Ban's younger sister were entitled to a quarter share each in the estate.

The trial Court dismissed respondent's suit on the strength of an unreported decision of a single Judge of the Chief Court to the effect that "full blood relations exclude half blood relations although the latter may be nearer in degree."

The lower appellate Court held that respondent and his sisters, being half-brother and half-sisters of Tha Zi were

\*Special 2nd Appeal No. 285 of 1923 from the decree of the District Court of Henthawaddy in Civil Appeal No. 20 of 1923.

nearer in degree than the children of the elder brother, who died before Tha Zi, and therefore excluded those children, and that they were entitled to divide half the estate between them.

One of the children of Tha Zi's elder brother appeals against that decision on the strength of the unreported decision mentioned above, and joins as a formal co-appellant the younger sister of Ma Hnin Ban as being administratrix of the estate.

Respondent files a cross-objection to the effect that the distribution of the estate should be *per capita* and not *per stirpes*, so that he ought to get one-quarter and not one-third of the estate. No authority for this proposition has been advanced and I agree with the learned Judge in the lower appellate Court that it is in accordance with justice, equity and good conscience that where a married couple die under circumstances in which the relatives of both inherit the estate, the relatives of each should be regarded as inheriting half the

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APPENDIX.

PRESENT :—MAUNG KIN, J.

Civil Second Appeal No. 123 of 1916 of the Chief Court of Lower Burma against the Judgment of the District Court, Akyab, in C. A. No. 38 of 1916.

Taung Mro and one v. Aung Nyun and one.  
*May Oung* for appellants.

*Sin Hla Aung* for respondents.

Judgment. 4th January, 1918.

Some lady whose name is not known had three children (1) Kyunma by her first husband, (2) Ma Wa Byu and (3) Chi Paung by her second. Kyunma died, so did Chi Paung and Chi Paung's children. Then Wa Byu died leaving no children or other direct heirs. The dispute is as regards Ma Wa Byu's estate and between Mi Ein Tha Pyu, the child of Kyunma and Aung Nyun and San Shwe U, the grand-children of Chi Paung. The lower Courts have given one-half to Mi Ein Tha Pyu and one-half to Aung Nyun and San Shwe U. Taung Mro is the husband of Mi Ein Tha Pyu and has no interest in the estate and should not have been brought on the record at all.

The position is as follows :—Aung Nyun and San Shwe U are related to the deceased as grand-nephews through their grand-father who was her full brother. Mi Ein Tha Pyu may be described as a niece of the deceased by her half-sister. It has been argued for Mi Ein Tha Pyu that inasmuch

estate. I shall therefore not consider the cross-objection further.

The question for decision is thus whether the younger brothers and sisters of Tha Zi by the same father but by a different mother exclude the children of an elder full brother of Tha Zi's, who died before Tha Zi.

It is admitted on both sides that there is no textual authority in Buddhist Law on this point, and appellant's learned advocate admits that the only authority in his favour is that of the learned Judge of the Chief Court who decided the unreported case of *Taung Mro v. Aung Nyun* (1) which has already been mentioned. In that case the contest was between the daughter of an elder half-sister of the deceased and the grandchildren of a younger brother, both the elder half-sister and the younger brother having died before the deceased. There can be no doubt that if the elder half-sister and the younger brother had been alive the younger brother would have excluded the elder half-sister or even an elder sister or brother of the full blood. That is in accordance

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1. Civil Second Appeal No. 123 of 1916 of the Chief Court.

as she is the niece, she is nearer in the degree of relationship to the deceased than the grand-nephews, that is, the latter are one degree remoter than she is and that she therefore excludes them. For the other side it has been pointed out that they are the full blood relations of the deceased, while Mi Ein Tha Pyu is one of half-blood. They say that, moreover, their opponent is a child of the elder sister of the deceased and that in order to descend to her, the inheritance will have first to ascend to the elder sister, and thus the rule against the ascent of inheritance will be offended, whereas their grandfather is a younger brother of the deceased. They say therefore that they exclude Hi Ein Tha Pyu but they have not filed any cross-appeal.

There is an alarming absence of texts on the point.

To my mind the first point to be seriously considered is whether, as between Kyunma and Chi Paung, who would exclude the other, were they the claimants to the estate? I can find no text which deals with such a case. There are texts dealing with the rights of the children of a common father or mother by different wives or husbands in the estate of the father or mother, as the case may be, but they are not useful even by way of analogy. I can find no texts which say that a person may share in the estate of his deceased half-brother along with the deceased's own or full brother. In my judgment it must be held that full-blood relations exclude the half-blood. It follows then that Kyunma's descendants cannot claim any share in Ma Wa Byu's estate, so long as she died leaving full-blood relations. I also

with the ordinary rule of Buddhist Law against ascendance of inheritance, and it was partly on that ground that the case was decided. But the learned Judge also said: "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. In my judgment full-blood relations exclude half-blood relations."

It seems to me that in a case like the present where the "full brother" was an elder brother and had died before he was within reach of the inheritance, both the rule against the ascent of inheritance and the rule that the nearer relationship excludes the more remote operate in favour of the younger half brother and sisters, and that the lower appellate Court was right in finding that respondent and his two sisters would exclude the appellant Kyi Hlaing who was a son of the elder full brother. With all respect for the opinion of the learned Judge who decided the case of *Taung Mro v. Aung Nyun* (1) and who was himself a Burman Buddhist I would suggest that the dictum that "full-blood relations exclude half-blood relations" was expressed in too general terms and that there is no sufficient authority either in the texts of Burmese Buddhist Law or in the case-law on the subject for so wide a proposition. In this connection I may note that in the case of *Kyaw Sein v. Ma Min Yin* (2), where the contest was between a maternal aunt of the deceased and his step-brothers it was held that although the step-brothers were not blood-relations of the deceased they were entitled to inherit his estate to the exclusion of the

1. Civil Second Appeal No. 123 of 1916 of the Chief Court.

2. 4 U B R 20.

think that there is much force in the contention that the fact that Kyunma is the elder sister of Ma Wa Byu is in the way of Mi Ein Tha Pyu. The rule against the ascent of inheritance would be offended, if she was allowed to come in, as it is settled law that as between elder brothers and sisters of the deceased and their younger brothers and sisters the former are excluded by the latter. I do not think that as Mi Ein Tha Pyu is not a full-blood relation of the deceased she can claim the benefit of the rule, the nearer in degree excludes the more remote, as against the full-blood relations. For the above reasons I would hold that Mi Ein Tha Pyu is not entitled to any share in the estate of the deceased. And she is fortunate that the opposite parties have not appealed. The appeal is dismissed with costs.

aunt, and that in the case of *Nga Son v. Ma Nyo* (3), it was held, following the decision in *Ma Gun Bon v. Maung Po Kywe* (4), that a step-son succeeded to the estate of his step-mother to the exclusion of the step-mother's sister.

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

*Kyaw Myint* for appellant.

*Mr. Chari* for respondent.

PRESENT :—HEALD, J.

P. N. S. M. Syed Khan and 2 others ... *Petitioners\**

v.  
P. K. C. Nagoor ... *Respondent.*

*Criminal Procedure Code (Act V of 1898), S. 195—False complaint—Subsequent discovery that complaint instigated by third parties—Application for sanction—Whether sanction necessary to prosecute third parties.*

Where a false complaint was filed by a person and it was afterwards discovered that it was instigated by third parties who were not parties to the complaint, and proceedings were launched against them under §. 211, I. P. C. Held that as the offences complained of were committed in relation to the proceedings in Court no prosecution could be launched except on the written complaint of the Magistrate's Court or, of some Court to which the Magistrate's Court is subordinate.

Held also that the High Court having jurisdiction over the Magistrate's Court has power to make the necessary complaint and the order in the case should issue as the complaint.

Judgment. 24th March, 1924.

On the 29th of March, 1913 Nagalingam filed a complaint charging the present respondent P. K. C. Nagoor, (called in the complaint K. C. Nawood) with criminal breach of trust, in that he had pawned certain articles of jewellery

3. 2 U B R (1897-01), p. 531.

4. 2 U B R (1897-01), p. 66.

\*Cr Rev No. 40-B of 1924 being review of the order of the Western Sub-divisional Magistrate of Rangoon in Cr Reg. No. 1576 of 1923.

entrusted to him to one Tumbi Rowther. Thumbi Rowther was called by the Magistrate and said that respondent had redeemed the jewellery. A warrant for respondent's arrest was then issued. He was arrested on the 7th of April and said at once that he did not even know Nagalingam, and that the charge was a false one concocted by somebody because he was interesting himself in civil litigation in which his father-in-law was engaged. The Magistrate recorded that the case looked "fishy," and ordered respondent's release on bail. On the 10th of April the case was adjourned because some of the witnesses were absent. On the 29th of April Nagalingam was absent and was said to be ill, and the Magistrate saying that he was inclined to think that he was trying merely to harass respondent issued a warrant for his arrest. On the 2nd of May the warrant had not been returned and Nagalingam was absent. Respondent informed the Magistrate that he could prove that the case was false. Next day Nagalingam was reported to be in Hospital, but respondent said that he was not there, so the Police were directed to make further enquiries and the case was put down for the 9th of May. On that date the return of the warrant showed that Nagalingam could not be found and was in hiding. The Magistrate said that under the circumstances he might discharge respondent at once but that if he did so complainant would get no compensation from Nagalingam. Instead of doing so he issued a fresh warrant for Nagalingam's arrest. Nagalingam was still not found, and on the 23rd of May and on the 10th of June fresh warrants for his arrest were issued with the same result. On the 26th of June respondent was discharged, the complaint being classified as "False" and his advocate said that if he thought fit he would apply later for sanction to prosecute Nagalingam. There the matter rested for over 10 years.

On the 2nd of October 1923 respondent filed a complaint charging Nagalingam and the present petitioners together with two others said to be living in the Ramnad District, Madras, with a criminal conspiracy to have him arrested in pursuance of which conspiracy Nagalingam filed the false complaint against him on the 29th of March, 1913. He alleged that

in June, 1923 a letter written by the first two petitioners and by the two men who are now said to be in Ramnad to the third applicant and one Katuwas in which the whole conspiracy was disclosed, came into his possession. He produced that letter and the cover in which it is said to have been found. The cover bears Madras post-marks dated the 21st and 22nd of October 1912, and Burma post-marks dated 30th and 31st of October. The letter purports to have been written to P. N. S. Katuwas and some one referred to as "P. N. S. M" who was apparently Katwa's son, and is said to be the third petitioner, P. N. S. M. Ebrahim, by the first and second petitioners and O. Kethamuthu Servai and N. Sornamuthu Servai. It informed the addressees that the writers had filed a suit against respondent with the first petitioner as plaintiff and that respondent on being served with the summons had said that he would contest the suit. It went on to say that whatever defence he might make they could win the suit, so long as they were united. It said further that respondent had challenged the 1st petitioner to swear on the Koran that the claim was true and that if they had to take the oath disgrace would fall on them, so that the addressees must send a warrant against him as soon as they received the letter. They must not let him get off easily lest others should be encouraged to resist them as he had done and should drag them into Court as they had dragged him. If he got off easily he would interfere more boldly than before with their operations. A warrant must be sent so that their enemies would be afraid of them, fearing that they too might be handcuffed and treated like respondent. The recipients of the letter were to ensure the writers' future prosperity by getting a warrant against him and were to spare no expense. The letter then asked that the warrant might be sent at once to the Muthukulathur Magistrate's Court or if that was not possible that it might be sent by post to the 1st petitioner in which case the writers would get respondent arrested and sent to Burma. The writers referred to a letter by the addressees to them in which the writers had asked them to ascertain and inform them when respondent was leaving for Burma and said that they would do so. They went on "It will be fine to hand-

cuff him at Seganapuram." The letter then gave full details of the arrangements which had been made by them for the suit against respondent and certain instructions which apparently were for the fabrication of evidence.

If that letter can be proved to have been written by or on behalf of the 1st and 2nd petitioners or the other two persons mentioned as being responsible for it and a connection between it and the complaint filed by Nagalingam against respondent can be established the prosecution of the persons by or on whose behalf the letter was written and Nagalingam and the person or persons who instigated the filing of the complaint against respondent would be justified, since it seems probable that an offence under section 211 read with S. 109 (or possibly 120 B) of the Indian Penal Code was committed.

The Magistrate before whom respondent filed his complaint held that he was debarred from taking cognisance of the offence because the Magistrate who dealt with the complaint which respondent alleges to have been false did not give the sanction, which, under the old S. 195 of the Code would have been necessary. He therefore dismissed the complaint.

Respondent applied to the District Magistrate in revision and that Magistrate said that section would have been necessary only in the case of Nagalingam and that the provisions of S. 195 of the Code do not apply to the petitioners and the rest of the accused.

Petitioners now come to this Court in revision and argue that if the provisions of S. 195 apply in the case of Nagalingam they apply in their case also, since the offence alleged against them, if committed at all, was committed in relation to the proceedings in the Magistrate's Court which arose out of the complaint made by Nagalingam.

I am of opinion that this argument is correct and that no Court can take cognisance of the offence which is alleged to have been committed by the six persons whom respondent accuses except on the written complaint of the Magistrate's Court or of some Court to which the Magistrate's Court is subordinate.

But that finding does not by any means end the matter.

The Magistrate's Court is subordinate to this Court and therefore I have power to make the necessary complaint, and as I am satisfied that it is expedient in the ends of justice that an enquiry should be made into an offence under S. 211 read with S. 109 or 120 B of the Indian Penal Code, which appears to have been committed in relation to Criminal Regular Trial No. 118 of 1913 in the Court of the Western Sub-divisional Magistrate of Rangoon, a copy of this order signed by me will be sent to the Western Sub-divisional Magistrate, Rangoon as this Court's complaint.

I note for the information of the Magistrate that I regard this letter as extremely serious, and that it would probably be advisable to enlist the services of the Criminal Investigation Department, Burma, which should be asked to work in conjunction with the Criminal Investigation Department, Madras.

PRESENT :—HEALD, J.

Kabudin *alias* Shwe Po and Rasat Singh... *Petitioners\**

v.

King Emperor

*Lower Burma Land and Revenue Act (Burma Act II of 1876), R. 107-G—Digging clay for brick-making without license—Whether owner of land or contractors supplying labour liable.*

The petitioners were engaged as contractors to supply labour to dig clay and make bricks and they accordingly supplied the labour by which clay was dug and 8,000 bricks were made without obtaining a license. They were prosecuted under Rule 107-G of the Lower Burma Land and Revenue Act, 1876 and convicted and fined. On revision the conviction against the contractors was set aside and the owner of the field who engaged the contractors was ordered to be prosecuted.

Reference made by H. H. Mackney, Esq., I. C. S., Sessions Judge of Insein in his Cr. Rev. No. 80 of 1924 :—

The three applicants have been convicted under R. 107-G of the Lower Burma Land Revenue Rules for digging clay for making bricks without license.

\*Cr. Rev. No. 316-B of 1924 being review of the order of the 2nd Additional Magistrate of Insein passed in Cr. Reg. No. 26 of 1924.

The case was tried summarily and there is no appeal. The applicants ask for revision of the case as they consider that it was not proved they were responsible for the brick manufacture, and in any case they were merely contractors and the persons guilty are the labourers who actually dug or the persons who engaged applicants as contractors. I confess I am quite unable to follow the latter plea. Surely if a man engages to carry out a work he is responsible for it whether he performs the labour with his own hands or not. The rule makes it an offence to dig clay without a license and if these persons undertook to dig clay and make bricks and there was no license they are obviously guilty. No doubt the persons who engaged them might also under certain circumstances be guilty, but that has nothing to do with the question of the guilt of the applicants.

It must be admitted that the evidence that all three applicants were concerned is extremely unsatisfactory and it would have been better for the Magistrate to call witnesses who could give definite evidence thereto. Nearly all the evidence is hearsay. However the headman says he had seen applicants Mg Gale and Mg Shwe Po causing clay to be dug and the ten house gaung Ba Shin says he had seen all three. This evidence is somewhat vague. Mg Gale admits that he "made bricks as labourer of Ne Dun with my coolies and that he had already made about 8000 bricks as sample. The other two applicants denied the charge altogether.

I consider that the persons said to have engaged these applicants and some of their labourers should have been called and examined and that it is extremely doubtful on the existing evidence that Shwe Po and Rasal Singh had anything to do with the matter at all. As regards Mg Gale I think he was rightly convicted on his own admission. It is clear he not only supplied the labourers but caused the clay to be dug and made the bricks. He was in charge of the work. The proceedings will be submitted to the High Court, Rangoon with a humble recommendation that the finding and sentence of the lower Court so far as regards Kabudin *alias* Shwe Po and Rasal Singh be set aside and that a fresh trial be ordered.

Order. 5th May, 1924.

For the reasons given by the learned Sessions Judge in his report dated the 5th of May, 1924 the convictions and sentences passed on Kabudin *alias* Shwe Po and Rasal Singh are set aside and the fines which have been paid will be refunded. The District Magistrate should take steps to have Mg Ne Dun, the owner of the land who was presumably responsible for the unsuccessful digging of clay, prosecuted.

PRESENT :—CARR, J.

A. V. Joseph . . . Appellant\*  
 v.  
 J. L. Lammond . . . Respondent.

*Criminal Procedure Code (Act V of 1898), S. 443—Prosecution by European on behalf of Railway Administration—Duty of European to pass sleepers—Whether such person is a Railway employee under Indian Railways Act (Act IX of 1890), S. 3 (7)—Claim by appellant to be tried by jury.*

A person who is engaged by a Railway Administration to pass sleepers and who is paid by results partly by the Railway Administration, and partly by the contractor, is an employee of the Railway within the meaning of S. 3 of the Indian Railways Act, 1890.

A British Indian subject cannot claim to be tried under Chapter 33, Cr. Pro. Code in a criminal prosecution launched against him by a European employee on behalf of a Railway Administration.

Order. 12th May, 1924.

The appellant, A. V. Joseph held a contract for the supply of sleepers to the Bengal Nagpur Railway Co. Ltd., He is being prosecuted for fraud in connection with that contract. The case was sent up for trial under S. 420, I. P. C., but a

LOWER BURMA LAND AND REVENUE ACT, 1876.

*Rule 107-A.*—No person shall mine, quarry, dig for, excavate or collect stone, laterite (whether in blocks, gravel or sand), limestone, sandstone, marble, gypsum, clay or other minerals on land wherein the right of such minerals is reserved to or otherwise belongs to Government except under a license or lease granted under the provisions of this Chapter.

*Rule 107-G.*—Whoever mines, quarries, digs for, excavates or collects any mineral in contravention of the provisions of Rule 107-A, or before payment of any fee, rent or royalty payable in advance under a license or lease issued under the provisions of this Chapter or otherwise in contravention of the terms or limitations of any such license or lease, or removes any mineral, other than a mineral for which a license free of royalty may have issued under the provisions of Rule 107-B, before payment of the royalty therefor, shall be punished with imprisonment for a term which may extend to one month, or with fine which may extend to two hundred rupees, or with both.

\*Cr. Appeal No. 466 of 1924 from the order of the Western Sub-divisional Magistrate, Rangoon, passed in Cr. Reg. No. 1560 of 1924.

charge has been framed under S. 468, I. P. C., which is within the cognisance of a first class magistrate.

The complaint was made to the police by Mr. Lammond who is a European, while the appellant is an Indian. The appellant claimed under S. 443, Cr. P. C., to be tried under the provisions of Ch. 33 of the Code, which if applicable, compel a Magistrate if he does not discharge the accused to commit him to sessions for trial. In Rangoon this would mean that he would be tried by a Jury. The Magistrate rejected this claim and this appeal is filed under S. 443 (2), Cr. P. Code.

The only question is whether Mr. Lammond is a complainant within the definition in S. 444, Cr. P. C., and this narrows itself down to the question whether he is a "railway servant" as defined in S. 3 of the Indian Railways Act, 1890, clause 7, which says:—"Railway servant" means any person employed by a railway administration in connection with the "service of a railway."

Mr. Chari refers to certain clauses in the contract between the appellant and the Railway Co. which provide for the appointment of a sleeper passing officer by the Chief Engineer of the Burma Railways and for the payment by the appellant of part of such officer's remuneration in the form of a fee of Rs. 20 for each 1,000 sleepers rejected in excess of 10 per cent. of those presented for examination. He says also that the Railway Company pays Rs. 20 for each sleeper passed, but I do not find this in the contract. Mr. McDonnell on the other hand says that Mr. Lammond, who is the sleeper passing officer, is paid a fixed salary of Rs. 1,000 per mensem. I do not think this question is of any importance. An employee may be paid a fixed salary or by time or by the piece but the mode of payment does not affect the fact that he is employed.

That the appointment or nomination is to be made by the Chief Engineer of the Burma Railways also makes no difference. It is clear on the contract that the Bengal Nagpur Railway Co., authorises the Chief Engineer, Burma Railways, to act on their behalf in this matter.

I think there can be no question that Mr. Lammond is employed by the Bengal Nagpur Railway Co.

It is further contended that his employment is not "in connection with the service of the Railway." Mr. Chari has not made himself very clear on this point. As far as I understand him he would limit the word "service" to the actual running of the trains. I cannot accept this very restricted meaning for the word. S. 148 of the Railway Act makes S. 3(7) applicable to a railway under construction and in the earlier stages of construction there can be no running of trains.

In my view the word "service" has a much wider meaning than this, and necessarily include the maintenance of the permanent way. For that maintenance it is necessary to provide sleepers and it is also necessary to ensure that the sleepers are sound and of good quality. It follows that a person employed so as to ensure the quality of the sleepers is employed in connection with the service of the railway.

I hold therefore that the decision of the Magistrate was correct.

The appeal is dismissed.

*Mr. Chari* for appellant.

*Mr. McDonnell* for respondents.

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PRESENT :—YOUNG AND HEALD, JJ.

V. P. R. N. Swaminathan Chetty ... *Appellant*\*

v.

V. Periyanan ... *Respondent.*

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*Crim. Pro. Code (Act V of 1898) S. 476 B—Identifier's affidavit—Subsequent denial by deponent of identity of party served—Sanction to prosecute for perjury.*

An identifier made an affidavit that he had accompanied the process-server and had pointed out the defendant, and that summons had been refused, and the strength of the affidavit an *ex parte* decree was passed. The deponent subsequently denied the identity of the person served and sanction was applied for to

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\*Civil Mis. Appeal No. 69 of 1923 against the order of the District Court of Pegu in C. M. No. 32 of 1923.

prosecute the deponent for perjury which the District Court refused as the deponent may have been mistaken.

*Held* as it was probable that of the two sworn statements one or the other must be false it was expedient in the interests of justice that an enquiry should be made and an enquiry was ordered accordingly.

Judgment. 20th May 1924.

*Per* HEALD, J :—The parties in Civil Regular Suit No. 16 of 1920 of the District Court of Pegu were two Chetties namely, the present petitioner, V. P. R. N. Swaminathan, who was plaintiff, and M. R. S. P. Singaram, who was defendant and was in Devacota. Process was issued for service on the defendant at Devacota, and was returned with an endorsement that the defendant had refused service. That endorsement was supported by an affidavit sworn at Pegu by the present respondent, V. Periyanan, to the effect that he accompanied the process server : that he and two others pointed out M. R. S. P. Singaram and that M. R. S. P. Singaram refused service. Petitioner was given an *ex parte* decree. M. R. S. P. Singaram applied for that decree to be set aside on the ground that he had not been served. Petitioner called respondent as his witness to prove service, and the respondent swore that the person to whom the summons was tendered was not the defendant, M. R. S. P. Singaram. There is, therefore, ground for enquiry as to whether or not respondent committed perjury.

Petitioner applied for sanction to prosecute respondent for perjury.

The learned Judge in the District Court refused sanction on the ground that both respondent's sworn statements might be true: that respondent might not have understood his affidavit and that the circumstances were not such that it was necessary in the interests of public justice that sanction should be given.

Petitioner now appeals to this Court under the provisions of S. 476 B of the Code of Criminal Procedure.

False affidavits and false evidence are extremely common, and where, as in this case, it seems probable that of two sworn statements one or the other must be false, we are of opinion that it is expedient in the interests of justice that an enquiry should be made.

A copy of this order signed by us will be sent to the District Magistrate of Pegu as our complaint under S. 476 B of the Code of Criminal Procedure.

*Mr. Halkar* for appellant.

*Mr. Naidu* for respondent.

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PRESENT :—LENTAIGNE, J.

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U. Kyaw Zan	...	<i>Appellant*</i>
v.		
Ah Doe	...	<i>Respondent.</i>

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*Mesne profits of paddy land—Claim of landlord for apportionment—Purchase of land by mortgagee at Court sale in November—Tenancy rent payable in March following.*

A mortgagee who purchases the mortgaged property at a Court sale and is put into possession after confirmation of sale, is entitled to the whole of the paddy rented from the land which fall due at the end of the agricultural year in which he makes the purchase. The landlord has no claim for apportionment.

But where the landlord has equities in his favour or in the case of rent accruing monthly a claim for apportionment may be made.

*The Land Mortgage Bank of India Ltd. v. Vishnu Govind Patankar* (1879) 2 B 670—approved *Maung Gaw Ya v. Maung Talok* (1918) 3 U. B. R. 141 distinguished.

Judgment. 22nd May, 1924.

One Shive Baw who acquired the land referred to in this suit caused the land to be transferred into the name of his son Sin Phaw U and the said Sin Phaw U mortgaged the land by a registered deed to one Tun Aung since deceased. Subsequently the first appellant U Kyaw Zan as creditor of Shive Baw obtained a decree and caused the said land to be sold in execution of such decree and as auction purchaser entered into possession.

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\*Special Civil 2nd Appeal No. 264 of 1923 from the Decree of the District Court of Akyab in Civil Appeal No. 40 of 1923.

The plaintiff respondent as representative of the said mortgagee Tun Aung obtained a mortgage decree in the District Court against the widow and legal representative of the said mortgagor Sin Phaw U and against the first appellant U Kyaw Zan and his agent the second appellant. On appeal in the Division Court such decree was set aside but on appeal such decree was restored by the decree of the late Chief Court of Lower Burma, dated the 15th March, 1922. On the 10th July 1922 the final decree for sale of the said land was passed, and on the 16th September, 1922, respondent plaintiff was declared to be the auction purchaser at the sale in execution of such mortgage decree: the sale was confirmed on the 23rd October, 1922, the sale certificate being issued in favour of the plaintiff respondent as such purchaser a few days later, and the plaintiff respondent was put in possession of the said land in November, 1922.

The appellant U Kyaw Zan had during the pendency of the appeal in the Chief Court leased the land to two tenants and the second appellant had been his agent. The plaintiff respondent demanded the rent from such tenants but on being informed that they intended to pay the rent to the second appellants, he instituted the suit now under appeal in the Township Court against the two appellants and against the said tenants, claiming a declaration of his right to receive the rents valued at Rs. 540 and for the issue of injunctions to the appellants restraining them from receiving such rents, and to the tenants directing such tenants to pay the rents to the plaintiff respondent in due time.

The defence was that the suit was premature as the right to the rents would not be payable until the following March, that the land revenue would have to be deducted therefrom when paid that the first appellant was entitled to the rents for the period from the 1st April to the 16th November, 1922, and that the plaintiffs would only be entitled to the subsequent rent. This was in effect a claim that the rent for the year should be apportioned between the first appellant and the plaintiff respondent for the respective period during which they were in possession, each paying his portion of the land-revenue.

The Township Court gave a declaration in part as prayed, but decided in favour of the contention of the appellant defendant that the rent should be apportioned, taking the 16th Sep-

tember, the date of the auction sale, as the important date, and awarded proportionate costs.

On appeal the District Judge, following the decision in the case of *The Land Mortgage Bank of India Ltd. v. Govind Patankar* (1) decided in favour of the plaintiff respondent that he was entitled to the rents for the entire year, namely 900 baskets of paddy, and gave plaintiff a decree as prayed but for 900 baskets of paddy instead of for the money value as specified in the plaint and for costs in both courts.

The present appeal is against that decision, and the sole question now in issue is whether the rents which were payable is a fixed quantity in paddy or near the end of the agricultural year should be apportioned between the parties.

There can be no doubt that the authorities are very meagre on the point and that the case cited above is more in point than any other authority to which I have been referred. I think that there can be no question that the plaintiff respondent became vested with all the rights of the landlord in respect of the said land on the sale being confirmed, when the sale certificate was issued to him. He was put in possession and had given notice to the tenants as landlord to recover the rents payable on or about the 1st March. He had then become liable to pay the land-revenue on the land, and I can see no reason for holding that he had not been become vested with the right to receive all rents, and profits which were subsequently payable. This is not a case of a monthly rent or of there being any arrears of rent, but was a clear case in which the rent did not become payable until many months after the plaintiff had acquired his right. That being so I am of opinion that the plaintiff was the person vested with the right to recover the rents. But this right would not save the plaintiff from the duty to apportion and pay a reasonable share to the appellant, if the appellant could show any equitable claim to the share of the rent for the earlier period.

On a perusal of the record I am unable to find any such equitable right in favour of the appellant. The decision of the District Court in the original mortgage suit had been

1. (1878) 2 Bom. 670.

against the appellant long prior to the commencement of the agricultural year in question, and even the decree of the late Chief Court had been passed on the 15th March practically at the commencement of the year. It was open to the appellant to redeem the mortgage if he wished, and he had notice of the possession long prior to such decree, but he never had any such intention of redeeming, and his sole object was to postpone the final decree and the auction sale as long as he could : that gave him no equitable right against the mortgagee or his representative of the mortgage who had a legal right to have the property made available for the satisfaction of the mortgage debt, and in the result obtained the land in the auction sale in part satisfaction of his mortgage-debt.

The only recent authority which I have discovered is the decision in the case of *Maung Gaw Ya v. Maung Talok* (2) decided by Heald, J. as Judicial Commissioner of Upper Burma, on the different question of the right of an usufructuary mortgagee in Burma to the growing crops on the land at the time of redemption. No such crops were sown or planted by the mortgagee or his tenant with notice of the intended redemption.

Various authorities available on both aspects of the question were discussed in that case, and I can find nothing in that case which throws any doubt on the view which I have taken above.

It has been contended that the rule of apportionment should be applied in regard to the provisions of the Transfer of Property Act, 1882, but in my opinion that provision of the Act is rendered inapplicable to this case by reason of the saving in clause (d) of S. 2 of that Act.

For the above reasons I see no reason to disagree with the decree of the lower appellate Court, and I dismiss the appeal with costs.

*Mr. Lambert (Senior)* for appellant.

*Mr. Chari* for respondent.

PRESENT :—HEALD, J.

King Emperor

v.

Bejai\*.

*Prevention of Cruelty to Animals Act (Act XI of 1890), S. 6—Using bridle with leather disc studded with nails—Conviction preferable under S. 3—Enhancement of sentence.*

Where the respondent a hackney carriage driver was prosecuted before the honorary Magistrate for working a lean pony and using a bridle with a leather disc studded with nails, and was fined Rs. 20 under S. 6 of the Prevention of Cruelty to Animals Act.

*Held*, agreeing with the District Magistrate that the sentence was inadequate and that the conviction should have been under S. 3 under which the respondent would have been liable up to three months' imprisonment.

*Held also*, although the Court has power to interfere in revision with an inadequate sentence, it does not ordinarily interfere merely because it would itself have passed a heavier sentence, so long as the sentence passed involves substantial punishment, though the Court would have confirmed a heavier sentence in this case.

*Pointed out* :—Honorary Magistrates should deal with such cases more severely.

Reference made by H. Sitzler, Esq., I. C. S., District Magistrate, Rangoon in his Cr. Rev. No. 140 of 1924.

The respondent in the case, a gharry driver, has been called upon to show cause why the proceedings of the Honorary Magistrate (2nd Bench) should not be submitted to the High Court for enhancement of the sentence inflicted on him under S. 6 of the Prevention of Cruelty to Animals Act. On the 29th of January he was found using a bridle with two leather discs, one on each side, studded with nails. His pony's mouth was bleeding and there were signs that the accused had freely pulled at and jerked at the reins in order to hurt the animal and teach it a lesson. His excuse apparently was that it was a restive animal. The Honorary Magistrate fined him only Rs. 20. I have seen the bridle and am of opinion that the sentence is altogether too lenient and a substantive sentence of imprisonment should have been passed. Mr. G. B. Chakravarti who has appeared for the respondent when called upon to show cause argues that no enhancement is necessary as the accused is a poor man earning a wage of Rs. 15 per month and further he had to pay the expenses of medical treatment of the pony amounting to Rs. 12-4-0. I do not consider that the cause shown is sufficient and I still think that a sentence of rigorous

\*Cr. Rev. No. 220-B of 1924 being review of the order of the Honorary Magistrate (2nd Bench), Rangoon in Summary Trial No. 157 of 1924.

imprisonment is necessary in such a bad case as this. I therefore direct that report be made to the High Court under S. 438, Cr. P. Code and that the Honorary Magistrate's proceedings be submitted together with the bridle with the recommendation that the sentence of fine be maintained but that a substantive sentence of imprisonment be passed in addition. It should be noted that there are 10 nails on one side of the bridle and 9 on the other.

Order. *9th April, 1924.*

Bejai, a hackney carriage driver, was sent before the Honorary Magistrates of Rangoon on a charge under S. 6 of the Prevention of Cruelty to Animals Act for working a lean pony and ill-treating it by using a bridle with a leather disc studded with nails on either side of the mouth.

He was fined Rs. 20 and the pony was ordered to be sent to the infirmary for treatment at his expense. The treatment is said to have cost him Rs. 12-4-0 and he lost the use of the pony while it was at the infirmary.

The District Magistrate has reported the case to this Court with a recommendation that a sentence of rigorous imprisonment be added to that of fine.

I entirely sympathise with the District Magistrate in his abhorrence of such cruelty and I agree with him that the sentence was inadequate.

But offences under S. 6 of the Act are punishable with fine only, and although the accused ought to have been punished under S. 3 of the Act under which he would have been liable to three months' imprisonment, he seems to have been convicted under S. 6 only.

Further although this Court has power to interfere in revision with an inadequate sentence, it does not ordinarily interfere merely because it would itself have passed a heavier sentence so long as the sentence passed involves substantial punishment.

There can be no doubt that to a hackney carriage driver a fine of over Rs. 20 is a substantial punishment, and therefore I do not think that the case is one in which it is necessary for this Court to interfere.

I would nevertheless certainly have confirmed a heavier sentence and I think the Honorary Magistrates should deal with such cases more severely.

I note that the Honorary Magistrate's record seems to have been tampered with and that the District Magistrate should enquire who is responsible for the alteration of the section in the space for the "Offence alleged."

PRESENT :—YOUNG AND BAGULAY, JJ.

F. Miers and four others . . . *Petitioners\**  
*v.*  
 R. R. Khan . . . *Respondents.*

*Rangoon Rent Act (Burma Act II of 1920) S. 18—Whether S. 5 Limitation Act applies to references under S. 18.*

Section 5 of the Limitation Act does not apply to references from the order of the Rent Controller to the Chief Judge of the Small Cause Court under S. 18 of the Rangoon Rent Act 1920.

Such references are not intended by the Act to be in the nature of regular appeals.

*Mahomed Ibrahim Moplla v. S. R. Jandass* 1 B. L. J. 138—explained.

Judgment. 10th June, 1924.

PER BAGULAY, J. :—This order disposes of five revisions of orders passed by the Chief Judge of the Small Cause Court of Rangoon, acting as a Court of Reference under the Rangoon Rent Act.

The facts of these cases are exactly the same, and they will be disposed of by one order.

The respondent, R. R. Khan, is the landlord of a certain number of plots in Rangoon. He served the five tenants with notices to pay enhanced rent. They refused to pay, and he applied to the Rent Controller to fix the rent.

The proceedings before the Rent Controller were somewhat protracted, and orders were finally passed on the 25th March, 1923.

The tenants applied to the Chief Judge of the Court of Small Causes under S. 18 of the Rangoon Rent Act. On the 12th July, 1923, he dismissed all their applications as time-

\*Civil Revn. Nos. 182, 183, 184, 185 and 186 of 1923 against the Judgment and decree of the Chief Judge Small Cause Court Rangoon in Rent References Nos. 358, 359, 360, 361, and 362 of 1923.

barred, and the tenants have applied to this Court in revision of that order.

Their contention is that the learned Judge should have held that S. 5 of the Limitation Act applied.

S. 5 of the Limitation Act says that the Court may admit an appeal or certain applications after the period of limitation prescribed therefor when sufficient cause is shown for the delay. For this section to be applied in the present case, it must be shown that it can be brought within the wording of the section.

The applications before the Chief Judge of the Court of Small Causes were not applications for review of judgment, nor for leave to appeal, nor were they applications which have to be brought under the section by any special enactment of the Act. The only hope, therefore, of bringing this section into play would be to hold that they are appeals.

It is argued on behalf of the applicants that they are appeals, and, in support of this contention, a dictum of Pratt, J. in *Mahomed Ibrahim Moolla v. S. R. Jan Dass* (1), is quoted. In this case the judgment of the Court is set out in full by the Hon'ble Chief Justice, and Pratt, J. merely adds a short note. In the course of it he makes the statement:—"The intention of the Legislature was apparently to provide for an appeal from the decision of the Rent Controller to a Civil Court." The question as to whether the reference to the Small Cause Court was an appeal or not was not a point requiring determination in that case. The remark, therefore, is no more than an *obiter dictum*. It will be noticed further that the remark does not go further than to state what was apparently the intention of the Legislature. It does not state that the Act did provide an appeal.

The Rent Act itself does not say that the reference is intended to be an appeal, and the fact that S. 23 states that the procedure shall be as nearly as may be that for the regular trial of suits shows that it cannot be a regular appeal, which would be based upon the evidence recorded by the Court from which the appeal lay.

We see no reason for holding that S. 5 of the Limitation Act can apply. The limitation for this reference must be

held to be fixed by S. 18 of the Rangoon Rent Act. This states that the petition of reference must be filed within 30 days from the date of the order passed by the Controller, to which the time taken in obtaining copies may be added. In this view the applications to the Chief Judge of the Court of Small Causes were manifestly out of time.

The wording of S. 18 is important on the face of it, and, therefore, the provisions of the section must be regarded as imperative.

The applications are accordingly dismissed with costs, Advocate's fee, 1 Gold Mohur in each case.

*Patel* for petitioners.

*Mr. Clifton* for respondents.

PRESENT :—DUCKWORTH AND GODFREY, JJ.

(Mandalay Bench)

K. O. M. Syed Hoosein . . . . . *Appellant\**

v.

S. R. M. M. C. T. Chettiar Firm . . . . . *Respondent.*

*Civil Procedure Code (Act V of 1908) O. 38—Simultaneous attachment and arrest before judgment—Mortgaged property—Liability to attachment before judgment.*

The power of the Court to issue simultaneously, execution for arrest and attachment is entirely discretionary under the Code, and there is no doubt that the Court has the same power in matters before judgment limited however by the provisions of O. 38 of the Schedule.

*Chena Pemaji v. Chelabhai Narandas*, 7. B. 301—referred to.

*Obiter* :—Mortgaged property may be liable to attachment before judgment in a mortgage suit when the circumstances justify it.

*Jagamaya Dasee v. Baidyanath Premanick*; 46. C. 245—referred to.

Judgment. 12th May, 1924.

PER GODFREY, J. :—These appeals have been filed separately by 3 of the defendants in Suit No. 160 of the District Court of Mandalay against an order of the District Judge of the 10th September, 1923 making final a conditional order of attachment before judgment on certain goods (then in the

\*Civil Mis. Appeal No. 69 of 1923 (Mandalay Bench) from the order of the District Court Mandalay passed in Civil Suit No. 160 of 1923.

defendant's possession) and a conditional order of arrest before judgment directed against the two defendant-appellants in Civil Miscellaneous Appeals Nos. 69 and 71 of 1923, which he had previously issued.

The defendant-appellant in Civil Miscellaneous Appeal No. 70 of 1923 is only interested in the order of attachment; but all three appeals have been argued together and will be so dealt with. The attachment has been duly effected, but the warrants of arrest have been returned unexecuted.

The case is still pending and has only reached the stage of the settlement of the issues. The sale of the attached goods, which has been directed has been stayed pending the disposal of these appeals.

There can, we think, be no real doubt that an appeal does lie both from the order of arrest and from that of attachment. It is true that an order of arrest is not one of the appealable orders enumerated in O. 43, R. 1 of the Schedule to the Civil Procedure Code, but the right is given specifically by S. 104, C. P. Code, and being a statutory right conferred by the body of the Code is not a matter of procedure and would not be taken away by rules contained in the Schedule. Moreover, its omission from O. XLIII does not necessarily mean that it does not exist in fact its inclusion would be superfluous—the order not being exhaustive in its terms.

The contentions put forward on behalf of the appellant are in effect as follows:—

It is first contended that there are no grounds either for arrest or attachment before judgment. It is then contended that an attachment cannot issue as the suit is a mortgage suit and the property attached is mortgaged property. It is next contended that arrest and attachment cannot issue simultaneously; and finally that the suit is not a *bona fide* one and therefore attachment should not issue.

It is clear that the power of the Court to issue simultaneously execution for arrest and attachment is entirely discretionary under the Code (see O. XXI, R. 21, Civil Procedure Code and *Chena Pemaji v. Chelabhai Narandas*, (1) and we have no doubt that it has the same power in matters before judgment,

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limited, however, by the provisions of O. XXXVIII of the Schedule. The contention that attachment cannot issue because the suit is a mortgage suit and the property mortgaged property, proceeds upon an entire misapprehension as to the nature of the suit and is in fact without any substance whatever. It appears that in 1920 the defendants, who had been carrying on business under the name of Kavannah Ona Mohideen and Sons, were indebted to Haji Omer Khatab Mohamed Esa and Co. in the sum of Rs. 83,000, and in order to pay off that debt, borrowed this sum from the plaintiff Chetty in terms of a registered bond of the 1st October, 1920. By that bond the money so borrowed was repayable by certain instalments with interest and in the event of default in payment of any one instalment the whole amount of the balance unpaid was to become immediately due and payable and the plaintiff Chetty was to be at liberty to sell the goods mentioned in the Schedule to the bond in part satisfaction of his claim, the defendants having by their bond created a charge on such goods for the payment of their debt.

The plaintiff's case is that the defendants have made default in paying the instalments and he now sues for a money-decree against the defendants for the balance still payable and asks for a declaration of charge (lien he calls it) on the goods and for their sale.

This is not a mortgage suit but even if it were, we are far from saying that mortgaged property would in no circumstances be liable to attachment [see *Jogemaya Dassi v. Baidyanath Pramanick* (2)]. That question, however, does not arise.

It is then said that it is apparent from the plaint and the bond and a statement of account filed by the plaintiff Chetty firm that the suit is not a *bona fide* one, because it seems that the defendants endorsed the cheque for the Rs. 83,000 given then by the plaintiff Chetty to their creditors, H. O. K. Mohamed Esa and Co., and the plaintiff Chetty has been paying such instalments to Mohamed Esa and Co. It does not necessarily follow from this that there is anything not *bona fide* in the

Chetty's action. Without going into the merits of the case which we are not prepared to do at the present stage, it is impossible to say what arrangement Mohamed Esa and Co. may have made with the Chetty or that the Chetty has not a perfectly good and simple explanation.

It remains then to consider whether no sufficient grounds existed for the issue of the orders complained of as alleged. It can hardly be seriously contended that no grounds existed upon the affidavits filed for the issue of the conditional orders. From these affidavits there can be no sort of doubt that the defendants were removing large quantities of goods from their shop and also selling large quantities at less than cost price, very considerably reducing their stock. In order to show cause against the attachment and the order for the arrest, which latter they have so far managed to evade, the defendants have filed numerous affidavits largely argumentative in character, the effect of which apart from the charges made by many of the deponents against the Chetty of subornation of witnesses, etc., and against the Police of improperly rendering assistance to the Court process-servers would seem to show that there had been considerable sales of damaged and soiled goods only at reduced prices, but that in other respects sales were normal. The Judge of the District Court was not satisfied with these affidavits and found that the defendants had failed to show and accordingly maintained the order of attachments and arrest, in view of the admitted facts that the defendants have at no time personally appeared in Court to show cause, but on the contrary have been successfully evading arrests that they are quite unable to furnish security for the amount of the claim against them, or even for the amount of the difference between the value of the goods attached and the amount of the claim, that they have considerably reduced their stock and do not suggest that they are replenishing it; and finally that they are in default in payment of the instalments provided for by their bond and that the goods attached are not nearly sufficient in value to cover the plaintiff Chetty's claim. \* We think there is every reason for the plaintiff Chetty's apprehension and see no sufficient reason for differing from the District Court's finding or for interfering with the orders passed.

The three appeals are accordingly dismissed with costs. Advocate's costs to be six gold mohurs for the three cases.

*Mr. N. Mukerjee* for appellant.

*Lutter for Aiyangar* for respondents.

PRESENT :—YOUNG AND BAGULEY, JJ.

Ma Pu Mai and one ... *Appellants\**

v.

Ko Sit Tin and one ... *Respondents.*

*Payment into Court by decree-holder within fixed period—Default—No order for extension of time—Subsequent payment—Whether decree may be executed.*

Where a decree directed payment by the appellants of a sum of money into Court by a certain date upon which the respondents were to reconvey the land to them and the appellants failed to make the deposit within time, but having made it applied for execution of the decree,

*Held* that as the appellants had failed to obtain an extension of time from the Court for making the deposit, they were debarred from executing the decree.

Judgment. 10th June, 1924.

*Per* BAGULEY, J. :—By a decree of the District Court of Myaungmya, dated the 26th November, 1921 the plaintiff-appellants were directed to pay into Court within a month from the date of the decree a sum of Rs. 1,203-3-0 and on such payment being made Ko Sit Tin, 3rd defendant was ordered to reconvey to them a certain plot of paddy land.

By the same decree the plaintiff-appellants were also directed to pay into Court within the same period the sum of Rs. 107-8-0 and on such payment Mg. Po Mya and Ma Ngwe Thin were ordered to reconvey to them another plot of land.

The appellants did not pay the said sums into Court till the 17th January, 1922, and on the 17th January, 1923 applied for execution of the decree by delivery of possession to them of the said two plots of land.

\*Civil Mis. Appeal No. 83 of 1923 against the decree of the District Court of Myaungmya in C. E. No. 5 of 1923.

The respondents objected to the execution on the ground that there was no valid decree as the deposit of the money had not been made within the time ordered by the Court. The District Court of Myaungmya allowed the objection. Hence this appeal.

Sit Tin, one of the judgment-debtors, but not the other judgment-debtors had appealed on the 26th January, 1923 against the decree which was dismissed on the 15th December, 1922.

No application was made either to the original or the appellate Court for an extension of the time.

The appellants relied on the case of *Abdul Shaker Sahib v. Abdul Rahiman Sahib* (1) where it was held that the plaintiff not having made payment within the time fixed by the decree he was not entitled to execute the decree.

In that case the purchasers had applied to the original Court for an extension of time and the case more applicable would in my opinion be that of *Ramaswami Kone v. Sundara Kone* (2), where it was held that the plaintiff not having made payment within the time fixed by the decree, he was not entitled to execute the decree, it seems to me the only possible order to make where the plaintiff, not having applied for an extension of time, pays the money into Court after the date fixed for payment.

The appeal is dismissed with costs.

PRESENT :—CARR, J.

Mahomed Kaka

... *Petitioner\**

v.

Rangoon Electric Tramway & Supply Co., Ltd. ... *Respondent.*

*Contract Act (IX of 1872), S. 108, Exception 1—Movable property attached in possession of judgment-debtor—Court sale by Bailiff—Hired property—Sale without knowledge of owner—Defective title of purchaser.*

1. (1922) 72 I C 868.

2. (1907) 31 M 28 : 17 M L J 495.

\*Civil-Rev. No. 97 of 1924 against the decree of the 2nd Judge, Small Causes Court, Rangoon, in C. R. No. 8652 of 1924.

A purchaser of moveable property at a Court sale by the Bailiff gets no more than the title of the judgment-debtor in the property he purchases.

Where certain property which was attached and bought at a Court sale turned out to have been taken on hire the purchaser was ordered to return the property or its value at the suit of the true owner as S. 108, Exception 1, Contract Act, does not operate in favour of the purchaser in such a case. See *Greenwood v. Holquotte*, 12 Ben L R 42; *Helby v. Mathews*, L R App Cas (1895) 471 followed.

#### Facts.

The facts of the case are contained in the following judgment of U. Tha Zan U, 2nd Judge of the Lower Court, dated 17th December, 1923 :—

The plaintiffs, the Rangoon Electric Tramway Co., Ltd., hired 4 ceiling fans to one Mahomed Kaka. Mahomed Kaka died in or about the month of July, 1923. In execution of three decrees in C. R. Nos. 6246 and 6571 of 1923 and 1021 of 1922 of this Court plaintiffs obtained a decree against the heir and legal representative of the deceased Mahomed Kaka and the said 4 fans were attached and sold by the Bailiff of this Court by auction to the defendant on the 13th day of November, 1923, without the knowledge of the plaintiffs.

The plaintiffs now sue the defendant for recovery of the 4 fans or their value Rs. 400 as they were their absolute property as the deceased Mahomed Kaka had no interest in the fans beyond that of a hirer.

There is no dispute on facts. The only contention is that as the defendant bought the fans in Court sale he is not liable either to return the fans or pay for their value, and that the decree-holders at whose instance the sale was made and the heirs and the legal representatives of Mahomed Kaka should be added as defendants.

Under S. 108 of the Contract Act the defendant bought nothing beyond the right, title and interest of Mahomed Kaka which were those of hirer only. As decided in *Greenwood v. Holquotte* (1) and *Helby v. Mathews* (2) besides other cases I hold that the plaintiffs are entitled to sue the defendant for recovery of the fans or their value. It is not necessary for them to join the decree-holders or the heirs and legal representatives of the deceased judgment-debtor as defendants. Defendant himself can file a suit against these persons in his turn.

The suit is decreed with costs.

Judgment. 2nd June, 1924.

It is, I think, settled law that in circumstances such as those in this case the purchaser gets no more than the title of his vendor and the first exception to S. 108 of the Contract Act does not enable a hirer to pass a good title to a vendor.

1. 12 Ben L R 142.

2. L R App Cas (1895) 471.

Mr. Vertannes has raised certain questions of fact but as these were not taken up in the trial Court I do not think that I can consider them now.

The case is a hard one but I do not think that anything is to be gained by admitting the application. It would only involve the petitioner in further expenses.

The application is dismissed.

*Villa* for plaintiff.

*Mr. Paul* for defendant.

PRESENT :—BROWN, J.

Mg. Paw, Kyaw Zan, Mg. Yin and Su Kin . . . *Petitioners\**  
*v.*  
 King-Emperor . . . *Respondent.*

*Gambling Act (Burma Act I of 1899), Ss. 11, 12—Game of gonyin played on sloping ground—Whether game of chance.*

"Gonyin" is not a game of chance but of skill. The mere fact that it is played on sloping ground does not render it a game of chance. *Q. E. v. Mg. Shwe Zin and three others*, 1 U B R (1897-01) Cr. 209.

Reference by U. Tha Hnyin-Sessions Judge of Henzada, in his Cr. Rev. No. 37 of 1924.

The accused have been convicted under Ss. 11 and 12 of the Gambling Act and sentenced to pay fines by Maung Pe Thon, the 1st Class Township Magistrate, Myanaung, and the fines have been realized.

They have now applied for revision of the order of the Magistrate on the ground that it was against the weight of evidence and contrary to law.

The cause for the prosecution was that a game of "Gonyin" was played in the compound of Ma Chit Ti with heavy betting and that a commission at the rate of two annas in the rupee was charged by the 1st accused Nga Paw.

In *Q. E. v. Mg. Shwe Zin and three others* (1) it was held that the game of "Gonyin" was a game of skill. The Magistrate said that the game played in this and in Criminal Regular Case No. 26 of 1924 of his Court were the same and as the game was played on a sloping ground and not on a level ground as usual, the game was one of chance.

\*Cr. Rev. No. 241-B of 1924 being review of the Order of the Township Magistrate, Myanaung, in his Criminal Regular No. 29 of 1924 on reference by the Sessions Judge, Henzada.

1. I. U. B. R. (1897-01) Cr. 209.

To me it seems that more skill is required to play the game on a sloping ground and the fact that the ground was a little sloping did not make the game a game of chance.

The question next remained as to whether any commission was charged at the game so as to make the enclosure where the game was played a common gaming-house. The prosecution witness Kin Myo said that commission was charged at the rate of two annas in the rupee but he did not actually know who took and enjoyed the commission. Maung Sin and Maung Aye stated that three persons from Kyaungyin whose names he did not know, acted as brokers and took the commission.

It is clear therefore that the evidence to prove the taking of the commission was of the most meagre kind. I disagree with the Magistrate in holding that any commission was charged at the game. The convictions and sentences under Ss. 11 and 12 of the Gambling Act cannot be sustained. The proceedings are submitted to the High Court of Judicature at Rangoon under S. 438 (1) of the Criminal Procedure Code with a recommendation that the convictions and sentences passed by the Magistrate be set aside and fines realized may be refunded to the accused.

Order.

15th May, 1924.

The game of "Gonnyin" is described in the case of *Q. E. v. Mg. Shwe Zin and three others* (1) where it was held that the game was a game of pure skill. There is a course of certain element of luck in almost all games, but it does not appear to me that the fact that the ground in this case happened to be somewhat sloping can appreciably alter the nature of the game of "Gonnyin."

As a matter of fact I can find nothing in the evidence to show that the ground was sloping, or that there was any special element of luck in the game. I set aside the convictions and sentences of the appellants and direct that the fines, if paid, be refunded to them.

PRESENT :—DUCKWORTH, J.

(Mandalay.)

Maung Po Lon

... *Petitioner\**

King-Emperor

... *Respondent.*

*Upper Burma Ruby Regulation (XII of 1887)—No special provision for appeals or revisions of orders under the Regulations—High Court's jurisdiction to entertain same—Illegal acquisition of sapphire—Order of confiscation—Application for revision.*

The High Court has jurisdiction to entertain applications for revision of orders passed under the Upper Burma Ruby Regulation, 1887, by which not only a person is convicted and sentenced to imprisonment but also precious stones are confiscated. Cr. Rev. Case No. 142 of 1923, Mandalay (unreported), referred to.

Order. 16th May, 1924.

In this case a certain Maung Kin was convicted under S. 6, cl. (1) of the Upper Burma Ruby Regulation, 1887, and it was ordered that he should undergo three months' rigorous imprisonment, and that the sapphire-stone in question should be confiscated to the Government.

In the course of the trial, Maung Po Lon, the present applicant, gave evidence that he had purchased the stone, within the ruby area, from Maung Kin, and that he was, therefore, under the Act "the owner."

On appeal to the Sessions Court, the conviction was altered by the Sessions Judge to one under the second clause of S. 6 of the Regulations, and the sentence was reduced to one month's rigorous imprisonment. About the same time it appears that the original accused Maung Kin applied to the Commissioner of the North-West Border Division sitting as a High Court, and prayed that that part of the order referring to the confiscation of the stone should be set aside. The Commissioner refused to take any action and referred Maung Kin to the Magistrate or the Sessions Judge. Application was then made by Maung Po Lon, the present applicant, to the Magistrate praying that the sapphire in question should be restored

\*Criminal Revision No. 178-B of 1924 (Mandalay) against the order of the Head-quarters Magistrate, Mogok, in Cr. Case No. 81 of 1923.

to him and the auction sale which had been advertised in the meantime be stayed. The learned Magistrate held that there was no provision under which he could revise his own order and dismissed his application. Maung Po Lon then appealed to the Sessions Court, which in turn, set aside the Magistrate's order confiscating the stone, and directed the Magistrate to proceed with the case in accordance with S. 8 of the Upper Burma Ruby Regulation. The Magistrate then recorded evidence and held that the petitioner Maung Po Lon was a *bona fide* purchaser, and that, inasmuch as he had acted *bona fide*, he was entitled to consideration and he therefore in lieu of ordering confiscation of the stone, gave him the option of paying the sum of Rs. 1,750 within one month from the date of the order, or after the conclusion of the appeal, if any.

Against this order, Maung Po Lon once more appealed to the Sessions Court. The appeal was dismissed summarily.

It is against this order that Maung Po Lon has come up to this Court on revision, his object being to have the order of confiscation cancelled and the order of payment in lieu of confiscation set aside, and to procure that the sapphire-stone in question should be handed over to him. In any case, he contends that the amount ordered to be paid in lieu of confiscation was excessive. The sale of the stone has in the meantime been stayed.

When Mr. Banerjee started to argue his case, Mr. Aiyangar, who was appearing for Mr. Lutter on behalf of the Crown, raised a preliminary objection that against orders passed under the Upper Burma Ruby Regulation, 1887, the High Court has no revisional powers. Mr. Aiyangar referred me to S. 1 (2) of the Cr. P. Code, and to the patent fact that no provision appears to have been made in the Regulation either for appeal or for revision. But it must be noted that a person convicted under S. 6 of the Regulation is liable to be imprisoned for one year for the first offence, and to two years for any subsequent offence, or to fine or to both imprisonment and fine. This is under cl. (1). Under cl. (2), he is liable to be imprisoned for one month for a first offence and six months for any subsequent offence. He is liable to be tried before a Magistrate of the first class specially empowered in that behalf. To argue that in such a case a convicted person

would have no right to appeal under the provisions of the Code of Criminal Procedure, because there is no specific provision for an appeal under the Regulation would, I think, be absurd. The same remarks, it seems to me, would apply to revisions. Moreover, the High Court has very wide powers of revision, and so far as I can find (no authorities have been quoted before me) the only Acts which are at all excepted from the revisional jurisdiction of a High Court are the Press Act, the Extradition Act, and the Reformatory Schools Act, and this only in regard to certain orders passed by lower Courts. My learned brother, Pratt, J., in Criminal Revision Case No. 142 of 1923 (unreported), took up and dealt with a revisional application under this Regulation. It may be that the point in question was not raised before him or it may be that he considered that there was no doubt that a revisional application would lie. On the few materials before me, I am of the opinion that applications for revision of orders passed under this Regulation by which not only a person is convicted and sentenced to imprisonment or fine, but also stones are confiscated, do lie to the High Court, and that therefore I have jurisdiction to hear this application. The matter, however, is in this instance not of any real importance, since after perusing the record, I am of the opinion that there are no merits in this application. S. 8 of the Regulation is perfectly clear. It provides, in such cases as this, for confiscation, or in lieu of confiscation for payment by the owner in order that he may be able to keep the stone. The order under which revision was therefore quite justifiable and I do not consider that a sum of Rs. 1,750 for a stone worth about Rs. 3,500 was in any way excessive. An offence under S. 6 of the Regulation was committed by the applicant's vendor in connection with this sapphire, and therefore, even though the applicant has acted *bona fide*, the Magistrate had no choice but to apply S. 8. In doing so moreover he chose the more lenient course. The application is dismissed and the sale, which this Court has stayed, will proceed, unless the applicant makes the payment of Rs. 1,750 within one month from the date of this order.

Mr. Banerjee for petitioner.

Aiyangar for Lutter for the Crown.



The question is what is the exact meaning of the word "alone."

It is argued that, because the right to sue or to appeal survives to Ma Ngwe E and Maung Byaung's legal representatives, it cannot be said to survive to Ma Ngwe E alone. With this reading of the rule I am not in agreement.

These two persons as joint owners of the land and joint mortgagors, when both alive, were each individually entitled to redeem the mortgage; Ma Ngwe E alone could have redeemed the mortgage. It is true that Maung Byaung would have had to be made a *pro forma* defendant; but Ma Ngwe E could have filed a suit by herself. This we understand to mean that Ma Ngwe E alone had the right to sue.

Quite apart from this, however, O. 41, R. 4, gives Ma Ngwe E the right to appeal entirely by herself. This reads: "Where there are more plaintiffs than one in a suit, and the decree appealed from proceeds on any ground common to all the plaintiffs, any one of the plaintiffs may appeal from the whole decree in favour of all the plaintiffs."

This would most certainly give Ma Ngwe E the right to prosecute her appeal by herself.

We hold then that the appeal does not abate entirely. It will abate so far as Maung Byaung is concerned; but Ma Ngwe E can carry on the appeal by herself.

*Hay* for appellants.

*Maung Kien* for respondents.

PRESENT :—YOUNG AND BAGULEY, JJ.

Kalenter Ammal by her attorney.

A. S. Meera Lebbai Mericair

... *Appellant\**

v.

Ma Mi and others

...

*Respondents.*

*Evidence Act (I of 1872), S. 63 (5)—Secondary evidence of Talaknama—Attesting witnesses—Incompetent to give evidence of contents without personally reading document.*

\*Civil 1st Appeal No. 74 of 1923 against the decree of the District Court, Pegu, passed in Civil Suit No. 8 of 1922.

Evidence of an attesting witness that he has seen the document signed or heard its contents read out or explained to him is not admissible to prove the contents of the document. Such evidence does not amount to of having "seen" the document within the meaning of S. 63 (5) so as to enable the witness to give an oral account of the contents.

It is necessary for the witness himself to have read the document to be able to give an oral account of it. Oral evidence under S. 60, Evidence Act, must in all cases whatever be direct and not hearsay.

*Mg Chit U v. Mg Tha Ku*, 4 U. B. R. 135. *Kanayalal v. Pjarrabai*, 7 B. 139 at 144—approved.

A declaration at the time of the execution of a talaknama that the executant was effecting a divorce by deed is not "talak".

Judgment. 10th June, 1924.

Sheik Moideen died at Tawa in the Pegu district on the 29th February, 1920, leaving a fairly large estate. A suit was brought by Kalenther Ammal for the administration of his estate, which had been taken possession of by Ma Mi and Mahomed Esoof who are the defendants in this case. Kalenther Ammal claims to be the widow of the deceased, Sheik Moideen. Ma Mi also claims to be a widow of the deceased, and Mahomed Esoof claims to be his son.

The defendant raised a large number of issues, and the Court framed nine issues for trial. Some of these have apparently been dropped by mutual consent, and others have not as yet been tried. Evidence has been recorded at length, and Issue No. 2 alone has been decided. Issue No. 2 ran as follows:—Was there a valid divorce between plaintiff and Sheik Moideen? and the lower Court has answered it in the affirmative. In this way Kalenther Ammal's claim to any interest at all in the estate of the deceased has been negatived, and her suit has been dismissed.

She now comes on appeal.

Defendants claim that the deceased had divorced the plaintiff. On examination of the evidence recorded by the lower Court, it is manifest that a double divorce is alleged to have taken place—a written divorce which is said to have been sent to her in India where she lived, and also an oral divorce pronounced against her in her absence by the deceased in the presence of witnesses at Tawa. The written divorce being a

document can only be proved in the way allowed by the Evidence Act.

The document itself has not been produced. The defendants allege that it was sent to the plaintiff and must, therefore, be in her possession. Notice was given to her to produce it. Plaintiff denies that any such document exists. The defendants, in consequence, seek to prove the contents of the document by secondary evidence.

Secondary evidence is defined in S. 63 of the Evidence Act, and the particular form of secondary evidence, which the defendants produce, comes under S. 63 (5). According to the witnesses whom they produce, Sheik Moideen executed this document in his house at Tawa. It was a document written in the Tamil language and signed by him and attested by certain other witnesses. The writer of the document has not been called as a witness, but witnesses are called to say that they saw the document signed, and had it read out to them by the writer, or else its contents explained to them either in Tamil or Burmese, according to their nationality, by the deceased himself.

The first point to be considered is whether the statements of any of these witnesses are admissible as oral accounts of the contents of a document given by some person who has himself seen it. In my opinion, none of these persons can be said to have "seen" the document within the meaning of S. 63 of the Evidence Act.

In Woodroffe and Ameer Ali's Law of Evidence (7th Edition) at page 489 it is stated that the person must have seen the original. It will not be sufficient that he heard it being read. No authority for this statement is quoted. But in *Maung Chit U v. Maung Tha Ku* (1) where the point in issue was how a judgment or decree, the original of which had been destroyed, should be reproduced, the learned Judicial Commissioner remarked, "What was required was an oral account of the contents of the judgment or decree by some one who had read the one or the other." And there is also the

statement—" Statements of persons who merely heard judgment pronounced were not admissible in evidence."

It has been argued in the present case that, if a witness has seen a document without reading it, nevertheless under S.63 (5) he becomes qualified through knowledge that he has acquired otherwise than by reading it, or seeing it in such a way that he became acquainted with its contents by so seeing it. With this contention I am not in agreement.

Section 60 of the Evidence Act says that oral evidence must, in all cases, be direct. If a person by merely seeing a document, possibly a document in a language which he does not understand, or possibly a document which he is unable to read, being illiterate, deposes to the contents of the document merely from what other people have told him about it, he is giving hearsay evidence. The man who reads out the document to him would certainly be entitled to give evidence of its contents. But another person who repeats what is read out to him is giving hearsay evidence of what would be legitimate secondary evidence, were it before the Court.

Section 63 (5) of the Evidence Act does not overrule the general principle of law that hearsay evidence is ordinarily not admissible. The reason for this is quite understandable. The law says that, if it is possible, the document itself must be produced. If the document itself is produced, there can be no possibility of a mistake with regard to its terms. If the document itself cannot be produced, then the law allows secondary evidence of its contents to be given. But it will be noted that in all forms of secondary evidence allowed by S. 63, only one possibility of a mistake exists. The first three sub-sections of S.63 refer to copies made from, or compared with, the original. In each of these cases there is only one possibility of a mistake. The 4th sub-section refers to counter-parts of documents as against the parties who did not execute them. Ordinarily speaking, it would be assumed that counter-parts of a document would be a copy of the original. Then we have sub-section (5) which says that a person who has seen a document may give his account of the contents of it. Here again, there is only one possibility of a mistake, namely, that the person's

memory may play false. It is quite clear that, if a person has only seen a copy of a document, there are two chances altogether, and, therefore, the evidence given by him would be of a different category to the secondary evidence allowed by law, and a person who has seen a copy of a document is not entitled to give secondary evidence of the contents of the original. See *Kanayalal v. Pyarabai* (2).

Again a person who heard a document read out and then gives an account of its contents might make a mistake himself or the person reading it out to him might have made a mistake. Again we get secondary evidence one degree lower than that described by S. 63.

For these reasons I hold that merely because the witnesses produced by the defendants say that they saw the document, this does not entitle them to give an account of its contents, which is obviously derived from another source than seeing it.

Two of the witnesses cited by the defendants are Burmese witnesses, and they were unable to read the document which was in Tamil. They say that Sheik Moideen explained its contents to them; but it would seem that he also was unable to read it, for he was illiterate, only being able to sign his name. These Burmese witnesses are patently useless.

The others are Tamil speaking; but none of them allege that he has read the document.

I, therefore, hold that there is no admissible evidence of the contents of this document alleged to have a talaknama or written divorce, and, therefore, I hold that the written divorce has not been proved.

We then fall back on the question of whether an oral divorce has been proved.

Two of the witnesses, Manika Meera and Mada Sar, state that Sheik Moideen pronounced three *talaks*. The rest of the witnesses with regard to this divorce make no such allegation. I note that Manika Meera was apparently silent on this point until a very leading question was put to him in examination-in-chief. Mada Sar, on the other hand, says that Sheik

Moideen uttered the word "talak" three times at the suggestion of the luyis present. He does not specify which of the luyis it was : and none of the other witnesses who have been examined by the defendants make any suggestion that they told Sheik Moideen to utter the word "talak" three times or heard him utter it. I must then hold that a divorce by pronouncement of three *talaks* has not been proved.

The question then arises whether the statement made by Sheik Moideen with regard to the contents of the document, which he is said to have signed at the time, would constitute a divorce.

Ameer Ali on page 545 of his work on Mahomedan Law states that Sunnis, for the purpose of effecting a divorce, also allow the use of an infinite number of formulæ. All that the law requires is to see that the words of divorce pronounced by a husband could show a clear intention on his part to dissolve the contract of marriage, and a Madras case, of *Asha Bibi v. Kadir Ibrahim Rowther* (3) is to the same effect.

In the present case I am unable to see how it can be held that Sheik Moideen was intending to divorce his wife by the words which he used in the presence of the witnesses. His object at the time was, if the statements of the witnesses can be taken at their face value, to effectuate a divorce by a written document. He had no intention whatsoever of effecting an oral divorce on the spot in her absence. Such a divorce would have been quite unnecessary and superfluous in view of the *talaknama* which he had written at the time. The words he used or is said to have used to the witnesses were simply explanatory of that writing and were not intended by him in any way to effect the divorce. It is true he had the intention of divorcing his wife, but no intention of divorcing her by word of mouth at the time, and in consequence the words which he uttered did not effect the oral divorce.

For these reasons I come to the conclusion that, at the time Sheik Moideen died, he had not divorced the plaintiff, Kalenther Ammal. It is impossible to pass orders in the case,

because the issue with regard to the status of Ma Mi and Mahomed Esoof has not been decided : nor had any conclusion been come to as to the extent or value of the estate.

I would set aside the decree of the lower Court dismissing the plaintiff's suit, and remand the case for disposal on its merits. When the District Court deals with the case now it should come to a finding on every one of the issues already framed in order that, if any further appeal is filed, the appellate Court may be in a position to pass final orders without further delay.

Costs of the appeal to be costs in this case as ultimately decided.

*Patker* for appellant.

*Mr. Doctor* for respondent.

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PRESENT :—BROWN, J.

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U. Pathada, U. Paduma and U. Nandiya . . . *Petitioners\**

v.

King-Emperor

*Respondent.*

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*Ante-Boycott Act (Burma Act V of 1922), S. 4 (a)—Order of Government sanctioning prosecution for offence specified in order—Charge for analogous offence—No jurisdiction.*

An order to prosecute the appellants (certain Buddhist monks) under the Ante-Boycott Act for passing three resolutions proposing a boycott of phonyis of certain kyaungs and their lay-followers was passed by Government.

The prosecution evidence failed to prove that the resolutions were passed by the appellants, but a charge was framed that they had in the same month instigated and promoted the boycott of five kyaungs and were convicted thereunder.

*Held*, that the convictions were illegal inasmuch as the order of sanction related to a specified offence which had been particularly set out in the order and the appellants were tried and convicted of an offence other than that which was so specified.

*Nga Aung Hman v. King-Emperor*, 2 B L J 196 explained.

*Mandayapurath Eresa Kutty v. Moopan and another*, 44 M L J 166.

*Barindra Kumar Ghose v. King-Emperor*, 37 C. 467 at p. 489 *et seq.*

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\*Criminal Revision No. 116-B of 1924, being review of order of the District Magistrate of Mergui passed in Criminal Regular Trial No. 37 of 1923.

Judgment 29th May, 1924.

The applicants are three Buddhist monks who have been convicted of offences under the provisions of S. 4 of the Ante-Boycott Act. Their convictions have been upheld by the Sessions Judge on appeal, and they have now come to this Court in revision.

The only ground which has been seriously taken is that the convictions are illegal for want of the sanction or order required by S. 9 of the Ante-Boycott Act. The order authorising the prosecution is worded in the following terms:—  
“Under the provisions of section 9 (1) of the Burma Ante-Boycott Act, 1922, His Excellency the Governor-General in Council hereby orders Maurice Osborne Tanner, District Superintendent of Police, Mergui, to lay a complaint against Phongyi U. Pathada of Palaw Kyaung, Phongyi U. Nandiya of Thingyaing Kyaung and Phongyi U. Paduma of Taw Kyaung, Mergui, for that they committed an offence punishable under S. 4 (a) of the Act in that at a meeting of the Sangha Sametgyi held on the 11th October, 1923, at Shwe Kyaung they passed three resolutions proposing the boycott of the Phongyis of the Wuttaik Kyaung, Shwedaung Kyaung, Kaynbin Kyaung, Saya Bein Kyaung and Ashe Kyaung and their lay-followers on account of their refusal to abide by the decision of the Sangha Sametgyi Phongyis.” When the case was on for trial it was found that there was no evidence to prove that they passed the three resolutions in question at the meeting mentioned in the Local Government’s order. And they were not charged with this offence, but with another offence, namely, that in the month of October they instigated and promoted the boycott of five Kyaungs. It is somewhat difficult to discover what were the exact acts of the applicants which were held to prove that they had instigated and promoted the boycott, but from the diary of relevant events attached to the judgment of the Sessions Court it would appear that most of the facts relied on occurred long before the month of October and the offence if proved at all was proved to have taken place before October. This point is not one of very great importance, and it can hardly be said that the applicants are prejudiced because the charge

stated that they committed an offence in September whilst the evidence showed that the offence was complete before. But the question for decision is whether an order for prosecution having been ordered for an offence, the Courts had any jurisdiction at all to take cognizance of another offence. The point did occur to the learned Sessions Judge but he held that the Court had jurisdiction on the authority of *Nga Aung Hman v. King-Emperor* (1). In that the offence was described in the order by reference to a marriage and by mistake spoke of the accused "daughter's" marriage instead of his "son's." It was held that the intention of the legislature was to ensure that no prosecution for an offence within S. 196 of the Code of Criminal Procedure or under the Ante-Boycott Act should be launched except on a complaint authorised by the Government, and this intention having been given effect to it was immaterial whether or not all the facts on which the complaint was to be based were stated in the authority with meticulous precision. It was further held that it was doubtful if it was even necessary to set out any fact other than the alleged fact that the accused had committed an offence under a certain section of the Act. In that case however it appears to have been clear that the Government had intended to order the prosecution for the offence of which the applicant had been convicted, and that there was simply an obvious clerical mistake in the order. In the present case there can be no question of a clerical mistake. The terms of the order are very precise and are incapable of misinterpretation. The offence for which the prosecution is ordered is that the three applicants passed certain resolutions at a certain meeting which was held on the 11th October. It appears from the record that this particular meeting was held. It was not therefore a question of mistake as to date. The prosecution ordered was for a definite offence committed on a definite occasion. No evidence has been adduced as to this offence but the applicants have been convicted of another offence (possibly under the former section of the same Act, but still a quite distinct offence) on another occasion. I find myself in the circumstances unable to hold that the Courts had jurisdic-

tion to deal with the case. It may be unnecessary for the Government Order under S. 4 to set out any fact other than the alleged fact that the accused had committed an offence under a certain section of the Act. But in the present case the order set out very much more than that. It set out with great precision the offence for which the prosecution was ordered, and there can be no doubt that that is not the offence of which the applicants had been convicted. I have been referred on behalf of the Crown to the case of *Mandayapurath Eresa Kutty v. Moopan and another* (2). But, in that case the suggestion there was that the officer directed to file the complaint was wrongly described in the order not that there was anything wrong with the description of the offence. In the words of the judgment the question was only one of the machinery for the institution and prosecution of the proceedings and not of the mischief which S. 196 is designed to affect. In the present case it is not a question of machinery. S. 9 specifically lays down that no Magistrate shall take cognizance of an offence punishable under this Act unless upon complaint made by the order of or under authority from the Local Government. The authority of the Local Government in this case was to prosecute for an offence which was very carefully defined. There was no authority whatever to prosecute for any other offence. In the case of *Barindra Kumar Ghose v. King-Emperor* (3) it was held that it was beyond the competence of the Local Government to delegate to any other body or person this controlling power and the discretion it implies. In the words of Jenkins, C. J., "It is, I think, opposed to the true intendment of S. 196 for the Local Government by its order to give its local or other advisers a roving power to determine under what section of the chapter proceedings should be taken and to abandon to them the discretion and responsibility that properly belongs to itself." It was held that an order to prosecute under Ss. 121-A, 123 and 124 of the Indian Penal Code gave no authority to prosecute under S. 121. Similarly in my opinion an authority to prosecute for a definite offence could not be any authority for a prosecution for an offence, which

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2. 44 M.L.J. 166.

3. 37 C. 467 at p. 489 et seq.

quite clearly could not be within the terms of the order. It is idle to argue that it is unnecessary to grant sanction save in general terms. In this particular case the order was couched in very precise terms and cannot cover the offence for which the applicants have been found guilty. It must be presumed that the Local Government intended what was set forth in such precise terms in their order, that the prosecution was to be for the offence alleged to have been committed on the 11th October. No authority from the Local Government has been shown for varying the terms of the order and I am constrained to hold that the convictions of the applicants are void for want of jurisdiction. I set aside the convictions of the three applicants and direct that they be acquitted and released so far as this case is concerned. Their bail-bonds will be cancelled.

*Mr. Lambert* for petitioners.

*Mr. Gaunt, A. G. A.*, for the Crown.

PRESENT :—BAGULEY, J.

Ma Kin and four others . . . . . *Petitioners\**

v.

King-Emperor . . . . . *Respondent.*

*Criminal Procedure Code (Act V of 1898), S. 77 (1)—Issue of search warrant directed to a "Thana"—Name and designation of Police-officer omitted—Obstruction to search—Prosecution for obstruction—Conviction—Subsequent discovery of omission—Whether conviction legal—S. 205—Absence of accused—Represented by another accused—Conviction set aside.*

Where one of the accused was absent throughout the proceedings and another accused was allowed to appear for her, the conviction and sentence on the absent accused were set aside. The Magistrate may dispense with the attendance of an accused under S. 205, Cr. P. Code, where he is represented by a pleader.

Where a search warrant was directed to a certain "Thana" for execution without specifying the name or designation of the Police-officer concerned, in contravention of S. 77 (1), Cr. P. Code, and was endorsed by the Police Station-officer to a Police constable by name, who was obstructed in its execution,

\*Cr. Rev. No. 384-B of 1924; being review of the order of the Sub-divisional Magistrate of Twante in his Cr. Reg. No. 30 of 1924, under S 435, Cr P Code.

*Held*, that as the legality of the warrant was never challenged either at the time of the search or in the Magistrate's Court, and as the accused had not suffered from what was at most a clerical error and the application for revision of conviction for obstruction was purely an *ex post facto* attempt at justification, the convictions should be confirmed.

*Emperor v. Gokal*, 45 A. 142—approved.

*Queen-Empress v. Pukot Kotu and others*, 19 M 349; *Queen-Empress v. Tiruchittambala Pathan*, 21 M 78; *Queen-Empress v. Poomalai Udayan*, 21 M 296; *Queen-Empress v. Ramayya and others*, 13 M 148; *Dharam Chand Lal v. Queen-Empress*, 22 C 596.

#### Reference.

Reference by H. F. Dunkley, I. C. S., Sessions Judge, Hanthawaddy, in his Cr. Rev. No. 226 of 1924.

This is an application for revision of the order of the Sub-divisional Magistrate of Twante, passed in his regular trial No. 30 of 1924, convicting five applicants of an offence under S. 186 of the Penal Code, and ordering them to pay a fine of Rs. 30 each. It appears that in his criminal regular No. 191 of 1923 the Sub-divisional Magistrate issued a bailable warrant for the arrest of one Po Tu, and that constables Po An and Mg. San went to Kalaikani village to execute this warrant, and hearing that Po Tu was hiding in the house of the 1st applicant, Ma Kin, they went and searched that house. It is alleged that they were obstructed in the search of the house by all the applicants. The warrant in question is filed on the process-file of the present case, it should of course be filed on the main file as an exhibit for the prosecution. The warrant is addressed to "Wabalaukthauk Thana," that is to the police-station as a whole. Consequently the warrant itself is not in order and does not comply with the provisions of section 77 (1) of the Criminal Procedure Code, which requires that a warrant shall be directed to one or more Police-officers, that is, the Police-officers must be named either by name or by office, or by both in the warrant. The warrant was therefore illegal, and consequently the constables were not acting in the exercise of their public functions, and no conviction can be had for obstruction to the execution of such an illegal warrant. On this ground alone the applicants are entitled to an acquittal.

Again, it appears from the diary that Ma Kin was absent throughout the proceedings, and that one of the other accused, Mg. Sein was allowed to appear for her. I know of no provision of the Criminal Procedure Code which allows one accused person to appear for another. S. 205 of the Code allows the Magistrate when a summon is issued in the first instance to dispense with the personal attendance of the accused and to permit him to appear by pleader. There is nothing on the record to show that Ma Kin was represented by a pleader. The diary note of the 10th March states "U. Net appears for them," and perhaps it may be presumed that U. Net is a pleader. But there is nothing to show that U. Net appeared at the subsequent hearings of the case. Consequently, on the ground that Ma Kin was absent throughout the proceedings and that it is not stated, that she was, with the permission of the Court, represented by the

pleader as required by S. 205 of the Criminal Procedure Code, it seems to me that the conviction of Ma Kin must be set aside.

Turning to the evidence of the alleged obstruction the evidence of the arresting constable is merely to the effect that Ma Kin objected to her house being searched, that Mg. Sein and Mg. Shein used abusive language to the searching party, that E Mg. looked for a stick but did not find one, and that Hla Mg. was holding a hammer. It is admitted that no one made any attempt to assault the search party, and further that none made any active resistance to the search. It is also admitted that the house was searched. There can be no obstruction without some overt act done or physical means used, and the evidence clearly shows that there was no obstruction in this case. The conviction cannot, in my opinion, be supported on any ground. The proceedings are therefore submitted to the High Court of Judicature with a recommendation that the convictions and sentences be set aside in the cases of all five appellants.

Order.

9th June, 1924.

The fact that Ma Kin never appeared at the trial and there is nothing to show that under S. 205, Cr. P. Code, the Magistrate dispensed with her presence and allowed a pleader to appear for her, obviously renders the conviction and sentence passed upon her absolutely illegal. It is hereby set aside and if she has paid her fines it must be refunded. No note of payment or non-payment of fine appears in the diary as it should have been done.

With regard to the alleged illegality of the warrant, I note that the point was never raised before the Magistrate and this, no doubt, accounts for the warrant itself not appearing as an exhibit. If strict technicalities are to be insisted upon it might be argued that there is nothing to prove that the paper found in the process-file of the Magistrate's case is the one under which the Police-officers are acting.

The learned Sessions Judge says that it is illegal because it is addressed to the Police Station and not to any Police-officer by name or by description. It is addressed to "Wabalaukthauk Thana." It is possible that the word "Ok" may have been omitted by a clerical error and the intention was to address it to the Wabalaukthauk Thana-ok or officer in charge of the Wabalaukthauk Police Station which would have been perfectly legal. It must be remembered, however, that there are parts of this province, I have served in them myself, where the customary mode of addressing the Police Station-officer is

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to call him a "Thana." I am not aware whether this is the custom in Twante or not. I have never served there, but in some parts of the province the custom is well established. The point however is utterly outside the merits of the case. The accused did not object to the execution of the warrant because it was illegal, had they done so the matters would have deserved very careful scrutiny, nor was this raised as a defence when they were tried, it is purely an *ex post facto* attempt at justification and I note that they did not come up in revision till 7 1/2 weeks after the Magistrate convicted them.

I am in full accord with Stuart, J.'s remarks in *Emperor v. Gokal* (1) 'I am not disposed to go out of my way to find technical excuses for persons who used criminal force towards constables acting honestly within the scope of their authority.' In the present case the warrant was endorsed to one of the constables who were executing it, by name by the Police Station-officer, and, as I have pointed out, the legality of the warrant was never challenged either when the search took place, or in the Magistrate's Court and it is not certain that the accused did suffer from what was at most a clerical error. There are many authorities which might be quoted showing that public servants when acting in good faith, as were the constables in the present case, are entitled to protection. *Queen-Empress v. Pukot Kotu* (2) is a case in which the searching officer had no warrant at all, and the principle that trivial errors and irregularities, particularly if only discovered subsequently are not a good defence which is very similar to the present one, underlies the decisions in *Queen Empress v. Tiruchithambala Pathan* (3), *Queen Empress v. Poomalai Udayan* (4), *Queen Empress v. Ramayya* (5), *Dharam Chand Lal v. Queen Empress* (6) and *Government of Assam v. Sakedulla* (7).

Coming now to the facts of the case, it must be remembered that the case is one of revision, not of appeal, and it appears to me that there is evidence on the record which, if believed, will justify the Magistrate's finding. There is

1. 45 A 142.

2. 19 M 349.

3. 21 M 78.

4. 21 M 296.

5. 13 M 148.

6. 22 C 596.

7. 51 C 1 (F B).

evidence that there was a warning to keep out or there would be trouble ; there was abuse, and obscene remarks followed by the display by Mg. Sein of his private parts, the mere threat of which was enough to deprive one of the luyis of all desire to assist in the search. The learned Sessions Judge says that E Mg. merely looked for a stick but did not find one. This, I presume, is taken from the evidence of Po An but Mg. San says that E Mg. went further and picked up a stick, and so does Chit Pe. In my view there was quite enough evidence on the record to justify the Magistrate in coming to the conclusion that there was obstruction, if he accepted it, and, as I have already mentioned, this is an application for revision, not an appeal.

I consider, however, that the sentences are too heavy, as no actual hurt was caused.

The conviction of Ma Kin is set aside. The fine, if paid by her, will be refunded.

The convictions of the remaining applicants are confirmed, but the fines are reduced to Rs. 10 each, or, in default, ten days' rigorous imprisonment. The balances of the fines, if duly paid, will be refunded.

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PRESENT :—BROWN, J.

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U. Nandiya *alias* U. Po Gan and U. Thumana . . . *Petitioners\**

v.

King-Emperor . . . *Respondent.*

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*Anti-Boycott Act (Burma Act V of 1922), S. 4—Hanging out notice-board that certain non-members of a Society were not recognised—Offence under Section 4 (a).*

Where certain Pongyis put up a notice-board at the gate of the Kyaung compound on which was written in Burmese :—“Those who do not belong to the Thanga Thamagyi Society are not recognised : those who are not recognised by the Wunthanu are not recognised.”

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\*Criminal Revision No. 165-B of 1924 being review of the order of the Head-quarters Magistrate, Yamethin, passed in Cr. Reg. No. 237 of 1923.

*Held*, that the notice amounted to an offence under the provisions of S. 4 (a) of the Anti-Boycott Act.

Judgment. 21st May, 1924.

The petitioners are or were Pongyis residing in a Kyaung in Shawbyngon Village of the Yamethin District. At the gate of the Kyaung compound was hung a notice-board on which was written in Burmese, "Those who do not belong to the Thanga Thamagyi Society are not recognised: those who are not recognised by the *Wunthanu*, are not recognised." This has been held to amount to an offence under the provisions of S. 4 of the Anti-Boycott Act, and both the petitioners have been convicted. The appeals to the Sessions Judge were dismissed, and they now filed an application in revision.

The point which has been most strongly urged in their behalf is that the hanging up of this notice-board did not amount to an offence, as the notice did not contain a proposal to boycott any person or class. But a "person who is not recognised by the *Wunthanu* Society" is capable of identification at once. People may be divided into classes in an infinite variety of ways, and I can see no reason whatever why the people of the locality should not be divided into two classes, those that are and those that are not recognised by the *Wunthanu* Society. The evidence on the record suggests that most of the people of the locality did belong to the *Wunthanu* Society. The explanation to S. 4 does not in any sense claim to be exhaustive. The purpose of the explanation was to extend rather than to narrow the scope of the section. The phrase "class of persons" is very wide, and does in my opinion cover the description given in the notice of the persons who are not to be recognised. A notice posted on the gate of a Kyaung saying that certain persons are not recognised was, in the state of feeling existing in the village, a direct instigation to the villagers to boycott. I am of opinion that there is no force in this objection to the conviction. There is evidence for the prosecution that this notice remained posted up for a year. It was admittedly up for some months and it is in evidence that after it had been posted the applicants refused to associate with two Pongyis who were not members of the Thanga Thamagyi Society, and that two laymen Ye Gyan and Nga Bu were boycotted. It has been argued that the

evidence in this case as to the actual boycotting is the same as the evidence which resulted in the conviction of the applicant U Nandiya for boycotting in another case. I do not understand, however, that the contention is that the double conviction was illegal, and I cannot therefore understand the force of this argument. I do not therefore see sufficient reason for interfering with the convictions. It is further suggested that the sentences were excessive. That the Legislature regarded an offence under S. 4 of the Act as more serious than an offence under S. 3 is clear. The maximum punishment for an offence under S. 4 is two years and I am not prepared to hold that the sentence of three months' imprisonment was unduly severe, at any rate in the case of U Nandiya. It appears however that U Thumana, though the principal Pongyi in the Kyaung, was not the principal offender. U Nandiya admits that he put up the notice on his own responsibility. U Thumana admits that after he came to know of the existence of the notice-board it remained up for some months, and he must therefore be held to have approved of it. But I think that in the circumstances it is not necessary to send him back to jail now. He spent three days in jail before being let out on bail by the Sessions Judge. He was sent back to jail by the Sessions Judge on the 25th February and orders for his release on bail were not passed until the 10th April. He must therefore have already served nearly seven weeks' rigorous imprisonment and he has further been ordered to execute a bond for his good behaviour for one year. In view of the subordinate part he probably took in the affair I do not think it is necessary to order him to serve the unexpired part of his sentence. I reduce the term of imprisonment already undergone. With this exception, I dismiss the application so far as both applicants are concerned. U Nandiya should be re-arrested and committed to jail to serve the unexpired portion of his sentence.

#### Sentence.

Mg. Lu Daw, Head-quarters Magistrate, Yamethin.

Three months' rigorous imprisonment and to execute a bond for Rs. 500 with two sureties to be of good behaviour for one year after release under S. 1 of the Burma Anti-Boycott Act.

PRESENT :—YOUNG, J.

Ma Po . . . Appellant\*  
 v.  
 A. Bux and two others . . . Respondents.

*Civil Procedure Code (Act V of 1908), O. 2, R. 2 (2)—Withdrawal of suit under O. 23, R. 1 (2)—Subsequent filing of suit with omitted portion of claim—Whether repugnant to O. 2, R. 2.*

Where a plaintiff omitted to sue for a portion of his claim and withdrew the suit with leave to bring a fresh suit under O. 23, R. 1 (2) and later filed the suit including certain lands omitted in the previous plaint, and it was objected that the additional relief having been omitted originally could not be incorporated in the suit as being repugnant to O. 2, R. 2.

*Held*, that the effect of an order for withdrawal with leave under O. 23, R. 1 (2) was to restore the parties to the position in which they would have stood if no such suit had been instituted and that the provisions of O. 2, R. 2 did not deprive the plaintiff of his right to include the omitted portion of his claim.

*Venkata Shetti and others v. Ranga Nayak*, 10 M 160; *Behari Lal Pal v. Srimati Baram Mai*, 18 A 53 followed.

Judgment. . . . 23rd May, 1924.

This was an appeal from concurring judgments, and the main ground argued was that the suit, which was one brought with leave on withdrawal of a former suit, was bad, in that it related to more land than was included in the former suit.

O. 23, R. 1 (2) permits a Court, under certain circumstances, to allow a plaintiff to withdraw a suit and bring another for the subject-matter of the former suit.

O. 2, R. 2 (2) forbids a plaintiff, who has omitted to sue in respect of any portion of his claim, to sue in a later suit in respect of the portion so omitted.

The matter has been before the Courts before. In *Venkata Shetti and others v. Ranga Nayak* (1), where the plaintiff sued for interest on a mortgage bond only and was allowed to withdraw with leave to bring a fresh suit for the principal and interest under the bond; the appellants advanced the same argument

\*Civil Second Appeal No. 259 of 1923 against the decree of the District Judge of Pegu in C. A. No. 48 of 1923.

and it was held that it was not necessary to hold that S. 43 of the Code of 1882 (corresponding to O. 2, R. 2 of the present Code) applied in the case of a suit withdrawn by permission under S. 373 (corresponding to O. 23, R. 1), but that the effect of such an order was to leave matters in the same position in which they would have stood had no such suit been instituted. The Court went on to remark that the obvious intention of the Court which made the order was to allow the respondent to sue for principal and interest instead of compelling him to proceed with his claim for interest alone, in which case any second suit for the principal would have been met by the plea that the suit was barred by S. 43 of the Code ; and, if the contention now raised were to prevail, the anomaly would be presented by an order made by a competent Court as to a matter within its discretion, to which order no legal effect could be given.

This decision was concurred with by the Allahabad High Court in *Behari Lal Pal v. Srimati Baram Mai* (2) where it was held that it was most probable that the Legislature intended that, when a suit was withdrawn with permission under the first paragraph of S. 373 of Act No. XIV of 1882, the effect should be to leave the parties in the same position as if the suit had never been brought.

The Madras decision was a very strong one, because it is obvious that the leave of the Court was given with the very object of defeating S. 43 and it was held implicitly that the Court was entitled to regard this as a sufficient ground for allowing the plaintiff to withdraw his suit.

It is noteworthy that in the next sub-clause, both in the former and the present Code, a plaintiff is forbidden to sue in a subsequent suit for a relief which he has omitted to sue for in the original suit without the express leave of the Court, and that these words "without the express leave of the Court" are omitted in the sub-clause under consideration, and I agree with the Allahabad Court that the matter is not free from difficulty ; but the provisions of the law are for all material

purposes the same in both Codes, and I am not prepared to differ from the conclusions arrived at in these two decisions.

The appellants also sought to urge that the lower Courts have failed to attach due weight to the evidence of the surveyor but that is a question that cannot be considered in second appeal.

The appeal fails and is dismissed with costs.

*Maung Pu* for appellant.

*Mr. Banerji* for respondents.

PRESENT :—DUCKWORTH, J.

(Mandalay.)

Mg. Po Maung . . . . . *Petitioner\**

v.

Mg. Aung Paw . . . . . *Respondent.*

*Co-operative Societies Act (Burma Act II of 1912), S. 42 (6)—Suit by one member against another—Credit of amount due to one member transferred by liquidator to another member—Whether suit ultra vires—Civil Court.*

The provisions of S. 42 (6) of the Co-operative Societies Act, 1912, do not apply to a suit filed by one member of a Co-operative Society against another for money wrongly credited by the Liquidator to the account of the latter.

Such a suit is not one for an account between the members of the Society which a Civil Court has no jurisdiction to entertain under the Act but is merely one for money had and received.

Judgment. 21st May, 1924.

Respondent-plaintiff Maung Aung Paw and appellant-defendant were members of the Moksogyon Co-operative Credit Society, which was dissolved in 1918. Maung Aung Paw has clearly paid up all his dues. The Liquidator says so and Mg. Aung Paw possesses a certificate to that effect. It appears that out of the sale proceeds of some of his paddy the Liquidator had in deposit a sum of Rs. 261-6-0 to the credit of Maung Aung Paw. The Liquidator, through Maung Aung Paw had

\*Civil Revision No. 143 of 1923 (Mandalay), against the decree of the District Court, Shwebo, passed in Civil Appeal No. 89 of 1923.

paid up all that was due by him, utilized this sum early in 1923 in part payment of a debt, to the Society by Maung Pa Maung. Maung Aung Paw holds a certificate showing that this was actually done. In these proceedings, he sued Maung Po Maung to recover that amount. The Township Court dismissed his suit, but the District Court decreed the claim. Maung Po Maung has now applied to this Court on revision under S. 115, Civil Procedure Code. His case has all along been that he has paid up all that was due by him, and that the accounts of the Society have been settled. He pleaded ignorance of the facts alleged by the plaintiff-respondent. On revision, Mr. Aiyangar, who appeared for Maung Po Maung raised two points, *i. e.*, that under S. 42 (6) of the Co-operative Societies Act of 1912, a Civil Court has no jurisdiction to deal with Mg. Aung Paw's claim and that, in any case, the claim could not be granted, inasmuch as plaintiff-respondent admitted that Mg. Po Maung had paid all his dues to the Society, and because the matter involved a suit for an account between the members of the Society.

It is true that Maung Aung Paw did say in his cross-examination—"I know that U. Po Maung has paid his dues." But this may merely mean that Maung Aung Paw knows that U. Po Maung had paid his dues by now, and, in any case, the Liquidator's evidence proves that the sum of Rs. 261-6-0 belonging to Maung Aung Paw, was used towards settling Maung Po Maung's debt. In regard to Mr. Aiyangar's last point, also, Maung Po Maung, in his written statement, alleged that the accounts of the Society have been settled. The present suit is not, therefore, in its essence, a suit for an account at all.

With reference to the first point section 42 (6) serves to exclude with certain reservations from a Civil Court's jurisdiction "Any matter connected with the dissolution of a registered Society under this Act." To my mind, the matter in suit is purely one between Maung Aung Paw and Maung Po Maung, and it in no way affects the action of the Liquidator, nor is it connected, except indirectly with the dissolution of the Society. What I think that S. 42 (6) was intended to prevent, was litigation in the Civil Courts in regard to the validity of the actions and decisions of a Liquidator under the Act, except in

respect of certain specified orders, which are appealable to a District Court or which may be enforced as decrees of Courts. I do not consider that it was even intended to preclude a suit of the sort we have here, were it so, it is hard to see where a man, situated like Maung Aung Paw, could get relief, to which he is clearly entitled under S. 69, Contract Act, as well as under the common law. The District Court, therefore, did not act without jurisdiction, neither was its decision contrary to Law. There are no grounds for revision and the application is dismissed with costs.

*Aiyangar* for petitioner.

*Mr. S. Mukerjee* for respondent.

PRESENT :—YOUNG, J.

Ma The Nu and six others . . . Appellants\*

v.

Mg. Ni Ta and one . . . Respondents.

*Evidence Act (I of 1872), S. 65—Secondary evidence—Destruction of deed—Tender of secondary evidence of deed without proof of loss of deed—Absence of objection by opposite party—Objection in Appellate Court—Whether sustainable.*

Where one of the parties tendered secondary evidence of a document alleged to have been destroyed by fire without any objection being taken by the other side in the trial Court, and on appeal it was urged that no foundation for the reception of secondary evidence had been laid,

*Held*, that the party tendering the secondary evidence had been misled by the absence of objection, in consequence of which no evidence of loss of the original document had been produced and that the secondary evidence was rightly admitted by the trial Court.

*Cf. Kishen Kaminee Dossee v. Ram Chunder Misser, 12 W R 13; Chinnaji Govind Godbole v. Dinkar Dhondew Godbole, 11 B 320, 324; Akbur Ali v. Bhyea Lal Jha, 6 C 666, 670.*

Judgment. 5th June, 1924.

The sole question raised in this second appeal was whether where secondary evidence of a deed alleged to have been des-

\*Civil Second Appeal No. 191 of 1924 against the decree of the District Court of Prome in C. A. No. 24 of 1923.

troyed by fire was admitted by the Court of first instance without objection and also without any foundation for the reception of secondary evidence having been laid, the appellate Court erred in holding that it could not entertain any objection to the said evidence as no objection had been made in the Court of first instance.

In my opinion the proper place to take objection was the Court of first instance and if objection had been taken there and then, *non constat* but that the requisite foundation for the reception of the evidence would have been laid. It must be assumed that the party tendering the evidence took it that the opposing party either knew of or accepted the statement of the destruction of the deed without requiring further proof, and if the opposing party did not mean one of these two things, that he was misled and the opposing party was estopped from taking the objection in the Court of Appeal, which rightly held that the evidence must be accepted. Cf. *Kishen Kaminee Dossee v. Ram Chunder Misser* (1), *Chimnaji Govind Godbole v. Dinkar Dhondev Godbole* (2), *Akbur Ali v. Bhyea Lal Jha* (3).

I dismiss the appeal with costs.

*Mr. Lambert* for appellants.

PRESENT :—CARR, J.

Anwar Ali . . . Appellant\*

v.

Fazal Ahmed . . . Respondent.

*Evidence Act (1 of 1872), Ss. 65, 74 and 76—Income-tax Return—Certified copy—Whether admissible in evidence.*

The issue of a certified copy of an Income-tax Return to any person other than the assessee is prohibited by law. Cf. *Income-tax Act, 1922, S. 54.*

Such a copy is not admissible in evidence under S. 65, Evidence Act, not being a copy of a public document within the meaning of S. 74 or 76 of the Evidence Act.

1. 12 W R 13.

2. 11 B 320, 324.

3. 6 C 666, 670.

\*Special Civil Second Appeal No. 284 of 1923 against the decree of the District Court of Tavoy in C. A. No. 34 of 1923.

It is the duty of the person tendering documentary evidence to show that it is admissible.

Judgment. 5th June, 1924.

I observe that copies of the judgment and decree of the District Court have not yet been filed on the record of the Subdivisional Court. This is gross carelessness and must be remedied as soon as the records are received back.

Both Courts have found that there was a partnership between the parties for the year 1919-20. Mr. Barnabas argues from this that under S. 109 of the Evidence Act, the burden of proving that the partnership has ceased to exist is on the defendant. That may be so, but it is clear on the evidence of the plaintiff and his witnesses that what they allege is a separate agreement for partnership for each of the three years. Plaintiff says (at the bottom of page 22) : " Before we found that there was a loan of Rs. 4,000 the defendant and I had agreed to enter into partnership for the following year. "

There are statements of a similar effect at the top of p. 23, reverse, bottom of p. 24 and in Rahim's evidence on page 28 obverse and reverse, and on page 30, Abdul Subhan's evidence is similar.

On the evidence I am not prepared to differ from the finding of the District Judge. Rahim is now partner with the plaintiff and Abdul Subhan has fallen out with the defendant. Their evidence is too good altogether. It was not likely that they would be present on all three occasions and their evidence generally is of a class that does not inspire confidence. As regards the year 1919-20 there were certain circumstances that tended to support the story of a partnership. For the two years there are no such circumstances. The defendant alone conducted the business and it is not shown that the plaintiff had anything at all to do with it.

The appeal is therefore dismissed with costs.

The question arises which, while of no great importance in this case itself, is of considerable importance generally.

The defendant obtained from the Income-tax Office at Tavoy copies, one uncertified and two certified, of Income-tax Returns made by the plaintiff. These were filed and were admitted in evidence by the Subdivisional Judge. The District Judge pointed out that since these documents are confidential copies they should not have been issued, but then said that since they had been obtained he could not find anything to render them inadmissible in evidence. This is the wrong way to look at it. It is for the person tendering documentary evidence to show that it is admissible.

The uncertified copy was, of course, clearly inadmissible in any circumstances. As regards the certified copies, S. 65 of the Evidence Act permits secondary evidence to be given of documents in certain cases. One of these is set out in cl. (f) :—"When the original is a document of which a certified copy is permitted by this Act or by any other law in force in British India, to be given in evidence." Cl. (g) also permits secondary evidence "when the original is a public document within the meaning of S. 74."

S. 76 provides for the issue of certified copies of public documents, but it allows the issue only to a person who has a right to inspect the document. It does not therefore authorize the issue of certified copies of Income-tax Returns, which no private person has a right to inspect. The next S. 77 allows the production in evidence of "such" certified copies. This clearly means only such copies as are lawfully issued under S. 76 and does not make admissible copies which have been unlawfully issued and certified.

S. 54 of the Income-tax Act, 1922, makes it clear that the issue of these copies was unlawful, and makes the disclosure of any particulars contained in the return an offence punishable with six months' imprisonment. There can be no doubt therefore that the copies were not admissible in evidence.

*Barnabas* for appellant.

*Mr. Clifton* for respondent.

PRESENT :—BAGULEY, J.

Takit Tumi . . . *Petitioner\**  
*v.*  
 King-Emperor . . . *Respondent.*

*Penal Code (Act XLV of 1860), S. 379—Bricks left for 8 years—Removal—Assumption that same abandoned—Conviction for theft set aside.*

Where the accused removed some bricks from a heap which had been left lying for eight years it was held that it was open to the assumption that the bricks had been abandoned and their removal under the circumstances did not constitute theft.

## Reference.

Reference made by J. P. Doyle, Esq., I. C. S., Sessions Judge of Tavoy and Mergui, in his Cr. Rev. No. 176 of 1924.

Takit Tumi and Maung Kyi Hlaing were tried summarily by the Special Power Magistrate, Mergui, convicted of the theft of some bricks valued at Rs. 23 and sentenced to a fine of Rs. 15 each. I called for the case in revision on my own motion on the 2nd April and returned it with remarks on the 23rd April, 1924, from Tavoy. Shortly after my arrival in Mergui an application in revision was presented to me by Takit Tumi.

The ostensible owner of the bricks was one Po Thaug although he has not mentioned the fact in the course of his evidence. He alleged that 2,000 bricks had been stolen from three kilns where they had been left lying for eight years. The ten house gaung to whom he originally made the report states that he was under the impression that the bricks had been abandoned. The Magistrate in his judgment considered that "probably the accused thought that the bricks had been abandoned." Under these circumstances the ingredients constituent of the offence of theft did not exist and the conviction of Takit Tumi and Maung Kyi Hlaing was not warranted.

In his application in revision Takit Tumi states that he has since found out that Po Thaug was not the original owner of the bricks, Mr. Leslie having abandoned them to Mr. Samson in whose garden Takit Tumi was sinking the well on which he employed the bricks in question. He supports this allegation by a letter from Mr. Leslie to Mr. Samson. I do not consider however that it will be necessary to investigate this point since the conviction was in the terms of the judgment itself *prima facie* unsound.

I submit the proceedings with the recommendation that the sentence be set aside and the fines which have been paid will be refunded.

\*Criminal Revision No. 347-B of 1924 being review of the order of the Special Power Magistrate of Mergui in his Cr. Reg. Trial No. 25 of 1924.

Order. 24th May, 1924.

If a heap of bricks was left lying untouched for 8 years it would not be unreasonable to suppose that they must have been abandoned by their owner. Apparently this accused was not the only person who thought so, and the Magistrate appears to have thought that he had that honest belief.

For the reasons given in the learned Sessions Judge's order I set aside the conviction and sentence. The fine will be refunded.

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PRESENT :—HEALD, J.

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U Tha . . . *Petitioner\**  
 v.  
 Mg. Tun Pru . . . *Respondent.*

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*Burma Forest Act (Burma Act IV of 1902), R. 65—Contractor disputing amount of royalty—Removing fire-wood without payment of royalty.*

A contractor who removes fire-wood without paying royalty to the licensee, even though there may be a dispute as to the amount of royalty, commits an offence under R. 65 of the Forest Rules.

Upon reading the reference made by the Sessions Judge, Akyab, in his Cr. Rev. No. 29 of 1924 the High Court passed the following order :—

Order. 5th April, 1924.

Accused was prosecuted for a breach of R. 65 of the Rules under the Forest Act in that he had failed to pay Government royalty on firewood which he had imported into Akyab and sold.

The right to collect such royalty at Akyab is let to a contractor whose servants collect it. The royalty is assessed at a rate per 100 cubic feet by measurement if the firewood is stacked on arrival, but if the importers prefer not to have it stacked, they can have the royalty assessed on the registered capacity of the boats in which it is imported.

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\*Cr. Rev. No. 215-B of 1924 being review of the order of the Subdivisional Magistrate of Akyab in his Cr. Summary Trial No. 3 of 1924.

Accused disputed the amount claimed by the contractor's servant. The contractor swears that he sent him a notice to pay at the prescribed rates and that accused disregarded it. The contractor then reported the matter to the Forest Range Officer, who in turn reported to the Divisional Forest Officer, who sent a notice of demand to accused. Accused still took no notice. The Divisional Forest Officer then ordered his prosecution for an infringement of the provisions of R. 65 of the Rules under the Forest Act. That Rule says that no firewood in respect of which any money is due to Government shall be moved from a collecting station without the special permission of a Forest Officer.

It is not denied that the accused had not paid the royalty or that he had removed and sold the firewood, and the Magistrate convicted him of a breach of that rule and sentenced him to a fine of Rs. 100 out of which Rs. 80 was to be paid as representing royalty, the amount of royalty claimed being Rs. 86-10-0.

The fine was paid but the accused asked the Sessions Judge to interfere in revision on the grounds that he had never refused to pay the royalty, that he had merely disputed the amount payable, that it was not proved that the place from which he removed the firewood was a collecting station, that the royalty could have been recovered under S. 71 of the Act, and that the Local Government's notification declaring firewood to be subject to royalty was *ultra vires*.

The Sessions Judge has reported the case to this Court with a recommendation that the conviction and sentence be set aside and the fine be refunded on the grounds that the Magistrate thought that the accused's refusal to stack the firewood was a breach of the Rule and that the Magistrate only charged him with refusal to pay the royalty, which was not in itself a breach of R. 65, and did not specifically charge him with the removal of the firewood.

I have read the Magistrate's record and from that record it is perfectly clear that the accused was guilty of a breach of the Rule and was rightly convicted. The fine was lenient, and the case is obviously not one in which this Court ought to interfere in revision.

The papers will be returned.

PRESENT :—YOUNG, J.

Maung Pan Sat . . . Appellant\*

Maung Po Hla . . . Respondent.

*Credibility of witness—Conclusion of fact by trial Court—Disbelief by appellate Court—Experience of trial Judge to be considered.*

*Pointed out.*—The dictum of the Privy Council in *Ma Than Thein v. Ma Pwa Thit* that appellate Courts should not reject a trial Court's conclusions as to credibility of witnesses unless there are circumstances of an exceptional character justifying such rejection, is in the nature of a warning which is specially applicable where the trial Judge is a judicial officer of very great experience.

*Ma Than Thein v. Ma Pwa Thit*, 2 B L J 260 : 1 R 451 commented on.

Judgment. 23rd May, 1924.

The question in this appeal is whether the lower appellate Court was justified in setting aside the judgment of the Trial Court because it disbelieved the evidence of certain witnesses on a question of fact, whom the Trial Court which had the advantage of seeing and hearing them and noting their demeanour in the witness-box had believed.

The Privy Council in *Ma Than Thein v. Ma Pwa Thit* (1) have reiterated their warning that this rejection by the Appellate Court of the evidence of witnesses who have found favour with the Trial Court on questions of fact is only warranted by exceptional circumstances, but this was in an appeal from a Judge of very great experience and it is doubtful whether their Lordships meant to issue more than a warning. Moreover, in the present case, the Appellate Court gave reasons for discrediting these witnesses which seem to me sound. It found that two of them were merely casual witnesses whose presence at the *locus in quo* was but lamely explained and that the evidence of the third was rather against than in favour of the story which he was called to support.

\*Special Civil Second Appeal No. 197 of 1923 against the decree of the District Court, Bassein, in C. A. No. 32 of 1923.

1. 2 B L J 260 : 1 R 451.

With these criticisms I concur and agree that under the circumstances the Trial Court should have disbelieved the two witnesses and held that the evidence of the third witness was against rather than for the story he was called to support.

The appeal is dismissed with costs.

*Mr. Halkar* for appellant.

*Kyaw Myint* for respondent.

PRESENT :—CARR, J.

Maung Chan E and one ... Appellants\*

v.

Ah Tit and two others ... Respondents.

*Lease for life—Possession—No registered deed executed—Doctrine of part performance applied.*

Where a lessee is let into possession of the demised land under an oral agreement for lease in cases in which a registered deed is necessary but has not been executed, the lessee may resist an action for ejectment by the lessor and maintain his possession under the oral lease.

*Maung Myat Tha Zan v. Ma Dun and one*, 3 B L J 78 applied.

*Jogendra Krishna Ray v. Kurpal Harshi*, 49 C 345 : 35 C L J 175 followed.

Judgment: 23rd June, 1924.

The appellants resisted ejectment claiming that they had a lease for the term of their lives. The Township Judge found that they had proved this and dismissed the plaintiff's suit for ejectment. The District Judge held, that as the lease was not in writing and registered, it was invalid and reversed the decision.

In *Civil Reference No. 1 of 1924* (1) this Court has accepted the principle of the doctrine of part-performance as governing transactions which ought to be made by registered deed when they are made without a deed. It is held in effect that if in such circumstances possession of the property has

\*Special Civil Second Appeal No. 221 of 1923 against the decree of the District Court of Henzada in Civil Appeal No. 24 of 1923.

i. Reported in 3 B. L. J. 78.

been given under the contract the vendor cannot recover the property on the ground that no title has passed. And the case of *Jogendra Krishna Ray v. Kurpal Harshi* (2) is an authority from which I see no reason to dissent for applying the same principle to leases as well as to sales. I am constrained therefore to hold that in law the District Judge was wrong.

But he also considered the evidence and held that the appellants had not proved their claim. In this I agree with him. The principal fact in favour of the appellants was that they had erected a somewhat substantial house on the land. But there is ample evidence that other people who took land from Ma Saing at about the same time also erected substantial houses and that many, if not all, of those others left the land because Ma Saing demanded higher rent. They would not have done so if their tenancy had been on the terms now claimed by the appellants, and if those tenants were not on those terms it seems unlikely that the appellants alone should have been granted them. We have it too, that when appellants rebuilt their house they first assured themselves that Ma Saing was not going to raise their rent. Had they had such a tenancy as they claim she could not have raised it.

The evidence for both sides is fairly evenly balanced, none of it in my opinion, being worth very much. The claim of the appellants is an inherently unlikely one and the burden of proving it lay heavily on them. I do not think they have discharged that burden.

The appeal is therefore dismissed with costs.

*Mr. Halkar* for appellants.

*Kalyanwalla* for respondents.

PRESENT :—LENTAIGNE, J.

Hollandia Pinmen . . . Petitioners\*  
 v.  
 H. Oppenheimer . . . Respondents.

*Negligence—Contract for dry cleaning of dress—Damage in cleaning—General clause in contract against claim by owner—Proof of negligence—General finding by Small Cause Court.*

The respondent entrusted a Georgette dress to the petitioners for dry cleaning. The dress was returned in a torn condition and showed traces on analysis by the Chemical Examiner, of having been cleaned with sulphuric acid. Damages were awarded by the Small Cause Court for Rs. 50 for negligence in cleaning.

On revision it was contended for the petitioners, that the respondent had failed to prove negligence or to show that the damage had been caused by chemicals such as sulphuric acid (the Chemical Examiner not having been called as a witness) and that there was a clause in the receipt by which the property could not be claimed if it happened to get torn during the cleaning.

*Held*, (1) that a literal construction of the clause would render it absurd and unreasonable, and that the clause was only intended to cover cases of accidental tearing even if all reasonable care were taken, and that it would not safeguard the petitioner against any tearing due to negligent treatment or deliberately improper treatment. *Price and Co. v. Union Lighterage Company* (1903) 1 K B 750, 754 [on appeal (1904) 1 K B 412]; *Nelson Line (Liverpool), Ltd. v. James Nelson and Sons, Ltd.*, (1908) A. C. 16 at p. 20; *Shaik Mahomed Ravurther v. British India Steam Navigation Co., Ltd.*, (1908) 32 M 95 referred to;

(2) that although the evidence of negligence was not strong and was based on inferences, which, though not conclusive, were not rebutted by witnesses who could have been called by the petitioners, yet the finding of the trial Judge should not be disturbed; that it was not necessary for the Small Cause Court to come to a particular finding as to what the negligence was due to, the general finding of negligence being sufficient.

Judgment. 20th June, 1924.

The respondents sued the applicant for damages in respect of the deterioration alleged to have been sustained by a silk georgette dress whilst in the custody of the applicants with whom it had been left for dry cleaning. In his plaint and in correspondence written prior to suit the respondent had alleged

\*Civil Revision No. 46 of 1924 against the decree of the Small Cause Court of Rangoon in C. R. No. 4146 of 1923.

that he had sent a piece of the dress to the Chemical Examiner who had reported that it bore traces of free sulphuric acid and that sulphuric acid would cause the material to perish. At the hearing the respondent was unable to establish this part of his case, and it was stated that he could not call Major Owens, the Chemical Examiner, who gave such report because he had gone on leave. The only evidence for the plaintiff was that of Mr. Oppenheimer himself and any inferences to be drawn from an inspection of the dress. Mr. Oppenheimer has sworn that the dress, which belonged to his wife, had only been worn once, that he had left it with defendants for dry cleaning, that it was then in good condition, and that it was given back to him in a bundle and he then opened the bundle and found the dress torn; that he formed the opinion that some chemical had been used and therefore he sent a cutting of the dress to the Chemical Examiner, Major Owens, who was still on leave. He also stated that the defendant at one time had stated that he would pay him the price of the dress. In cross-examination he admitted that he did not know how georgette is dyed and he stated that the defendant's man had told him that they could not work the dress. The defence was a denial that anything had been done to the dress and a statement that after receipt it had been examined in accordance with the usual custom before cleaning and had been found torn in three places and for that reason the defendants had decided to refuse to clean it and that it had been returned in the same condition as when received. But at the hearing the defendants did not examine either the assistant who received the dress or the assistant who returned the dress to Mr. Oppenheimer. The defendant himself was examined and deposed to the fact that he never used sulphuric acid in washing clothes and that they did not keep sulphuric acid in stock. He also stated that the plaintiff showed him the dress in his shop and it was not then in the same condition and it was when shown in Court, though he admitted that it had small holes in it when shown to him in his shop.

If the defendant had examined his assistants and they had deposed to the facts alleged in the written statement, this defence would have been a stronger one; but as it happens,

they were not examined and the trial Judge was impressed with the failure to examine the two assistants and drew inferences unfavourable to the defendant and gave a decree for Rs. 50. The position was that the case against defendant was based on inferences, which though not conclusive evidence against the defendant, were not rebutted and the failure to examine the necessary witnesses in reply became an additional point against defendants.

This Court has been requested to revise that decision on three main grounds. Firstly, it is contended that as the receipt contains the clause that "Clothing cannot be claimed in case of any accident by fire or if things get torn", the present claim is barred and that no claim can be made for any tearing of the articles. That is not the literal meaning of the clause which, in effect, states that the return of the article cannot be claimed if it happens to get torn. Such a literal construction of the clause would render it absurd and unreasonable. I will assume, however, that it was intended to mean that damages cannot be claimed for tearing; but obviously when so construed, it should be taken as meaning that the safeguard only arose in the case of such accidental tearing as might easily happen even if all reasonable care were taken. On such a construction the clause would not safeguard the defendant against any tearing due to negligent treatment or deliberately improper treatment. We find similar clauses in various mercantile contracts and the usual rule is that a clause intended to safeguard against the negligence of employees must be explicit to that effect. See for example, the cases on negligence clauses in Bills of Lading such as *Price and Co. v. Union Lighterage Co.* (1), *Nelson Line (Liverpool), Ltd. v. James Nelson and Sons, Ltd.* (2) and *Shaik Mahomed Ravurther v. British India Steam Navigation Co., Ltd.* (3). In this case the trial Judge has expressly pointed out that it would be absurd to hold that a customer cannot claim the value of the article if the defendants' servants wilfully or negligently damage it. Consequently it is clear that the trial Judge had in mind the fact that it would be necessary for him to come to a finding that

1. (1903) 1 K B 750, 754 [on appeal (1904) 1 K B 412].

2. (1908) A C 16 at 20.

3. (1908) 32 M. 95.

there had been negligence before he could decide in favour of plaintiff, and this being so, I am not prepared to hold that there is any defect in this part of his finding.

The second contention is that the trial Judge acted with material irregularity in the exercise of his jurisdiction, because he failed to consider the point that the respondent's case was that the article damaged by chemicals in the process of cleaning and that the respondent had failed to prove such fact. In my opinion this contention is based on a misapprehension of the law applicable to question of proof.

At the hearing it was further contended that there was no evidence that the damage had necessarily been caused in the manner alleged by chemicals such as sulphuric acid. I quite agree with that contention but the trial Court was not restricted to a finding as how the damage was done if the Court held that it was caused by negligence. I fully realise that the evidence of negligence in this case is not very strong but that aspect is quite different from the position in a case where there is no evidence of negligence. The trial Judge had the advantage of seeing the witnesses and forming an opinion from their demeanour, which this Court cannot have. It was open to the trial Judge to assess the damages on the basis of a consideration of the original cost and the amount of wear deposed to, etc., even in the absence of more definite evidence as to the extent of the negligence which he has found to be proved. The trial Court as a Court of Small Causes was not bound to discuss such points at greater length than I find in this judgment.

For the above reasons, I do not think that this is a class of case in which I would be justified in exercising the functions of an appellate Court and reversing the decision unless there was stronger ground for questioning the discretion exercised by the trial Judge.

I therefore dismiss the application with costs.

*Mr. Doctor* for petitioner.

*Patel* for respondent.

PRESENT :—ROBINSON, C. J. AND BROWN, J.

Hardayal . . . Appellant\*

v.

Ram Doo . . . Respondent.

*Burma Courts Act (IX of 1922), Ss. 2 (f), 7 (b)—Enlargement of jurisdiction of Subdivisional Court—Transfer of case from District Court to Subdivisional Court—Appeal—Whether to District Court or High Court—Value of suit—Increase in value of appeal.*

The appellant filed a suit for accounts valuing his suit at Rs. 3,100 so as to bring it within the jurisdiction of the District Court under the Lower Burma Courts Act, 1900. Upon the passing of the Burma Courts Act, 1922, the suit was transferred to the Subdivisional Court whose jurisdiction had been increased by the new Act from Rs. 3,000 to Rs. 5,000. The Subdivisional Court awarded Rs. 2,128 odd whereupon the appellant appealed valuing his claim on appeal at Rs. 11,000. The District Court returned the memorandum of appeal to be filed in the High Court.

*Held* (returning the memo. of appeal), that in a suit for accounts it is open to the plaintiff to value his suit at any figure he chooses and having done so the value for the purpose of jurisdiction is automatically fixed by reason of the provisions of S. 8. of the Suits Valuation Act and the suit therefore came within the pecuniary jurisdiction of the Subdivisional Court from which an appeal lay to the District Court; (2) that the term "value" referred to in S. 2 (f) means "the amount or value of the subject-matter of the suit"; *Golap Singh v. Indra Coomar Hazra*, 13 C W N 493; *Hirjibhai Navroji Anklesaria v. Jamshedji Nassarwanjee Ginvalla*, 15 Bom. 1021 referred to; *Rhupendra Kumar Chakravarthy v. Purna Chandra Bose*, 43 C 650; *Saroda Sundari Basu v. Akramanessa Khatun*, 28 C W N 710 applied; (3) that the value fixed by the plaintiff being approximate and tentative only the Subdivisional Court had jurisdiction to take up the case, but could not pass a decree for more than Rs. 5,000. If after enquiry it was found that the tentative value was not correct and that the real value of the suit was over Rs. 5,000, the proper course would be for the Subdivisional Court to return the plaint for presentation to the proper Court; and (4) that an appellant cannot by increasing his claim in appeal alter the course of the appeal so as to change the forum. *Ma Ma v. Ma Pwa and Ma Mmon and three others*, 4 L B R 279; *Thein Yin v. Foucar Brothers and Co., Ltd.*, 4 L. B. R. 120 followed.

Judgment. 30th June, 1924.

*Per* ROBINSON, C. J. :—The plaintiff-appellant brought a suit for an account of a joint family business. He has estimated the value of the suit for purposes of Court-fee at Rs. 3,100,

\*Civil First Appeal No. 103 of 1923 from the decree of the Subdivisional Court of Toungoo in C. R. No. 84 of 1922.

and the value of the suit for purposes of jurisdiction is, by S. 8 of the Suits Valuation Act, deemed to be the same amount. At the time the plaint was filed, the Subdivisional Court had jurisdiction up to Rs. 3,000 only. The suit was filed in the District Court and there is very little doubt that the figure Rs. 3,100 was selected to enable it to be filed in that Court.

At the time the suit came on for hearing, however, the Burma Courts Act had been enacted. By S. 7 (b) thereof it is enacted that the Subdivisional Court shall have jurisdiction to hear and determine any suit of a value not exceeding Rs. 5,000. Then follows a proviso giving the Local Government power, by notification, to extend the jurisdiction of any Subdivisional Court to suits without restriction as regards the value. The learned District Judge, on taking up the case, transferred the suit for hearing to the Subdivisional Court, which then had jurisdiction to hear and determine the suit, as it was valued at Rs. 3,100 only.

A preliminary decree was passed for accounts and they were referred to a Commissioner who decided that nothing was due to the plaintiff.

Objections were filed to his report, and, after hearing them, the report was varied and a final decree was passed, giving plaintiff Rs. 2,128-2-9. From this decree, which was within the pecuniary jurisdiction of the Subdivisional Court, an appeal was filed by the plaintiff, claiming that he is entitled to the full amount of items 1 to 6 in the accounts, *minus* that Rs. 2,000 odd, which had been awarded to him.

His claim amounted to over Rs. 11,000. The Court-fee on the appeal was based on a difference between the original tentative claim, namely, Rs. 3,100 and the Rs. 2,128-2-9, which had been decreed.

How this can be correct we do not see. The point was noticed by the learned District Judge, but he held, after considering the provisions of the Burma Courts Act, that the appeal lay to the High Court. He passed no order as to the Court-fees, but returned the appeal to be presented in this

ROBINSON, C. J. AND MAY OUNG, J.

Ma Min Byu and one

v.

Maung Chit Pe and others.

*Mortgage with possession redemption with-  
in fixed period—Default— Forfeiture clause  
—Clog on redemption.*

Where a mortgage with possession provides for forfeiture of the land in default of redemption within a fixed period, the forfeiture clause is a clog on redemption and is inoperative. The principles of S. 60 of the Transfer of Property Act, 1882, apply as a matter of justice, equity and good conscience in the case of such mortgages, when executed in places to which that section has not been extended.

*Nga Po Nyun v. Mi Yin*, II U B R (1914-16) 141 referred to.

*Nga Kyaw and others v. Nga Yu Nut*, II U B R (1907-09) p. 1 followed.

*Pattabhiramier v. Venkatarow Naicker and one*, 13 M I A 560. *Thumbusawmy Moodelly v. Hossain Rowther*, 1 Mad. 1 distinguished.

*Maung Naung v. Ma Bok Son*, 1 L. B. R. 192 dissented from.

Judgment. 23rd July, 1923.

ROBINSON, C. J. :—The decisions in Upper and Lower Burma appear to be somewhat conflicting and the judgments in Lower Burma are based on two judgments of their Lordships of the Privy Council passed long before the Transfer of Property Act came into force. In *Pattabhiramier v. Venkatarow Naicker and one* (1), their Lordships held that "the doctrine of the English Law with respect to the equity of redemption, after default of payment of the mortgage money, is

\*Civil First Appeal No. 284 of 1922 from the decree of the District Court of Mvaungmya in Civil Regular No. 23 of 1922.

1. 13 Moo. I. A. 560.

unknown to the ancient law of India prevailing in Madras, which, in the absence of any Regulation, or Act of the Legislature, altering such law, determines the interest of a mortgagor, in favour of the mortgagee under a conditional sale made absolute by failure of the mortgagee to redeem at the time specified in the Deed." The second case is that of *Thumbusawmy Moodelly v. Hossain Rowther* (2), in which the decision in *Pattabhiramier's case* (1) was approved and it was laid down that a contract of mortgage by conditional sale is a form of security known throughout India, which, by the ancient law of India, must be taken to prevail in every part of India where it has not been modified by actual legislation or established practice, and is enforceable according to its letter. Their Lordships pointed out that the state of the law was eminently unsatisfactory and called for the interposition of the Legislature. In the former case their Lordships were dealing with a mortgage by conditional sale, and since these decisions were passed, the Transfer of Property Act has been enacted. It seems unnecessary, therefore, to consider any further these two decisions. In S. 58 of the Transfer of Property Act four descriptions of mortgages are defined. By S. 60 of the Act, the rule enforced by Courts of Equity in England against the clogging of the right of redemption is introduced. By S. 98 of the Act, provision is made for anomalous mortgages. It is provided that, in the case of mortgages which do not satisfy the definition of the four kinds of mortgages specified in S. 58 and which are not mortgages amounting to a combination of a simple mortgage and an usufructuary mortgage or a mortgage by conditional sale and an usufruc-

2. 1 Mad. 1.

tuary mortgage, the rights and liabilities of the parties shall be determined by their contract as evidenced in the mortgage deed and, so far as such contract does not extend, by local usage.

In 1907, the Judicial Commissioner of Upper Burma, in the case of *Nga Kyaw and others v. Nga Yu Nut* (3) held that the decision of their Lordships of the Privy Council referred to above were not applicable in Burma and that such questions are to be decided by equity, justice and good conscience, and that the equitable rule contained in S. 60 of the Transfer of Property Act would apply in favour of redemption; but that, if the case was one depending on the terms of the contract, in that particular case the mortgagors had not forfeited their right of redemption. The deed in that case provided that the mortgagors desired to mortgage their land for Rs. 430 and that they would redeem it in Taboung, 1262, by payment of an extra sum of Rs. 70, i. e., Rs. 500 in all. It provided that while the land was in the mortgagee's possession the mortgagors would be responsible for any interference therewith and that if on the dates specified the mortgagors fail to redeem, they will make over outright the land for Rs. 430, the money advanced. After deciding that the decisions of the Privy Council were not applicable in Burma, the learned Judicial Commissioner proceeded to consider the Transfer of Property Act and he held that, the Act not being in force, it was not necessary to observe the distinction between the anomalous and other mortgages. He finds that, if the mortgage was an ordinary mortgage, the principle enunciated in S. 60 of the Act should be applied, and

if the mortgage was an anomalous mortgage, the particular contract before him was not intended to execute itself and a further transaction was necessary before the land could become the property of the mortgagees.

In *Nga Po Nyun v. Mi Yin* (4), the Judicial Commissioner held that anomalous mortgages like other mortgages are subject to the rule contained in S. 60, Transfer of Property Act, and that the insertion of a forfeiture clause in a mortgage bond does not make the mortgage anomalous, but is merely of no effect. The condition in this case was "when five months have elapsed if the principal and interest be not paid and the property redeemed, let the creditor go with this mortgage bond to the Town Lots Office and effect a mutation of names and take the property as his absolutely." The learned Judicial Commissioner held that S. 98, Transfer of Property Act, must be read subject to S. 60.

In Lower Burma, in *Maung Naung v. Ma Bok Son* (5), Sir Charles Fox dealt with a case in which the transaction was effected by registered document according to the terms of which the relationship of mortgagors and mortgagee was first created, but it contained a clause to the effect that if the mortgagor did not redeem within two years, the creditor (mortgagee) would be entitled to outright ownership of the land. The Transfer of Property Act had not been extended, but it was held that if S. 60 were applicable or if the decision had to be according to rules of equity as administered by the English Chancery Courts, the last clause would have to be held to be invalid, and, following the

3. II U. B. R. (1907-09) 1.

4. II U. B. R. (1914-16) 141.

5. I L. B. R. 192.

two decisions of the Privy Council already cited, the learned Judge held that the document must be enforced according to its terms. In this state of the authorities, I think it is as well to deal with the question broadly though, strictly speaking, it is not necessary to do so for the decision of this particular appeal.

We have to deal with the case in which the Transfer of Property Act or, at any rate, S. 60 thereof has not been extended, and is therefore not applicable. It is necessary to consider the case of an ordinary mortgage or a combined mortgage of the kind specified in S. 98 and to decide whether the principles enunciated in S. 60 should be applied in deciding the case in accordance with justice, equity and good conscience. In my opinion, it is clearly so necessary. I agree with the two Upper Burma rulings on this point. It is in entire accord with the notions prevailing as to mortgages in this country and to so hold imposes no hardship on the mortgagee. If he has not taken steps to acquire the legal title by necessary action after the failure of the mortgagor to redeem within the stipulated time, the right of redemption is not extinguished. The mortgagor can seek the aid of the Courts to permit him to redeem and the well-recognised rule of "once a mortgage, always a mortgage," should be enforced. The Lower Burma decision is not, in my opinion, good law at the present day. It was based on decisions passed long before the Transfer of Property Act was passed and the rule enunciated therein can now, in my opinion, only apply in the case of anomalous mortgage deeds. I am unable, however, to agree with the learned Judicial Commissioner in *Po Nyun's* case that S. 98 of the Act is subject to the provisions of S. 60 thereof. If it was so subject, the

whole provision as to anomalous mortgage deeds would become a dead letter and to argue that, because it finds a place earlier in the chapter, it must therefore apply to all mortgage deeds, appears to me to be unjustified. The legislature deliberately provides for anomalous mortgages and enacts that they are to be decided according to the terms of the contract. From this rule every ordinary mortgage and the two combined mortgages specified therein are excluded; if there is an anomalous mortgage, and the enforcement of its terms and conditions would not be for any other reason inequitable, the rule of decision in S. 98 must be applied. In my opinion, therefore, the decision of the learned Judicial Commissioner in *Nga Kyaw's* case correctly sets out the law that should be applied at the present time.

In the appeal before us the mortgage is a usufructuary mortgage, pure and simple, in the beginning; to that is tacked on a mortgage by conditional sale to take effect on failure of the mortgagor to redeem. It is one of these combinations referred to in S. 98 which is excluded from rules relating to anomalous mortgages. To that must be applied as a rule of equity, justice and good conscience, the rule against clogging the equity of redemption enunciated in S. 60 of the Act. I would therefore accept the appeal and grant the usual decree for redemption for Rs. 5,000, with permission to sue for mesne profits from the date of decree until possession be given. The respondents to pay the appellant's costs in both Courts.

*May Oung, J.*—I concur.

*Kyaw Htoon* for plaintiff-appellants.

*Maung Pu* for defendant-respondents.

## BOOK REVIEWS.

## RECENT LAW BOOKS.

*The Law of Gaming and Wagering, Civil and Criminal*, by S. G. Velinker, B. A., L. L. B., Barrister-at-Law, etc., 3rd Edition, Advocate of India Press, Bombay. Published by the Author.

Since the amendment of the Bombay Prevention of Gambling Act (IV of 1887) by Bombay Act VI of 1919 and Bombay Act V of 1922—by both of which a number of radical changes were introduced—the legal world have been eagerly searching for a handbook which would eliminate the dreary work of searching for authorities on this important subject. The work under review is the last word on the matter, giving, as it does, all possible references to the statute and case-law, and still more important, arranging them in a form easily get-at-able and readable. The application of the law is fully dealt with, and on the Civil side a full explanation is given of the little understood Teji-Mandi transactions of the Indian Brokers, as well as many other forms of wagering. Indispensable alike to Police Officer, Magistrate, Judge, Civil or Criminal Lawyer or even Headman, it will eliminate a great deal of troublesome work by its sane and practical arrangement. In convenient shape and size, neatly and strongly bound and printed in clear type on good paper it is a credit alike to Author and Printers and deserves all the commendation it can receive.

*The Succession Certificate Act (VII of 1887) with commentaries*, by K. Jagannatha Sastri, B. A., B. L. and K. Sankara Sastri, B. A., B. L., Vakils of the High Court of Madras. Law Printing House, Mount Road, Madras.

This is the neatest little vest-pocket companion we have had for a long time. In the compass of some 160 pages it comprises in a readable and easily referable form all the citations, official and non-official, dealing with the Act, together with notes on recent changes and a most useful table of Court-fees. Lastly, for the convenience of practitioners in the Native States wherein the law on this subject is nearly in the same terms as the Act, the Rules and Notifications in force in those States have been added. The arrangement is excellent, the printing clear and get-up neat and both the Author and Printers are to be complimented on the fruits of their labour.

*The Yearly Digest, 1923, with which is incorporated Chitale's Annual Indian Digest*, by R. Narayanaswamy Aiyar, B. A., B. L., Vakil, High Court, Madras. The Madras Law Journal Office, Mylapore, Madras.

Although consisting of some 1,500 pages, this singularly complete and useful volume is easily handled and by no means bulky. The reason lies in the paper used, which while perfectly opaque and very strong is yet so thin as to take up barely one-fourth the room of that usually used. To save space still further, it is mostly printed in 8-point type, but even here, the press work is so exquisite that it is as easy and restful to the eyes as most 12-point-work. The arrangement and indexing leave absolutely nothing to be desired, the binding is strong and handsome, and the whole job is obviously the work of an expert. The price is so phenomenally low that it seems incredible, in spite of its mammoth circulation, how any profit at all can be made on it. We feel that from every view-point, no praise can possibly be too

high for this work, and tender our heartiest congratulations to compiler and Printers.

*The Workmen's Compensation Act, 1923 (Act VIII of 1923)*, by C. M. Agarwala, Barrister-at-Law. Butterworth & Co., Ltd., 6 Hastings Street, Calcutta.

Mr. Agarwala has given us a number of books on legal subjects, and all of them have more than merited the praise bestowed upon them. In this timely work the author maintains high repute as a luminous text writer. The element of labour becomes daily of more and more importance, and the relations of employer and employee must be clearly understood, not only by Bench and Bar, but by all concerned, if industry is to go on. In this lucid and accurate work the law on the subject has been so clearly arranged that even the layman cannot fail to understand it, and it will be of considerable use to all whose business requires the employment of labour, while to the professional man it is a *sine qua non*. The Act comes into force on the 1st July, 1924, and all whose work is connected with the subject will be well advised to put themselves in possession of a copy of the book as soon as possible. The size is convenient, and the printing, paper and get-up are in Messrs. Butterworth's usual high-class style, which in itself merits all the praise that can be given. We congratulate Author and Publishers on the achievement.

*The Indian Arbitration Act (Act IX of 1889)*, by G. J. Advani. Messrs. Kay Cee Brothers, Bunder Road, Karachi.

Among the many useful books produced recently, this work certainly deserves every commendation. Mr. Advani is the author of two other works, namely, 'The Law of Arbitration in India,' and 'The Deccan Agriculturists' Relief Act,' and in the volume under review he more than sustains his reputation.

The subject has been dealt with in a manner easily understood by the layman and yet is exhaustive enough in treatment to satisfy the most learned members of the legal profession.

The copious appendices, addenda and notes, the illuminating references and the concise and well-arranged index all conspire to render this book one of the most useful in the lawyer's library.

For practitioners in seaport towns, where arbitration is mostly resorted to, this work is not only valuable, it is indispensable.

In the Foreword by the Hon'ble Mr. Justice E. M. Pratt, I. C. S., of the Bombay High Court, we notice a sentence which we cannot refrain from quoting :

"The author has been well advised to include cases in the unofficial reports. Now that High Courts habitually refer to these reports, no text-book writer and no practitioner can afford to ignore them."

We commend this remark to the notice of the profession in Burma.

The book is neatly got-up and bound. Our congratulations to Author and Printers.

## THE HON'BLE MR. JUSTICE BEASLEY.

By the time we go to press Mr. Justice Beasley will have left Rangoon for the Madras High Court. During the short period of 15 months he has been a Judge of our High Court, he has won the respect and admiration of the Bar and the public. With intellectual gifts of a high order, legal acumen and shrewd practical experience of the law, he combined an innate sense of justice, a power of observation and a thoroughness which never failed him in arriving at a true and impartial judgment in a cause. His presence amongst us was a constant reminder of the traditions of the great profession to which we belong, coming as he did, from the very home of those traditions—that no person's rights should be wrested from him, that the main purpose of the profession is to assist the cause of justice for the benefit of the race, and above all to teach men to play the game. His courtesy was the outcome of a just and humane disposition which permeated all his work. To juniors, as well as to seniors,—it made no difference who they were—he gave the same patient attention and even-handed justice. Whilst we regret his departure from our midst, we join in wishing him God-speed and the highest honours the profession can bestow on him in his new sphere of work.

The following is an account of the Bar farewell which took place on the 14th August, which we have pleasure in reproducing from the *Rangoon Times* :—

"The members of the Bar gathered in large numbers in Court No. 6 yesterday evening to bid farewell to Mr. Justice Beasley who is leaving to-day for Madras

to take up an appointment as Judge of the High Court of that Province.

Mr. C. Hamlyn, senior member of the Bar present, said :—

Your Lordship, the members of the Bar have assembled in your Lordship's Court this afternoon to express the regret that your Lordship is leaving the High Court of Judicature for that Province of Madras. Fate has decreed your Lordship a transfer, and we whilst expressing our regret realise that what is our loss is the gain of the High Court of Madras. If we remember right it is some fifteen months ago that His Majesty the King of the Netherlands appointed your Lordship Judge of this Court, and I think I shall not be accused of indulging in the language of flattery when I say that in that time your Lordship has won the esteem, not only of the legal practitioners but of litigants and of the public generally. Your Lordship has always displayed perseverance, also consistent courtesy towards those around you, and an intense devotion to duty, and set us a very valuable example. Moreover, in administering justice your Lordship has always exercised a high sense of law and equity. I would like to add to these attributes that we at the Bar have much admiration for the way in which your Lordship has endeavoured to hold the traditions of the English Bar as far as it is possible to hold those traditions in this country. Thus having expressed our sorrow at your Lordship's departure, I desire to add on my own behalf and on behalf of my colleagues that we wish you a friendly farewell, and in thus wishing you good-bye, may we also express this wish that health and happiness may attend your Lordship in the new sphere you are about to enter.

Mr. Justice Beasley, replying said :—

Mr. Hamlyn, I am deeply grateful to you for the very kind words which have fallen from you and spoken not only on your own behalf but also on behalf of the Bar, you being the senior barrister in Court. I am also deeply grateful to the members of the Bar and the pleaders for attending here in such large numbers, that being one more piece of evidence to me of the very good will that you feel towards me. If I merit one-quarter of what you have said, Mr. Hamlyn, I should feel, indeed I do feel, that my stay in Rangoon has not been in vain. My stay here has been a very short one, but a very pleasant one, and I do feel that I shall take with me to the Bench at Madras the very valuable experience I have gained in this Court.

The work in this Court is very heavy and it is as important as it is heavy. If at times in this Court on the Original Side the chariot of justice has not proceeded quite as rapidly as one would wish it to do, I am glad to say and do feel that though slow the progress has been to arrive at the end of the journey, its journey has not been made in vain. I have always received the very greatest kindness and courtesy from the members

of the Bar who have appeared before me, and I have received what is still more valuable, the very greatest assistance from the Bar. Every Judge, right down to the end of his career, is much in need of assistance from the Bar and the more he is in need of assistance at the very outset of his career. I have always looked for that assistance and I have not looked in vain. Turning to the other side—the Bench—if I may be allowed to say so, I do think it is a useful thing sometimes for barristers of ripe experience in England to be sent out as Judges to the East because they bring with them to the Court traditions of the great English Bar—the greatest profession in the world—and they help to keep these traditions green within the memories of those out here. There is also another side. Whether in law or in business it is a useful thing sometimes to look at things from a different point of view. It may not necessarily follow that that point of view is the right one. But it is nevertheless a useful thing.

I am deeply grateful to you in coming here and saying what you, Mr. Hamlyn, have said and in saying farewell to you, the only thing I can say is that all good health and good fortune attend you."



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The Magistrate's Court is subordinate to this Court and therefore I have power to make the necessary complaint, and as I am satisfied that it is expedient in the ends of justice that an enquiry should be made into an offence under S. 211 read with S. 109 or 120-B of the Indian Penal Code, which appears to have been committed in relation to Criminal Regular Trial No. 118 of 1913 in the Court of the Western Sub-divisional Magistrate of Rangoon, a copy of this order signed by me will be sent to the Western Sub-divisional Magistrate, Rangoon, as this Court's complaint.

I note for the information of the Magistrate that I regard this letter as extremely serious, and that it would probably be advisable to enlist the services of the Criminal Investigation Department, Burma, which should be asked to work in conjunction with the Criminal Investigation Department, Madras.

PRESENT :—HEALD, J.

Kabudin *alias* Shwe Po and Rasal Singh . . . *Petitioners\**  
 v.  
 King-Emperor . . . *Respondent.*

*Lower Burma Land and Revenue Act (Burma Act II of 1876), R. 107-G—Digging clay for brick-making without license—Whether owner of land or contractor's supplying labour liable.*

The petitioners were engaged as contractors to supply labour to dig clay and make bricks and they accordingly supplied the labour by which clay was dug and 8,000 bricks were made without obtaining a license. They were prosecuted under Rule 107-G of the Lower Burma Land and Revenue Act, 1876, and convicted and fined. On revision the conviction against the contractors was set aside and the owner of the field who engaged the contractors was ordered to be prosecuted.

Reference made by H. H. Mackney, Esq., I. C. S., Sessions Judge of Insein, in his Cr. Rev. No. 80 of 1924 :—

\*Cr. Rev. No. 316-B of 1924 being review of the order of the 2nd Additional Magistrate of Insein passed in Cr. Reg. No. 26 of 1924.

The three applicants have been convicted under R. 107-G of the Lower Burma Land Revenue Rules for digging clay for making bricks without a license.

The case was tried summarily and there is no appeal. The applicants ask for revision of the case as they consider that it was not proved they were responsible for the brick manufacture, and in any case they were merely contractors and the persons guilty are the labourers who actually dug or the persons who engaged applicants as contractors. I confess I am quite unable to follow the latter plea. Surely if a man engages to carry out a work he is responsible for it whether he performs the labour with his own hands or not. The rule makes it an offence to dig clay without a license and if these persons undertook to dig clay and make bricks and there was no license they are obviously guilty. No doubt the persons who engaged them might also under certain circumstances be guilty, but that has nothing to do with the question of the guilt of the applicants.

It must be admitted that the evidence that all three applicants were concerned is extremely unsatisfactory and it would have been better for the Magistrate to call witnesses who could give definite evidence thereto. Nearly all the evidence is hearsay. However the headman says he had seen applicants Mg Gale and Mg Shwe Po causing clay to be dug and the ten house gaung Ba Shin says he had seen all three. This evidence is somewhat vague. Mg Gale admits that he "made bricks as labourer of Ne Dun with my coolies and that he had already made about 8,000 bricks as sample." The other two applicants denied the charge altogether.

I consider that the persons said to have engaged these applicants and some of their labourers should have been called and examined and that it is extremely doubtful on the existing evidence that Shwe Po and Rasal Singh had anything to do with the matter at all. As regards Mg. Gale I think he was rightly convicted on his own admission. It is clear he not only supplied the labourers but caused the clay to be dug and made the bricks. He was in charge

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LOWER BURMA LAND AND REVENUE ACT, 1876.

*Rule 107-A.*—No person shall mine, quarry, dig for, excavate or collect stone, laterite (whether in blocks, gravel or sand), limestone, sandstone, marble, gypsum, clay or other minerals on land wherein the right of such minerals is reserved to or otherwise belongs to Government except under a license or lease granted under the provisions of this Chapter. •

\* \* \* \* \*

*Rule 107-G.*—Whoever mines, quarries, digs for, excavates or collects any mineral in contravention of the provisions of Rule 107-A, or before payment of any fee, rent or royalty payable in advance under a license or lease issued under the provisions of this Chapter or otherwise in contravention of the terms or limitations of any such license or lease, or removes any mineral, other than a mineral for which a license free of royalty may have issued under the provisions of Rule 107-B, before payment of the royalty therefor, shall be punished with imprisonment for a term which may extend to one month, or with fine which may extend to two hundred rupees, or with both.

of the work. The proceedings will be submitted to the High Court, Rangoon, with a humble recommendation that the finding and sentence of the lower Court so far as regards Kabudin *alias* Shwe Po and Rasal Singh be set aside and that a fresh trial be ordered.

Order. 5th May, 1924.

For the reasons given by the learned Sessions Judge in his report dated the 5th of May, 1924, the convictions and sentences passed on Kabudin *alias* Shwe Po and Rasal Singh are set aside and the fines which have been paid will be refunded. The District Magistrate should take steps to have Mg. Ne Dun, the owner of the land who was presumably responsible for the unsuccessful digging of clay, prosecuted.

PRESENT :—CARR, J.

A. V. Joseph ... Appellant\*  
v.  
J. L. Lammond ... Respondent.

*Criminal Procedure Code (Act V of 1898), S. 443—Prosecution by European on behalf of Railway Administration—Duty of European to pass sleepers—Whether such person is a Railway employee under Indian Railways Act (Act IX of 1890), S. 3 (7)—Claim by appellant to be tried by jury.*

A person who is engaged by a Railway Administration to pass sleepers and who is paid by results partly by the Railway Administration, and partly by the contractor, is an employee of the Railway within the meaning of S. 3 of the Indian Railways Act, 1890.

A British-Indian subject cannot claim to be tried under Chapter 33, Criminal Procedure Code, in a criminal prosecution launched against him by a European employee on behalf of a Railway Administration.

Order. 12th May, 1924.

The appellant, A. V. Joseph, held a contract for the supply of sleepers to the Bengal-Nagpur Railway Co., Ltd. He is being prosecuted for fraud in connection with that contract. The case was sent up for trial under S. 420, I. P. C., but a charge has been framed under S. 468, I. P. C., which is within the cognizance of a First Class Magistrate.

\*Cr. Appeal No. 466 of 1924 from the order of the Western Sub-divisional Magistrate, Rangoon, passed in Cr. Reg. No. 1560 of 1924.

The complaint was made to the police by Mr. Lammond who is a European, while the appellant is an Indian. The appellant claimed under S. 443, Cr. P. C., to be tried under the provisions of Ch. 33 of the Code, which, if applicable, compel a Magistrate if he does not discharge the accused to commit him to sessions for trial. In Rangoon this would mean that he would be tried by a Jury. The Magistrate rejected this claim and this appeal is filed under S. 443 (2), Cr. P. Code.

The only question is whether Mr. Lammond is a complainant within the definition in S. 444, Cr. P. C., and this narrows itself down to the question whether he is a "railway servant" as defined in S. 3 of the Indian Railways Act, 1890, clause 7, which says:—" 'Railway servant' means any person employed by a railway administration in connection with the service of a railway."

Mr. Chari refers to certain clauses in the contract between the appellant and the Railway Co. which provide for the appointment of a sleeper passing officer by the Chief Engineer of the Burma Railways and for the payment by the appellant of part of such officer's remuneration in the form of a fee of Rs. 20 for each 1,000 sleepers rejected in excess of 10 per cent. of those presented for examination. He says also that the Railway Company pays Rs. 20 for each 1,000 sleepers passed. but I do not find this in the contract. Mr. McDonnell on the other hand says that Mr. Lammond, who is the sleeper passing officer, is paid a fixed salary of Rs. 1,000 per mensem. I do not think this question is of any importance. An employee may be paid a fixed salary or by time or by the piece but the mode of payment does not affect the fact that he is employed.

That the appointment or nomination is to be made by the Chief Engineer of the Burma Railways also makes no difference. It is clear on the contract that the Bengal-Nagpur Railway Co. authorises the Chief Engineer, Burma Railways, to act on their behalf in this matter.

I think there can be no question that Mr. Lammond is employed by the Bengal-Nagpur Railway Co.

We have called upon Counsel to satisfy us that the appeal does lie to this Court, and not in the District Court.

In a suit for an account it is open to the plaintiff to value his suit for purposes of Court-fee at any figure he chooses, and, having done so, the value for purposes of jurisdiction is automatically fixed by reason of the provisions of S. 8 of the Suits Valuation Act.

The value fixed by the plaintiff was approximate and tentative only. It gives the Subdivisional Court jurisdiction to take up the case, but it does not give the Subdivisional Court to pass a decree for more than Rs. 5,000. If, after enquiry, it is found that the tentative value is not correct, and that the real value of the subject-matter of the suit is over Rs. 5,000, the proper course would be, in our opinion, for the Subdivisional Court to return the plaint for presentation to the proper Court.

The words of S. 7 (b) give the Subdivisional Court jurisdiction to determine only suits not exceeding Rs. 5,000 in value and "value" is defined in S. 2 (f) to mean "the amount or value of the subject-matter of the suit".

This appears to be the view taken by the learned Judges in *Bhupendra Kumar Chakravarty v. Purna Chandra Bose* (1), which view is repeated in *Saroda Sundari Basu v. Akramanessa Khatun* (2). With this view we agree.

The same view was taken in *Golap Singh v. Indra Coomar Hazra* (3) and again in *Hirjibhai Navroji Anklesaria v. Jamshedji Nassarwanji Givvaka* (4).

The question before us is as to the forum of appeal, and this must be decided with reference to S. 9 (f) (b) of the Burma Courts Act. It is there enacted that an appeal from a decree or order of a Subdivisional Court shall lie to the District Court.

*Prima facie*, therefore, the appeal from this decree which was one passed by a Subdivisional Court for an amount that

1. 43 C 650.

3. 13 C W N 493.

2. 28 C W N 710.

4. 15 B. 1021.

was within its pecuniary jurisdiction, would lie to the District Court.

There are, however, two provisos to sub-clause (b).

The first enables the Local Government, by notification, to direct that appeals from original decrees of any specified Subdivisional Court shall lie to the High Court. There has been no notification under this power with reference to the Subdivisional Court with which we are concerned; nor, indeed, has this power been exercised in any instance so far.

The second proviso lays down that an appeal from a decree or order in any suit or original proceeding of a value exceeding Rs. 5,000 shall lie to the High Court. It is urged that, under this proviso, the present appeal lies to this Court; and a question has been raised as to whether the value there mentioned refers to the value of the decree or to the value of the suit, *i. e.*, the value of the subject-matter of the suit.

Under the Lower Burma Courts Act, which was superseded by the Burma Courts Act on the creation of the High Court, a similar provision was made as to an appeal from a decree of a District Court, but any such provision is now unnecessary because all appeals from a District Court lie to the High Court. There was, under the Lower Burma Courts Act, a Divisional Court, and the provision therein made was to enact that in suits of value under Rs. 5,000 the appeal should lie to the Divisional Court, and that, when the value is over Rs. 5,000, to the Chief Court.

As regards Subdivisional Courts under the present Act, there being no Subdivisional Court having jurisdiction in excess of Rs. 5,000, there can be no appeal to which this proviso would apply, unless it be held that a Subdivisional Court, given jurisdiction by the valuation put upon the suit by the plaintiff, could pass a decree for an amount in excess of its ordinary pecuniary jurisdiction.

That we have held no Subdivisional Court can do. There can be, in our opinion, no doubt whatever that the intention of the legislature was in this proviso to make a provision for appeals from a decree of a Subdivisional Court the jurisdiction of which had been extended by the Local Government by noti-

fication to more than Rs. 5,000 in exercise of the powers conferred by S. 7 (b) of the Act.

In the present case, the Subdivisional Court, having jurisdiction owing to the valuation put upon his claim by the plaintiff, passed a decree which was within the limits of the Court's pecuniary jurisdiction. The appeal lies from that decree, and there is no finding at present that the value of the subject-matter of the suit is more than Rs. 2,128.

We see no reason, therefore, for holding that, because the plaintiff now in appeal chooses to increase his claim, that alters the course of the appeal. This was held by the late Chief Court in the case of *Ma Ma v. Ma Hmon* (5).

The same view was taken in *Thein Yin v. Foucar Brothers and Co., Ltd.* (6).

For the above reasons we must hold that the appeal lies to the District Court and must be returned for presentation to that Court.

As to Court-fees we pass no orders; but it will be for the District Court to take such action as it thinks necessary on this matter.

As to costs, the appeal, having been filed in this Court under the orders of the District Court, we think that costs should abide the result of the appeal.

*Mr. Halka*<sup>1</sup> for appellant.

*Mr. Anklesaria* for respondent.

PRESENT :—CARR, J.

Ma Shwe Kin

v.

Ka Hoe and one

Appellant\*

Respondents.

*Mortgage with possession by registered deed—Subsequent sale by mortgagor to mortgagee for additional sum—No registered deed—Doctrine of part performance does not apply.*

<sup>5</sup> 4 L.B.R. 279.

<sup>6</sup> 4 L.B.R. 120.

\*Civil Second Appeal No. 308 of 1923 against the decree of the District Judge's Court, Myaungmya, in Civil Appeal No. 25 of 1923.

A mortgage with possession was effected by registered deed. Subsequently the mortgagor made over the land absolutely to the mortgagee for a further sum but no document was executed. Later, the mortgagor sued for redemption. It was contended that the mortgagees were in possession as purchasers and could not be ousted.

*Held*, that the mortgagor was entitled to redeem. It was an essential requirement in order that the case may come within the doctrine of part performance laid down in *Mg. Myat Tha Zan v. Ma Dun and one* (3 B. L. J. 78) that possession must have been given under the contract of sale and should be referable to no other title, and that the requirement had not been fulfilled in this case.

*Karamath Khan v. S. P. L. Latchmi Atchi*, 10 L. B. R. 241 : 13 B. L. T. 119; *Santhayi Ammal v. S. A. Aruthaya Udayar*, 11 L. B. R. 94 referred to.

*Mg Myat Tha Zan v. Ma Dun and one* 3 B. L. J. 78—explained—not applied.

Judgment. 23rd June, 1924.

The Additional District Judge was guilty of a very gross blunder when he said in his judgment that the mortgage in question was not effected by a registered deed. It was clearly stated in the plaint that it was. This was admitted in the written statement, and there was a certified copy of the deed on the record.

The mortgage was with possession and it was executed in 1915. The plaintiff sued to redeem it. The defence was that the plaintiff and her husband, since deceased, had in 1917, taken a further sum of Rs. 100 making Rs. 900 in all, and handed over the land absolutely.

Both Courts below have found that the defence case is established, and have further held on the authority of *Karamath Khan v. S. P. L. Latchmi Atchi* (1) and *Santhayi Ammal v. S. A. Aruthaya Udayar*. (2) that the plaintiff is not entitled to redemption.

These decisions have been reviewed in Civ. Reg. No. 1 of 1924 [*Mg. Myat Tha Zan v. Ma Dun* (3)], and have been upheld. But there they have been more definitely put on the basis of the doctrine of part performance and the effect is that where possession has been given in pursuance of a contract for sale it would be inequitable to allow the vendor to

1. 10 L B R 241. 2. 11 L B R 94. 3. Reported in 3 B L J 78.

resile from his agreement and to commit a fraud by recovering possession of the property.

One of the most essential requirements in order that the case may come within this doctrine is that possession must have been given under the contract for sale and can be referable to no other title. It is obvious that this requirement is not fulfilled in this case and I am unable to hold that effect must be given to the alleged agreement. Nor can I hold with the Additional District Judge that the mortgage has been extinguished. In my view therefore the plaintiff is entitled to a decree for redemption.

One other point arises. The assessed area of the land at the time of the original mortgage was 7.94 acres. It is now 20.99 acres. There is a provision in the mortgage deed that if any extension of cultivation is made the cost of it must be calculated and borne by the mortgagor. An issue was framed on this point "Have the mortgagees incurred any expense in respect to the extension, and if so, to what extent?"

The Subdivisional Judge did not answer this question, but found that the extension had been made by the defendant. The Additional District Judge did not come to any finding at all but remarked that if the mortgage were still subsisting the plaintiff would be entitled to the whole holding. He had, of course, overlooked the deed altogether.

It was for the defendants to prove the cost of making the extensions. In my view they have not proved anything at all. The plaintiff claimed that she and her husband continued to work the land as tenants all along until her husband was killed at the beginning of the season of 1284 in a quarrel with another tenant whom the defendant sought to put in. The defendants denied this and alleged that the plaintiff was tenant only in 1277-78 and again in 1283 (1915-16 and 1921-22). Neither party has proved this allegation. The probability is that the extensions had been made gradually for several years before, but were only then brought under assessment. The defendant called two witnesses who claimed to have been employed in clearing the land some 4 to 6 years ago. Each is

independent of the other and neither has support from any other witness. In my opinion this evidence is unsatisfactory and is not sufficient to prove that defendant spent anything at all on the extension.

I set aside the judgments and decrees of the Lower Courts. There will be judgment for the plaintiff for redemption of the whole holding and 20.95 acres on her paying into Court within 6 months of this date the sum of Rs. 800, less the costs now awarded to her. Should she fail to pay the required sum within that period, the land shall be sold and the Rs. 800 less the plaintiff's costs, shall be paid to the defendants and the balance to the plaintiff. The defendants will pay the plaintiff's costs in all Courts.

*Ba Thein* for appellant.

*Kalyanwalla* for respondent.

[*Note* :—Attention is invited to the report immediately following this case in which Duckworth, J. has allowed a subsequent purchase by a mortgagee in possession. The only difference between the two cases appears to be that the mortgage in the case decided by Carr, J. was by registered deed, whereas in the case decided by Duckworth, J. the mortgage was oral. This however was not the *ratio decidendi* in the case before Carr, J. and the decision proceeds upon the ground that possession should have commenced under the contract for sale in order that the Full Bench ruling in *Mg. Myat Tha Zan's* case may apply. The case of *Ma Pyone and two others v. Ma U and two others* (2 B. L. J. 233) which is in point, was not cited before Carr, J.—*Ed.*]

PRESENT :—DUCKWORTH, J.

(Mandalay.)

Ma Ma E, Ma Pyu and Mg. U . . . . . *Appellants\**

v.

Mg Tun by his agent Mg. Po Zon . . . . . *Respondent.*

*Oral mortgage with possession—Subsequent agreement for purchase—Suit for redemption barred.*

\*Civil Second Appeal No. 279 of 1923. (Mandalay).

Where a person enters into possession of land under an oral mortgage and whilst being in possession comes to an agreement to purchase the land and pays the price to the mortgagor, a suit for redemption will not lie.

Even though the right to sue for specific performance has become barred by limitation in such a case, the equities in favour of the purchaser remain. *Ma Pyone and two others v. Ma U and two others*, 2 B L J 233 followed.

*Mg. Shwe Hmon v. Mg. Tha Byaw*, 11 L B R 462, *Ma Shaw On v. Mg. Kywet*, 9 B L T 45 and *Venkatesh Damodar v. Mallappa Bhimappa*, 46 B 722 referred to.

Judgment.

6th June, 1924.

The case of the plaintiff-respondents was that the land in suit was mortgaged to 1st appellant Ma Ma E and her brother deceased Mg. Yin, for Rs. 350 with possession. Ma Pyu and Mg. U are the legal representatives of Mg. Yin. The suit was for redemption of this mortgage. The defence was that though the land had been mortgaged for Rs. 350, it was subsequently sold outright to the appellants for a further payment of Rs. 217 in April, 1917.

It was admitted that there was no document of mortgage. The plaintiff dated the mortgage in 1910, but the defendant-appellant's case was that it was dated in 1908. The plaintiff contended that it was an oral mortgage. This was not denied, but it was set up that it was entered in the Register of Reports of Transfer and Changes (then No. VIII), and the pyatbaing (Exhibit 7) was produced.

The Trial Court held that the sale set up by defendants was established, and dismissed the suit for redemption.

On appeal, the District Court allowed the claim, holding that the onus of proof as to the sale in 1917 was on the defendants and that since there was no registered conveyance, as required by law, the evidence given as to the sale was inadmissible and that the pyatbaing, in which the said sale was stated to have been reported (Exhibit III), did not transfer any interest in the property. Finally the learned Judge held that the present appellants could not resist a redemption suit, on the ground that there was an agreement to sell the land, because a suit for specific performance would be barred by time.

The defendants have now come to this Court on second appeal. Clearly they must succeed. Evidence has been

given by the Revenue Surveyor, which shows that the report as to the sale in April, 1917 was indeed made, and that, too, by both parties, in fact there is ample evidence to prove the payment of Rs. 217 and that an invalid sale transaction took place. The headman's evidence strongly bears this out and from April, 1917, the land has stood in Ma Ma E and Mg. Yin's names as owners. It is thus clear that, at the very least, there was a transaction in April, 1917, which can be treated as an agreement to sell the land to appellants. It was the duty of the vendor to give a registered conveyance, but none was ever given.

There is nothing to show that time for specific performance has elapsed, since there is no evidence that the vendor refused more than 3 years prior to suit to give a conveyance, and even if time for specific performance had elapsed, the same equities would apply.

The same principles apply as I held were applicable in the case of *Ma Pyone and two others v. Ma U and two others* (1). Much assistance may also be derived from the case of *Maung Shwe Hmon v. Maung Tha Byaw* (2). The case of *Ma Shwe On v. Maung Kywet* (3) may also be referred to. In the case of *Venkatesh Damodar v. Mallappa Bhimappa* (4) it was held that where the plaintiff agreed to sell land to the defendants, who were already in possession and defendants paid up the purchase money, but omitted to take a registered conveyance, plaintiff was not entitled to recover possession, though the right to obtain specific performance of the agreement had become time-barred. It seems to me manifest that, in this case, the intention of the mortgagor was to extinguish the mortgage debt.

The appeal is clearly good. The plaintiff cannot be allowed to take advantage of the fact that he gave defendants no registered conveyance, and the latter was entitled to retain possession as against any claim under the mortgage by the plaintiff-respondent.

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1. 2 B L J. 233.

2. 11 L B R. 462.

3. 9 B L T. 45.

4. 46 B. 722.

I set aside the decree of the lower appellate Court and restore that of the Subdivisional Court (though on other grounds) with costs in all Courts.

*Tha Gywe* for appellants.

*Mr. Lutter* for respondents.

PRESENT :—LENTAIGNE AND CARR, JJ.

Ma Hla and one *Appellants\**  
 v.  
 Maksadali *Respondents.*

*Tort—Nuisance—Neglect to maintain bund—Excessive flow of water on adjoining land—Abatement of nuisance by adjoining owner—Erection of higher bund in consequence—Flooding of higher land—Injunction on terms.*

The owner of higher land is entitled to an outlet for his water into lower land by whatsoever means nature intended it should have such outlet, and to an injunction against any person who prevents the water from so running by erection of a dam or other means of prevention.

Where the owner of higher land by neglecting to maintain his bund causes flooding to an adjoining owner's land and the adjoining owner raises his bund in order to protect his crops and thereby checks the flow of water, in consequence of which the higher land is flooded and the crops are damaged, *held*, an injunction should be granted directing the owner of the adjoining land to reduce his bund to a proper height, on the owner of the higher land repairing and maintaining his bund at the required level.

*Per Lentaigne, J.*—Though formerly the law of England and also of India permitted the abatement of nuisances, the tendency of modern decisions is to restrict the power to abate nuisances and that position is declared as regards easements in S. 36 of the Indian Easements Act, 1882.

Judgment. 24th June, 1924.

*Per CARR, J.* :—The defendant-respondent is the owner of a holding of paddy land on the south bank of the Udo stream. This is bounded on the east and partially on the south by the plaintiff's land. That portion of the plaintiff's land which lies

\*Letters Patent Appeal No. 89 of 1923 against the decree of the Appellate Court in Civil Second Appeal No. 255 of 1922.

to the east of the defendant's is bounded on the north by the Udo stream. This stream flows from east to west. It is claimed that the defendant's land is the lower and that the rain water that falls on the plaintiff's land naturally drains on to the defendant's land and that the defendant has put up a bund along the east and south boundaries of his land, thus preventing this natural drainage and causing the water to accumulate in plaintiff's fields, thus causing damage to his crops. The defendant denies that the water so drains on to his land, but there is no doubt that it does. His only object in putting up the bund—which he admits having done—must have been to prevent such drainage.

So far the facts are all in favour of the plaintiff. In *Banoo Mahomed Hoosein v. Mansooklal Dawlat Chand* (1) it was held that "The owner of a higher land is entitled to let the water run off into the lower land by whatever means nature intended that it should, and his right is infringed by any means which prevent the water so doing whether it be the damming of a stream, or the holding up of the promiscuous spill".

That case, like the present, dealt with land under cultivation and so far at any rate as concerns such land I have no difficulty in accepting that proposition. That there is a natural right to such drainage is recognised by Illustration (1) to S. 7 of the Indian Easements Act, 1882.

The same view was taken in *Ramaswamy Naicker v. Rasi Naicker* (2). But in this case it was argued that the plaintiff had erected a bund which would result in increasing the volume of water which would flow to the defendant's land. There had been no finding on this point. The learned Judges said: "Whether the burden has been appreciably increased or not is a question of fact which must be determined in each case. It is not the law that the owner of the upper land may not interfere with the flow of water at all. But he is not entitled to do anything that will throw on the defendant's land any water which would not naturally have gone there."

That too is a proposition that I have no difficulty in accepting, and from it it seems to follow that if the owner of the

1. (1909) 3 B L T 77.

2. (1913) 38 M 149.

higher land does so cause excess water to flow on to the lower land the owner of the latter is entitled to protect himself from such flow. And if in doing so he interferes with the natural flow also I think he is entitled to do so for it would in fact be impossible to keep off the one without also keeping off the other.

What has happened in this case is somewhat different. It is shown by the evidence that all, or almost all, of the owners of land bordering the Udo stream maintain bunds along the bank of the stream to prevent it from overflowing on to their land. The plaintiff had such a bund but has neglected it, with the result that it was breached. The bulk of the water held up by the defendant's bund is this flood water, and this is what has caused most of the damage to the plaintiff's crops. If the defendant's bund were removed this water would flow on to the defendant's land and cause damage.

The case thus is not one of the plaintiff causing more than the natural flow of water on to the defendant's land. But by neglecting his own bund the plaintiff has allowed a natural flow to reach the defendant's land, which would have been protected from that flow had the plaintiff maintained his own bund as formerly. How long this bund has been kept up is not known and it cannot be held that the defendant has acquired a right to have the plaintiff's bund maintained.

I am unable to find any authority at all similar to this case. But it seems to me equitable that if the plaintiff is given an injunction directing the defendant to remove his bund he should be required himself to maintain his own bund.

I would therefore allow the appeal and grant the plaintiff an injunction directing the defendant to reduce his boundary kazin to its former height on the plaintiff himself repairing his bund along the bank of the creek and maintaining it at its former height and its former condition. Respondent to pay plaintiff's costs in all Courts.

LENTAIGNE, J. — I concur in the finding that the appeal should be allowed and that the plaintiff should be granted an injunction directing the defendant to reduce his boundary

kazin to its former height on the plaintiff giving an undertaking to repair his bund along the bank of the creek and to maintain it at its former height and in an efficient condition. Though no issue has been framed as to the natural obligations in respect of bunds next the creek, I think that the fact that two adjoining owners are found to have a continuous bund erected in such a manner that the bund of each owner is necessary for the protection of the land of the other as well as of his own land raises a strong presumption of a mutual understanding that each owner will repair his portion of the continuous bund necessary for both their lands. Under such circumstances, I see no objection to the Court declaring such equitable right and requiring the plaintiff to undertake to avoid in the future a neglect of his obligations, when he seeks relief against an adjoining owner who has done a foolish act for the purpose of protecting himself against the loss likely to arise from the omissions of the plaintiff.

I think, however, that there can be no question that the defendant committed a tortious wrong in raising the height of his kazin in such a way as to create floods on the plaintiff's land. Though formerly the law of England and also of India permitted the abatement of nuisances, the tendency of modern decisions is to restrict the power to abate nuisances; and that position is declared as regards easements in S. 36 of the Indian Easements Act, 1882. The action of the defendant was of an analogous nature, and it was alleged that the tortious wrong was committed by him in order to curtail loss to his land arising from a neglect by the plaintiff. In my opinion the proper remedy for the defendant was to seek redress in the Law Courts or by the friendly intervention of executive authorities, and that the object of curtailing his own loss was no justification for his causing damage to the plaintiff by doing a tortious act. For these reasons I would award the plaintiff his costs in all Courts.

*Mr. Chari* for appellants.

*Mr. Anklesaria* for respondents.

---

PRESENT :—YOUNG AND BAGULEY, JJ.

The Suratee Bara Bazaar Company, Ltd. . . . *Appellant\**

v.

The Municipal Corporation of the City of  
Rangoon . . . . . *Respondent.*

*Rangoon Municipal Act (Burma Act VI of 1922), S. 80 (2)—Definition of "Gross annual rent"—Lighting, conservancy and water tax not to be included.*

The lighting, conservancy and water taxes, commonly known as occupiers' taxes, which average about 16·12 per cent. of the rental, are not part of the "gross annual rent" of lands and buildings and must be excluded for the purpose of assessment.

The deductions allowed by the Commissioner under Schedule III, Chapter II, S. 3, up to 20 per cent. do not relate to these taxes but are made in respect of such matters as vacancies, establishment and management charges.

Judgment. 25th June, 1924.

YOUNG, J.—This is an appeal from a decision of the Chief Judge of the Court of Small Causes dismissing an appeal from the Municipal Commissioner under S. 91 (3) of the Municipal Act, and the sole question to be decided is whether taxes paid on a building can be included in the gross annual rent for which buildings and lands liable to taxation may reasonably be expected to let from year to year.

The taxes payable consist (1) of a general tax, (2) of a lighting tax, (3) of a conservancy tax, (4) of a water tax, and in the absence of any agreement to the contrary, the general tax is payable by the owner and the other taxes by the occupier. In our opinion no landlord when fixing the rent he seeks to demand and no tenant when fixing the rent he is prepared to pay will include in it the taxes payable by the occupier or will exclude from it the taxes payable by the owner. There seems to us to be no reason why the tenant in fixing the rent he is prepared to pay and the landlord in fixing the rent he is prepared to demand should include in it taxes which the tenant will have

\*Civil Mis. Appeal No. 44 of 1923 against the order of the Rangoon Small Cause Court in Civil Application No. 1 of 1923.

to pay to the Municipality or exclude from it taxes which the landlord and not the tenant will have to pay to the same body. The Municipal Commissioner in the present case has deducted 10 per cent. for Municipal taxes in accordance with the custom prevalent in the Municipality and sought to legalise it under the provisions of Schedule III, Chapter II, S. 3 which enables the Commissioner when any building or land has been let to two or more persons holding it severally to treat the whole as one property, and in such case to deduct from the gross annual rent for which such building or land may reasonably be expected to let from year to year, not more than 20 per cent. In our opinion to do so assumes that the taxes payable by the occupier form part of the gross annual rent which as we think is not the case. The section therefore has no applicability but relates to deductions for such matters as vacancies, establishment and management charges. The net amount excluding this item was found by the Municipal Commissioner to be Rs. 47,558 and to this figure no objection has been taken.

Further we were informed in argument that landlords' taxes came to 7 per cent. and tenants' taxes came to 16 1/2 per cent. The assessment for taxation purposes will therefore be as follows :—

Let  $x$  be the assessment for taxation purposes.

$$\therefore x = \text{Rs. } 47,558 - 16\frac{1}{2}\%$$

$$\therefore 233x = \text{Rs. } 95,11,800 ;$$

$$\therefore x = \text{Rs. } 40,822.$$

As the Municipal Commissioner's valuation worked out to Rs. 42,800 per mensem and ours work out to Rs. 40,822 it follows that the Suratee Bara Bazaar has been successful to the extent of nearly Rs. 2,000.

I therefore allow it as costs in both Courts the sum of 8 gold mohurs.

BAGULEY, J. :—This is an appeal from an order passed by the Chief Judge of the Small Cause Court, Rangoon, confirming an order passed by the Commissioner of the Corporation of Rangoon, fixing the valuation for rating purposes, of the Suratee Bara Bazaar Company, Limited at Rs. 42,800 per month.

The sole question to be decided is whether any taxes and, if so, what taxes, paid on a building are to be included in the "Gross Annual Rent" referred to in S. 80 (2) of the Rangoon Municipal Act.

The Commissioner in his order based his assessment on the amount of rent which would be paid by a "hypothetical tenant" taking the Bazaar on lease, he would first of all in making his offer for renting the property, calculate the total gross rent which he would receive from the sub-tenants. He would then have to make allowances for—

(a) Stalls which would become empty in the ordinary course of things and be vacant before being re-let and also for bad debts and irrecoverable rents, such as constantly occur from time to time.

(b) He would then have to consider the necessary expenses which he would incur in the way of cleaning, protecting, etc., the Bazaar, the cost of collecting rents and so on.

(c) He would have to consider other necessary outgoings in the way of taxation, and

(d) He would then have to consider how much actual profit he would expect to put into his own pockets to reward him for the trouble of managing the business and incurring the risk of loss, which is inseparable from all business transactions.

The "hypothetical tenant" must, in the ordinary course of things, be perfectly normal, in fact, if the expression may be allowed, he must be abnormally normal, and he must be regarded as incapable of entering into any special or out-of-the-way contract. His form of lease would be simply "I lease house No. X in Y Street for Rs. Z per month".

Under these circumstances as laid down in S. 86 (2) of the Rangoon Municipal Act, he would have to pay lighting, conservancy and water tax, while the owner would have to pay general taxes, as defined in S. 80 (1) of the same Act.

It is agreed that the "Gross Rent" of the Bazaar in question comes to Rs. 52,558 per month; and it is also agreed that a fair deduction for management, provision for empty

stalls, into pocket profit, etc., is Rs. 5,000 per month. The net amount left comes to Rs. 47,588 per month. This, however, allows nothing for the Municipal taxation, which he would have to pay, and this again depends on the net rating which is fixed for the Bazaar. In other words, the "Annual Value" as defined in S. 80 (2) meaning the "Gross Annual Rent" which the owner would be liable to receive, must mean, in this particular case, Rs. 47,558 less tenants' taxes, as defined in S. 86, for that is the amount which the landlord would expect to get from a "hypothetical tenant".

It has been argued that no taxes can possibly be intended to be included in the "Annual Value" for, if that was the case, the owner would be paying taxes upon taxes. This, however, is the constant state of every one. A man does not pay income-tax upon the income which he enjoys after deducting the income-tax. He pays it upon the full gross income and this is even the case when his gross income is just about the limit which qualifies it for deduction at a higher rate of taxation. For instance, if the gross income is Rs. 10,250, the net income, after deduction of income-tax, would be under Rs. 10,000. But, nevertheless, the assessee has to pay Rs. 10,250 and at a rate applicable to income over Rs. 10,000. Again, it has been argued that R. 3, Chapter II of Schedule III prevents an assessor in assessing as one property, property which is sub-rented to a large number of tenants, from deducting more than 20 per cent. of the "Gross Annual Rent" of the property in order to arrive at the assessment for taxation purposes. But in this Rule, the word "Rent," whatever it may mean, must be used in the same meaning throughout. If the property as a whole is leased to a "hypothetical tenant" then we must regard him as sub-leasing to "hypothetical sub-tenants." And if, in actual fact, these sub-tenants pay "gross rents," then we must reduce those "gross rents" to "hypothetical rents" before limiting the reduction to 20 per cent. The assessment will therefore work out as follows :—

The figures given during the arguments for taxation :  
Landlords' taxes 7 per cent. ; tenants' taxes totalling 16 1/2 per cent. If therefore X be the assessment for taxation purposes.

X is also the "Annual Value" and X equals Rs. 47,558 minus 16 1/2 per cent of X. Therefore 233 X equals Rs. 95,11,600; and therefore X equals Rs. 40,822.

I find then that the "Annual Value" of the Suratee Bara Bazaar Company, Limited, is Rs. 40,822 per month.

As appellants have succeeded to a substantial part of their claim, I would allow them eight gold mohurs costs.

PRESENT :—YOUNG AND CARR, JJ.

Maung Paw Thit and two others . . . Appellants\*  
 v.  
 Ma E Yin . . . Respondent.

*Burmese Buddhist Law—Inheritance—Lettetpwa acquired by inheritance during the second marriage—Shares of son of the first marriage and husband and daughter of the second marriage.*

The deceased a Burmese Buddhist woman left her surviving a son by her first marriage and the husband and a daughter of the second marriage. The property to be divided was *lettetpwa* inherited by the deceased during the second marriage.

*Held*, that the son by the first marriage and the husband of the second marriage should divide the property equally; that the daughter by the second marriage had no right to inherit in the presence of her father.

*Tun Gyaw v. Ma Ba Lo*, 11 U. B. R. 1897-1901, p. 66; Leading Cases 255; *Mg. Gale v. Mg. Bya*, 4 L. B. R. 189; Leading Cases 258—approved.

*Mi Chan Mya v. Mi Ngwe Yon*, 2 U. B. R. 74; *Ma Sein Ton v. Ma Son*, 8 B. L. T. 203; *Ma E Hmyin v. Mg Ba Maung*, 2 R. 123—followed.

*Ma Ein Hlaing v. Ma Shwe Kin*, 3 U. B. R. 272; *Ma Lay v. Tun Shwe*, 10 L. B. R. 10—dissented from.

Judgment. 21st July, 1924.

CARR, J. —The facts relevant to this appeal are as follows. —Ma Nu first married Maung Ne and had by him a son, San Htein. Maung Ne died and Ma Nu then married the first defendant Paw Thit. By him she had a daughter.

\*Special Civil 2nd Appeal No. 470 of 1923 from the decree of the District Court of Insein in C. A. No. 56 of 1923.

Ma The, the third defendant. Next Ma Nu died and Paw Thit married the second defendant.

During her coverture with defendant Paw Thit, Ma Nu inherited certain property from her father, U Shwe Gya.

The only question now to be decided is—To what share in the property so inherited from U Shwe Gya is San Htein entitled?

San Htein has died since the death of his mother Ma Nu and the plaintiff-respondent is his widow, but that does not affect the question for decision.

The case is one for which I can find no rule whatever in the Dhammathats. Had there been no child by the second marriage it is clear that the inherited property in question would be shared equally by San Htein, the son of the first marriage, and Paw Thit, the second husband. This was the rule adopted in *Tun Gyaw v. Ma Ba Lo* (1), and as May Oung remarks (2) it has never been departed from.

It is also clear that if both the parent and the step-parent are dead and there are children by both marriages the property in question would be shared equally between the children of the two marriages—whether *per stirpes* or *per capita* does not now matter—*Mg. Gale v. Mg. Bya* (3).

The question is whether the fact that both a child by the second marriage and the step-parent are living makes any difference to the mode of division. May Oung (4) suggests that it is probable that the surviving parent would take one-half and that the other half would be divided equally between the children of the two marriages. On this basis San Htein's share would be one-quarter and not one-half, and that is the contention put forward for the appellants in this case. But May Oung cites no authority for the proposition and puts it forward merely as a probable suggestion.

In the case of *Mi Chan Mya v. Mi Ngwe Yon* (5) the question was of the division of the *lettetpwa* of the first

1. II U B R (1897-1901), p. 66.

2. Leading Cases, 255.

3. 4 L B R 189.

4. Leading Cases, 258.

5. 2 U B R 74.

marriage between the children of that marriage on the one side and the second wife and her children by the deceased on the other side. It was held that the division was the same as if there had been no children by the second marriage, and that "The children of the second marriage get nothing because their mother is still living and on her death they get her share."

This was expressly dissented from in *Ma Ein Hlaing v. Ma Shwe Kin* (6), which followed *Ma Lay v. Tun Shwe* (7).

But a bench of this Court has very recently, in *Ma E Hmyin v. Mg. Ba Maung* (8), dissented from these two last quoted decisions and approved that in *Mi Chan Mya's* case. The question that arose in this case was not as to the division of the estate, but whether the children of the second marriage are heirs of their father while their mother is alive. It was held that they were not, and that one of them was not entitled to claim a share during the lifetime of the mother.

This decision is a logical application of that in *Ma Sein Tan v. Ma Son* (9), which laid down the general rule stated on page 125 of the report, that the surviving spouse is the sole heir of the deceased husband or wife to the exclusion of their children, except the *orasa*.

Applying this rule, Paw Thit would exclude Ma The from inheritance and therefore her existence could not logically affect the share to which Paw Thit is entitled.

Thus there seems to be no reason for holding that the decision of the District Judge that San Htein's share is one-half is incorrect.

I would therefore dismiss this appeal with costs.

YOUNG, J. :—I concur.

*A. B. Banerji* for appellants.

*Ba Shin* for respondent.

6. 3- U B R 272.

8. 2 R 123.

7. 10 L B R 10.

9. 8 B L T 203.

PRESENT :—BROWN, J.

U Shwe Kyaw and one	...	<i>Petitioners*</i>
v.		
Ma Sein Bwin	...	<i>Respondent.</i>

*Criminal Procedure Code (Act V of 1898), S. 203—Complaint—Prosecution of party—Discharge—Fresh complaint on same facts—Cognizable but not to be entertained without strong grounds.*

A Magistrate should not take cognizance of a fresh complaint against a party who has been prosecuted and discharged on a former complaint on the same facts unless he is plainly satisfied that new facts would be adduced which could not with reasonable diligence have been brought forward in the previous proceeding or that there was some manifest error or manifest miscarriage of justice in the previous proceedings.

Where he is satisfied that no such grounds exist he should dismiss the complaint under S. 203, Cr. P. Code. *King-Emperor v. Nga Pyu Di*, 1 L B R 27 (F B); *Mi The Kin v. Nga E Tha*, 1 U B R (1904-06) 19—referred to.

Order. 21st July, 1924.

In Criminal Regular Trial No. 231 of 1923 of the 2nd Additional Magistrate, Moulmein, a complaint was filed by one Ma Sein Bwin against the petitioner, Ma Chit Htain, for criminal misappropriation and breach of trust.

The case as set forth in the complaint was that Ma Sein Bwin had entrusted her jewellery to Ma Chit Htain for sale to the respondent, Maung Shwe Kyaw. Ma Chit Htain had not returned the jewellery or its value, and put off the payment from time to time; and the complaint states that Ma Sein Bwin had recently heard that Ma Chit Htain had received the price from Maung Shwe Kyaw.

The case was duly tried, and Ma Chit Htain was found guilty with regard to the first of the four pieces of jewellery, but no charge was framed as regards the other pieces of jewellery.

\*Cr. Rev. No. 358-B of 1924. Review of the order of the Sub-divisional Magistrate of Moulmein in Cr. Reg. No. 54 of 1924.

In the course of the proceedings a search warrant was issued for the production of this piece of jewellery from the petitioner, Shwe Kyaw ; and on the 6th of December, 1923, a complaint was filed by Sub-Inspector of Police, Maung So Thin against Shwe Kyaw with regard to these pieces of jewellery. He therefore prosecuted Shwe Kyaw for criminal breach of trust, apparently with regard to all four pieces of jewellery.

Shwe Kyaw was discharged by the Magistrate after examining all the witnesses for the prosecution.

After the completion of these two cases, Ma Sein Bwin filed a complaint against both the petitioners in which she charged them jointly with offences under S. 409, or 411, or 417 of the Indian Penal Code with regard to the three pieces of jewellery, leaving out the piece of jewellery for which Ma Chit Htain had already been convicted.

The Magistrate proceeded with the trial, and the petitioners now come to this Court and plead that, in view of the previous orders, the Magistrate should not have taken cognizance of the case.

It has been contended that, no allegation of fresh evidence being forthcoming in the present case, the Magistrate had no power to take cognizance without an order from a superior Court for further enquiry.

As regards the three articles in question, the view taken by the Magistrate that the orders passed in Ma Chit Htain's case amounted to an order of discharge, is, no doubt, correct. And the facts appear to be the same as were brought forward in the previous case against Shwe Kyaw. The Magistrate has therefore entertained complaints of offences against the accused of which they have previously been discharged.

It was held by a Full Bench of the Chief Court of Lower Burma in the case of *King-Emperor v. Nga Pyu Di* (1), that a previous order dismissing the complaint or discharging the accused is no bar to the institution of a fresh case against the same accused.

The same view was taken in the Upper Burma case of *Mi The Kin v. Nga E Tha* (2).

It may, therefore, be taken as settled law in this Province that the Magistrate was competent to take cognizance of the present case ; but it does not necessarily follow from the mere fact that he is competent to take cognizance that he should have done so. If an accused person, after enquiry and after an order of discharge has been passed, is liable to further prosecution on the same evidence, as a matter of course it is quite clear that the way is open to grave injustice and oppression. And although the Magistrate in the present case was competent to take cognizance of a further complaint, it seems to me clear to have been his duty to have considered whether the circumstances were such as to justify him in doing so, or whether he should not have dismissed the complaint under the provisions of S. 203 of the Code of Criminal Procedure.

As pointed out in *Ma The Kin's* case " It is the duty of a Magistrate therefore who receives a complaint in a case where there has been a previous order of dismissal or discharge, not to issue process, unless he is plainly satisfied that there has been some manifest error or manifest miscarriage of justice, or unless new facts are adduced which the complainant had not knowledge of or could not with reasonable diligence have brought forward in the previous proceedings. "

In the complaint in the present case there is no allegation that new facts would be adduced which could not with reasonable diligence have been brought forward in the previous proceedings ; nor is there any allegation of any manifest error or manifest miscarriage of justice in the previous proceedings. The case does, therefore, seem to me to be one in which the Magistrate should, after the examination of the complaint in oath, have held that there was no sufficient ground for proceeding and have dismissed the complaint. This point was not considered at all by the Magistrate, who apparently was of opinion that the fact that he had power to take cognizance of the complaint settled the matter.

In my opinion, in a case of this sort, there is considerable force in the contention that a re-trial on the same facts would be oppressive, and, therefore, should not have been allowed. Interference in revision with the exercise of a discretionary power would not ordinarily be justified. But in this case, the Magistrate does not appear to have realised that he had any discretion in the matter.

I direct that the proceeding of the Magistrate against Ma Chit Htain and Maung Shwe Kyaw be stayed, and the complaint of Ma Sein Bwin be dismissed under the provisions of S. 203 of the Code of Criminal Procedure.

PRESENT :—GODFREY, J.

Maung Tun . . . . . *Appellant\**  
 v.  
 Maung Khan and one . . . . . *Respondents.*

*Evidence Act (I of 1872), S. 91—Evidence to prove oral mortgage inadmissible—Inadmissibility of revenue records to prove mortgage.*

The appellant, having attached certain land in the possession of the respondent in a suit under O. 21, R. 63 of the Civil Procedure Code, attempted to prove that the appellant was in possession as mortgagee from the judgment-debtor in April, 1915 and to give oral evidence of the mortgage, and by production of the revenue records. The respondent claimed to have purchased the land orally in 1912.

*Held*, that inasmuch as mortgages of immoveable property in Upper Burma were required to be made by registered deed since the extension of the Transfer of Property Act to Upper Burma, oral evidence of such a mortgage was inadmissible; that the evidence of revenue maps and records can only be received as relevant where evidence other than the documents themselves is admissible.

*Mi Za U and others v. Nga Pyan*, 2 U B R Evidence, p. 3.

*Nawonhi Jan v. Bhuri*, 30 All 331.

*Ma Hlaing and others v. Mg. Chit Su*, 1-R 135—partly dissented from.

[Ss. 54, 59, 107, 117, 118 and 123 were extended from 1st September, 1914 to the whole of Upper Burma except the areas from time to time excluded from the operation of the Indian Registration Act, 1908 (vide *Burma Gazette*, dated 27th June, 1914, Judicial Department, Notification No. 100 of 20th June, 1914)—*Ed.*]

\*Civil Second Appeal No. 204 of 1923 (Mandalay) against the judgment and decree of the District Court of Mandalay in C. A. No. 15 of 1923.

*Pointed out.*—The practice of Courts of first instance in admitting every document and questioning the admissibility afterwards is an entirely erroneous method of procedure and one liable to lead to innumerable difficulties, to say nothing of the prejudicial effect documents improperly admitted are likely to have on the mind of the Judge.

Judgment. *2nd June, 1924.*

The defendant-appellant in this case attached certain land holding No. 17 of 1920-21 in Kanbyu Kwin, Madaya Township, in execution of his decree in the Township Court against one Ma Pwa On, alleging it to be her property. The plaintiff-respondents applied to have the attachment set aside upon the ground that they had purchased the land from Ma Pwa On in 1912-13 and were owners in possession. They failed in their application, however, and then filed the present suit under O. 21, R. 63 for a declaration of their right to have the attachment removed.

Their suit was dismissed in the Subdivisional Court, Madaya, but on appeal to the District Court, Mandalay, the Subdivisional Court's judgment was set aside and the plaintiff-respondents' suit was decreed.

The defendant-appellant now appeals to this Court against the judgment and decree of the District Court.

It is admitted that the plaintiff-respondents have been in possession for the last 9-10 years, and that they received possession from Ma Pwa On; but the question for determination is the nature of such possession, whether as owners by purchase for Rs. 400 as alleged by them or as mortgagees for Rs. 300, as alleged by the defendant-appellant. The plaintiff-respondents adduced evidence of an inconclusive character, such as witnesses who say they happened to be present at the alleged transaction of sale; but they really take the case no further than the fact of possession, which affords a strong presumption of ownership in favour of the plaintiff-respondents. And if the case rested there, there would be no difficulty.

But the defendant-appellant claims to have established that the respondents was in fact a mortgagee for Rs. 300 in April, 1915. Now this was unlike the plaintiff-respondents' allegation of a sale in 1912-13 after the Transfer of Property

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Act had been extended to Upper Burma, and the provisions of S. 59 of that Act, requiring a registered instrument signed by the mortgagor and attested by two witnesses therefore applied, and with it also S. 91 of the Evidence Act, preventing the proof of such a mortgage except by the production of the document itself or by secondary evidence in such cases where secondary evidence is admissible.

There being no registered document in this case, and no question of secondary evidence, the defendant-appellant is faced with the difficulty as to whether he can give any evidence of the alleged mortgage at all. As a matter of fact he has been allowed to give oral testimony on the point, and to put in a map and a counterfoil of an entry in the Revenue Register No. VII of April, 1915, and to call the Revenue Surveyor in support of it. It would seem to be the practice for the Courts of first instance to admit everything and to determine the question of admissibility afterwards—an entirely erroneous method of procedure and one liable to lead to innumerable difficulties, to say nothing of the prejudicial effect documents improperly admitted are likely to have on the mind of the Judge.

And the question now arises as to whether any of this evidence was in fact admissible at all. It is contended that S. 91 of the Evidence Act only excludes extraneous evidence of the terms of the contract, which ought to have been reduced to writing but was not, and, therefore, it is said that the *fact of mortgage* may be proved.

This it seems to me is entirely fallacious. S. 91 provides that "when the terms of a contract, or of a grant or of any other disposition of property, have been reduced to the form of a document, and in all cases, in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself \* \* \* \* \*". A mortgage is a contract. It is also a disposition of property. But it is a particular kind of contract and a particular kind of disposition of property, to which certain recognised incidents or terms invariably attach. It is a transfer of an interest in specific im-

moveable property for the purpose of securing the payment of money advanced by way of loan. These are all *terms* of the contract, and all these *terms* are conveyed by the one word "mortgage."

All that the defendant-appellant would be entitled to prove on the strength of his argument is the fact of the transfer of possession. But that fact is admitted. The terms, upon which such transfer was made, whether it secured the repayment of money that had been lent on loan, he would not be entitled to prove.

I have been referred to various cases on the probative value attaching to authorised maps and entries made in authorised Revenue Registers as corroborative of oral testimony.

*Mi Za U and others v. Nga Pyan* (1); *Nawnhi Jan v. Bhuri* (2); *Mg. Hlaing and others v. Mg. Chit Su* (3), but the law on this point is well settled and can only apply where evidence other than the documents themselves is admissible at all.

The last mentioned case does perhaps go further, for it would seem that the Court had acted upon evidence of entries of a similar mortgage in a similar register of 1915 together with oral testimony, notwithstanding the provisions of S. 91 of the Evidence Act (which was not referred to) and had granted the appellant, who was unquestionably the previous owner, possession upon payment of the mortgage money.

So far as it is to be regarded as an authority for the proposition that a mortgage, which ought to have been by a registered instrument can be proved, I am unable with due respect to agree with it. The fact of the entries was no doubt a relevant fact under section 23 of the Evidence Act, but evidence of it in proof of the mortgage was inadmissible under S. 91.

It follows therefore that the defendant-appellant, being unable to prove his alleged mortgage, the decree of the District Court must be confirmed and the appeal dismissed with costs. Advocate's fees fixed at 3 gold mohurs.

*Mr. Basu* for appellant.

*Mr. Ganguli* for respondent.

1. 2 U B R Evidence, p. 3.

2. 30 All 331.

3. 1 R 155.

PRESENT :—GODFREY, J.

(Mandalay.)

Mg Taw San . . .

Appellant\*.

v.

Mg Po Thein . . .

Respondent.

*Civil Procedure Code (Act V of 1908), O. 21, R. 2—Failure to certify payment by decree-holder—Application for execution—Dismissed as time-barred—Subsequent application mentioning part-payment—Limitation Act, 1908, Arts. 181, 182 (5).*

A decree-holder, having failed to certify part payments made on account of the decree, filed an application for execution after three years from the date of the decree which was dismissed as time-barred. He then filed a fresh application mentioning the payments made which were within three years of the decree.

*Held*, that under Art. 181 read with Art. 182 (5) of the Limitation Act, the application for execution was not time-barred and execution should issue. *Lakhi Narain v. Felamani Dasi*, 20 C L J 131; *Jatindra Kumar Das v. Gayan Chandra Pal*, 46 C 22—followed.

Judgment.

5th June, 1924.

In this case the appellant, who is one of the judgment-debtors in Suit No. 30 of 1919 of the Sub-divisional Court of Myinmu, appeals against an order of the District Court of Sagaing, reversing an order of the Sub-divisional Court and directing that execution should issue against him of the decree obtained by the respondent on the 6th August, 1919.

It appears that the respondent first applied for execution of his decree on the 31st August, 1919, but without result. No subsequent steps were taken to execute the decree until the 21st October, 1922, when the decree was already time-barred. This application was dismissed on that ground.

On the 8th December, 1922, however, he applied to the Court in order to certify certain alleged part payments as having been made to account of the decree before it was time-barred, and followed this up with a fresh application for execution on the 30th April, 1923, giving credit for the part payments alleged to have been made.

\*Civil 2nd Appeal No. 18 of 1924 (Mandalay) against the judgment and decree of the District Court of Sagaing in C. A. No. 122 of 1923.

At the hearing of this last application enquiry was made into the alleged part-payments, which were denied, and the application was dismissed by the Sub-divisional Court, the Court finding that the alleged payments were not proved and that the application was therefore time barred.

On appeal the District Court set aside this finding and order and directed execution to issue. It is against this order of the District Court that the present appeal is preferred.

It is contended on behalf of the appellant that an application made in order to certify payments is not a step in aid of execution; that it does not lie after the decree itself is time barred; that no Court executing a decree shall recognize a payment, which has not been certified; that execution having been refused in the previous application cannot now issue, as that would be questioning orders passed in execution in the same proceedings, and finally that the part payments alleged have in fact not been proved and that the application is time barred.

There can be no doubt upon the authorities that an application to certify is a step in aid of execution. It would also seem clear from the rulings cited in *Lakhi Narain v. Felamani Dasi* (1) and *Jatindra Kumar Das v. Gayan Chandra Pal* (2), from which I see no reason to differ, that an application made by a decree-holder to certify payments made within three years of the decree, may be made at any time within three years from the dates of such payments (Art. 181, Limitation Act), and, if so made, will afford the decree-holder a fresh starting point for limitation within the meaning of Art. 182 (5) of the Limitation Act (see case reported in 46 Calcutta, p. 22).

The previous application for execution, which was rejected, did not, in the opinion of the Court, lie, because no payments had in fact been certified and no application had then been filed to certify them. This omission has now been rectified and an application has been filed. In such circumstances I can see no force in the contention that the present application cannot now be entertained.

---

1. 20 C L J 131.

2. 46 C 22.

The objection taken that under O. 21, R. 2, Civil Procedure Code, that a payment which has not been certified shall not be recognised by a Court executing a decree, therefore falls to the ground.

On the question as to whether the part-payments alleged have been proved or not, I must say that I was at first impressed by the argument that if they had indeed been made, they would surely have been mentioned in the earlier application, but I find that they in fact are mentioned.

In the first application of all—the one of the 31st August, 1919—they were not, of course, mentioned, because they had not then been made. It is true that the first payment of Rs. 200 on the 3rd September, 1919, was made before that application was dismissed for default; but that very default, as apparent from the diary of the execution proceedings No. 28 of 1919 appears to me only consistent with the fact of some payment having been made and strongly corroborative of the decree-holder's case. The entry of the 8th September, 1919 runs:—"Case called. D. H. present, but the notice returned unserved; issue fresh notice to appear on 23—9—1919." That would be the order more or less as of course, and it does not appear that the decree-holder even stated that he wanted a fresh notice. From the next entry it would seem that he did not, for it runs:—"Court-fee not paid—suit (? application) dismissed for default."

In these circumstances it would not appear that the decree-holder, who, if he appeared at all, appeared in person, got much opportunity of certifying a part-payment, and if he did, I do not think it is very much matter for surprise that he did not think of mentioning it; he had not received satisfaction in full, and his pleader was not present to advise him. He does not seem to have been cross-examined about this.

In his next application he does make mention of the three payments now alleged.

The evidence adduced in support of them is not very strong; but I think it is greatly strengthened by the inherent probabilities of the case and the almost irresistible conclusion

that the decree-holder must have received part-payments of some sort or he would not have made default in his first application for execution or have delayed so long in applying again for execution.

I therefore think that the finding arrived at by the District Court was correct, and that the application for execution is not time-barred.

The appeal is accordingly dismissed with costs. Advocate's fees fixed at 3 gold mohurs.

*Mr. A. C. Mukerjee* for appellant.

*Mr. S. Mukerjee* for respondent.

PRESENT :—CARR, J.

Maung Po Tok and one . . . Appellants\*

Ma Le War and two others . . . Respondents.

~~Mortgage—Unregistered deed—S. 91, Evidence Act—Deed inadmissible—~~  
~~Oral evidence of mortgage admissible.~~

Pointed out—The principle laid down in *Mg. Myat Tha Zan v. Ma Dun*, (3 B. L. J. 78) applies also to mortgage transactions and oral evidence is admissible under S. 91, Evidence Act, to show the nature of the transaction in cases where the mortgage was purely oral as well as where an unregistered deed has been executed.

*Mg. Aung v. Shwe Lin*, 1 B. L. J. 203—referred to.

*Mg. Myat Tha Zan v. Ma Dun*, 3 B. L. J. 78: 2 Ran 285; *Jogendra Krishna Ray v. Kurpal Harshi and Co.*, 49 Cal. 345—applied.

Judgment. 3rd September, 1924.

The plaintiff claimed to recover land alleged to have been mortgaged to the defendants, while the defence was that the transaction was a sale. The learned District Judge has drawn a distinction between mortgaging land and handing it over as security for a debt. Presumably this is on the authority of *Mg. Aung v. Shwe Lin* (1). I must confess that I cannot see the distinction. The essence of a usufructuary mortgage

\*Special Civil 2nd Appeal No. 454 of 1923 from the decree of the District Court of Prome in C. A. No. 72 of 1923.

as defined in S. 58 (d) of the Transfer of Property Act is that possession of immovable property is made over in order to secure a debt and one cannot make such a transaction any the less a mortgage by omitting to call it by that name.

In this case the transaction, whether mortgage or sale, was invalid because it was not effected by a registered deed. The defendants claim that an unregistered deed was executed but this is denied by the plaintiff. The District Judge held this document to be inadmissible, in which he was clearly right. He also held that no other evidence of the nature of the transaction was admissible and gave the plaintiff a decree for possession, on her admitted prior title, on payment of Rs. 900 admitted by her to have been borrowed on the security of the land. In effect this is the same as giving her a decree for redemption of an invalid mortgage. There are cases in which it has been ruled that in such a case as this plaintiff may not prove the invalid mortgage and therefore the suit must fail.

But I think the situation has been altered by the Full Bench decision in *Mg Myat Tha Zan v. Ma Dun* (2). The facts there were not quite on all fours with the present case, since there was no allegation of a mortgage. But the principle seems to be the same. It was held on equitable grounds that a sale invalid for want of registration must be looked upon as an agreement for sale and that if possession has been given in pursuance of the transaction the *quasi* vendee can resist a suit for possession by his vendor. It was further held that oral evidence of the agreement can be given. The same considerations apply with equal force to a mortgage invalid for the same reasons. The result, therefore, is that in this case each party may give evidence of the nature of the transaction. The existence of an unregistered deed seems to make no difference. The deed itself is inadmissible under S. 49 of the Registration Act, but the application of S. 91 of the Evidence Act is the same whether the transaction has been purely oral or whether an unregistered deed has been executed.

I would refer also to the case of *Jogendra Krishna Ray v. Kurpal Harshi & Co.* (3), in which a Bench of the Calcutta

2. 3 B L J 78 : 2 R 285.

3. 49 Cal 345.

High Court has laid down that "When in pursuance of an agreement to transfer property the intended transferee has taken possession, though the requisite legal documents have not been executed and registered, the position is the same as if the documents had been executed, provided that specific performance can be obtained between the parties to the agreement in the same Court and at the same time as the subsequent legal question falls to be determined."

There is nothing in this case to show that the defendants' right to specific performance was time-barred. Moreover some of the decisions quoted in *Myat Tha Zan's case* (2) are to the effect that the possessor is entitled to retain possession even if his right to specific performance has become time-barred.

I must hold, therefore, that the evidence in this case other than the unregistered deed is admissible. And on that evidence there can be no doubt that the decision must be in favour of the defendant-appellants.

I therefore set aside the judgment and decree of the District Court and dismiss the plaintiff's suits with costs in all Courts.

*Thein Maung* (I) for appellants.

*N. C. Sen* for respondents.

PRESENT :—YOUNG AND CARR, JJ.

Maung Po Thaug and one . . . Appellants\*  
 v.  
 Maung E Pe and others . . . Respondents.

*Burmese Buddhist Law—Pre-emption—Property purchased jointly by husband and wife—Death of wife—Sale by husband to third party—Right of children to pre-emption of property sold.*

Where a Burman Buddhist husband and wife jointly purchased property, and the wife died leaving children, and the husband then sold the property to a stranger,

\*Civil 2nd Appeal No. 256 of 1923 from the decree of the District Court of Tavoy in C. A. No. 43 of 1923.

2. 3 B. L. J. 78 : 2 R. 285.

*Held*, that the children had a right of pre-emption in respect of the property.

*Held also* that as the husband and wife were joint owners of the whole area and each of them had an undivided half-share in the whole, what passed by inheritance to the husband was the interest of the wife in the whole area, and that the whole of the property sold was subject to the right of pre-emption and not merely one-half.

*Mo Thi v. Tha Kaw*, 4 L B R 128—referred to.

*Ye Nan O v. Aung Myat San*, 8 L B R 466 ; May Oung's Leading Cases 157—discussed.

*Mg. Po Gyi v. Mg. Po Saing and others*, 3 B L J 21—approved.

Judgment. 31st July, 1924.

*Per CARR, J.*—The first defendant-appellant, Po Thaung, married first Ma E (I), by whom he had two daughters, who are still living but are not parties to this suit. After the death of Ma E (I) and in the year 1909 or earlier, Po Thaung married Ma E (II), who already had two sons, the first and second plaintiffs, by her first husband Mg. Su, from whom she had been divorced. By Ma E (II) Po Thaung had two sons, the third and fourth plaintiffs. Ma E (II) died some years ago but there has not yet been any partition of the estate. It is alleged in the plaint, and not denied, that Po Thaung has again re-married, and has left all four plaintiffs living with their grandmother, the mother of Ma E (II).

In the year 1913 Po Thaung and Ma E (II) bought the land in suit by a registered deed in favour of both of them. It was contended by Po Thaung that this was bought with money none of which was contributed by Ma E (II), but on this both Courts below have found against him, holding that the land is the jointly acquired property of Po Thaung and Ma E (II).

In 1922 Po Thaung sold this land to the 2nd defendant Ma Kho by a deed in which he expressly undertook to indemnify her, should any suit be brought by the four plaintiffs. He has contended that before this sale he offered the land to the first two plaintiffs at the same price and that they refused to buy. But here also both Courts below have found against him and have held that there was no offer.

Ma Kho has died during the pendency of this appeal and her son, S. Sin Thun, has been substituted as second appellant.

The plaint was not very happily drafted. It was headed "Suit for setting aside sale of paddy land, cancellation of sale deed and right of pre-emption, valued at Rs. 5,000." But there is no further reference to the right of pre-emption. The contention in the fifth paragraph is that since Po Thaung was not the exclusive owner of the land and had not received the consent of the first two plaintiffs, he had no right whatever to sell the land. The prayer was that the sale be set aside and the deed cancelled and that Po Thaung be directed to convey the land to the plaintiffs on their paying him his share.

The Sub-divisional Judge gave the plaintiffs a decree for pre-emption of the whole of the land on payment of the full price, Rs. 5,000. This was upheld in appeal.

The principal question for decision is whether in such circumstances the plaintiffs or any of them have a right of pre-emption.

The Sub-divisional Judge relied on the decision in *Mo Thi v. Tha Kwe* (1) which at first sight does seem to justify his decision. Tha Kwe was the son of Ko Maung and Ma Yu. After the death of Ko Maung, Ma Yu sold the land, and Tha Kwe sued to enforce his right of pre-emption and succeeded. There was a dispute as to how the land had been acquired and the finding was in favour of Tha Kwe's contention that it had been purchased by Ko Maung and Ma Yu. So far the case is exactly similar to that now under consideration. But it was admitted that the land had formerly belonged to Ma Yu's parents and that it passed from them to Ko Maung and Ma Yu. In his judgment the learned Judge said :—"It is not disputed by either side that the land is the ancestral property of the family of Tha Kwe and Ma Yu." The question whether the children have a right of pre-emption in land purchased by their parents, as against one parent, does not seem to have arisen at all. The finding that there was such a right seems to have been based simply on the fact that the land was ancestral property. The main question decided was that the widow's right of disposal was subject to the son's right of pre-emption.

This decision was in part dissented from in *Ye Nan O v. Aung Myat San* (2), but not so as to affect the present case. But there are some passages in the judgments in that case which throw some light on the general question. Thus Hartnoll, J., at pages 469-470, speaking of the right of pre-emption says that it is claimed by co-heirs "on the ground that they are co-heirs, and it relates to inherited property—property that has descended from a common ancestor or that has come from a common relative." Again on page 472 he says: "The word 'ancestral' used in connection with the right seems to be a misnomer; for the word 'ancestral' should be substituted the word 'inherited.'"

*May Oung* (3) accepts this proposition and says: "In order to be the subject-matter of a right of pre-emption the property concerned must have been inherited from some one . . . The essential requisite is that the property must have come to the seller by way of inheritance; if he or she had acquired it in any other manner there is no right in regard to it even if it had previously belonged to an ancestor." This last sentence is perhaps inconsistent with *Mo Thi's case* (1) but a later unreported decision (Civil 2nd Appeal No. 207 of 1910) is referred to. In that case a father gave a piece of land to one of his sons by registered deed. Both father and son died and the son's widow sold the land. It was held that another son had no right of pre-emption. Thus that case is not parallel with the present one.

The latest decision is that in *Mg. Po Gyi v. Mg. Po Saing* (4), in which the facts were essentially the same as in the present case. The land had been acquired by the father and step-mother and after the death of the father it was sold by the step-mother. Following *Mo Thi's case* (1), it was held that the sons had a right of pre-emption.

It may be argued that in the present case [and in *Mg. Po Gyi's* (4) also] only one-half of the land has been the subject of inheritance and that Po Thaung is the owner of the other half by right of purchase and that therefore only the one-half is subject to the right of pre-emption. This is an arguable proposition. But Po Thaung was not the owner of a definite one-

1. 4 L B R 128.

2. 8 L B R 466.

3. L C 157.

4. 3 B L J 21.

half of the area in dispute. He and his wife were joint owners of the whole area, the interest of each being one-half. Thus Ma E's rights extended over the whole area and what has passed by inheritance is an interest in the whole area. On full consideration I think that this is the correct view and that the whole holding is subject to the right of pre-emption.

I think, however, that the form of the final order and decree of the Sub-divisional Court requires amendment in the interests of finality and the avoidance of further disputes. The deed of sale to the second defendant should become void only on the plaintiffs paying in the money to complete the purchase. And since the second defendant has presumably paid the price to the first defendant it is the former who should receive the money. The proper course, however, is to order payment into Court and then if there is any dispute between the defendants as to which of them is entitled to the money it can be decided by the Court before ordering payment.

The defects to be remedied are only formal and the plaintiffs must have their costs.

The decrees of the Courts below are modified and there will be a final decree as follows :—

That on the plaintiffs, within six months from this date, paying into Court the sum of Rupees five thousand only, less the total amount of their costs in this suit in all three Courts, the sale-deed of the land in suit executed by the first defendant in favour of Ma Kho shall become void, and the second defendant shall deliver to the plaintiffs the land in suit and the first defendant, Po Thaug, shall execute and register a conveyance of the land in suit to the plaintiffs for a consideration of Rupees five thousand only.

*Mr. Ankelsaria* for appellants.

*Thein Maung* (I) for respondents.

PRESENT :—BAGULEY, J.

Bawa Rowther

Appellant\*.

v.

King-Emperor

Respondent.

*Criminal Procedure Code, (Act V of 1898) S. 162—Charge under S. 411, Indian Penal Code—Statements by co-accused to Police as to location of stolen property inadmissible—Ss. 27 and 157 of the Indian Evidence Act in conflict with amended S. 162, Criminal Procedure Code—Latter provision prevails.*

Under the amended provisions of S. 162, Criminal Procedure Code, the information obtained by a Police-officer from any accused party cannot be given in evidence in a trial. Such information can no longer be proved under S. 27, Evidence Act, and it will be necessary for the Police-officer merely to prove the fact discovered as the result of such information stating that he acted "on information received."

Section 162, Criminal Procedure Code, where it is in conflict with S. 27 (or 157) of the Evidence Act, must be held to over-ride those provisions.

[See Circular No. 7 of 1924, dated 17th July, 1924 of the High Court Rangoon appended to this report.]

Judgment. 6th September, 1924.

This case has been tried with a complete disregard of the provisions of S. 162 of the Criminal Procedure Code, as recently amended.

In determining whether the guilt of the accused has been proved, it is necessary to ignore entirely all evidence which is held to be inadmissible under this section.

The first witness, Guruswamy Servai, states that the first accused, Bingaren Servai, was his cook ; that he disappeared, and at the same time jewellery disappeared from his house also ; that he searched for, and found, the 1st accused ; and that, when questioned, the first accused said that he had entrusted most of the jewellery to Bawa, who is the present appellant. He says that afterwards, in consequence of what the first accused said, the Police arrested the present appellant ; and that, the next day, the witness, a Police-officer and the

\*Criminal Appeal No. 845 of 1924 against the order of the E. S. D. M. Rangoon, in Cr. Reg. Trial No. 400 of 1924.

second accused journeyed to Nyaunglebin, where Moideen Pitchay produced some pieces of gold, which were unidentifiable. That, I think, is all the relevant evidence with regard to the appellant that I can find in the first witness's statement.

The next witness is Moideen Pitchay. He says that he met the appellant in Rangoon; that the appellant asked him to make some jewels; that he took him to the grocery stall of the third accused; and that, on the instructions of the appellant, the third accused gave him some pieces of gold.

The 3rd witness, Ponnia Asari, says that he had seen the first and second accused having a chat.

The 4th witness, Rathnavelu, knows nothing about the appellant.

The 5th witness, Veerabhadra Devar, deposes to the first accused saying that he had given most of the jewellery to the appellant.

The 6th witness, Anga Muthu, says the same.

The 7th witness, Maung Aung Dun, is the head-constable of the Myetada Guard Police Station. Practically the whole of his statement is inadmissible under S. 162 of the Criminal Procedure Code.

The 8th witness, Rajamma, knows nothing about the appellant.

In the examining Court, the 1st accused denied all knowledge of the matter, and denied having said that he had given any gold to the appellant. The appellant also denies everything.

The defence is directed to showing that the appellant is a substantial man of good character, and that is all.

I note that, after the charges had been framed and the accused examined, the Magistrate actually recalled the Police witnesses to prove the statement alleged to have been made by the 3rd accused. Under what provision of the Act this is admissible, I have not the least idea.

The accused has been convicted, it would seem, mainly because the Magistrate was of opinion that the pieces of gold with Moideen Pitchay were discovered in consequence of a

statement made by the present appellant to a Police-officer, and this, he says, is admissible under S. 27 of the Evidence Act.

The view which this High Court takes is that S. 162 of the Criminal Procedure Code, in its present form, overrides S. 27 of the Evidence Act, and, it must be pointed out that the pieces of gold, which, Moideen Pitchay says, he got from the appellant, have not been proved to be any part of the stolen property.

I can see no evidence upon which the appellant can be convicted.

I set aside the conviction and sentence. The appellant will be acquitted and released so far as this case is concerned.

*Kyaw Htoon* for appellant.

---

HIGH COURT OF JUDICATURE AT RANGOON.

CIRCULAR NO. 7 OF 1924.

*Dated Rangoon, the 17th July, 1924.*

---

TO

ALL MAGISTRATES.

The attention of all Magistrates is directed to the provisions of S. 162, Criminal Procedure Code. The practice of putting Police-officers into the witness box for the purpose of general corroboration or contradiction of witnesses by means of their statements of the Police is no longer permissible.

Prosecution witnesses may be cross-examined on their statements to the Police *where reduced to writing*, at the request of the accused or, where the accused is undefended and ignorant by the Court itself acting in the interests of the accused.

Where such a request is made or where the Court itself desires to act in the interests of the accused a copy of the statement shall be furnished to the accused, excluding where necessary from the copy matter referred to in the second proviso of S. 162. The attention of the witness should then be called to the facts of the statement (as contained in the copy) relied upon to contradict him. If he denies making the statement the Police-officer who recorded it or another witness who can prove it must be called to prove it. When it is duly proved it can be used to contradict the witness.

The question may also arise as to the interpretation of Ss. 27 and 157 of the Evidence Act in the light of S. 162 of the Criminal Procedure Code as now amended. The view of the Hon'ble Judges is that where S. 162 conflicts with the earlier enactments it must be held to overrule them.

The difficulty then arises as to how a Police-officer is to give a coherent account of how he comes to find property, etc. as the result of information received from the accused. The information can no longer be proved under S. 27 of the Evidence Act and it will be necessary for the Police-officer merely to prove the finding of the property (or whatever fact was discovered as the result of such information) stating that he acted "on information received."

S. 32, cl. (1) of the Evidence Act is expressly exempted from the operation of S. 162 of the Criminal Procedure Code. Consequently statements made to the Police by a deceased person as to the cause of his death or as to any of the circumstances of the transactions which resulted in his death may be proved in cases in which the cause of that person's death comes into question.

Maps can no longer be proved by the evidence of Police-officers as to statements made to them and it is therefore advisable that where possible they should be drawn by some other agency.

Identification parades should not be conducted by the Police as statements made to Police-officers are inadmissible in evidence. If the parade is conducted by any person other than a Police-officer statements made to him are admissible.

(By order)

RAIBART M. MACDOUGALL,  
Registrar.

PRESENT :—ROBINSON, C. J. AND BAGULEY, J.

Ma Mi and one

v.

Kalenthher Ammal

Applicants\*

Respondent.

*Civil Procedure Code (Act V. of 1908) S. 109—Application for leave to appeal to Privy Council—Remand order—Leave to be granted where remand order decides cardinal point in case.*

An order of remand is an interlocutory order and ordinarily leave to appeal to the Privy Council is not given from such an order. But if a remand order has the effect of deciding finally the cardinal point in the suit, it must be held to be a final order from which leave to appeal should be granted.

*N. Venkataranga Row Garu v. Raja K. V. Narasimha Rao Garu*, 38 Mad. 509; *Ahmad Husain v. Gobind Krishna Narain*, 33 All. 391—referred to.

*Habib-un-nissa v. Munawar-un-nissa*, 25 All. 629; *Rahimbhoy Habibhoy v. C. A. Turner*, 15 B. 155; *Saiyid Muzhar Hossein v. Mussamat Bodha Bibi* 17 All 112; *Ananda Gopal Gossain v. Nafar Chandra Pal Chowdhry*, 35 Cal. 618—followed.

\*C M Application No. 59 of 1924 for leave to appeal to His Majesty in Council from a remand order of the High Court in Civil 1st Appeal No. 74 of 1923.

Judgment. 1st September, 1924.

ROBINSON, C. J. :—This was a suit brought by one Kalen-ther Ammal claiming to be the widow of Sheik Moideen, and Mahomed Esoof, who claims to be his son, for the administration of his estate.

Numerous issues were raised, one being whether the present respondent had been divorced by Sheik Moideen. The original Court decided in defendants' favour and there would be an end to the suit. The decision arrived at was that there had been a valid divorce, and the plaintiff's suit was dismissed.

From that decree she appealed to this Court, which held that no divorce had been proved, and remanded the suit to the original Court for decision on the merits.

Defendants now apply for leave to appeal to His Majesty in Council, claiming that this Court's order is a final order within the meaning of S. 109 of the Code of Civil Procedure. The application is opposed on the ground that it is a mere order of remand, and that it would be open to the defendants to raise this point in appeal to His Majesty in Council when the whole case has been decided.

I agree with the decision in *N. Venkataranga Row Garu v. Raja K. V. Narasimha Rao Garu* (1), and *Ahmad Husain v. Gobind Krishna Narain* (2), that the provisions of S. 105 (2) of the Code will not debar applicants from raising the question before the Privy Council.

The question that arises for decision here is whether the order of this Court is a final order from which a right to appeal is given as of right when the amount or value of the subject-matter in dispute is, as in this case, admittedly over Rs. 10,000.

We have been referred to a very large number of decisions amongst which there is a considerable conflict of opinion on the point. It may be accepted that ordinarily an order of remand is merely an interlocutory order; but, in my opinion, that does not finally decide the question, and if the order in question has the effect of deciding finally the cardinal point in the suit, it must be held to be a final order from which leave to

1. 38 Mad. 509.

2. 33 All. 391.

appeal should be granted. This view was taken in *Habib-un-nissa v. Munawar-un-nissa* (3).

In *Rahimbhoy Habibhoy v. C. A. Turner* (4) their Lordships of the Privy Council, in dealing with the case in which the Court passed a decree directing the taking of accounts against the defendant, said: ". . . . It is true that the decree that was made does not declare in terms the liability of the defendant, but it directs accounts to be taken which he was contending ought not to be taken at all; and it must be held that the decree contains within itself an assertion that, if a balance is found against the defendant on those accounts, the defendant is bound to pay it. Therefore the form of the decree is exactly as if it affirmed the liability of the defendant to pay something on each one of these claims, if only the arithmetical result of the account should be worked out against him.

" Special leave to appeal was granted, because the real question in issue was the liability to account which had been determined against the defendant.

The question in issue in the present suit is the liability of Ma Mi and Mahomed Esoof to account, and what has been decided is that they are so liable.

Again, in *Saiyid Muzhar Hossein v. Mussamat Bodha Bibi* (5), after referring to *Rahimbhoy Habibhoy's case* (4), their Lordships held that, where the point raised and decided by the first Court was that no valid will had been made, and it accordingly dismissed the suit, and the High Court on appeal reversed the decree and remanded the suit for disposal on the remaining issues, holding in favour of the plaintiff as to the will, the question as to the will went to the foundation of the plaintiff's claim and was the cardinal point in the suit, and that, therefore, although there might still be subordinate enquiries to make, they granted leave to appeal.

In *Ananda Gopal Gossain v. Nafar Chandra Pal Chowdhry* (6), the Calcutta High Court, following these two decisions of their Lordships of the Privy Council, granted leave to appeal in a case where the question was whether notices un-

3. 25 All. 629.

5. 17 All. 112.

4. 15 B. 155.

6. 35 C. 618.

der S. 167 of the Bengal Tenancy Act had been properly served or not. The first Court held that service of notices had not been proved and dismissed the suit. The High Court on appeal held that notices were duly served, and remanded the case for retrial on its merits. It was held that this question of service of notice was the cardinal point in the case, that though the order of the High Court purported to be only an order of remand, leave should be granted. It is pointed out that the decision of the question in defendants' favour would finally decide the case.

It appears to me that in the present matter the main point in dispute between the parties is whether the plaintiff had been legally divorced or not. The decision on that point in defendants' favour would put an end to the whole suit. The point can rightly be described, in the language of their Lordships, as the "cardinal point in the suit"; and the order passed by this Court must therefore be held to be a final order within the meaning of S. 109 of the Code of Civil Procedure. There are, no doubt, decisions on questions of limitation where leave to appeal is not granted because the parties are relegated to the same position they occupy at the commencement of the suit subject to the decision on the question on the point of limitation. Where the decision is on the question of *res judicata* the authorities are not at one, but every case must be decided on its own circumstances; and in the matter before us I consider it is impossible to hold that the order in question was a mere order of remand, and I would grant leave to appeal as prayed.

Respondents must pay the costs of this application. Advocate's fees five gold mohurs.

BAGULEY, J.:—I concur, but would like to add a few remarks. There were originally nine issues framed. Of these, Nos. 5 and 9 were with regard to the maintainability of the suit, and with them we are not now concerned. The suit was held to be maintainable. Issues Nos. 1 and 6 were decided in favour of the plaintiff, being given up by the defendants. Under them it was held that plaintiff had been lawfully married to the deceased, and that she was of sound mind.

There remain five issues. Of these, No. 2 decided the status of the plaintiff at the time of filing the suit; Nos. 3

and 4 together decided the status of the defendants at the time of filing the suit ; No. 7 decided the value of the estate left by the deceased ; and the remaining one, No. 8, depended on the result of the remainder.

There were those two cardinal points to be decided—the status of the plaintiff and the status of the defendants.

In appeal it was decided that she had a status, which would enable her to share in the estate. I do not see how this could be regarded as a preliminary point, even though the state of the record made it necessary for the case to be sent to the trial Court for further evidence.

The decision, against which it is now sought to appeal, was one which concerned one of these cardinal points of the case, and, therefore, in my opinion, the appeal will now lie.

There is also a very important point of law raised with regard to the admissibility of a certain form of secondary evidence of the contents of a document.

I, therefore, concur in the proposed order giving permission to appeal.

*Clarke* for applicant.

*Mr. Chari* for respondent.

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PRESENT :—ROBINSON, C. J., AND BAGULEY, J.

A. R. A. R. S. M. Chokkalingam . . . Applicant\*

v.

The Commissioner of Income-tax, Burma . . . Respondent.

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*Income-tax Act (XI of 1922), S. 66 (2)—Reference to High Court—Fee of Rs. 100 payable in respect of each application—Not on each point referred.*

The fee of Rs. 100 required to be paid for a reference under S. 66 (2), Income-tax Act, is payable in respect of each application and not in respect of each point raised in the application.

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\*C M Application No. 60 of 1924 for *mandamus* under S. 66 (3), Indian Income-tax Act 1922.

Judgment. 26th August, 1924.

*Per* ROBINSON, C. J. :—The Commissioner of Income-tax received an application that certain questions of law be referred to this Court. The application was accompanied by a fee of Rs. 100 as required by S. 66 (2) of the Act. The application specified twelve points.

The Commissioner decided that the first was a question of fact and not of law and he refused to state a case.

As to the remaining eleven points he held that no fee had been paid in respect of them and he saw no reason to take up any of these points on his own motion.

On the question of the fee we are of opinion that it is to be paid in respect of the application and not in respect of each point raised therein. The section contemplates each application is a case, and Sub-S. (5) shows that each case may raise several questions of law. Words in singular should be read as including the plural unless there is anything in the context to point to a different meaning.

We are therefore of opinion that the learned Commissioner was in error on this point and that he should have dealt with the other points raised. It is obviously inconvenient that this matter should be disposed of piecemeal and indeed the questions raised appear to overlap.

We therefore return the case to the Commissioner with a request that he will deal with the other points raised and then refer the case or refuse to do so.

The present application will remain pending with liberty to the petitioner to apply.

*Keith* for applicant.

*Mya Bu, A. G. A.* for respondent.

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[S. 66 (2) :—Within one month of the passing of an order under S. 31 or S. 32, the assessee in respect of whom the order was passed may by application accompanied by a fee of Rs. 100 or such lesser sum as may be prescribed require the Commissioner to refer to the High Court any question of law arising out of such order, and the Commissioner shall, within one month of the receipt of such application, draw up a statement of the case and refer it with his own opinion thereon to the High Court.]

PRESENT :—CARR, J.

Ah Kit . . . . . *Appellant\**  
 v.  
 King-Emperor . . . . . *Respondent.*

*Criminal Procedure Code (Act V of 1898), S. 234—Three separate charges under S. 408, Indian Penal Code against first accused—Abetment of two of such charges only against second accused—Misjoinder.*

Where three separate offences under S. 408, Indian Penal Code were charged against the first accused and the second accused (appellant) was charged with abetment of two of the same offences but not of abetment of the third,

*Held*, that the trial was bad for misjoinder that although S. 239, Criminal Procedure Code, may permit the joinder of the first two charges against the first accused with the charges for abetment of those offences against the 2nd accused, there is no provision which allows the joinder of the third charge against the 1st accused with either or both of the charges framed against the 2nd accused.

Judgment. 23rd August, 1924.

There has been a misjoinder of charges in this case. The first accused was charged, under S. 234, Criminal Procedure Code, with three separate offences punishable under S. 408, Indian Penal Code. The second accused, the present appellant, was charged with abetment of two of these offences, but not of abetment of the third.

S. 234, Criminal Procedure Code, permits the joinder of the three charges against the first accused, and it may be that S. 239 read with S. 234, permits the joinder of the first two charges against the first accused with the charges of abetment of those two offences against the second accused. But there is no provision which permits the joinder of the third charge against the first accused with either or both of the charges against the second accused.

S. 233, therefore, governs the case, and the trial was illegal.

\*Cr Appeal No. 864 of 1924 from the order of the E. S. D. M., Rangoon in Cr Reg No. 233 of 1924.

I set aside the convictions and sentences passed on the appellant Ah Kee or Ah Kit and direct that he be re-tried by some Magistrate to be appointed for the purpose by the District Magistrate, Rangoon.

Bail should be allowed pending the re-trial.

PRESENT :—BAGULEY, J.

Appaya and eight others . . . . . Petitioners\*  
 v.  
 King-Emperor . . . . . Respondent.

*Excise Act (Burma Act V of 1917), S. 30 (a)—36 quarts of country liquor in possession of nine persons in sampan—Separate bundles of four bottles each—Possession separate and not joint.*

The nine petitioners were caught in a sampan with 36 quarts of *kazaw-ye* in nine bundles of four bottles each and were convicted under S. 30 (a) of the Excise Act for being found in joint possession of 36 quarts.

*Held*, that when the liquor of each person is kept separate, as in the present case, that owners of each portion of it are not in joint possession of the whole.

*King-Emperor v. Nga Pyu*, 8 L B R 464 ; *Queen-Empress v. Rajia P J* 405—distinguished.

Judgment. 1st September, 1924.

In this case the accused have been fined Rs. 10 each under the Excise Act in the following circumstances :—

They were all caught in one sampan, and in the sampan were found thirty-six quarts of *kazaw-ye* in nine bundles of four bottles each. The learned Magistrate has convicted them all, holding that they were in joint possession of thirty-six quarts. As authority for this he quotes the case of *King-Emperor v. Nga Pyu* (1). In that case two men were found carrying

\*Cr. Rev. No. 634-B of 1924, being review of the order of the Second Additional Magistrate, Rangoon in Summary Trial No. 1089 of 1924.

a pot containing eight quarts of country fermented liquor, and they were held to have been in joint possession of the eight quarts. This ruling followed the ruling of *Queen-Empress v. Rajia* (2), where also there was a jar containing eleven quarts of toddy said to have belonged to different people.

But the present case is not on all fours with the case quoted by the learned Magistrate. When the liquor is placed in a jar, it is impossible to say that one person is in separate possession of any one part of it. The liquor, as it is being carried, shakes about in the jar, and it is clearly a fact that people, who have each put, say, four quarts into the jar, are jointly in possession of the whole contents of the jar.

In the present case the liquor was in nine separate bundles of four bottles each and presumably each man was in possession of his own four bottles. To hold that everybody in this sampan is in joint possession of all the contents would lay down a principle that all the passengers on an Ocean Liner are in joint possession of all the boxes in the passengers' baggage room—a finding which it would obviously be quite impossible to support.

When the liquor of each person is kept separate, as in the present instance, the owners of each portion of it are not in joint possession of the whole.

I, therefore, set aside the conviction and sentence and acquit the accused. The fines which have been paid will be refunded to them.

PRESENT :—CARR, J.

Mg. Po Lon

.. *Petitioner\**

v.

Mg. Ba On and one

... *Respondents.*

*Criminal Procedure Code (Act V of 1898), S. 145 (1)—No order in writing—Irregularity cured by S. 537—Order that neither party should work the land.*

\*Cr. Rev. No. 492-B of 1924, being review of the order of the S. D. M. of Pyapon in Cr M Trial No. 48 of 1924.

2. P J 405.

The failure to make an order in writing as required by S. 145 (1), Criminal Procedure Code, is an irregularity which, however, is cured by S. 537 if a party has not been prejudiced thereby.

An order that neither party should work the land is not a proper order. If the case is emergent the land should be ordered to be attached.

[S. D. M.'s Diary :—Complainant said that there was a dispute likely to cause a breach of the peace for working the disputed land by both parties. The accused admitted working the land together with the complainant's party. That being the case a breach of the peace is likely to be caused. Therefore order that the land in dispute should not be worked by any party pending disposal of the case.]

Order. 1st September, 1924.

The Magistrate's procedure has been irregular. He did not make an order in writing as required by S. 145 (1), Criminal Procedure Code. But no objection was taken on this ground before the Magistrate and petitioner has not been prejudiced. I think that S. 537, Criminal Procedure Code, is sufficient to cure this defect.

Then his order that neither party should work the land was incorrect. Under S. 145 (4) if he thought the case was emergent he could attach the land.

But I do not think that any interference is called for. Counsel for both parties agree that there is a suit pending between the parties and that the District Court has appointed a Receiver, who is now in possession of the land. The Magistrate should consider this in passing his final orders.

The application is dismissed. Petitioner will pay costs, two gold mohurs, to respondent.

*Ba Shin* for petitioner.

*Hamlyn* for respondents.

PRESENT —BAGULEY, J.

Maung Po Maung ... Petitioner\*

v.

King-Emperor ... Respondent.

*Burma Forest Act (Burma Act IV of 1902) S. 55 (d)—Cutting fire-wood without license—Case closed without conviction—Confiscation of sampan.*

\*Cr. Rev. No. 536-B of 1924, being review of the order of the Township Magistrate (II) of Bogale in Cr. Reg. No. 119 of 1924.

Where certain persons were prosecuted for an offence under S. 55 (d), Burma Forest Act, for cutting fire-wood without a license and the prosecution was closed and no further proceedings were taken except the confiscation of a sampan which was engaged for carrying away the firewood,

*Held*, that the order of confiscation of the sampan was illegal. The Court has power only to order such confiscation where a person is convicted of a Forest offence, but that in cases where the offender is not known or cannot be found the only thing that can be confiscated is the property in respect of which the offence was committed.

Judgment. 1st September, 1924.

This is an application in revision of an order passed by the Township Magistrate of Bogale, directing the confiscation of a sampan:

It would appear that the Forest authorities filed a complaint against four men for cutting wood in the Forest Reserve without a license. The Court issued warrants for their arrest, but they did not come to Court, and, in the end, the case against them was closed. The sampan which they used, however, had been seized by the Police, and the Magistrate directed its confiscation. Against this order of confiscation, Maung Po Maung appealed to the District Magistrate, but the appeal was rejected, and he now comes to this Court in revision.

It is not alleged, or suggested, that the present applicant took any part in the Forest offence. The sampan had apparently been hired from him.

The Magistrate makes no reference to the section of the Forest Act under which he is acting; but it would appear that he is purporting to act under S. 64 (1) of the Burma Forest Act, as that is the only section which gives power to confiscate any "tools, boats, carts and cattle used in the commission of an offence." S. 64, however, only applies to cases in which any person is convicted of a Forest offence; and in the present case no one has been convicted at all. If, however, we turn to S. 66 of the Forest Act, we find the procedure followed when the offender is not known, or cannot be found. Under this section, however, the only thing that can be confiscated is "the property in respect of which the offence has been committed," and the words used are the same as those used in S. 64; but there, in addition to "the property in respect of which such offence has been committed" are used the

words "tools, boats, carts and cattle used in the commission of such offence," which addition is missing from S. 66.

Until, then, a person has been convicted, I see no authority in the Forest Act for confiscating anything except Forest produce in respect of which the offence has been committed.

I, therefore, accept the application and set aside the order confiscating the sampan.

PRESENT :—YOUNG AND BAGULEY, JJ.

V. P. R. V. Chokalingam Chetty v. Seetal Ache and others\*  
and  
P. R. V. Chokalingam Chetty v. M. R. S. P. Singaram Chetty.

*Civil Procedure Code (Act V of 1908), O. 41, Rr. 20 and 33—Omission to implead some of the defendants in appeal—Res judicata as regards such omitted parties—Subsequent application during hearing to add parties—Court's discretionary power to implead not to be exercised.*

Where an appellant has omitted to implead some of the defendants as respondents in an appeal, the result of which is to constitute a *res judicata* in favour of the omitted respondents, and the period of limitation for filing an appeal against them has expired, the Court will not exercise its discretionary power to add such respondents under O. 41, R. 20 or R. 33. To do so would virtually be making a fresh appeal for the appellant against persons who had been exonerated by the decree of the lower Court.

*Subramanian Chetty v. Veerabadran Chetty*, 31 M. 442—followed.

*Amlook Chand Parrack v. Sarat Chunder Mukerjee* 38 Cal. 913.; *Girish Chander Lahiri v. Sasi Sekharswar Roy*, 38 Cal. 329—distinguished.

Judgment. 1st July, 1924.

*Per* BAGULEY, J. :—This judgment covers Civil First Appeals Nos. 242 and 243 of 1922, arising out of Civil Regular Nos. 18 and 19 of 1921, of the District Court, Pegu, both of which cases were disposed of in one judgment.

The litigation started with the winding up of a firm known as K. P. which used to carry on business in Rangoon,

\*Civil 1st Appeals Nos. 242 and 243 of 1922 against the decrees of the District Court of Pegu in C. R. Nos. 18 and 19 of 1921.

Pegu and other places. It seems to have got into financial difficulties about the year 1908, at which time all its properties were placed in the hands of a trustee or manager. His exact position it is unnecessary to determine in this case. His business was to endeavour to liquidate so much of the firm's property as was necessary to pay off its debts, and shortly, to try and save as much as possible out of the wreckage. His efforts were unsuccessful and he gave up the position in 1922. In 1917 the K. P. joint family was adjudged insolvent by the District Court of Ramnad.

In the course of the tenure of his office by the trustee, a sale deed was entered into, which purported to transfer a large amount of land, the property of the K. P. joint family, to one Bansilal Abirchand. Bansilal Abirchand sold some of this land to the E. N. M. K. firm and some to the M. R. S. P. firm. The E. N. M. K. firm subsequently sold the land to other persons.

After the K. P. joint family had been adjudged insolvent, the firm of V. P. R. V., which was one of the creditors, moved the Official Receiver of the District Court, Ramnad, to put up to auction the interest of the K. P. joint family in the lands which were purported to be sold to Bansilal Abirchand. They were duly put up to auction and the interest of the K. P. joint family was bought in by the V. P. R. V. firm. It is claimed that the sale in favour of Bansilal Abirchand was invalid; so in Civil Regular Suit No. 18 of 1921, the plaintiff-appellant, the V. P. R. V. firm sued Bansilal Abirchand, the E. N. M. K. firm and its various sub-purchasers for the return of the land sold to them by the E. N. M. K. firm.

In Civil Regular Suit No. 19 of 1921, the same firm sued Bansilal Abirchand and the M. R. S. P. Chetty firm for the return of the land sold to the latter firm.

Both suits were dismissed by the District Court, Pegu, and the plaintiff-appellant has filed these two appeals.

In Appeal No. 242 of 1922, he joins as respondents all the original defendants in Civil Regular Suit No. 18 of 1921, or their legal representatives, except the E. N. M. K. firm and Bansilal Abirchand.

In Appeal No. 243 of 1922, he makes only the M. R. S. P. Chetty firm the respondent.

As I have said, the plaintiff attacked the original sale of the land to Bansilal Abirchand, which purported to transfer to him many pieces of land, the property of the K. P. joint family. The lower Court dismissed both suits, holding that the sale of the land to Bansilal Abirchand was perfectly valid. This, of course, left no interest in the land with the K. P. joint family, and, therefore, the plaintiff-appellant, in buying the interest of the K. P. joint family at the time of the sale, bought nothing at all.

When the present appeals were argued, it was pointed out that the foundation of the title of all the defendants was the sale deed from the K. P. joint family to Bansilal Abirchand. It was pointed out that the decrees of the lower Courts declared this sale to be perfectly valid as between the plaintiff, Bansilal Abirchand and the E. N. M. K. firm. This finding had been left unappealed against by the omission of Bansilal Abirchand from the appeals; and it was contended that this made the point *res judicata* as between the plaintiff and Bansilal Abirchand. Hence it would also be *res judicata* as between the plaintiff and the sub-purchasers from Bansilal Abirchand.

The point appears to be indisputable and the question then arose as to whether Bansilal Abirchand and the E. N. M. K. firm could be added as respondents in the present appeals.

The decrees appealed against are dated 29th July, 1922, so it is perfectly clear that, ordinarily speaking, limitation has set in to prevent the plaintiff from filing any further appeals with regard to them, but it is contended that these parties can be joined under O. 41, R. 20, or O. 41, R. 33, regardless of limitation. A person added under O. 41, R. 20, must be a person who is interested in the result of the appeal. In the case of *Subramanian Chetty v. Veerabadrán Chetty* (1) it has been held that, where a defendant has been exonerated by the decree of a lower appellate Court and there is no appeal against that part of the decree, he cannot be added as a party

to an appeal filed against other defendants, because he cannot be said to be interested in the result of the appeal. In the body of the ruling, the learned Judges quote with approval the following dictum :—“ We do not think that S. 559 of the Code ” (O. 41, R. 20) “ empowers an appellate Court virtually to make an appeal for an appellant who has refrained from availing himself of his privileges under the law, by introducing for him other respondents than those he has included in his petition of appeal.”

Many cases have been cited before us into which I need not go in detail, but I may say that with two exceptions, they are all cases similar to the illustration given in O. 41, R. 33, which runs as follows :—

“ A claims a sum of money as due to him from X or Y, and in a suit against both obtains a decree against X. X appeals and A and Y are respondents. The appellate Court decides in favour of X. It has power to pass a decree against Y.”

In all cases which have been placed before us, except two, the party added is in the position of Y, in the Illustration. In one of these two cases, *Amlook Chand Parrack v. Sarat Chunder Mukerjee* (2), the appellant had made an application against two parties and had it rejected. He filed an appeal against one party only, and the Court allowed the second respondent to be added as respondent in the appeal. This, however, is a very special case, and the judgment shows that the appellant had endeavoured to make both respondents, respondents in the appeal also, but had been defeated by the Court's officers who had failed to issue the necessary process.

The other case is that of *Girish Chander Lahiri v. Sasi Sekharswar Roy* (3). This is also a somewhat special case. The appellant had been proceeding against his principal opponent in many Courts up to the Privy Council and back again, and in the course of one application, he had, it would appear, omitted to join some minor parties. He was allowed to add them in the appeal.

In the present case, however, we are of opinion that the dictum in *Subramanian Chetty v. Veerabadran Chetty* (1) should be followed. The adding of parties is discretionary and we see no particular reason why we should exercise our discretion in favour of the appellant, who never asked for our assistance in this matter until he was replying to the arguments of the respondents' Counsel. For some reason or other he failed to appeal against the decree which as between him and Bansilal Abirchand, declared that the sale deed in favour of Bansilal Abirchand was good. This finding, which is now beyond direct appeal, carries with it a finding that, as between him and Bansilal Abirchand's purchasers, the sale to Bansilal Abirchand is good.

This being the case, the two appeals must both fail, and they are dismissed with costs.

Clark for appellant.

Das, Foucar, Kyaw Myint and Jijibhoy for respondents.

PRESENT : — YOUNG AND CARR, JJ.

D. H. Atchia and Company	...	<i>Appellants*</i>
	v.	
M. E. Jeewa	...	<i>Respondent.</i>

*Rangoon Small Cause Court (Burma Act VII of 1920), S. 17—Application for ejectment against tenant—Sub-tenant in actual possession—Not impleaded as party—Order against tenant—Symbolical possession—Civil Procedure Code, O. 21, R. 36 applicable.*

Where an order for ejectment is obtained by a landlord against his tenant under S. 17, Rangoon Small Cause Court Act, and the premises are in actual occupation of a sub-tenant who was not made a party to the proceeding, only symbolical and not actual possession can be granted as against the sub-tenant. The provisions of O. 21, R. 36 of the Civil Procedure Code apply to orders for possession under S. 17, Rangoon Small Cause Court Act. The Court cannot in such a case make an order in execution for actual possession as against the sub-tenant.

I. 31 M 442.

\*Civil Mis. Appeal No. 72 of 1924 against the order of the Rangoon Small Cause Court in C. M. No. 379 of 1924.

Judgment. 29th July, 1924.

*Per* YOUNG, J.—The respondents filed an application for execution of a Small Cause Court decree for ejectment obtained against one H. M. Suleman, his tenant, alone, by actual ejectment of the judgment-debtor the said H. M. Suleman and all persons claiming under him including the present appellant, one of his sub-tenants. The suit and decree was against H. M. Suleman alone, and the appellant was no party to the one and not bound by the other. Under the Civil Procedure Code, O. 21, R. 36, only symbolical possession can be granted where the tenant is not bound by the decree.

This provision of the law is applicable to the Small Cause Court, *vide* S. 23 (a) (iii). Therefore, only symbolical possession and not actual possession could be granted of the premises in question. The order, therefore, declaring that the respondent is entitled to obtain an order compelling the applicant to deliver up possession is incorrect and must be altered to a declaration that the respondent is only entitled to symbolical possession as regards D. H. Atchia and Company.

As this does not operate as an order for actual possession the applicants have succeeded and must have their costs three gold mohurs.

*Per* CARR, J.—In a proceeding under S. 17 of the Rangoon Small Cause Court Act the respondent obtained an ejectment order against one Suleman. In execution he sought to enforce this order against the appellant, who claims to be a sub-tenant under Suleman, and who is admittedly in occupation of the premises. Appellant applied to cancel the order against him and the Judge dismissed his application. The reason he gave was that the respondent, having obtained an ejectment order against Suleman is entitled under S. 17 of the Act to obtain an order compelling the appellant to deliver up possession.

This shows that the learned Judge has misunderstood S. 17. The procedure under that section is prescribed in Rule 79 *et seq* under the Act, and, as I have said, it was under that section that respondent obtained his order against Suleman. Such an order cannot be passed in execution and if the respondent wishes to eject the appellant, he must proceed as laid down by the rules.

NOVEMBER PART

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The appellant was not a party to the proceedings and therefore is not bound by the order. In such circumstances under O. 21, R. 36, of the Code of Civil Procedure only symbolical possession can be given. This provision is applicable to the Small Cause Court under S. 23 (a) (iii) of the Act and therefore only symbolical and not actual possession can be given as against the appellant.

It has been objected that since the appellant is not a party to the suit he has no right of appeal. In my view since the respondent has sought to eject the appellant as if he were a party he cannot now contend that appellant has no right of appeal. I do not, however, consider this question of importance, for even if there were no right of appeal I should certainly interfere in revision.

I would allow the appeal and declare that the ejectment order is not enforceable against the appellant. The respondent to pay the appellant's cost. Advocate's fee three gold mohurs.

*Mr. Doctor* for appellants.

*Mr. A. B. Banerjee* for respondent.

PRESENT : —BAGULEY, J.

A. V. Joseph

Appellant\*

v.

King-Emperor

Respondent.

*Criminal Procedure Code (Act V of 1898), S. 342 (4)—Evidence Act (1 of 1872)—Trial before Magistrate—Accomplice, if not co-accused in same trial may be examined as witness.*

The appellant was charged under Ss. 471 and 468, Indian Penal Code, for causing a false hammer to be made and using such hammer for butting certain sleepers which he was to supply under contract to the Bengal-Nagpur Railway. The trial was before a 1st class Magistrate. Two persons, who, according to their own statements, were accomplices of the appellant, were examined as prosecution witnesses.

It was contended for the appellant that no pardon could have been tendered to them, as the offence charged was one triable by a Magistrate, that they had

\*Cr. Appeal No. 890 of 1924 from the order of the Western Sub-divisional Magistrate of Rangoon in Cr. Reg. Trial No. 1560 of 1923.

not been sent up for trial, nor convicted, acquitted, or discharged, and were therefore "accused" persons, and as such no oath could be administered to them, and that their evidence was not admissible.

Held (1) that in a trial before a Magistrate an accomplice is a competent witness and may be examined on oath provided he is not a co-accused under trial in the same case ;

(2) an "accused" within the meaning of S. 342 (4), Criminal Procedure Code, means an accused then under trial and under examination by the Court ;

(3) S. 118 of the Evidence Act makes no distinction between witnesses who are called for the prosecution and those called for the defence.

*Regina v. Hanmanta*, 1 B 610 ; *Queen-Empress v. Dala Jiva*, 10 B 190 ; *Empress of India v. Ashgar Ali*, 2 A. 260—not followed.

*Queen-Empress v. Mona Puna*, 26 B 661 ; *Mohesh Chunder Kopali v. Mohesh Chunder Dass*, 10 C 553 ; *Empress v. Durant*, 23 B 213 ; *Akhoy Kumar Mookerjee v. Emperor*, 45 C. 720 ; *Babu Singh v. Emperor*, 33 C. 1353—referred to and approved.

It was also contended for the appellant that the failure of the Police to send up the accomplices for trial under S. 170, Criminal Procedure Code, and the Magistrate's failure to issue process against the accomplices who were implicated in the crime, was disobedience of an express provision of the Code which rendered the whole trial bad according to the principle laid down in *Subrahmania Aiyar v. King-Emperor*, 25 M 61 (P. C.).

Held, (1) that the case cited referred to a "trial" and "the mode in which it was conducted," and was no authority for holding that every trial which is preceded by a Police investigation in which they have failed to comply with Chapter V of the Criminal Procedure Code in its entirety is bad ;

(2) a Magistrate is not bound under the Code, at any stage of a trial, to stop the proceedings, arrest any person against whom he thinks there is a chance of getting a conviction, and start the original trial *de novo*. *Govinda Sambhuji Mali v. Emperor*, 58 I C 449 ; *Subrahmania Aiyar v. King-Emperor*, 25 M 61 (P C)—discussed and explained.

Held also, the Court may convict on the uncorroborated testimony of an accomplice if satisfied as to his veracity. *Po Chit and one v. King-Emperor*, 6 L B R 4—affirmed.

[In the result his Lordship acquitted the accused on the facts.]

Judgment. 28th August, 1924.

The appellant, A. V. Joseph, has been tried and convicted by the Western Sub-divisional Magistrate of Rangoon on a charge of fraudulently and dishonestly using a forged document under S. 471 read with S. 468 of the Indian Penal Code, and sentenced to nine months' rigorous imprisonment and a fine of Rs. 1,000, or, in default, a further six months' rigorous imprisonment.

The appellant is a timber trader on a large scale, and has been supplying sleepers to the Bengal-Nagpur Railway Company, Limited, for some years. He has had several contracts, and the particular contract which is now in question is one known as "No. 4" for 11 3/4 lakhs of sleepers.

The Railway Company appointed a special officer, Mr. Lamond, for passing sleepers. The procedure was as follows :—

The appellant, or his sub-contractors, got a large number of sleepers ready for inspection, laying them out in rows. On Mr. Lamond's arrival, he would walk up one row and, as he passed each sleeper, it was turned over in his presence, so that he could see both faces of it. Having got to the end of the row, he would walk down, examining the butt ends of the sleepers on one side, and then return from the other side of the row, examining the opposite butt ends of the sleepers. Any sleeper which he refused to pass was originally marked on its face in the middle with a hammer mark, "R. E. J."; but later, in deference to the objections raised by the appellant, the use of the "R. E. J." hammer was discontinued, and the sleepers refused were simply marked with a chalk. When inspection of the row was complete, all those sleepers that he had passed were marked with a particular passing hammer, which was varied from time to time; and, it would appear that, while this was being done by the coolies, he would be examining the next row. It does not appear in evidence that he stood over the coolies while they used the hammers.

Before Mr. Lamond's appointment, sleepers supplied by Joseph to the Bengal-Nagpur Railway were passed by various passing officers, who appear to have been engineers in the employ of the Burma Railways, and various passing hammers were used. From the time Mr. Lamond began his work, he used a hammer for passing sleepers, bearing the letters

C
B R

He says that there were three hammers made of this description, of which two were issued to, and used by, him. What happened to the remaining hammer does not appear from the record. It seems to have been left in the possession of the Burma Railways.

Mr. Lamond started his duties on the 1st of September, 1921, and he used these two hammers from the beginning. About June, 1922, he got a fresh hammer or hammers made, bearing the letters "C. B. R." only without a triangle, and the two hammers he had previously used were thrown into deep water in the Maubin river. They have, of course, not been produced in Court.

Under the terms of the contract, sleepers were to have been of four kinds of timber, namely, Pyinkado, Taukkyan, Ingyin and Thitya only. It would appear that, when the shipments of sleepers were received in India by the Bengal-Nagpur Railway, they failed to give satisfaction; they were reported, or some of them were, to have been warped, waved, split, and as timber not mentioned in the contract. Eventually, information was given to the Railway authorities that Joseph was cheating over his contracts, and that he was somehow getting sleepers marked with what purported to be Mr. Lamond's hammer, but which were not so marked. Investigations were set on foot, and, eventually, Mr. Lamond made a report to the Police, charging Joseph under S. 420, Indian Penal Code, and stating that "a large number of sleepers were marked by, or under, A. V. Joseph's instructions with a false hammer mark manufactured in imitation of the mark used by me in marking sleepers passed by me."

The case was tried by the Western Sub-divisional Magistrate, Rangoon, and it would seem that the idea originally was that the charge, on the facts proved should be one under S. 420, Indian Penal Code; but, for some reason which has not been explained, when the charge was actually framed, it was under S. 471 read with S. 468, Indian Penal Code. I mention this, because, I think, this would explain why the evidence has come up in the form in which it has.

When the case came to be tried, after the evidence of Mr. Lamond, who had no personal knowledge of Joseph's malpractices, beyond the fact that sleepers, which, he contended, had never been passed by him, had been received by the Bengal-Nagpur Railway, the main evidence was found to be that of two witnesses named Hormasji and Chit Maung. Hormasji is a man who used to be a mill manager under Joseph. He

has parted with Joseph on what are clearly, unfriendly terms, and, since he left his employment, there has been a civil suit between them with regard to his pay and Provident Fund. Chit Maung is Hormasji's wife's nephew, and he would appear to be more or less a hanger-on of Hormasji.

Hormasji's statement, so far as the forgery is concerned, is that, on Joseph's instructions, he got Chit Maung to make a hammer, which was an exact imitation of the one used by Mr. Lamond to mark passed sleepers with. Chit Maung corroborates his statement. It was stated by Hormasji that the way in which the false hammer was used was as follows :—

The sleepers, which were to be passed by Mr. Lamond, were cut a few inches longer than necessary; they were then put up to Mr. Lamond, and he passed them. Subsequently, after he had departed, an inch or so was cut off each end of the sleepers, or some of them, which he had passed, thereby removing his hammer marks. In place of the sleepers so treated, a false hammer mark was put on the sleepers which Mr. Lamond had either rejected, or not seen, and which may or may not have been of the prescribed kind of timber. These were shipped in place of the ones which Mr. Lamond had passed, and then the sleepers from which the genuine marks had been removed were put up again for Mr. Lamond to pass on his next visit.

It is quite patent that, without the evidence of Hormasji and Chit Maung, the case would have to fall, and the first legal point, which was argued before me in this appeal, was that Hormasji and Chit Maung were wrongly examined as witnesses, and that their statements on oath should not have been recorded by the Magistrate and must be excluded from the consideration of the Court.

I will deal with this point first.

The argument, which was placed before me, has a certain amount of support from several old rulings, and one new one. As I have said, the original complaint was made by Mr. Lamond to the Police, and only one accused person was mentioned in it, namely, A. V. Joseph, the present appellant. He was also the only accused person sent up for trial before the Magistrate. Hormasji and Chit Maung, if their statements are

believed, were undoubtedly accomplices in the offence charged, for both of them knew of the use to which the hammer was intended to be put. They have not been tendered pardons for the simple reason that no pardon could legally have been tendered to them, for the offence charged was one triable by a Magistrate. They have not been sent up for trial before any Court, and, consequently, they have not been convicted, acquitted or discharged.

The argument put forward on behalf of the appellant is that, as soon as the Police began their investigation, it was their bounden duty, under S. 170, Criminal Procedure Code, to have taken steps against both Hormasji and Chit Maung, and that the Police have disobeyed an imperative direction of the Criminal Procedure Code in not sending them up as accused persons before a Magistrate, despite the fact that they were not mentioned in Mr. Lamond's complaint. It is argued that they really come under the category of "accused persons," and that, consequently, no oath could have been administered to them unless they were made approvers, which they could not be made in view of the section under which the complaint was made.

For authority on this point, the first case to be quoted is that of *Regina v. Hanmanta* (1). In that case several accused were sent up for trial on charges of theft and kindred sections, and two persons, who, according to their statements, were accomplices in the alleged fraud, were brought before the Magistrate under a warrant issued by him. The Magistrate gave each of them a certificate of pardon, purporting to be under S. 347, Criminal Procedure Code. They were then examined as witnesses. After their examination was complete, they were informed that their pardon was invalid, and they were asked whether they adhered to their statements, and they replied in the affirmative. It was held that they were "accused persons"; that they had not been legally pardoned; and that, therefore, they could not be examined as witnesses until they had been acquitted, discharged or convicted, and their evidence was rejected as absolutely inadmissible. That case differs from the one under consideration,

in that the witnesses had actually been arrested and brought before a Magistrate. Whereas, in the present case, the two witnesses had never been arrested at all.

The next case is that of *Queen-Empress v. Dala Jiva* (2), in which, following *Regina v. Hanmanta* (1), it was held that, in a case in which a pardon cannot legally have been given, an accused person could not be examined as a witness. This case was also followed in *Empress of India v. Asghar Ali* (3) in which the facts were almost the same.

These are all old cases ; but the case upon which the appellant's counsel mainly relies is a case from the Court of the Judicial Commissioner, Nagpur, namely, *Govinda Sambhuji Mali v. Emperor* (4), which, I understand, has also been officially published by the Nagpur Court. This was also a case concerning a forgery. It would appear that one Sakharam Dinaji was concerned in the forgery. He made a statement to the Police, but was never arrested, nor brought to trial before the Magistrate. He was, however, examined as a witness against the rest of the gang, and mainly upon his evidence, it would appear, they were convicted. The point was raised that he was not a competent witness, following the cases I have already mentioned.

It would seem, however, that the learned Additional Judicial Commissioner held that he was a competent witness, even though illegally converted into a witness ; but it was held that, as the trial had been in disobedience of an express provision of the Code, it was bad, and that the proceedings must be set aside. In coming to this conclusion, the learned Additional Judicial Commissioner considered that he was following the principle laid down by their Lordships of the Privy Council in *Subrahmania Aiyar v. King-Emperor* (5).

It will be seen then that, even this case [*Govinda Sambhuji Mali v. Emperor* (4)] upon which appellant's counsel mainly relies, cannot be held to be in support of the contention that the witness, Sakharam, was an incompetent witness. On page 453, column 1, there is a definite statement which runs

1. 1 Bom 610.

2. 10 Bom 190.

3. 2 All 260.

4. 58 I C 449.

5. 25 Mad 61 (P C).

as follows:—"I hold that Sakharam, even if illegally converted into a witness is none the less a competent witness. This view, which is in accordance with the plain meaning of S. 342 (4), is supported by the authorities and is based on reasons of convenience."

There is, indeed, ample authority for holding that a witness of this nature is a competent witness. In *Queen-Empress v. Mona Puna* (6), where several persons had been arrested in connection with a case of house-breaking and theft, one of the persons so arrested made certain disclosures to the Police, whereupon the Police discharged him and made him a witness, and, at the trial, he gave evidence against the accomplices who were all convicted. It was held that the evidence of this person Hari was admissible under S. 118 of the Indian Evidence Act, despite the fact that he had been illegally discharged by the Police. This case follows an unreported case of the High Court of Calcutta, which is given on pages 667 and 668.

There is another case, *Mohesh Chunder Kopali v. Mohesh Chunder Dass* (7). In this case Mohesh Chunder Dass and one Dulaladee were jointly accused of stealing paddy. It was apparently a complaint case. The Magistrate issued process against Mohesh Chunder Dass only. It was sought to examine Dulaladee as a witness for the defence; but the Magistrate, following *Regina v. Hanmanta* (1), refused to examine him. It was held that Dulaladee should have been examined as a witness. The case was not apparently argued before the Bench; but, nevertheless, it must be taken to be the opinion of the High Court. I may add that it was a two-Judge decision.

I am asked to distinguish this case from the present one, because that was a case in which the "accused person was sought to be examined as a defence witness." But, nevertheless, in these cases S. 118 of the Evidence Act has been relied upon as a basis of decision, and S. 118 in no way distinguishes between witnesses called for the prosecution and those called for the defence.

I would also mention the case of *Babu Singh v Emperor* (8). In this case many authorities have been quoted, which may,

1. 1 Bom 610.

6. 26 Bom 661.

8. 33 Cal 1353.

7. 10 Cal 553.

however, be summed up in the statement appearing on page 1357 :—“The law, however, is well settled, and there can be no controversy on the point that an accomplice, if he is not an accused under trial in the same case, is a competent witness and may, as any other witness, be examined on oath.”

It is true, as was pointed out to me, that, after making this statement, the learned Judges proceeded to discuss the matter for about five pages, and I am asked to hold that this shows that their statement, that there can be no controversy on the point, is hardly correct ; but I take it that they were merely summing up the results of their investigation before giving details of it.

In *Empress v. Durant* (9), where accused persons were being tried separately, because one was a European British subject and the remainder were Natives of India, and, therefore, were entitled to a separate Jury, it was held that Durant was entitled to call his co-accused as defence witnesses ; and it was held that “*the accused*” in clause 4 of S. 342 of the Criminal Procedure Code means the accused then under trial and under examination by the Court. Here also the witnesses were sought to be examined for the defence, but, as I have said before, S. 118 of the Evidence Act makes no distinction between witnesses called for the prosecution and those called for the defence.

The most recent case would appear to be that of *Akhoy Kumar Mookerjee v. Emperor* (10), in which it was held that an accused person actually under trial at the time cannot be sworn as a witness, and no accused, jointly tried, is a competent witness for, or against, the co-accused ; but, when accused persons are tried separately, each one, though implicated in the same offence, is a competent witness at the trial of the other.

It will be noticed that the words “at the trial of the other” are used without distinction as to whether he is sought to be examined as a witness for, or against, the co-accused.

It will, I think, therefore, be seen that there is ample justification for the dictum that it is now beyond controversy that

9. 23 Bom. 213.

10. 45 Cal. 720.

an accused person, when not being tried jointly with a co-accused, is a competent witness for, or against, him.

I will now proceed to deal with the second part of the Nagpur case, [*Govinda Sambhuji Mali v. Emperor* (4)], in which it was held that, because the Police had failed to do their duty under S. 170, and because the Magistrate had failed to issue process against a person shown to be implicated in the crime under S. 204, Criminal Procedure Code, the whole trial was bad. It will be noticed that S. 170 of the Criminal Procedure Code appears in Chapter V, which relates to information to the Police and their powers to investigate. The dictum of the learned Additional Judicial Commissioner is based upon *Subrahmania Aiyar's case* (5). That was a case in which the provisions of the Criminal Procedure Code with regard to joinder of charges had been infringed. There had clearly been a misjoinder of charges. The indictment referred to no less than forty-one acts. Their Lordships of the Privy Council set aside the conviction, holding that the trial was illegally conducted. They state at page 98 :—“ But this trial was prohibited in the mode in which it was conducted . . . . . , ” and, therefore, the conviction was set aside. This is the point which the learned Additional Judicial Commissioner professes to have followed ; but it must be noticed that their Lordships are only referring to the “ trial ” and “ the mode in which it was conducted. ” They are in no way whatsoever adverting to the previous investigation by the Police.

I am quite unable to agree that *Subrahmania Aiyar's case* (5) is a warrant for holding that every trial, which is preceded by a Police investigation, which has failed to comply with Chapter V of the Criminal Procedure Code in its entirety, is thereby void. For example, it is possible that the Police may search a dwelling and find in it stolen property ; the witnesses to the search may be men of unimpeachable character, but not living in the locality in which the search is held. This would be a breach of S. 103 of the Code of Criminal Procedure ; but, nevertheless, the fact of the finding of the stolen property may be proved beyond all possible doubt. If every breach of the

4. 58 I C 449.

5. 25 Mad, 61 (P C).

Criminal Procedure Code renders the trial which follows it void, the owner of that house could never be convicted of possession of stolen property. *Subrahmania Aiyar's case* (5) must be held to refer to a trial of such a case, and it goes no further than that.

It was next argued that it was the duty of the Magistrate, on receipt of the Police papers and before beginning the proceedings under S. 204, to have issued warrants, or summonses, to Hormasji and Chit Maung, and that they should then have been put in the dock together with Joseph. How he could have done this, I entirely fail to see. All that he had before him was the Police charge sheet, on which Joseph's name alone appears. There is nobody else mentioned on the charge sheet except Joseph. Hormasji appears in the list of witnesses, and all that is noted against his name is that "he will prove that the accused gave instructions for false hammers to be made, for sleepers, which had been passed, to be butted and inferior sleepers to be marked with a false hammer mark and substituted therefor, and that the cost of the sleepers, (? hammers), was entered in the accused's account." There is nothing here to suggest that Hormasji was supposed to be an accomplice.

Chit Maung also appears in the witness list, and all that is noted against him is "to prove the order for making a false hammer."

There is nothing whatsoever to suggest that either of these men is an accomplice.

Appellant's counsel argued, no doubt inadvertently, that the Magistrate had the Police papers before him, and that he could have referred to them; but this was obviously suggested in a moment when learned counsel had forgotten the new form of S. 162, Criminal Procedure Code. It appears to me that when the charge sheet was placed before the Magistrate, he could do nothing but issue process against Joseph only. It is possible that, as the case progressed, he might have thought fit to join Hormasji as a co-accused, or he might have directed the Police to take action against him in separate proceedings, or he might have taken the course that he did and left the matter for future consideration.

There is nothing in the Code, so far as I am aware, which states that a Magistrate is bound, at any stage of a trial, to stop the proceedings, arrest any person against whom he thinks there is a chance of getting a conviction, and start the original trial *de novo*. There is nothing on the record to show that Hormasji, or Chit Maung, has ever been promised a pardon, and, even if they had each been granted an illegal pardon, they would merely be in the same position as many of the persons who have been declared competent witnesses in the various cases I have already cited.

I see no reason whatsoever for holding that the evidence of Hormasji and Chit Maung must be excluded from consideration.

Appellant's counsel had much to say about the Police, who, by failing to arrest Hormasji and Chit Maung, connived at the offence of "compounding a felony." This, however, is not an offence as such under the Indian Penal Code, which knows nothing of "felony," and I note that the section under which, he says, they have committed an offence is S. 213, Indian Penal Code. A reference to this section, however, shows that the gist of it consists in accepting, or obtaining, a gratification in consideration of screening a person from punishment. But there is no evidence anywhere, which suggests that Hormasji bribed the Police, still less that Chit Maung did.

I hold, then, that Hormasji and Chit Maung are competent witnesses against the appellant, and that their evidence against him must be considered.

The next law point which was taken up was a complaint that Mr. Lamond's complaint to the Police only referred to an offence under S. 420, Indian Penal Code; and that it gave no specific details of time and place. I do not quite follow the criticism involved.

Had Mr. Lamond's complaint to the Police been a charge framed by a Magistrate, or had it been a plaint in a Civil Suit, one would certainly have expected much greater detail and definition. Nowhere, however, have I seen it laid down that a First Information Report to the Police has got to be made with the same precision and particularity as a charge, or a

plaint in a Civil Suit. It is the charge, as framed by the Magistrate, that the accused has to answer, and not the First Information Report, nor, ultimately, the charge sheet sent up by the Police.

Another legal point taken up on behalf of the appellant was that the Magistrate had wrongly admitted a large amount of, what was termed, "evidence of prejudice." This consisted of two sets; one was a large bundle of copies of decrees recently passed against Joseph; and the other was a series of letters found in the appellant's letter-books, which show apparently that he had been complaining about Mr. Lamond's strictness in passing sleepers, and also that he was making desperate efforts to get all kinds of sleepers, which were not in accordance with the specification laid down in his contracts, passed as being in compliance with his contracts. For example, he writes to one of his contractors telling him to get his sleepers passed "as Taukkyan," suggesting that some of them were not Taukkyan really, but of different kinds of wood—a point which is emphasised in the following Ex. YY, which refers to an attempt to pass red coloured Thitsi, Zinbyoon and Banbwe as Taukkyan.

It is clear that these can, in no way, be held as direct evidence of the appellant's having forged, or used forgeries. But the decrees may well show the scarcity of money, which would perhaps be a motive for forgery, and thereby relevant under S. 8, even though not directly admissible under S. 11; and the attempts to pass off inferior sleepers would possibly come under the same category. These attempts, in part at any rate, failed, and the appellant may have had to have recourse to a false hammer in order to get through some of the sleepers, which, by trickery, or other means, he had failed to get Mr. Lamond to pass with a genuine hammer.

Another law point raised was that it was perfectly clear that Joseph did not make the hammer himself; that, therefore, he did not forge it; that, he certainly did not make hammer marks on the sleepers; that, therefore, he did not forge any mark on the sleepers; that, in consequence, a conviction of a substantive offence must be bad; and that, all that he could have been convicted of, at the worst, would be of abetment of the substantive offence.

It was argued that, even if I found the facts as the Magistrate has found them, I must acquit the appellant of the substantive offence, and that I could not alter a conviction in appeal into one of abetment of a substantive offence. It appears to me that this argument is entirely devoid of merit. S. 236 of the Criminal Procedure Code states that if a single act, or series of acts, is of such a nature, that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences, and it is very common thing to have a man charged in the Sessions Court with murder under S. 302, abetment of murder under S. 302 read with S. 109, and also under S. 302 read with S. 114, such joinder is a matter of every-day occurrence, and I have never before known it to be attacked as illegal.

S. 423 of the Criminal Procedure Code states that an Appellate Court, in an appeal from a conviction, may alter the finding; and S. 237 of the Criminal Procedure Code states that, in any case mentioned in S. 236, if the accused is charged with one offence, and it appears that he committed a different offence for which he might have been charged under that section, he may be convicted of the offence which he is shown to have committed, even though he was not charged with it. From this it is quite clear that a man, who is charged with a substantive offence, and nothing else, can always, without framing a further charge, be convicted of abetment of it. If authority for this statement is required, it can be found in cases of *Kher Singh v. Emperor* (11), *Yeditha Subbaya v. Emperor* (12) and *Lala Ojha v. Queen-Empress* (13).

It was argued that a hammer is not a document and that, therefore, it is not susceptible of being forged. This argument is based on a dictum of L. J. Cockburn in *Reg v. Closs* (14); but it is pointed out that this is a decision under the English Common Law, where the definition of "document" is narrower than it is under the Indian Penal Code. This is shown in Mayne's *Criminal Law of India*, page 756, and Gour's *Penal Law of India*, 2nd Edition, page 265.

Holding therefore, as I do, the law points that have been raised by the appellant's counsel against him, it is necessary for me to turn to examine the evidence in detail to decide whether Hormasji and Chit Maung are accomplices who can be believed without corroboration; and, if I consider that corroboration is necessary, whether there is sufficient corroboration to enable me to accept their statements.

[His Lordship then proceeded to deal with the evidence of the accomplices, and, whilst affirming the principle of law laid down in *Po Chit and one v. King-Emperor* (15) rejected the evidence as untrustworthy, acquitting the appellant on the facts.]

PRESENT :—ROBINSON, C. J. AND BAGULEY, J.

Ma Shin *alias* Ma Ma Gale and one\*

v.

Maung Shwe Hnit and one.

*Court-Fees Act (VII of 1870), Sch. I, Art. 1—Cross-objections as to costs—merely—Whether subject to payment of ad valorem Court-fees.*

A cross-objection which relates to costs, and costs only, must be stamped *ad valorem* under Sch. I, Art. 1 of the Court-Fees Act, and is not to be treated as a petition under cl. (d), Art. 1, Sch. II of that Act.

The "amount or value of the subject-matter in dispute" in a cross-objection as to costs only, must be read as meaning the "amount or value of the sum claimed as costs."

*Kumari Debi v. Rungpur North Bengal Bank, Ltd.*, 25 C W N 934—dissented from.

*Sharoda Soonduree Debee v. Gobind Monee*, 24 W R 179; *Babaji Hari v. Raja Ram*, 1 Bom. 75—referred to.

*Doorga Doss Chowdry v. Ramanauth Chowdry*, 8 M I A 262—explained.

Judgment. 26th August, 1924.

*Per* ROBINSON, C. J. :—The plaintiffs in this suit sold a piece of land belonging to them to the defendants. A

\*Special Civil Second Appeal No. 247 of 1924 against the decree of the District Court of Insein in C. A. No. 4 of 1924.

deed of sale was drawn up and executed. The plaintiffs then brought the present suit, alleging that, owing to a mistake, another piece of land belonging to them had been specified in the deed as having been sold, and they sought cancellation of the deed, or rectification by inserting the proper description of the land that was intended to be sold and bought.

The learned District Judge granted the plaintiffs a decree, cancelling the deed on their paying into Court, by a specified date, the amount of the purchase price and the costs of the defendants in both Courts.

From that decree the defendants appeal, and the plaintiffs have filed a cross-objection as to costs only, urging that the lower Appellate Court, having decreed the suit, erred in disallowing the plaintiff-respondents' costs, and directing them to pay the costs of the defendant-appellants. They were called upon to pay Court-fees on the amount claimed by them; they objected, but the matter having been the subject of a decision of a Bench of this Court last year in Civil Regular Appeal No. 166 of 1923, the Taxing Master ordered them to pay the full Court-fees on the amount claimed, and they have done so under protest. They then applied that they be heard by the Court on this question, and they rely on the case of *Kamal Kumari Debi v. Rungpur North Bengal Bank, Ltd.* (1).

This petition has been directed to be laid before a Bench of this Court, and now comes up for decision.

The learned Judge, in the case quoted above, has dealt with all previous questions, except some of the very earlier ones. All the decisions cited, as well as the decisions in *Sharoda Soonduree Debee v. Gobind Monee* (2) and *Babaji Hari v. Raja Ram* (3), take the view that the memorandum of cross-objections must be stamped *ad valorem*.

The learned Judge is unable to follow them, partly because in some no reasons are given, partly because the point was assumed, and partly because the dictum of their Lordships of the Privy Council in *Doorga Doss Chowdry v. Ramanauth Chowdry* (4) was not referred to.

1. 25 C W N 934. 2. 24 W R 179. 3. 1 B 75. 4. 8 M I A 262.

Some of the authorities, no doubt, deal with cross-objections as to matters in dispute in a suit as well as to the order as to costs.

I desire to confine this decision to the point immediately before us, and it must not be taken as expressing any opinion as regards any other matter.

The questions we have to decide are :—Whether a cross-objection which relates to costs, and costs only must be stamped under Art. 1 of Sch. I of the Court-Fees Act, or merely treated as a petition under cl. (d), Art. 1, Sch. II of that Act.

With the greatest respect, I regret I am unable to agree with the learned Judge in Calcutta. His decision appears to me to be based almost entirely on the dictum of their Lordships of the Privy Council in *Doorga Doss Chowdry's case* (4). He says in that case the question was whether costs of suit could be added in calculating the appealable value of Rs. 10,000 to the Privy Council, and the Judicial Committee held that "the costs of a suit are no part of the subject-matter in dispute."

Their Lordships of the Privy Council were dealing with an order in Council, and whether special leave to appeal should be granted. The appealable sum was admittedly under Rs. 10,000, and the Lord Chancellor, in refusing leave, pointed out that the interest accruing subsequent to the decree could not be added to the capital sum decreed for the purpose of reaching the appealable amount. And he goes on—"Here the interest, under any circumstances, would not be sufficient, for, to arrive at the necessary amount, you must add, as you seek to do, the costs. Now, the costs of a suit are no part of the subject-matter in dispute, *and cannot be used for the purpose you seek* . . . ."

These last words *italicised* are not quoted by the learned Judge in Calcutta, and it is clear, to my mind, that their Lordships were dealing with a special point, and that their dictum must not be extended further than the point that was immediately before them. They were laying down what was an

4. 8 M I A 262.

obvious proposition that the amount decreed as costs could not be added to make the amount or value of the subject-matter up to Rs. 10,000. In general terms, no doubt, costs do not form part of the subject-matter in dispute; they ordinarily merely follow the result.

S. 16 of Act VII of 1870 required a respondent filing a cross-objection to pay the Court-fee before being heard. That section has now been repealed, and cross-objections have been included in Art. 1 of Schedule I of the Act instead. There is no ground for supposing that it was intended to make any change in the law when this was done, the only change being that Court-fees have to be paid when the cross-objection is filed and not merely before the hearing. In my opinion, it is wrong to assume that the words "amount or value of the subject-matter in dispute" mean, in reference to a cross-objection, "the amount or value of the subject-matter in dispute in the suit." To do that, it would be necessary to add words to the Schedule which do not appear there, and the "amount or value of the subject-matter in dispute" in a cross-objection as to costs only, must, I think, be clearly read as meaning the "amount or value of the sum claimed as costs."

In my opinion, therefore, the decision of a Bench of this Court in Civil First Appeal No. 166 of 1923, was correct, and the order of the Taxing Master following that decision was also correct.

*Mr. Ankelsaria* for respondents.

PRESENT :—LENTAIGNE, J.

Ma Gun

v.

Mg. Lu Gale and four others

Appellant\*

Respondents.

*Transfer of Property Act (IV of 1882), S. 65 (a)—Auction sale of mortgage property—Purchase by mortgagee—Suit by co-heirs to recover three-fourths share—Implied covenant as to title of mortgagor—Suit for refund of part sale price.*

\*Special Civil 2nd Appeal No. 169 of 1923 against the decree of the District Court of Maubin in Civil Appeal No. 88 of 1922.

In a sale under a mortgage decree the purchaser acquires the interest of both the mortgagor and mortgagee, whilst in sale in execution of a money decree, the purchaser obtains only the interest of the judgment-debtor (*i. e.*, mortgagor).

A mortgagee who purchases the mortgage property at a Court sale and who afterwards finds that the mortgagor had no title to a portion of the property has a right of suit against the mortgagor and any other persons who have received the purchase price, for a refund of the excess price paid.

*Magantal v. Shakra Girdhar*, '22 B 945—applied.

*San Baw Ri v. Tun Pru*, (1906) 1 B L T 72—distinguished.

Judgment. 11th April, 1924.

In this case it is stated that the plaintiff Ma Gun became the mortgagee of certain lands belonging to the estate of Ma Sa Ma deceased under a mortgage deed executed by Lu Gale and Diba, two of the five children of Ma Sa Ma.

Ma Gun subsequently brought a suit against Lu Gale and Diba for recovery of the mortgage debt by sale of the mortgaged property. Diba died pending the suit but his heirs were not made defendants and the decree was obtained against Lu Gale alone.

The mortgaged property was sold in pursuance of such decree and was bought in by the decree-holder Ma Gun for Rs. 1,615.

She was allowed to set off her mortgage debt of Rs. 893-12-4 against the purchase price and she paid Rs. 721-3-8 into Court. Portion of that amount was applied towards Bailiff's charges and another portion was applied to some other claim against Lu Gale. The balance Rs. 572-5-8 was drawn out by Lu Gale, and according to the finding of fact in the Trial Court was in part divided by Lu Gale between himself and the other defendants in this suit, who were the heirs to the estate of Ma Sa Ma and it was also held that the balance of that sum was retained for the expenses of a suit, which was presumably the partition suit instituted by such heirs against Ma Gun.

Then the other defendants instituted the partition suit against Ma Gun alleging that they were heirs of Ma Sa Ma and that Lu Gale's sole interest in such estate was one-fourth, and that therefore the mortgage decree was only valid to the

extent of Lu Gale's one-fourth share in such property ; and they obtained a decree for partition and for recovery of a three-fourths share of the property.

Finally, Ma Gun, the plaintiff-appellant instituted the suit now under appeal in the Sub-divisional Court of Yandoon against the defendant-respondents, alleging such mortgage and mortgage decree, that the mortgaged property had been sold in pursuance of such decree and bought in by her as aforesaid for Rs. 1615, that she had paid into Court Rs. 721-5-8 after deducting the amount due to her ; and that the said sum of Rs. 721-5-8 had been divided amongst the defendants by Lu Gale and she sought for a decree for the recovery of that sum from the defendants.

Lu Gale did not appear and did not defend the suit, but the other defendants filed a written statement admitting plaintiff's allegations but denying that they had knowledge of the fact that Lu Gale drew out the said sum and denying that they had shared the money and also denying the demand.

The Trial Court framed two preliminary issues :—

- (1) Whether there is a cause of action or not ?
- (2) Whether the suit is maintainable ?

The Trial Court decided both of these issues in favour of the plaintiff on the ground that it was money paid under a mistake of fact and was recoverable under S. 72 of the Indian Contract Act, 1872. Lu Gale had mortgaged the whole of the land and the money was paid for the whole of the land and was alleged to have been drawn out on behalf of the defendants and enjoyed by the defendants.

The Trial Court then decided the two additional issues.

(3) What is the amount of money drawn by 1st defendant Maung Lu Gale ?

(4) Whether Maung Lu Gale enjoyed the amount jointly with the other defendants ?

On these issues the Trial Court decided that the sum of Rs. 572-5-8 had been drawn out by 1st defendant Maung Lu Gale on the 14th July, 1920 : and he then accepted the evidence of two witnesses examined for the plaintiff to the effect

that this money had been divided amongst the defendants, the 2nd defendant, Ma Dwe taking Rs. 90 and the other four defendants taking Rs. 30 each, making Rs. 210, and that Lu Gale then said that the balance Rs. 362-5-8 had been paid as lawyer's fee and Court-fee, which the Trial Judge stated was apparently paid for the purposes to recover their shares and that the other defendants had in fact agreed to such payment. The Trial Judge disbelieved Maung Chit Pe, the defendant's agent, who denied that division. On these findings the Trial Judge passed a decree for Rs. 572-5-8 against the five defendants with costs in proportion.

On appeal the District Judge reversed this decree and dismissed the suit with costs in both Courts, holding that in auction sales there is no warranty of title and he cited the decision of *San Baw Ri v. Tun Pru* (1) in support of this proposition. He in effect held that Lu Gale had some saleable interest and that therefore the money could not be recovered. The decision is not applicable to a sale under a mortgage decree.

The present appeal is against that decision. On the facts I may say at once that I accept the findings of the Trial Court. The facts as found had been deposed to by two witnesses and I see no reason for not accepting their evidence as the truth. I attach no force to the denial of the defendant's agent and I draw the strongest inference as to the truth of such facts because the other defendants did not give evidence denying such facts.

The distinction between the interest which an auction purchaser takes when he buys the property on a sale effected under a mortgage decree and when the sale is merely one in execution of a money-decree is pointed out in the case of *Maganlal v. Shakra Girdhar* (2) where various authorities are cited. In the case of a sale under a mortgage decree the purchaser acquires the interest of both the mortgagor and mortgagee, whilst in the case of a sale in execution of a money-decree, the purchaser obtains only the interest of the judgment-debtor (*i. e.*, mortgagor). Consequently Ma Gun on her auction purchase retained certain rights which she previously had as

1. (1906) 1 Bur L T 72.

2. (1897) 22 B 945.

mortgagee against the property. One of the rights which she had obtained as mortgagee was the right to the covenant implied by clause (a) of S. 65 of the Transfer of Property Act, 1882, that the interest which the mortgagor professed to transfer subsists and that the mortgagor had power to transfer the same. Therefore Ma Gun was entitled to enforce the implied covenant that Lu Gale and Dibi were entitled to sell the entire ownership of the whole of the mortgaged property, and when the partition suit disclosed the absence of such power and Ma Gun was deprived of a three-fourths share, Ma Gun had a right to sue Lu Gale on a breach of such covenant, and to claim a refund of the money paid under the mistake. Lu Gale must have been well aware that the larger price was being given for the property on the basis that the entire ownership therein was being sold and the fact that Lu Gale divided the balance received from such sale also tends to indicate that he was acting throughout with the consent of the co-heirs, and that the fact that the interest of the other co-heirs was not sold was owing to a technical failure of Lu Gale to get them to execute the mortgage for a loan which they had presumably authorised.

In any case it is clear on the facts that the co-heirs having taken their shares of the sale price of the land sold on the basis that the entire ownership was sold, then repudiate that basis and obtain back three-quarters of the land. It is obvious that they cannot have both the three-quarters share in the land and the price which was paid for the whole of the land and therefore they must refund the sum which they obtained from the sale of the land.

For these reasons I set aside the decree of the District Court and restore the decree of the Sub-divisional Court with costs throughout.

*San Win* for appellants.

*Ba Shin* for respondent.

PRESENT :—LENTAIGNE, J.

Hla Ban U. and U Kyaw Zan . . . . . *Appellants\**  
*v.*  
 A. V. P. L. Ramanathan Chettyar . . . . . *Respondent.*

*Transfer of Property Act (IV, of 1882), S. 101—Purchase of mortgage property during suit—Payment off of mortgage decree with notice of purchase to mortgagee—Pending attachment of part of mortgage property by mortgagee under separate money decree—Non-disclosure of attachment—Subsequent purchase by mortgagee at Court sale—Competition between mortgagee and purchaser—Validity of attachment.*

Where a person buys mortgage property in a pending mortgage suit by private treaty with the mortgagor and pays off the mortgage decree with part of the purchase money with notice to the mortgagee of the purchase, the mortgage so paid off will be kept alive and enure for the benefit of the purchaser.

*Vanmikalinga Mudali v. Chidambara Chetty, (1905) 29 M 37 ; Shyam Lal v. Bashir-ud-din, (1906) 29 A 778—followed.*

Where such mortgagee has already attached one of the items of mortgage property under a separate money decree at the time of the purchase and does not disclose the fact to the purchaser and thereafter proceeds to sale and obtains a certificate of sale behind the back of the purchaser, he may, notwithstanding the provisions of S. 64, Civil Procedure Code, be estopped from relying on his purchase. At the very highest he would be entitled to the sale proceeds of the equity of redemption of the attached property.

*Dinobhandu Shaw v. Jogmaya Dasi, (1902) 29 I A 9 : 29 C 154 ; Parashram v. Govind, (1897) 21 B 226—referred to.*

The mere production of a certified copy of a warrant of attachment containing a report by the Bailiff that a process-server had reported the posting of notice of attachment on the land and on the headman's house and on the notice-board of the Court, is not, as against persons disputing the attachment, legal evidence of such attachment, but may be used as a basis for the reception of evidence of attachment ; identification of the land must also be proved.

Judgment. 1st August, 1924.

In order to understand the facts in issue in the suit now under appeal it is necessary to mention some earlier proceedings. In Civil Regular No. 13 of 1918 of the District Court of Akyab the respondent Chettyar firm obtained a mortgage decree against three persons, Mi Shauk Pon Me, Nga Ni

\*Special Civil Second Appeal No. 296 of 1923 against the decree of the District Court of Akyab in Civil Appeal No. 31 of 1923.

Daung and Nga Hla Aung, for a sum of Rs. 7,627-2-8 including costs and an order for the sale of eight pieces of land being the mortgaged property. By a proclamation issued in such suit the said eight pieces of land were proclaimed for sale on the 19th May, 1919 in execution of such mortgage decree. By a registered deed bearing date and held to have been executed on the 3rd May, 1919 the said three defendant-mortgagors purported to sell and transfer the said eight pieces of land to the second appellant U Kyaw Zan U for the price of Rs. 9,000. The said purchaser U Kyaw Zan U, as he was entitled to do under S. 55 (5), clause (b) of the Transfer of Property Act, 1882, paid the amount of the said mortgage decree Rs. 7,627-2-8 into the District Court to the satisfaction of the said mortgage decree on the 14th May, 1919, and at the same time filed a petition in such suit setting out the fact of his purchase and praying for permission to make such deposit and for the cancellation of the proclamation for a sale on the 19th of that month. The sale was stopped, full satisfaction of that decree was entered up, and on the 10th June, 1919 the amount was paid out by the Court to the Advocate of the Chettyar firm.

In Civil Regular Suit No. 8 of 1917 of the Sub-divisional Court of Minbya, the same Chettyar firm had obtained a money decree for Rs. 1,143-12-0 against the same three persons, Mi Shauk Pon Me, Nga Ni Daung and Nga Hla Aung on the 21st July, 1917; and on the 10th April, 1919 in Execution Case No. 17 of 1919 of the same Sub-divisional Court and in execution of that money decree the Chettyar firm applied for the attachment of the piece of land the subject-matter of the present suit which is also one of the eight pieces of land covered by the said mortgage decree and included in the subsequent deed of conveyance on sale to the appellant U Kyaw Zan U. The evidence or absence of evidence as to the steps taken to effect such attachment will be discussed later on in this judgment, as an important issue in this case depends thereon. The sale of such piece of property in execution of such money decree was carried out by the Bailiff of that Court on the 28th June, 1919, and the decree-holder, the said Chettyar firm, was

declared the purchaser thereof for Rs. 482-8-0 ; on the 1st August, 1919, the sale certificate was issued to the Chettyar firm as such purchaser.

On the 21st January, 1921, the said Chettyar firm instituted the suit now under appeal, Civil Regular No. 14 of 1921 of the Township Court of Minbya against the first appellant Hla Ban U claiming Rs. 275 as damages for the use and occupation of the said land. Hla Ban U claimed to be the tenant under the 2nd appellant U Kyaw Zan U ; and on the 10th February, 1921, the 2nd appellant U Kyaw Zan U was made a second defendant in the suit ; he filed a written statement claiming to be owner under the deed of sale, dated the 3rd May, 1919, which he filed with his written statement. At the hearing, the two documents, the deed of the 3rd May, and the Court sale certificate were treated as admitted in evidence, but except that before settlement of issues the parties each stated that he owned the land or admitted the rent. No evidence was recorded and as the statements by the parties were taken before settlement of issues, there was no cross-examination.

On the 30th of March, 1921, the Township Court dismissed this suit on the ground that the plaintiff was unable to prove that the attachment was made before the land was sold to Kyaw Zan U ; but on appeal the District Court of Akyab reversed that decree on the ground that the sale certificate issued by the Court proved plaintiff's ownership, whilst in the opinion of the Judge the registered deed of sale produced by U Kyaw Zan U, though admitted in evidence, was insufficient to prove defendant's title. On second appeal the decree of the District Court was reversed by the late Chief Court, and it was held that the registered deed having been admitted in evidence without any objection being taken thereto, it was not open to the District Court of its own motion to object to the registered deed as not sufficiently proved ; and the case was sent back to the Trial Court with the direction that the case should be tried *de novo* on the basis that no further evidence be taken as to the two deeds but that the trial be on the five issues framed by the Chief Court.

When the case was heard again, the parties did not examine any witness, but produced certificate copies of certain

documents in addition to the documents previously filed by them. The Township Court again dismissed the suit with costs ; and the District Court again reversed the decree of the Trial Court and granted the plaintiff a decree as prayed with costs. It will be more convenient to discuss the findings of the lower Courts, issue by issue, as the re-trial was directed to proceed on specific issues.

The 1st issue was—What was the date on which the attachment in C. R. No. 17 of 1919 of the Sub-divisional Court of Minbya was actually effected ? The only evidence produced by the Chettyar firm on this issue was the filing of a certified copy of the warrant of attachment with a report by the Bailiff of the Township Court attached to it. From that report it is obvious that the Bailiff did not himself go to the land, but that some process-server had reported to him his movements and that he had tendered a copy to Ma Mi Shauk Pon Me who refused to sign her name saying that she had nothing to do with the warrants, that a copy was posted on the notice-board of the village headman, that a post was fixed on the land and a copy was posted on it and the land seized. The dates of such occurrences are not given by the process-server in his report, but the report of the Bailiff on the warrant contains entries that the notice was posted in the Court-house on the 12th April, that the date of execution was the 18th April, 1919 and the date of the return the 21st April, 1919. On this the Township Court held that the attachment was actually effected on the 18th April, 1919 ; and the District Court accepted that finding, but neither Court has gone fully into the question and both the Courts appear to assume that the mere entries on the warrant are sufficient evidence of such execution whilst the appellant is disputing the regularity of the attachment. In my opinion the warrant was rightly put in evidence but only for the limited purpose of proof of the issue of such warrant and as a basis of the proper evidence that the attachment thereunder was properly effected ; and it would be impossible to prove the actual effecting of the attachment without first putting the warrant into evidence.

There is a dispute as to how such an attachment should be effected ; I think that the appellant is wrong in his con-

tention that a notice to the District Court was necessary, and that he was also wrong in his contention that the mortgaged property was in the custody of the Court. I think that the Chettyar firm was entitled to attach the property in the manner provided in sub-rule (2) of R. 54 of O. 21, so as to enable his firm to proceed against the equity of redemption, as was held in *Parashram v. Govind* (1), and that if the property had been sold by the Court under the mortgage decree, such an attachment would have given the Chettyar firm a claim against the balance of the proceeds of sale remaining after the mortgage-debt, expenses, etc., and all secured claims had been discharged, provided that a notice of the previous effecting of the attachment reached the District Court before the distribution of the proceeds. R. 13 of O. 34 gives the order of payment in one class of case.

The question then arises whether the warrant proves the date of the effective attachment. In my opinion, the entries or reports as to how the process-server effected the execution of the warrant cannot in this case be given a higher probative force than depositions in the execution proceeding; but such depositions would be inadmissible in this case under S. 33 of the Indian Evidence Act, 1872, for various reasons obvious on a perusal of that section, and there is nothing to show that the 2nd defendant agreed to such hearsay reports being treated as proof of the facts alleged. Moreover, the process-server does not state that he personally knew the land in suit, and there is no report by the headman stating that the land on which a warrant was alleged to have been posted was that now in suit. In my opinion much clearer evidence that all requisite steps had been taken is necessary when the question arises between the attaching creditor and a third party, who cannot be treated as having notice of the proceeding or as bound by the attachment until such proof has been given. This is not a case in which an intervenor, having discovered an attachment, objects to it. I pointed out these objections at the hearing, and I was then requested by the Advocate for the respondent to remand the case for such evidence. I do not think that this is the class of case in which such a remand

should be ordered especially as the previous order for a retrial was granted for the express purpose of enabling the plaintiff to prove such points ; and it is obvious that the Chettyar firm having realised the sum of Rs. 7,627-2-8 from the 2nd defendant, is now trying on technical grounds to deprive him of the benefit of portion of the property purchased with that money. I must, therefore, hold that it is not proved when the attachment was actually effected and that it is not proved that it was prior to the 3rd May, 1919.

The 2nd issue is—“ If the attachment was effected prior to the 3rd May, 1919, can the 2nd defendant plead that such attachment was in operation against his purchase on the 3rd May, 1919 ? ” Both the lower Courts decided this issue against the 2nd defendant. Having regard to my finding on the 1st issue, this issue does not arise. If it had been proved that the attachment had actually been effected prior to the 3rd May, 1919, S. 64 of the Code would have technically applied, but the question would arise as to whether the facts alleged by defendant under the 3rd and other issues would raise an estoppel or other protective shield.

The 3rd issue is—“ If the sale to the 2nd defendant is inoperative as regards the land in dispute in the present suit, can the 2nd defendant set up as a shield the mortgage decree in C. R. No. 13 of 1918 of the District Court of Akyab ? ” The Trial Court decided this issue in favour of 2nd defendant, but the District Court reversed that finding, because the case did not come within S. 101 of the Transfer of Property Act, 1882. The appellant relies on the decisions in *Vanmikalinga Mudali v. Chidambara Chetty* (2) and in *Shyam Lal v. Bashir-ud-din* (3) ; and it is contended that as the mortgage-debt due under the decree for Rs. 7,627-2-8 was paid in satisfaction of the decree by the 2nd defendant who had bought the equity of redemption and the entire interest in the land and the 2nd defendant-appellant was entitled to keep alive the rights under the mortgage decree and it was for his benefit that he should do so, and that therefore such rights would enure for the protection of the 2nd defendant-appellant. In this case the 2nd defendant-appellant himself paid the amount into

2. (1905) 29 Mad. 37.

3. (1906) 29 All 778.

Court in his own name and on his own account, so it must be treated that he paid the amount for his own protection and in order to obtain a title to the property ; and this would be even a stronger case than that decided by the Privy Council in *Dinobhandu Shaw v. Jogmaya Dasi* (4). In that case there was an attachment of the equity of redemption of certain lands which were the subject of two mortgages. Pending the attachment the mortgagor desired to pay off both mortgages, and Rs. 40,000 was lent to him by the new mortgagee on the promise that on repayment of the previous mortgages, the property be mortgaged to him ; the two mortgages were paid off and then the property was reconveyed to the mortgagor, who handed the reconveyance to the new mortgagee. After that the appellant in that suit purchased at the execution sale with notice of the transactions, and it was held that the intention of the parties was that the earlier mortgages should not be extinguished on being paid off, but were to be kept alive for the benefit of the respondent mortgagee, the object being to give him the only charge on the property. That decision would apply exactly to this case with the modification that the object here was to sell the entire property to the appellant-2nd defendant. In that case it was urged that whatever the intention of the parties may be, S. 276 of the Code of Civil Procedure, 1882 (corresponding to S. 64 of the later Code) rendered the mortgage for Rs. 40,000 wholly void as against the appellant auction purchaser. In reply to this their Lordships of the Privy Council said :—“So to construe this section would be quite wrong. So far as the mortgage for Rs. 40,000 prejudiced the execution creditor, it is void as against him ; but the section does not render void transactions which in no way prejudice him ; and to hold the mortgage void so as to confer upon him a benefit which no one ever intended he should have, is entirely to ignore the object of the section and to pervert its obvious meaning. It is impossible to hold that the object of that section is to give an execution creditor an unincumbered fee simple instead of an equity of redemption against the intention of the parties.” These remarks must apply to the case now before me, and their application cannot

have any less force in the case now before me where the attaching creditor and execution purchaser was himself the mortgagee who was paid off pending the attachment. For these reasons I think that this issue should also be decided in favour of the appellant.

The case which I have cited would be authority for the proposition that the Chettyar by his execution sale could not have any greater right than against the original equity of redemption ; and the question occurred to me whether the fact, that the mortgagee who was paid off was also the attaching creditor, does or does not improve the position of the appellant. A copy of the petition under which the money was paid into Court is an exhibit and has been translated ; and it expressly pointed out that 2nd defendant Kyaw Zan U had bought the mortgaged properties for Rs. 9,000 from Mi Shauk Pon Me on the 3rd May, 1919 and that the Rs. 7,627-2-8 had been retained and was being paid into Court as the decretal amount ; and the prayer of the petition was that the petitioner be allowed to make such deposit, that the sale proclamation be cancelled and that the suit be closed. That petition presumably gave the Chettyar firm notice of the 2nd defendant's position ; and presumably with such knowledge the Chettyar firm received the sum of Rs. 7,627-2-8 and drew it out of Court. On these facts I think that the Chettyar firm should have realised that the 2nd defendant was presumably paying this amount under the belief that he was obtaining good title to all the mortgaged property. That being so, the question arises whether it would be open to the Chettyar firm to now allege that the 2nd defendant had acquired no title to one piece of the properties so sold unless he could also show that at the time he accepted that Rs. 7,627-2-8 he had expressly informed the 2nd defendant about the attachment then existing according to the Chettyar and which he afterwards made the basis of his purchase and of the present suit. I pointed this out to the advocates at the hearing and that there was no suggestion that the 2nd defendant had been informed about the alleged attachment ; and it was urged for respondent that this point had not been taken by the appellant. That may be true, though it is a point of estoppel which would obviously arise on the facts as alleged for appellant. The

point or some similar point was possibly urged before the District Judge who held that he could see no reason why plaintiff should acquaint 2nd defendant about the application to attach the property. As no issue has been framed on this question of estoppel and it is alleged that it was not raised, I will not express any final opinion on it, and it is, I think, unnecessary to decide this point in the present appeal. I may here note, however, that the actual form of the present suit is itself suggestive that the Chettyar firm realised the weakness of their case, and were launching a speculative suit for damages for a temporary use and occupation as a trespasser against a person in occupation who then alleged himself to be a tenant of the 2nd defendant, when the more appropriate claim would have included a claim for recovery of possession based on the same alleged title against both the defendants.

The 4th issue is—"Did the 2nd defendant or his vendor know of the application in Execution Case No. 17 of 1919 to attach the property in suit, when he purchased the same? If so, is the 2nd defendant postponed to the plaintiff in consequence of such knowledge?" Both the lower Courts decided that there was no reason to suppose that the defendants knew of the application to attach the property when he purchased it; and decided this issue against the plaintiff, as there was no evidence. I agree with that finding.

The 5th issue is—"Did the 2nd defendant take any steps to have the sale certificate cancelled? If he did not can he claim priority?" Both the lower Courts have held that the 2nd defendant took no steps, and the learned District Judge added a finding that "he cannot claim priority," but he gives no reason for such finding. In para. 2 of his written statement, the 2nd defendant stated that he was not aware of the allegations in para. 2 of the plaint; and he thereby denied all knowledge of the fact that plaintiff had been a purchaser at the Court sale or that the property had been sold at the Court sale. No attempt was made to show that 2nd defendant had any such knowledge; and the plaintiff by his action in originally omitting to join 2nd defendant as a party to this suit, was obviously asserting that he had no knowledge of the claim of 2nd defendant, and subsequently he joined him in an amended plaint merely on an assertion that first defendant alleged

that he had paid rent to 2nd defendant. It is difficult to believe that in the period of twenty months between May, 1919 and the institution of the suit in January, 1921 the plaintiff firm remained so completely ignorant of the fact that 2nd defendant was claiming to be purchaser of the land. As I have indicated above, the facts that 2nd defendant paid the Rs. 7,627-2-8 into the District Court on the 14th May, 1919 and at the same time formally alleged his purchaser of the mortgaged lands in a petition, would presumably have been communicated to the plaintiff before the plaintiff drew that money out of Court. I cannot, however, find any indication that during this period, the fact of plaintiff becoming an auction purchaser of the land now in suit was ever communicated to or brought to the knowledge of the 2nd defendant until the present suit was instituted in 1921. This fact is a sufficient answer to the contention so strongly urged by the Advocate for the plaintiff-respondent that R. 92 of O. 21 of the Code is a bar to the defence. The 2nd defendant could not be expected to apply to set aside a sale in a suit to which he was not a party and which had never been communicated to him and of which he expressly denies having any knowledge. Consequently, I must hold that the plaintiff has not established the necessary basis of fact even for a discussion as to the question whether R. 92 could have any application.

For the above reasons I must hold that the plaintiff has failed to establish his claim or that he had acquired any title to the land in suit by reason of the alleged Court sale and I therefore set aside the decree of the District Court and direct that the suit be dismissed with costs throughout.

*Mr. Chari* for appellants.

*Bose* for respondents.

DECEMBER PART

Burma Law Journal

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PRESENT :—ROBINSON, C. J. AND BROWN, J.

S. A. Christopher . . . . . *Appellant\**  
*v.*  
 J. A. Cohen and 2 others . . . . . *Respondents.*

*Easement—Right of way—Intentional abandonment of right by predecessors-in-title—Facts showing intention.*

The appellant was the purchaser of a piece of land adjoining a private road. The deed of conveyance in favour of the original purchaser contained an express grant of a right of way over the private road but the later conveyances in favour of the last three predecessors-in-title of the appellant omitted the express grant and contained general words instead.

The private road was not used by any of the predecessors-in-title, one of whom erected a fence, as a boundary and cut off the private road and constructed a separate pathway in his own land to answer the same purpose.

*Held*, that the fact of non-user for a period of years coupled with the omission of the express grant in the later conveyances and the action of the appellant's predecessor-in-title in erecting a boundary fence cutting off the private road showed an intentional abandonment of the right of way.

*R. v. Chorley*, (1848) 12 Q B 515 ; *Ward v. Ward*, 21 L J Exch. 334 ; *Crossley v. Lightowler*, 36 L J Ch. 584.

Judgment. 17th June, 1924.

*Per* ROBINSON, C. J. :—The plaintiff-appellant claims that he has a right of way over a strip of jungle land lying between his property and that of the 1st defendant-respondent. The whole of these lands at one time belonged to Messrs. Short and Hannay, and they conveyed them in three parcels to various persons.

By Ex. B, dated the 9th June, 1891 Short and Hannay conveyed lot No. 3 to one Srinivasa Aiyar.

The conveyance contains the following special clause:—

“ And it is hereby expressly provided, agreed and declared by and between the said vendors and purchasers that the road marked and described as ‘ Common Road ’ in the plan hereto annexed and lying between lots Nos. 3 and 5 shall be left open and freely used by the owners of lots Nos. 3, 4 and 5 each having a right-of-way over the same at all hours of the

\*Civil First Appeal No. 142 of 1923 against the judgment of the Original Side passed in C. R. No. 471 of 1922.

## THE BURMA LAW JOURNAL.

day and night and none of the owners of the said lots shall have any right to close the same at any time or claim more right in it than any of the others."

These lands have subsequently been sub-divided, but for the purposes of this case, I will refer to them as lots Nos. 3, 4 and 5. At that time this pathway, which is described as the 'Common Road' was practically impassable. It was jungle land with holes in it, in which water lay, and it had never been used by any one. The original owners reserved the right of ownership in this strip to themselves clearly, in order to permit of an exit from these three lots on to Churchill Road. Srinivasa Iyer by Ex. C, dated the 28th April, 1893, conveyed lot No. 3 to one Kruse. The same special clause, with reference to the 'Common Road' is included in the conveyance. By Ex. D, dated the 28th February 1902, Kruse conveyed it to Mrs. Desmazes, and the same special clause appears in the conveyance. Then by Ex. E, dated the 7th February, 1912, Mr. Desmazes transferred this property, as administrator of his wife's estate, to himself personally, setting out that the original purchase in his wife's name had been benami, he having provided the purchase money. The conveyance sets out the land as described in the schedule. The schedule specifies the land by lot numbers, and is delineated in the plan annexed, "together with the two-storied timber built house and out-offices and all other buildings, commons, fences, liberties, privileges, easements and appurtenances whatsoever to the said piece or parcel of land belonging or in anywise appertaining or usually held or occupied therewith or reputed to belong or be appurtenant thereto . . . ." There is nothing said about the 'Common Road' and, if the particular right now claimed was conveyed, it must be under the general terms above recited.

Then by Ex. F, dated the 15th May, 1917, Mrs. Martindale, Mr. Desmazes' sister, purported to transfer the land as his administratrix to herself as his heir. The wording of the schedule is verbatim, the same as that of the schedule to Ex. E, both these deeds having been drafted by Mr. Bagram. Then, on the 13th August, 1919, by Ex. C, Mrs. Martindale conveyed the property to the plaintiff-appellant. There is no mention of the 'Common Road,' nor does the plan attached

to the deed show the 'Common Road.' The property is conveyed with "all the legal and usual appurtenances and all the estate, right, title or interest, claim or demand whatsoever of the vendor into and upon the said premises."

When this property was purchased by Mrs. Desmazures in 1902, or shortly afterwards, a house was built upon the plot, and an entrance on to Churchill Road was constructed with a road running parallel to the 'Common Road' in dispute. A fence was erected between this road and the 'Common Road.' It is admitted that the plaintiff-appellant never knew of the right of way originally granted over the 'Common Road' and that he has never used it, nor, apparently, had any of his predecessors-in-title.

The defendant-respondents' land No. 4 was conveyed by Messrs. Short and Hannay by Ex. E, dated the 18th February, 1892, to one, David. They reserved to themselves the ownership in this 'Common Road' and the conveyance provides a conveyance of "liberties, privileges, easements, advantages and appurtenances" which clearly will not cover the 'Common Road' and, therefore, a special clause is inserted with reference to it, which runs as follows:—"And especially and more particularly a free right of way over a piece of the said allotments measuring about 46 feet long and 15 feet broad, reserved for a road which is to be common to all owners of land adjacent thereto for passing and re-passing to and from their respective portions of the said allotments."

On the 6th of March, 1919, by Ex. J, Mrs. Lillicarp, as executrix of Mrs. David, conveyed to the 1st defendant-respondent the same plot of land "together with the appurtenances." There is no mention of the 'Common Road.' Ex. K, dated the 20th December, 1890, is the first conveyance by Messrs. Short and Hannay to lot No. 5. The boundary on the west is described as the road leading to lot No. 4, which is the alleged "Common Road." There is no grant of any right of way over the "Common Road" in this deed at all.

The 1st defendant-respondent has filled up portions of this "Common Road" so as to make it passable. He has laid a pipe underneath the "Common Road" into which is collected the surface drainage from his land and he has made

man-holes at the side of the road for the purpose of clearing this pipe. He sold the northern portion of lot No. 3 to the Tata Industrial Bank, Limited, and the Bank, with his permission, have erected posts along the edge of the "Common Road" to carry power from the main in Churchill Road to their house.

The plaintiff-appellant alleges that, by these acts, his rights in this 'Common Road' have been infringed, and he asks for a declaration that the road is common to himself and the defendant-respondents and that none of them have any higher right than any other. He prays for an order against the 1st and 2nd defendant-respondents to remove the pipe and the iron pillars, and also for an injunction restraining them from using the said pathway in any other way, or for any other purpose, than a pathway.

The learned Judge on the Original Side, after inspecting the spot, has decided that the existence of these man-holes is an infringement of the plaintiff-appellant's right, if he has any. He is of opinion that neither the pipe nor the pillars are such interference as the Court should take notice of. He finds that the rights originally granted were intentionally abandoned by Mr. Desmazures and that the plaintiff-appellant acquired no such right of way as he claims.

The question we have to decide is whether the right of way granted by the original owners of the land over this 'Common Road' has been abandoned by the plaintiff-appellant's predecessor-in-title.

The law as to the extinguishment of a continuous easement may now be regarded as settled. In *R. v. Chorley* (1) it is said :—" It is not so much the duration of the cesser as the nature of the act done by the grantee of the easement, or of the adverse act acquiesced in by him, and the intention in him which either the one or the other indicates, which are material for the consideration of the jury."

In *Ward v. Ward* (2) Alderson, B. said :—" The presumption of abandonment cannot be made from mere non-user. There must be other circumstances in the case to raise that presumption."

---

1. (1848) 12 Q B 515.

2. 21 L J Exch. 334.

In *Crossley v. Lightowler* (3) Lord Chemsford, L. C. said :—“The authorities upon the question of abandonment have decided that a mere suspension of the exercise of a right is not sufficient to prove an intention to abandon it. But a long continued suspension may render it necessary for the person claiming the right to show that some indication was given during the period that he ceased to use the right of his intention to preserve it.

The question of abandonment of a right is one of intention to be decided on the facts of each particular case.”

These authorities appear to have been always followed in India : and it may be taken as settled law that, while mere non-user is not sufficient to amount to abandonment, it is a fact to be taken into consideration with the other facts and circumstances of the case, and it is from all these facts that the Court has to decide whether or not the clear intention to abandon can be inferred, or is indicated.

When we come to the plaintiff-appellant's title deed, Ex. G, dated the 13th August, 1919, we find the expression “legal and usual appurtenances” which clearly does not cover the right that is now claimed; which could only be brought in by the use of the very general terms “all the estate, right, title or interest . . . . of the vendor.”

The question, then is, does the fact of non-user, coupled the wording of these conveyances and the action of Mr. Desmazes, show an express intention on his part to abandon this right over the “Common Road”? In my opinion they do show such an intention.

In my opinion, therefore, the decision of the Court below was correct, and the decree should be confirmed.

I would dismiss the appeal with costs and fix Advocate's fee at 10 gold mohurs.

*Mr. Chari* for appellant.

*Das* for respondent.

PRESENT :—LENTAIGNE, J.

Ma Wet

\* *Petitioner*\*

Mg Po Taik

*Respondent.*

*Criminal Procedure Code, (Act V of 1898), Ss. 517, 520—Omission by Magistrate or Sessions Judge to order disposal of Exhibits as part of regular judgment—Subsequent order under S. 20.*

A Magistrate or Sessions Judge who has omitted to pass an order for the disposal of property produced as Exhibits as part of his judgment convicting or acquitting the accused is not precluded from passing a subsequent order for its disposal. S. 517, Criminal Procedure Code, does not limit his power in this respect. Nor is a Court of Appeal or revision so limited. S. 520 expressly authorises the separate consideration where necessary, of matters referred to in the section.

*In re, Laxman Rangu Rangari, (1911) 35 B 253—distinguished.*

Judgment. 31st July, 1924.

The applicant prosecuted the respondent for an alleged offence under S. 408, Indian Penal Code, before the 1st Additional Magistrate of Twante, and that Magistrate passed judgment on the 11th February, 1924 convicting the respondent and sentencing him to four months' rigorous imprisonment. The prosecution had reference to some paddy reaped by the respondent and four bullocks alleged to have been entrusted to the respondent. The judgment convicting the respondent contained no order as to the disposal of the property; but on the same day the Magistrate passed an order which is recorded in the Diary Sheet directing that the paddy and four bullocks which had been seized by the Court be handed to the complainant on her giving security in respect of the same.

The respondent appealed against such conviction and on appeal the Sessions Judge passed judgment on the 13th March, 1924, setting aside the conviction and acquitting the respondent. The appellate judgment contained no order reversing the order passed under S. 517 for the disposal of the property presumably because such order had not appeared in the judgment under appeal; and it is probable that the Sessions Judge, when passing such judgment, was not even aware of the order

\*Cr. Rev. No. 371 B. of 1924 being review of the order of the Sessions Judge, Hanthawaddy, in Criminal Revision No. 261 of 1924.

as to the disposal of property which had only been entered in the Diary of the Convicting Magistrate.

The respondent then applied to the Magistrate for a return of the paddy and four bullocks, but on the 28th March, 1924 the Magistrate refused to pass such order. The respondent then applied to the Sessions Judge for an order under S. 520 of the Code of Criminal Procedure directing that the properties which had been taken out of the possession of the respondent be returned to the respondent ; and on the 6th May, 1924 the Sessions Judge, who was a successor to the Sessions Judge who had heard the regular appeal, passed the order for the return to the respondent of the paddy and four bullocks.

The applicant, the original complainant, has applied for revision of that order, on the ground that the Sessions Judge had no jurisdiction to pass the order, because such order had not been included in the original judgment reversing the conviction. It is urged that S. 423, cl. (d) of the Code of Criminal Procedure would have authorised the Sessions Judge as a Court of Appeal to pass the said order as part of the judgment of the 13th March ; and that such judgment must be construed as a judgment refusing such return of the property, and that consequently the Sessions Judge had no jurisdiction to pass the subsequent order and was debarred by S. 369 from so altering his judgment.

In my opinion this contention is not sound. The order under S. 517 was not in fact the subject of the appeal to the Sessions Judge, and it had apparently been passed behind the back of and without notice to the respondent. It is quite true that the Sessions Judge could under S. 423, cl. (d) have passed the later order as part of the order of the 13th March ; but that does not necessarily mean that the Code compels him to limit all his orders under S. 520 to his judgment reversing the conviction. If the applicant's contention is sound, it would have equally debarred the Magistrate from passing the subsequent order on the 11th February, for the disposal of the property. It is obvious, however, that S. 517 does not limit the power of the Magistrate or Judge, who has omitted to pass an order for disposal of exhibits as part of his judgment convicting the accused, so as to deprive him of all power to

subsequently pass orders for the disposal of the property. Similarly, I do not think that a Court of Appeal or revision is so limited. I think that S. 520 expressly authorises the separate consideration, where necessary, of matters referred to in the section.

Reliance has been placed on the decision in *In re, Laxman Rangu Rangari* (1) in support of the contention of the applicant, but I think that that decision merely recognises the principle that, in a case like this, the Appellate Court, which would hear the appeal, would be the proper Court to exercise the jurisdiction under S. 520.

In my opinion the order passed by the Sessions Judge was a proper order and one which it was the duty of the Court to pass once the conviction had been set aside. The judgment of the Sessions Judge of the 13th March was to the effect that no offence had been committed; consequently it implied that the Magistrate had no jurisdiction under S. 517 to dispose of the property in respect of which no offence had been committed, and it was only right that such illegal order should be set aside.

For these reasons I do not think that the Court should interfere, and I dismiss the application.

---

PRIVY COUNCIL.

PRESENT :—LORD SHAW, LORD PHILLIMORE, LORD BLANESBURGH, SIR JOHN EDGE AND MR. AMEER ALI.

Mrs. Kirkwood *alias* Ma Thein, Mg. Aung and  
Mg. Byaung . . . *Appellants\**

v.  
Maung Sin and Ma Nga Ma . . . *Respondents.*

---

*Burmese Buddhist Law—Orasa—Definition—Status of orasa—When it arises—Conditions under which eldest born child may be superseded by younger member of family as orasa—Inheritance of children of orasa.*

The term *orasa* in the Buddhist Law is used to denote the first-born child in the family, whether male or female, who is competent to undertake the responsibilities of a deceased parent. There can only be one *orasa* in a family.

---

\*P C Appeal No. 81 of 1923 from the Chief Court of Lower Burma.

1. (1911) 35 B 253.

The status of an *orasa* child does not depend on the decease of the father where the child is a son, or of the mother where it is a daughter; it comes into existence on the fulfilment of three conditions, *viz.*, (1) that he or she is the first-born child; (2) that it attains majority; and (3) helps either in the acquisition of the family property and the discharge of the father's responsibilities; or, if a daughter, helps the mother in the care of the property and the control and management of the household, which lie particularly within the mother's duties.

The eldest child may be superseded or displaced from his or her status on grounds which are stated in S. 62 (p. 117) of U Gaung's Digest. When a son is incompetent to assume the duties and responsibilities of the father, either from physical defects or otherwise, the next brother may step into his shoes. There is no provision of law, however, by which on the mother's death a daughter who was not the eldest or first born should become the *orasa* child and become entitled to a preferential share.

The child of an *orasa* takes the same share as its uncle or aunt.

Cf. *Manugye* (Richardson's Translation), Book X, S. 6, p. 273; Book X, S. 3, p. 271; Book X, S. 15.—U Gaung's *Digest*, Ss. 33 62 162 and 163—approved.

U Gaung's *Digest* S. 140—disapproved.

#### *Facts.*

The appellants, the children of one Maung Po Cho, deceased, filed a suit in the District Court of Hanthawaddy, for recovery of a quarter share in the estate of U Baw and Daw Hmo, as representing Maung Po Cho, who, they claimed was the *orasa* son who had pre-deceased his parents. The defendants were the younger brother and sister of Maung Po Cho, children of U Baw and Daw Hmo.

The eldest child in the family of U Baw and Daw Hmo was a daughter, Ma Nyein Aung, who had attained majority, the next in seniority was the abovenamed Po Cho. The contest between the parties in the suit was as to whether both of these children were *orasa*, or if not both, which one of them was.

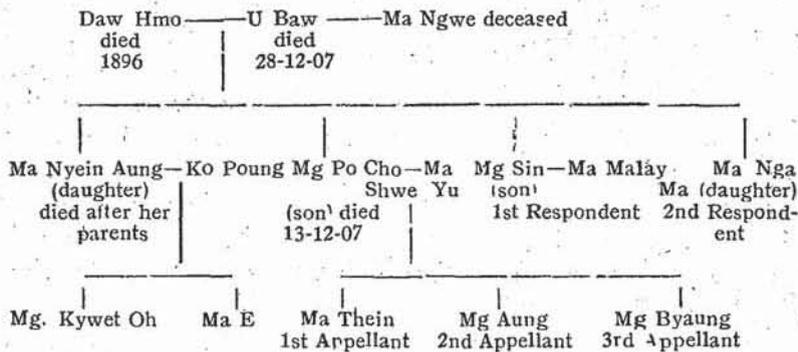
The District Court held that Po Cho was the *orasa* son. The defendants appealed to the Chief Court of Lower Burma in Civil 1st Appeal No. 23 of 1919 before Robinson, C. J. and Duckworth, J., who referred the principal question to a Bench of five Judges (*vide* Civil Reference No. 2 of 1921 reported in 11 L. B. R., p. 220) and gave judgment holding, *inter alia*, that Po Cho could not have acquired the status of *orasa* in the presence of his elder sister who was the first born.

They therefore dismissed the appellants' suit for a quarter share and awarded them a one-sixteenth share as children of a younger son who pre-deceased his parents.

Against this judgment the appellants brought this appeal. The texts in the *Mānugye* and U Gaung's *Digest* and the case-law were considered by their Lordships though the latter are not set out in the judgment.

Judgment. *7th August, 1924.*

*Per MR. AMEER ALI* :—This appeal arises out of a suit for the administration of the estate of one U Baw, a native of Burma, subject to the Burmese-Buddhist Law. U Baw died on the 28th December, 1907; his wife, Daw Hmo, is said to have died some years before. U Baw had by her four children. The following table will explain the relationship of the parties :—



U Baw had a second or junior wife, but she does not enter into the present controversy.

Po Cho, the elder son of U Baw and Daw Hmo, died a fortnight or so before the death of his father, leaving several children, who are the plaintiffs in this action. They claim a one-fourth share of the estate of U Baw on the ground that their father, Po Cho, was the *orasa* son of his father, and was consequently, under the Burmese-Buddhist Law, entitled to a preferential share of one-fourth in U Baw's estate. The claim is set out thus in the plaint :—

"That the said Ko Po Cho was the eldest son of the said U Baw and attained his majority and assisted the said U Baw in his business and kept up filial relations with the said U Baw up to his death, and the said Ko Po Cho attained the complete status of an *orasa* son of the said U Baw,"

In paragraph 6 the plaintiffs set out the basis of their own rights. They say that—

“As children and representatives of the said *orasa* son, they are entitled to an equal share in the estate of U Baw with each of their uncles and aunts, the said Ma Nyein Aung Maung Sin and Ma Nga Ma, and that as the second or lesser wife Ma Ngwe has since died they claim a one-quarter share of the whole of the said estate of U Baw.”

The defendants deny the plaintiffs' claim and the allegation that Po Cho was the *orasa* son.

In order to understand the controversy and follow exactly the decisions of the Courts in Burma in this case, it is necessary to explain that the Burmese-Buddhist Law is contained in a series of books entitled *Dhammathats* which have been composed from time to time by the expounders of that law ever since the thirteenth century, if not from before. This is lucidly set out in the Digest of U Gaung, printed under the auspices of the British Government. The author of this work, a distinguished Burmese jurist, describes a *Dhammathat* to be a “collection of rules which are in accordance with custom and usage” of the Burmese people. In his remarks on the treatment in these treatises of the subject of inheritance, Mr. Gaung observes that “the seven divisions of the Law of Inheritance are treated in the *Dhammathats* in such a very unsystematic and unmethodical way that it becomes a tedious task for any one who attempts to study the subject.” In order to arrive at a definite conclusion on the points in controversy their Lordships have to embark on a survey of the law which, apart from its tediousness, is not free from inconsistencies.

In the Digest of U Gaung six classes of sons are said to be entitled to inherit the property of their parents. In the first category stands the son born of a union contracted with parental sanction, and is known as *orasa*. As religious formalities do not appear essential to lawful wedlock, this form of marriage is evidently regarded to constitute a valid marriage. The term *orasa* is admittedly borrowed from the Sanskrit *aurasa* used in works on Hindu Law and has been corrupted into *auratha* or *orasa*. Mr. Richardson, the translator of the *Manugye Dhammathat* uses the word *auratha*, and Mr. Justice

Heald, of the Chief Court, adopts the same spelling. Whether the word is spelt *auratha* or *orasa* it undoubtedly denotes a son born of a union contracted with parental sanction ; in other words, a legitimate son. In course of time, judging from a comparison of the enunciations in the *Dhammathats*, it acquired a special meaning ; it came to signify a son who, by virtue of his position in the family and his competency to assume the duties of the father, was vested with a defined right in the parental estate. Similarly, in the course of time, as the *Dhammathats* show, the word was extended to include a daughter standing in the same position and vested with the same right.

The plaintiffs' case is that although Ma Nyein Aung was the eldest born daughter of U Baw and Daw Hmo, the appellant's father, Po Cho, as the eldest son, possessed the qualifications necessary for being vested with the status of an *orasa* son. They contend, and their contentions have been urged with great force before the Board, that, in the first place a woman is inferior to a man, and secondly, that the *Dhammathats* do not lay down the rule that the son who is vested with the status of an *orasa* son and acquires a preferential right to a fourth share of the family estate should be the eldest born, or, to speak more correctly, the first-born child. In support of their contention they rely on the provisions in the *Dhammathats* that in certain cases the younger son may be vested with the rights of the *orasa* or privileged son.

The suit was instituted in the Court of the District Judge of Hanthawaddy.

The substantial issue before him was whether Po Cho, who predeceased his father, acquired before his death the status of a privileged or *orasa* son and became thereby entitled to the preferential share of one-fourth in the parental estate, which he passed on to his children, the plaintiffs.

In using the term "privileged" their Lordships do not wish to introduce another element of complexity to a sufficiently perplexing question. They use it simply as a synonym for *auratha* or *orasa*.

Admittedly the entire property in dispute was acquired as stated in the plaint "during the marriage of the said U Baw

and Daw Hmo," and thus husband and wife under the Burmese-Buddhist Law were entitled to equal shares in the property. If this fact is borne in mind much of the difficulty in the case would disappear.

The District Judge felt himself constrained by previous decisions in the Burma Courts to hold that the plaintiffs had made out their claim and were entitled to a one-fourth share in the estate.

From the District Judge's decree the defendants appealed to the Chief Court. The appeal was in the first instance heard by a Division Bench consisting of Robinson, C. J., and Duckworth, J. In view of the fact that the decisions in previous cases were by no means consistent and having regard to the complexity and importance of the controversy in the present litigation, the learned Judges felt it advisable to refer the points at issue to a Full Bench of their Court; and considering that the reference should be based on specific questions, they submitted to the Full Bench six questions, which appear to cover a far larger ground than perhaps was actually necessary for the decision of this case.

It is interesting, however, to note the questions, as they furnish the key to the major part of the decisions of the Full Court. They are as follow :—

" 1. In a family consisting of both sons and daughters, can any child acquire the full status of *orasa* prior to the death of either parent ?

" 2. If so, in such a family where the eldest child is a daughter, can any son become *orasa* until his father dies ?

" 3. In such a family, can the question which child is the *orasa* be decided before the death of either parent ?

" 4. Can there be in such a family two *orasas* ?

" 5. Are sons always to be preferred to daughters as *orasa* ?

" 6. In such a family, 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 ?"

The matter thus came before a Full Bench of five Judges. Although some of them considered the questions rather wide in view of the actual facts of the case, all concurred substantially in the answers which Mr. Justice Maung Kin gave. His answers are as follow :—

"Question 1—in the affirmative.

"Question 2—Where the eldest child is a daughter, no son can become *orasa*.

"Question 3—in the affirmative.

"Question 4—in the negative.

"Question 5—in the negative, unless the son is the eldest born.

"As regards Question 6, I may say that the word 'transmit' is not quite a happy term. The eldest born son is the *orasa*. If he predeceased his parents, his children will have a right to preferential treatment as laid down in the first paragraph of S. 15 of the *Manugye*, or S. 162 of the Digest. If the eldest born son died before he became competent to take his father's place, a younger son, being fully qualified, may become *orasa*, and, if that son had predeceased his parents, his children will have a right to the same preferential treatment. But if the eldest born child was a daughter and predeceased her parents after she had become competent to take her mother's place, her children will have a right to the same preferential treatment. It is doubtful whether another daughter, younger than a son, can ever take the place of the eldest born daughter who is not competent or died before she became able to take her mother's place."

On receiving the answers to the questions submitted, the Division Bench reversed the decree of the District Judge and awarded a decree to the plaintiffs in respect of a one-sixteenth share of the estate, in lieu of the one-fourth that had been given to them by the Court of first instance. From this decree the present appeal has been preferred, and the arguments which were pressed in the Chief Court have been forcibly addressed to their Lordships.

Three principal grounds have been urged in support of the plaintiffs' claim, and on these grounds the correctness of the judgments of the Full Bench is challenged. First, that the *Dhammathats* do not, when speaking of an *orasa* son, lay down any rule that he should be the eldest or first born of the children. Secondly, that a daughter, by the rule in the *Dhammathats* relating to the inferiority of the female sex in relation to the male, can never be the *orasa* child; and, thirdly, that when there is a son, a daughter cannot be an *orasa* child, which appears to be only a branch of the second argument.

Before referring to the judgments of the Full Bench, their Lordships desire to state the result of their own examination of the *Dhammathats*.

In respect of the first proposition advanced on behalf of the plaintiffs, viz., that in the *Dhammathats* the status of *orasa* is not confined to the eldest or first born, it appears to their Lordships that the argument is based upon a misconception of the rules laid down in the Burmese-Buddhist Law. Chapter 6 of the Digest deals with the subject of partition between parents and their own children, *i. e.*, descendants of the first degree. S. 30 relates to partition between mother and son on the death of the father. All the *Dhammathats* agree that on the death of the father the eldest son should be entitled to a one-fourth share of the estate, and that the mother should be entitled to the remaining three-fourths for herself and her younger children. The *Vilasa* states as follows :—

“On the death of the father the rule of partition between mother and son is as follows :—

“If the son is the eldest born and if he helps the parents in the acquisition of the family property, he shall get his father's elephant and pony, together with their keepers ; the cup, spear, tray and plates used by his father ; the clothes, ornaments, and belt worn by him ; the lands held as an appanage of his office ; the town or village, the usufruct of which he enjoyed, and the office held by him. The mother shall get her belt, finger-rings, bracelets, earrings, necklaces, combs, betel-box, stool, and personal ornaments given her during the father's lifetime. The remainder such as gold, silver, bullocks, buffaloes, goats, pigs, fowls, ducks, clothes paddy-rice. Indian-corn, peas, millets, barley, sessamum, cotton and household furniture shall be divided into four shares ; the mother shall get three shares and the son one share. Even if there are ten sons, only one-fourth shall be given them.”

The *Kaingza* states the rule thus :—

“The reason why the mother gets three shares is that when the property was being acquired, the son was not yet born, and after he was born he could not (during his minority) do anything towards the retention of what was already acquired ; even the father can merely acquire, but cannot prevent waste. It is the mother alone who takes care of the property.”

In the *Myingun* the rule is stated in the following terms :—

“If the son is one who is competent to assume the father's responsibilities, and is known to the local authorities, he shall get his father's pony, drinking-cup, betel-box, sword, lands held as emoluments of office, lands worked by him, personal ornaments and wearing apparel, cups, trays, spoons and plates, spears large and small, armour, and such other articles worn by men only. Stored-up grain, bullocks, buffaloes, slaves, fowls, pigs and utensils shall be divided into four shares ; the mother shall get three shares and the son one share.”

The *Manugye* states the principle in identical terms (1). It declares that on the father predeceasing the mother, the estate, after the apportionment of the specific articles as laid down in the *Dhammathats*, should be divided into four shares out of which the "eldest son" should be entitled to one share and the mother and "younger children" to three shares. In section 12 it declares that when the mother dies in the lifetime of the father the same rule should apply to the "daughter's" claim to share in the estate.

It is unnecessary to refer to the passages in the other *Dhammathats* as set out in the Digest relating to the right of the "eldest son" to a one-fourth share on the death of the father, as they state the rule substantially in the same terms.

On these rules the question arises, who is the son who becomes entitled to this right? The respondents' contention is that this special right is given to the *eldest born* son, while the appellants urge that the words "eldest son" are not restricted to "the eldest born," but applies equally to a son who, in a family consisting of a number of children of both sexes, stands in relation to them as the eldest son. And on this ground they contend that Po Cho was the "eldest son" and entitled to the one-fourth share as *orasa* son.

The answer to the question, however, is furnished by the *Dhammathats* themselves. The reason why the mother becomes entitled to a three-fourth's share in the estate in which she and the deceased father held equal shares explains also who "the eldest son" is who becomes entitled to the one-fourth share.

The *Mano Dhammathat* explains the reason why the mother gets the three-fourth's share in these terms :—

"The mother gets three shares because while the property was being acquired the son was not yet born, and, when acquired the mother is the only person to take care of it and prevent it from being wasted."

The *Dhammathat-pyu* gives it thus :—

"On the death of the father the partition between mother and son shall be as follows :—

It states the question first, "Why should the mother get three shares?" and then gives the reply :—

1. Richardson's Translation, Book X, S. 6, p. 273.

"Because during the early days of her wedded life, while family property was being acquired the son was not yet born and whatever was acquired by his father the mother took care of and laid by. Hence the mother shall get three shares, she being the principal agent in the acquisition of the family property."

The *Vilasa* declares that on the death of the father the rule of partition between mother and son is as follows. It specifically states: "If the son is the eldest born," and "if he helped the parents in the acquisition of the family property, he shall get his father's elephant, etc. The remainder of the estate shall be divided into four shares—the mother shall get three shares and the son one share"

and to the question, "Why should the 'eldest born child' get a fourth share?" the answer is:—

"the parents obtained the child at the commencement of their wedded life by their earnest prayer and acquired the property with *his* or *her* assistance."

What can all this mean, except that "the eldest son" referred to in all the *Dhammathats* is *the eldest born child* of the wedded pair.

In S. 33 of Mr. Gaung's Digest the rules of the *Dhammathats* referring to the rights of the "eldest daughter" in the family estate on the death of the mother are set out at length. These rules require careful analysis and consideration in conjunction with the rules relating to the rights of the son on the death of the father, leaving the mother surviving him.

A comparison between these rules regarding the son's rights and the daughter's rights will elucidate still more clearly what is meant by the "eldest son" or the "eldest daughter" in the *Dhammathats*.

S. 33 deals with the subject of partition between father and the eldest daughter on the death of the mother, as happened in the present case. Daw Hmo died before her husband, leaving Ma Nyein Aung, the eldest born child of the marriage. Her status and her rights are clearly stated in the *Dhammathats*. The *Manugye*, the authority of which has been recognised by the Board, after setting out the specific articles belonging to the mother or in her sole use in her lifetime, such as earrings, bracelets, belt, cups for eating and drinking, clothes and ornaments worn by women to which the eldest daughter became

entitled, states the rule as to the partition of the residue of the family property between the surviving parent, the father, and the eldest daughter thus (2) :—

*Partition between father and daughter on the death of the mother.*

“Let the father have his riding elephant and horse, his goblet, the slave who carries his water and betel, his sword, betel apparatus, clothes, and ornaments. Let the daughter have her mother’s ornaments, clothes, and the slave who cooked her rice ; and having divided the residue into four shares, let the daughter have one and the father three.”

In the *Kungyalinga* the rule is stated in the following terms :—

“The mode of partition between the *orasa* daughter and father on the death of the mother is, *mutatis mutandis*, the same as that between mother and son on the death of the father.”—*The Digest*, p. 88.

In the *Warulinga* it is as follows :—

“The mode of partition between father and daughter on the death of the mother is, *mutatis mutandis*, the same as that between mother and son on the death of the father. The daughter shall get in addition her clothes, ornaments and goldflowers, one female slave, and her mother’s personal belongings, just as the son gets his father’s personal belongings.”

The *Cittara* states the rule thus :—

“The mode of partition between father and *orasa* daughter on the death of the mother is, *mutatis mutandis*, the same as that between mother and son on the death of the father.”

The *Kyetyo* gives the rule more fully ;

“The mode of partition between father and *orasa* daughter on the death of the mother is as follows :—

“The daughter shall get her anklets, bracelets, ear-rings, belt, necklaces, etc., given her during the mother’s lifetime, and by both parents, these having become her separate property. She shall also get her mother’s belt, necklaces, combs, finger-rings, ear-rings, bracelets, betel-box, cushions, and other personal ornaments. The ornaments worn by the daughter during the mother’s lifetime shall go to her. The rest of the property such as gold, silver, copper iron, slaves, buffaloes, bullocks, goats, pigs, fowls, ducks, paddy rice Indian corn millets barley, sessamum, cotton and household furniture shall be divided into four shares ; the father shall get three shares and the daughter one share.”

“The above rule applies when the daughter is the eldest born. The younger daughters shall get their shares only on the death of both parents.”

And then comes this important question :—

“Why should the mother get three shares and the eldest child only one share ? Because the mother saves the property acquired by the father

2. Richardson’s Translation of *Manugye*—Book X, S. 3, p. 271.

and thereby accumulates it at the early period of her wedded life, before the eldest child was born; and during the minority of the eldest child, before he or she could assist the parents the mother accumulates the property acquired by the father. The eldest child gets one share because he or she upholds the parent's position and rank and continues the family. Having to bear the children, the mother has not the heart to make them work, nor can she see them suffer privation; she cherishes them and brings them up. Children lie under greater obligation to the mother than to the father. Hence the mother gets three shares and the son one share. Should the property enumerated above be exhausted by the mother for her sustenance or in performing works of merit, let it be so. The sons shall not also claim the residue of the property to which the mother alone is entitled."

It is to be specially noted that the words here used are "eldest child," clearly indicating that the expression includes children of both sexes.

This passage from the *Kyetyo* shows not only that on the death of the mother the eldest born daughter is entitled to a one-fourth share, but it also explains why she becomes so entitled. The eldest born daughter steps into the shoes of the mother, assumes her responsibilities, manages the household and takes care of the younger children like the mother, and is confirmed in the status of the *orasa* child. The status does not depend on the decease of the father, where the child is a son; or of the mother, where it is a daughter; it comes into existence on the fulfilment of three conditions, viz.: (1) that he or she is the first-born child; (2) that it attains majority; and (3) helps either in the acquisition of the family property and the discharge of the father's responsibilities; or, if a daughter, helps the mother in the care of the property and the control and management of the household, which lie particularly within the mother's duties.

In their Lordships' judgment, although it is not easy always to reconcile the inconsistencies with which the *Dhammathats* bristle, upon a careful comparison of the different enunciations so laboriously brought together in the Digest, the following propositions clearly emerge from the rules propounded in the *Dhammathats*, viz., that the designation *orasa* is not limited to a son and that it connotes the eldest or first-born child who is competent to undertake the responsibilities of the deceased parent.

The grounds on which "the eldest child" may be "superseded" or displaced from his or her status are collected in S. 62 (p. 117) of the Digest. When a son is incompetent to assume the duties and responsibilities of the father, either from physical defects or otherwise, it is declared that the next brother should step into his shoes. Supposing there is a daughter intervening between the two sons, viz., the first born and the next born son, she could not possibly be the *orasa* child. The law does not say that on the mother's death a daughter who was not the eldest or first born should become the *orasa* child and become entitled to a preferential share. As already observed, the provision is for the first born, whether male or female, if competent.

In the present case the mother died several years before the father; it is not disputed that the eldest daughter, the first-born child, Ma Nyein Aung, assumed all her responsibilities. Nor is it disputed that she was quite competent to do so. It may be taken for granted that she looked after the conservation of the property as her mother did during her life-time and took care of the younger children. She was thus the *orasa* child of the marriage of U Baw and Daw Hmo. The second son, Po Cho, could never become the *orasa* child and could never acquire the status in his own right. There was no eldest born son whom he had superseded for "incompetency" or into whose shoes he had stepped on his death before attaining majority.

It is contended, however, that the sections dealing with partition between an elder sister and a younger brother on the death of the parents (Digest, S. 140) places the son on the same level as the elder daughter. The *Kyetyo* says :—

"If the eldest born is a daughter and the second child a son, let them share the estate equally between them."

The *Kyannet* makes the following statement :—

"If, after the establishment of a daughter as an *orasa*, a son is born they shall share the estate equally between them.

"If the elder daughter and the younger son are both childless, the estate shall not be divided equally between them, because the son is deemed the *orasa*."

Similar statements occur in other *Dhammathats*. Their Lordships do not propose to undertake the task of trying to

reconcile transparent inconsistencies. Whether the prescriptions to which the plaintiffs have referred as showing the superior right of a younger son to that of the elder daughter were actuated by a desire for a fair and equal division, it is difficult to say. It was certainly so in the case of one younger brother co-existing with the eldest born sister even after she was installed as *orasa*. Whatever may be the reason of these inconsistencies, it is clear that these arbitrary rules of distribution cannot override or control the previous express provisions relative to substantive right.

Ss. 162 and 163 of the Digest deal with the rights of the children of the eldest son or eldest daughter dying before the parents. S. 162 is headed thus :—

“The eldest son dies before the parents ; the son of the deceased is entitled to the same share as his father's youngest brother.”

And S. 163 has the following heading, clearly indicating the subject dealt with in the section :—

“The eldest daughter dies before the parents ; the deceased's child is entitled to the same share as the deceased's youngest sister.”

The *Manugye*, in S. 15, Book X, states the rule as to the devolution of the share of the eldest born son or eldest born daughter on his or her predeceasing the parents :—

“If the eldest son dies before his father and mother, the law of inheritance between his son and his son's uncles and aunts is this : because in case of the death of father and mother the eldest son is called father, let his son, and his (the eldest son's) younger brothers, share alike.

“Should the eldest daughter die before the father and mother, this is the law for the partition of the inheritance between her daughter and her daughter's uncles and aunts : that the daughter of the eldest daughter and her (the eldest daughter's) younger sisters shall share alike, because the eldest daughter, when grown up, stands in the place of a mother.

“In case of the death of the younger children occurring before the parents the law for partition of the inheritance between their children and the (co-heirs) relations of their parents is this : the children of the deceased have one-fourth of the share which would have come to their parents.”

The *Vilasa* declares that “the eldest son of a deceased *orasa* shall receive as much of the inheritance as the youngest of his uncles. But the younger sons should receive only a quarter as much. Because a son is a nearer kin than a grandson, the latter shall not receive out of the estate of his grandfather as much as the co-heirs of his deceased father.”

The prescriptions in most of the other *Dhammathats* are substantially the same.

These sections clearly refer to the rights of the children of the eldest born son or eldest born daughter. Po Cho did not belong to this category, and he had no right to the one-fourth of the estate to pass to the plaintiffs.

S. 164 refers to the shares of the children of one of the younger children predeceasing the parents.

"The child of a (deceased) younger son shall receive one-fourth of the share to which the deceased was entitled. He or she shall not receive an equal share with the aunts and uncles.

"The child of a (deceased) co-heir who was not the eldest shall receive a quarter of the share to which the deceased was entitled. The remaining three-fourths shall revert to the estate."

This is the conclusion at which their Lordships have arrived upon an independent review of the *Dhammathats*, and the view of the law that has forced itself upon them is supported and confirmed by the detailed and scrupulously careful examination to which the provisions of the Burmese-Buddhist Law have been subjected by the learned Judges of the Chief Court. Maung Kin, J., who is himself a Burmese, conversant with the Burmese language and customs, and well versed in the Burmese-Buddhist Law; has fully discussed the rules of the different *Dhammathats* concerning the questions with which the Court had to deal. In the course of his judgment he says :—

"All the *Dhammathats* mentioned in S. 30 of the Digest, when considered as a whole, lead to the inference that it is the eldest born legitimate son who is entitled to claim a quarter of the parental estate from his mother on the death of the father, provided he has helped the parents in the acquisition of property and takes the deceased father's place and continues the family. It appears that the *Dhammathats* take it for granted that the son, if competent to do so, will take his father's place and continue the family; but "whether this duty is a mere moral obligation or can be enforced at law is at present undetermined so far as decisions go." And this eldest born son, who is entitled to a quarter share, is by later *Dhammathats* called an *orasa*."

and he then makes the following comment on the argument against the view he has just expressed :—

"It may be argued that what is material is the fulfilling of the conditions and not the order in which the sons are born, so that even where the eldest born is a daughter a son who fulfils the conditions would be entitled to the quarter share from the mother on the death of the father.

"In my judgment the argument is not sustainable. It can only be founded on the *Dhammathats* noticed above which do not call the son entitled to the share by any description, such as *Tha-u*, *thagyi*, *thagyi auratha* or *auratha*, but which describe him only as the son who bears the father's burden or responsibilities. It appears to me that these *Dhammathats* put the matter in a comprehensive form, because whether the claim is made by the eldest born son or by a younger son, the conditions must be fulfilled. These *Dhammathats* do not, in my opinion, contradict the proposition that the eldest born son, if competent, can claim the share from the mother, and if not competent, he will be superseded by another son who is competent; but that if the eldest born is not a son, the right to a quarter share does not exist in favour of a son though he may be the eldest of the sons. I have deduced this by a consideration of the *Dhammathats* alone."

And his conclusion is as follows :—

"It has, however, been urged that, as the *Dhammathats* look upon the son as being superior to the daughter, the eldest born daughter cannot be allowed to claim the quarter share where there are sons. Among others, Ss. 140 and 150 have been referred to in support of the contention. These sections and the others contain rules of distribution after both the parents are dead. These are the rules which this Court has disregarded in *Ma Kyi Kyi's* case. They do certainly show that the son is regarded as superior to the daughter. But they do not give him, unless he is the eldest born, any greater share than the eldest of the daughters. For if the eldest is a daughter and there is a son younger than she is, that son, instead of getting a smaller share in accordance with the order of the births of the children, gets a share equal to the eldest daughter, and in my judgment wherever, in these rules, the word *auratha* is used, it is used to indicate the eldest child but not with reference to the right to claim a quarter share from the surviving parent. When both the parents are dead the question is not who is the eldest born but who is eldest of the surviving children, and all the surviving children get their fractional shares, larger or smaller, according to the priority of birth."

Maung Kin, J., refers to his own experience of the meaning attached by the Burmese people to the position of the eldest daughter. His remarks deserve attention :—

"There is an additional reason why these rules of distribution of inheritance after both the parents are dead do not apply to cases where the eldest daughter claims a quarter share from her surviving parent, the father. It is that the claim is allowed her under very special circumstances, and as a reward for her past assistance in the acquisition of property and the possibility (which the law-givers expected in the times they lived) of her taking her mother's place and continuing the family and controlling the younger children as her mother had done in her lifetime. In the extract from *Dhammathatkyaw* which is given in S. 62 of the Digest we find the principle. . . . The eldest brother is in the position of the father, the eldest sister in the position of the mother. This is in the mouth of every Burman, and it is clear from the fact of

the principle being recorded in that *Dhammathat* word for word the same as it exists in the mouth of the people that it is a well recognised principle. And so far as my experience goes the principle has never been taken to mean that in the case of the eldest daughter, only her younger sisters give her the position of their mother. The younger brothers also respect her as they had their deceased mother. This happy state of things exists to-day and long may it continue.

"Another point is that even if those rules of distribution among all the children are applicable to the question of the eldest daughter's right to a quarter on the death of her mother, the younger son cannot take her place, he can only prevent her from claiming the right. Then in that case there would be no *orasa* at all, a position which the *Dhammathats* can hardly be held to have contemplated.

"In my judgment it is really unnecessary to go into the question of the applicability of these rules because it is perfectly clear, as shown above, that the *Dhammathats*, in giving a quarter to the eldest child, have in view the case of there being both sons and daughters in the family."

The Burmese adopted the Buddhist religion, which was imported from India, and with the religion they also seem to have received the Indo-Aryan conception of the superior rights of men. And Mr. Justice Maung Kin thinks that the Hindu notion of sex superiority found its way among some of the text-writers. There appears to be considerable force in his observations, as will be seen from the use in the *Dhammathats* of various legal terms borrowed from the Sanskrit. Gradually, as the compilers of the *Dhammathats* absorbed the national customs and usages, the sex equalisation, which is the dominant feature of the Burmese law, prevailed, and the later *Dhammathats* show that the eldest born son and the eldest born daughter stand on the same footing.

With reference to this subject the learned Judge makes the following remarks :—

"Among the Burmese-Buddhists equality of the sexes is recognised in the *Dhammathats* with occasional aberrations to the effect that the male is superior to the female. But when we come to consider what superior rights are given to the man we find that his rights are hardly superior to the woman's. Although they borrowed their laws from the Hindu Institutes of Manu, the Burmese carefully refrained from adopting the sex inequalities of the Hindu Law. For instance, in Hindu Law, the term *aurasa* was applied originally only to the legitimate son. Next the Rishis evolved him into a son of a very superior type, namely, the son begotten by a man of a wife of the same caste who was espoused in an approved form of marriage with religious rites, was a virgin at the time of her marriage and had not passed through the marriage ceremony or a part of it with another man. This was done on spiritual grounds. In Hindu

Law a daughter is not called an *aurasa* and is not allowed to confer spiritual benefits on her father as the *aurasa* son is."

"The Burmese borrowed the word *aurasa* and Burmanized it as *auratha*, but gave their own meaning to it suitable to the conditions of family life which they approved. Thus they called a child (son or daughter) born in lawful wedlock an *auratha* child, putting the son and daughter generally on an equal footing."

and he winds up by saying:—

"In the result I would hold that the eldest born legitimate daughter has the right to claim a quarter share on the death of her mother whether she co-exists with sons or not, and that the eldest born child is the *orasa*, although, as regards the claim to a quarter share on the death of one of the parents, it would depend upon the circumstances of each particular case whether the claim can be made or not, that is to say, if the child is a son, he can only make the claim from the mother, on the ground that he steps into his deceased father's place; similarly, if a daughter, she can only claim as one who takes the place of her mother. It is clear also that there cannot be two *orasas*, a male and a female, in the same family, because an *orasa* is either the eldest born or the one who supersedes the eldest born."

His decision is practically embodied in his answer to question 6, already quoted.

Pratt, J., who followed him in delivering judgment, substantially agreed with his Burmese colleague.

Heald, J., deals with the facts and the law of the case with equal care and minuteness. He reviews in great detail the *Dhammathats* and the decided cases of the Burma Chief Court. He expresses his dissent from those which accorded the superior position to the younger son in preference to the eldest born daughter, and gives his reasons therefor. His experience of the country and of the people extends over twenty years. In his general conclusion he is in agreement with Maung Kin, J. He holds that *auratha* or *orasa* is applied to both eldest born son and eldest born daughter; and states that this view is clear from the enunciations of most of the *Dhammathats*. He reviews the *Dhammathats* according to their antiquity. He refers to the *Vilasa*, which was compiled in the twelfth century, and to the *Wagaru* in the thirteenth century, where the term *auratha* or *orasa* are applied to both eldest son and eldest daughter. He states that in the *Dhammathats Kyaw* and the *Kyangsa*, written in 1630, the same expression occurs, so also in the *Vaicchaya* of 1775. He refers

to U Gaung's authority, who is, as already stated, the author of the Digest. Heald, J.'s conclusion is :—

“From the above survey of the *Dhammathats* I think that it is fairly clear that the word *auratha* is commonly used to mean the eldest child, whether son or daughter, and that if the eldest child, being a son, is competent on the father's death to take the father's place in the family, or, being a daughter, is competent on the mother's death to take the mother's place, then he or she is *auratha*, and on the father's or mother's death, is, according to the *Dhammathats*, entitled to the father's or mother's personal property and to one-fourth of the rest of the estate, and, further, that if the eldest child, whether son or daughter, dies without having become entitled to that interest in the estate, his or her children are entitled to share equally in the estate with the younger brothers and sisters of the deceased.”

Dealing with the inconsistent statements in some of the *Dhammathats* showing a certain preference for sons in relation to the eldest daughter, he says as follows :—

“The *Vicchadani*, when dealing with the partition between brothers and sisters after the death of both parents, actually says : ‘Though the eldest child be a daughter she does not reach the status of *auratha* and she must share equally with her younger brother,’ and one or two of the minor *Dhammathats* contain similar passages, which I have no doubt were taken from some old books and reproduced Hindu or possibly pre-Hindu ideas. But just as the *Dhammathats*, when translating passages which are evidently taken direct from what may be called the Hindu Law books, use *auratha* in its original sense of ‘legitimate’ and, nevertheless, when they come to apply it to Burmese Buddhist Law use it in the special sense of ‘an eldest born child who is competent,’ so, although they reproduce passages which follow the Hindu Law in saying that a daughter can never be *auratha*, nevertheless when they come to the actual division of the property of the estate of a Burmese family they put the daughter practically, and in some cases entirely, in the same position as the son.”

Duckworth, J., and the Chief Justice adopted the views of Maung Kin, J. Duckworth, J., says :—

“It is perfectly clear that S. 163 of the Digest applies to families consisting of both sons and daughters. Among the Burmese people generally, there is no doubt that the eldest legitimate child, whether it be a son or daughter, is regarded as taking the place of the parent of the same sex when that parent dies.”

Their Lordships do not feel called upon to discuss in detail the decisions of the Burma Courts cited at the Bar, as they agree generally with the observations of the Judges of the Full Bench.

In so far as those decisions expressly or by implication are adverse to the rights of the eldest born daughter, their

Lordships have no doubt they proceeded on an insufficient consideration of the status assigned to the first-born child by the Buddhist-Burmese Law as embodied in the *Dhammathats*, and expressed in the existing customs and usages to which Mr. Justice Maung Kin so forcibly refers.

The eldest born child occupies an extraordinarily favoured position as compared with the younger children, inasmuch as the parents, to use the quaint language of the *Vilasa*, "obtained the child by their earnest prayers at the commencement of their wedded life, and acquired the property with his or her assistance."

These considerations have led their Lordships to the conclusion that in the present case Po Cho, being a younger child, although the eldest son, did not acquire the status of *orasa* and did not become entitled to the privileged position allotted to the eldest or first-born son. In these circumstances the judgments of the Full Bench and the decree of the Chief Court appear to their Lordships to be perfectly right, and they are of opinion that this appeal fails and should be dismissed. In view, however, of the importance of the case and the difference of opinion prevailing until the decision of the Full Bench on the questions at issue, their Lordships think that the costs of both parties should come out of the estate. And they will humbly advise His Majesty accordingly.

Solicitors for appellants : *De Gruyther, K. C.* (with him *Hon. Geoffrey Lawrence*).

Solicitors for respondents : *Dunne, K. C.* (with him *E. B. Raikes*).

PRESENT :—BAGULEY, J.

Khem Chand

... *Petitioner\**

v.

Lalu

... *Respondent.*

*Criminal Procedure Code—Act V of 1898—S. 439—Revision against acquittal—When allowed.*

\*Cr Rev Nos. 502-B and 427-B of 1924 being review of the order of the Second Additional Magistrate of Pyapon passed in Cr Reg No. 77 of 1924.

The High Court will not interfere in revision against an order of acquittal on the application of a private person except in very exceptional cases such as where the interests of public justice require it, or where public grounds are put forward which render the application a matter of public importance, or a question of jurisdiction is involved.

*Queen-Empress v. Balwant*, 9 All 135; *Faujdar Thakur v. Kasi Chowdhury*, 38 Cal 786; *Kangali Sardar v. Bama Charan Bhattacharjee*, 42 Cal 612; and *Nga Po Pyaw v. Nga Po Nwe*, 3 U B R 19—referred to.

Order.

11th August, 1924.

The applicant prosecuted the respondent for cheating with regard to three pairs of diamond bangles. The respondent was convicted by the Magistrate but acquitted, on appeal, by the Sessions Judge. The present application is for the revision of that order of acquittal.

That this Court has power to revise orders of acquittal is undoubted. For authorities on this point, I need only quote *Queen-Empress v. Balwant* (1), *Faujdar Thakur v. Kasi Chowdhury* (2), *Kangali Sardar v. Bama Charan Bhattacharjee* (3) and *Nga Po Pyaw v. Nga Po Nwe* (4). The question now arises as to whether I should admit this application for revision. In the last quoted case, there is the dictum, "But in any case the power of reversing acquittals is one that will only be used sparingly and where the interests of public justice demand." And there is a further statement, "it will not do so except in exceptional cases, and applications for the purpose should be discouraged on public grounds."

Mr. Patker, who argued the application, was unable to quote me any case in this Court or in the late Chief Court of Lower Burma in which an acquittal has been set aside in revision on the private application.

In *Faujdar Thakur v. Kasi Chowdhury* (2) on page 623, it is mentioned that, in recent times, until four or five rules have been issued and all except one, by one Bench. How many of these rules were made absolute is not known to me but it seems clear that it is only in rare and most exceptional cases that acquittals are set aside in revision on the application of private persons. In the present case there seems to me to be

1. 9 All. 135.  
3. 42 C 612.

2. 38 C 786.  
4. 3 U B R 19.

no striking feature at all. The Magistrate took one view of the oral evidence and the Sessions Judge took the opposite view. There is no legal point or question of jurisdiction involved. There are no public grounds put forward which render this a matter of importance. The only point of importance is the fact that respondent got three pairs of diamond bangles worth more than Rs. 3,000 from the applicant and has pawned them to a third party, and, if the applicant can get the respondent convicted in connection with these diamond bangles, he expects to be able to recover them from the third party, without having recourse to a civil suit.

I see no reason why he should use the Criminal Courts to recover property which he cannot obtain by a civil suit. I am asked to exercise the power which is only meant to be used in very exceptional cases, and I do not regard the present case as falling within that category. I dismiss the application.

*Parker* for petitioner.

PRESENT :—YOUNG, J.

Maung Po Thin and three others . . . . . *Petitioners\**  
*v.*  
 Maung Po Thin and one . . . . . *Respondents.*

*Civil Procedure Code (Act V of 1908), S. 115—S. 151—Filing wrong copy of decree with appeal—Dismissal of appeal—Inherent power to allow substitution of correct decree—Refusal to exercise jurisdiction under S. 151.*

Where a practitioner has, by mistake, filed the wrong decree with an appeal, he may be allowed under the inherent powers of the Court to substitute the correct decree. A refusal to exercise such jurisdiction under S. 151, Civil Procedure Code, is ground for revision.

Judgment. 10th September, 1924.

The learned District Judge sets out the facts of the case very fully.

There was an appeal filed against a decree in Suit No. 46 of 1923 of the Court of the Sub-divisional Judge of Pyapon, refusing to set aside an award. There was also a decree in

\* Civil Revision No. 54 of 1924.

a suit between the same parties, in opposite capacities, for enforcing the award. The first plaintiff and the first defendant bore, in English, the same name. By mistake the pleader filed the wrong decree with his appeal. He, therefore, asked the Judge to allow him to substitute the decree. The learned Judge held there was no provision of the Code permitting this, and rejected the appeal.

In doing so, I think he was wrong. There was the inherent power of the Court under S. 151. The learned Judge, in my opinion, failed to exercise jurisdiction, and I set aside his order, and direct him to substitute the decree and proceed with the hearing of the appeal.

*Maung Pu* for applicant.

*Rahman* for respondent.

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PRESENT :—YOUNG AND CARR, JJ.

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Coalfields of Burma, Ltd.	...	<i>Appellants*</i>
v.		
H. H. Johnson	...	<i>Respondent.</i>

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*Companies Act (VII of 1913), S. 162 (5)—Non-compliance with statutory notice—Reasonable cause—Objection of Company that debt not presently due—Order for winding up subject to conditions—Admissibility of evidence of terms not included in letter—Filing of regular suit to determine liability.*

The respondent having presented a petition for winding up of the appellant Company for non-payment of money due to him as salary under an agreement, after notice served under S. 162 (5), Companies Act, the appellant Company objected that one of the terms of the engagement was that the respondent should not draw his salary, though credited monthly, until the Company was earning revenue and that the debt was not presently due.

The trial Court passed an order for winding up but stayed it on condition that the Company paid the amount claimed into Court.

The Company appealed.

*Held*, that as the letter embodying the engagement did not contain all the terms of the engagement, the question whether the particular term set up was included or not must be left to be decided in a regular suit and that S. 92, Evidence Act, did not apply to exclude such evidence.

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\*C M Appeal No. 4 of 1924 from the order of the O. S. in C. M. No. 165 of 1923.

*Held also*, the omission of a joint-stock Company to comply with a statutory notice requiring payment of a debt is not neglect within the meaning of S. 162 (5) unless there is no reasonable cause for the omission.

*In re, London and Paris Banking Corporation*, (1874) L R 19 Eq 444—followed.

Order. 20th August, 1924.

*Per* YOUNG, J. :—This is an appeal from an order staying the winding up of a Company on certain conditions, which the appellant claims should never have been imposed.

The respondent had applied for a winding-up order under S. 162 (5) of the Indian Companies Act in that, he a creditor for over Rs. 500, had, on the 27th July, 1923, served a notice under his hand requiring the Company to pay to him the sum of Rs. 31,494, being balance of salary at Rs. 2,000 per month due under an agreement and other sums, and the Company had for three weeks thereafter neglected to pay the sum or to secure or compound for it to his reasonable satisfaction and was therefore deemed in law to be unable to pay his debts.

The Company objected that the debt was not presently due, for that it was one of the terms of his engagement that he should not draw his salary, though it was to be credited to him monthly, until the Company was beyond the proving stage and earning revenue. If this is a *bona fide* defence, it is quite clear that the petition must, as the learned Trial Judge said, be rejected. He, however, went on to hold that, even assuming this arrangement was made, no evidence could be given of it as the terms under which he was employed had been reduced to writing in the Company's letter to him of the 3rd November, 1921, in which there was no reference to the payment of the petitioner's remuneration being dependent upon the Company getting beyond the proving stage and earning revenue. I agree that, if it was a defence the Company were precluded by law from raising, it must be treated as non-existent. I also hold that, if it was not a defence the Company were precluded from raising, it must be considered a *bona fide* defence the truth or falsity of which must be decided in a regular suit. We have, therefore, to consider whether S. 92 of the Evidence Act forbids such a defence to be raised.

S. 92 runs as follows :—“Where the terms of any such contract (*i. e.*, as has been reduced to the form of a document)

..... have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of varying, adding to or subtracting from its terms."

Now the letter of the 3rd November, 1921, on which reliance is placed as containing the terms of the contract, ran as follows :—" We have to inform you that you were duly elected to the Board of Directors of this Company on the 1st September, 1921, that a remuneration of Rs. 2,000 per mensem was sanctioned for you as Consulting Engineer to the Company as from the 20th January, 1921."

Then followed other matters.

It will be seen that the letter in question contains only one term of the agreement, though perhaps the most important one ; nothing is said as to travelling expenses, though it is evident from a private letter written by Colonel Frank Johnson and put in evidence by the respondent that, when the original offer was made to him, he was in Canada and received a telegram "Are you willing drop Canada and come Burma similar terms provided all parties consent" ; nor is anything said as to leave and leave pay ; nor is anything said as to the duties to be performed by the respondent and the only conclusion at which I can arrive is that there were other terms settled, perhaps verbally, and that this scrap of paper does not contain all the terms of the agreement between the parties. This is really sufficient for the disposal of the matter, for, if the letter does not contain all the terms of the agreement, S. 92 does not apply and the question whether this particular term was included or not must be left to be decided in a suit, for the omission of a joint-stock company to comply with a statutory notice requiring payment of a debt is not neglect within the meaning of the sub-section, unless there is no reasonable cause for the omission. *In re, London and Paris Banking Corporation* (1). Here there was reasonable cause, if the story of the Company is true, and I am not prepared to try on affidavits the disputed question of its truth or falsity. It is essentially a question for a suit, with cross-examination on each side. The learned

Trial Judge felt this and did not embark on the question of its truth or falsity, but merely contented himself with a discussion of the question whether the defence could be proved, or not. He came to the conclusion that, whether true or false, it could not be proved. I have come to the conclusion that it can be proved and that the question of its truth or falsity must be tested in a suit. I therefore set aside the order of the Trial Judge ordering the deposit of the amount claimed as a condition of not making an order of winding up, direct the money to be returned to petitioners and stay the order for winding up pending the decision of the suit. If no suit is filed within six months, the petition for winding up will stand dismissed with costs. The appellants will have their costs of the appeal (6 gold mohurs).

*Keith* for appellants.

*McDonnell* for respondent.

*Woodham* for Latilla (a Director).

PRESENT :—GODFREY, J.

L. W. Nasse

... *Appellant\**

v.

King-Emperor

.... *Respondent.*

*Presidency Towns Insolvency Act (III of 1909), S. 102—Obtaining credit by a trick—Non-disclosure of bankruptcy—Offence under the Act.*

Where the appellant, a bankrupt, falsely personated another of the same name by telephone, and obtained credit thereby for over Rs. 50 without disclosing the fact that he was a bankrupt,

*Held*, that as the respondents were looking to the bankrupt personally for payment and he had not disclosed the fact that he was a bankrupt, an offence under S. 102 had been established.

Judgment. 7<sup>th</sup> October, 1924.

The appellant in this case has been convicted by the Western Sub-divisional Magistrate, Rangoon, of an offence under S. 102 of the Presidency Towns Insolvency Act, and sentenced to a term of two months' rigorous imprisonment and he appeals to this Court against the same.

\*Cr. Appeal No. 1170 of 1924 from the order of the W. S. D. M., Rangoon; in Summary Trial No. 580 of 1924.

He was charged upon the complaint of Messrs. Oppenheimer and Company, who, it appears, had, on the 1st August, 1924, received a telephone message purporting to come from a client of theirs of the name of J. L. Nasse, an uncle of the appellant, to the effect that Messrs. Oppenheimer and Company might safely supply cement on credit to the appellant. Shortly after this the appellant himself came to their office and said he had come in connection with the telephone message about cement, and he asked for 100 casks and agreed to pay for them at the rate of Rs. 12 per cask on the 12th August.

Messrs. Oppenheimer and Company gave him a delivery order and he took delivery of 60 casks at Rs. 12 a cask. Next morning, however, they learnt that the appellant had sold the 60 casks at the rate of Re. 1 less than the rate at which they had sold to him. They spoke to J. L. Nasse on the subject and he denied all knowledge of the telephone message. They accordingly stopped delivery of the balance of 40 casks cement, and, on learning that the appellant was an undischarged insolvent—a fact which he had not disclosed to them—they filed their complaint.

S. 102 of the Insolvency Act provides that an undischarged insolvent obtaining credit to the extent of Rs. 50 or upwards from any person without informing such person that he is an undischarged insolvent shall, on conviction by a Magistrate, be punishable with imprisonment for a term which may extend to six months, or with fine, or with both.

From the evidence adduced, it is perfectly clear that the appellant has been guilty of the offence charged. His defence was that his uncle had telephoned to Messrs. Oppenheimer and Company and that they were really giving credit to his uncle and not to him. His uncle, however, entirely repudiates the sending of any telephone message and there appears to be no good reason for not believing him.

The Director of Messrs. Oppenheimer and Company who received the telephone message only knows J. L. Nasse very slightly and not sufficiently well to be able to recognise his voice on the telephone, and he did not know the appellant before at all. The appellant relies on a letter he wrote to his uncle on

the 7th August, which his uncle produced in the witness-box when asked for it. That letter appeals to the uncle for help on the ground that things are going wrong with the appellant with regard to the cement he had obtained from Messrs. Oppenheimer and Company, and that they were threatening to file a complaint and he asks his uncle to see Messrs. Oppenheimer and Company and to ask them to wait for payment and not to take any action. He proceeds : " Now I will tell you what really happened. The man I gave the cement to is a Baboo I am doing work for in Sandwith Road . . . . . Well, he wanted some cement and gave me Rs. 600 for it. I straight away went to Clark of the Plumbing Co. and paid him the money I am due him as he is now taking up my case for arbitration. Well I took 60 casks from Messrs. Oppenheimer, gave it to the Baboo signing for it as sold to him . . . . I really had the honest intention of paying the firm something on Tuesday, but unfortunately things turned out otherwise and what made matters worse was when you denied all knowledge of what happened . . . . ."

It is contended that these last words indicate that the uncle knew all about it inasmuch as he had himself sent the telephone message ; but it is obvious that such a construction conflicts with what is previously stated in the letter and the need for telling his uncle what " really happened." The appellant alleges that he had written another letter to his uncle asking him to telephone and he complains that he has not been allowed to call witnesses to prove that he had so written. It does not appear to me that there is any real substance in this complaint, because the uncle does not appear to have been cross-examined with regard to any other letter, and, even if he had been and had denied it, the fact that the appellant's proving that he had written to the uncle asking him to telephone, does not, in the face of the uncle's evidence, prove that the uncle did in fact send a telephone message as the appellant alleges. So that it can make no material difference to the case against the appellant whether such evidence is adduced or not.

It is further contended that the offence is not committed unless Messrs. Oppenheimer and Company in fact gave credit to the appellant and it is argued that the evidence shows that

they really gave credit to the uncle. It is clear, however, from the acknowledgment put in by the appellant in this Court that Messrs. Oppenheimer and Company were looking to him for payment, and not to his uncle—in the first instance, at all events. And their case is that the message was that they could safely give credit to the appellant. Moreover, I take it that obtaining credit by a trick would equally be within the purview of the section, the fact of the person obtaining it being an undischarged insolvent being undisclosed.

It is finally contended that the sentence of two months' rigorous imprisonment without the option of a fine is unnecessarily severe and I am asked to alter it to one of fine as being more appropriate. I have considered this question, and I think that, having regard to all the circumstances, this is not a case in which I can properly interfere. The appellant first of all impersonated his uncle on the telephone, then obtained goods by falsely representing that he had come in connection with his uncle's telephone about cement, and then obtained money by selling at a lower rate the cement which he had obtained on credit and for which he has not yet paid in full.

The appeal is dismissed. The bail bond will be cancelled and the appellant re-arrested and committed to jail to serve the remainder of his term.

*F. C. Brown* for appellant.

PRIVY COUNCIL.

PRESENT:—LORD SHAW, LORD CARSON, SIR JOHN EDGE,  
MR. AMEER ALI AND SIR LAWRENCE JENKINS.

Ma Thaung and another Appellants\*  
v.  
Ma Than and others Respondents.

*Burmese Buddhist Law—Inheritance—Death of first wife—Partition by way of partnership-deed allotting specific shares of property—Re-marriage by father—Children of first marriage not entitled to share in property of deceased father.*

Where a Burman Buddhist father makes a partition or allots specific shares of his property, amongst his children on the death of his wife, and then remarries, the children are not entitled to claim from the step-mother a share in the property left by him.

A deed of partnership was executed between the children and the father on the death of the mother and shares were specifically allotted to each of the parties, *held*, that though in form a deed of partnership yet according to the true intent and construction of the document and the conduct of the parties it was a document of partition.

The conduct of the parties to a contract reduced into writing may not alter or vary it, but their conduct may help to explain or elucidate a contract open to different meanings. S. 213, *U. Gaung's Digest, Vol. I, Inheritance, p. 276.*

*Ma Hnin Bwin v. U. Shwe Gon, (P. C.) 7 B. L. T. 105—referred to.*

Judgment. 18th December, 1923.

MR. AMEER ALI :—This appeal arises out of a suit brought by the plaintiffs in the Court of the District Judge of Mandalay, Upper Burma, for a share in the inheritance of one U Nyein, a Burmese subject to the Burmese Buddhistic Law. It was treated in the first Court as a suit for administration, and a decree was made therein by the District Judge on June 1, 1920. This decree was reversed on October 25, 1921, by the Judicial Commissioner of Upper Burma, and the plaintiffs' claim was dismissed; hence this appeal to His Majesty in Council.

The facts of the litigation are set out with clearness and precision in the able judgment of Mr. Mosley, the District Judge.

\*P C Appeal No. 10. of 1923 from the judgment and decree of the Judicial Commissioner, Upper Burma.

U Nyein was a trader by profession, and appears to have carried on in conjunction with his wife, Ma Gale, a profitable business in rice. They had a rice-mill which, it is stated, was opened in 1894 and appears to have been at the time of Ma Gale's death in December, 1904, a valuable property. It is to be noted that in the Burmese social and legal system the wife is, to all intents and purposes, a partner.

U Nyein had by Ma Gale five sons and two daughters, who were all *sui juris* when she died. Although under the Burmese Law the eldest daughter became entitled on Ma Gale's death to a definite share in her property, no division took place, and the father and the children continued, as in her lifetime, working in common.

Some months after Ma Gale's death, U Nyein appears to have contemplated marrying again. Before, however, the marriage was actually contracted, on May 11, 1905, he executed the document Ex. L, on the construction and meaning of which the determination of this appeal turns. About a fortnight later U Nyein married Ma Than, the contesting respondent in this appeal.

Ex. L is in the form of a partnership deed, but the respondent contends that in fact it is a partition deed by which U Nyein divided his property amongst his children.

It is urged on her behalf that, under the law of the *Dhammathats*, the children have, after the partition, no right in the property retained by the father. The plaintiffs deny the correctness of the legal proposition on which the respondent bases her contention, and they urge that, whatever the meaning of Ex. L, they are entitled to a share in their father's inheritance.

A number of issues were framed in the Court of the District Judge; the two following embody the substance of the matter now in dispute: (i) Was the deed of arrangement, dated 11th May, 1905 (Ex. L), between U Nyein and his children a division of inheritance in view of his approaching marriage with Ma Than, or was it a mere agreement of partnership? (ii) Are his children who signed that agreement entitled as heirs to share in the property retained by U Nyein under that agreement?

The District Judge, on the form of the document, coupled with the evidence to which he refers in his judgment, came to the conclusion that Ex. L was not a deed of partition but merely a partnership agreement, and he accordingly, as stated already, made an administration decree with respect to the inheritance of U Nyein.

On appeal the Judicial Commissioner has taken a different view. From the circumstances proved in the case he infers that, contemporaneously with Ex. L, there must have been between U Nyein and his children some agreement, necessarily parol, which led him to put the division in the shape it has taken. In one place he says as follows: "It is open to the parties to prove that it was a condition precedent to the attaching of any obligation under the contract, that the disposition should be regarded as a partition of property in view of the marriage, and that the claims of the children of U Nyein as his heirs on his death should be modified accordingly. Further, Ma Than was not a party to the document, nor can she I think for this purpose be regarded as the representative in interest of such a party. She is therefore entitled under the provisions of S. 99 of the Evidence Act to show a contemporaneous agreement. It does not seem to me however that Ma Than is trying to show such a contemporaneous agreement. She does not deny that the terms of agreement between the parties were those of a partnership. Her contention is that that agreement formed a part of a larger transaction and that it was made for the purpose of effecting a division of property. I am of opinion that it is open to her to prove her contention by oral evidence. At the time that the deed was drawn up Ma Than was a stranger to the family. It is not surprising therefore that she is unable to bring any direct evidence as to the intention of the parties when the deed was drawn up, and as to the effect of the deed." He is, however, definite in his conclusion that the deed in question was drawn up in view of the approaching marriage, and that by this instrument U Nyein did effect a partition of his property with his children by Ma Gale.

Owing to this divergence of opinion between the two Courts in Burma, their Lordships have carefully examined the

terms of the document (Exhibit L). In their opinion it speaks for itself.

It begins with the usual formula : " On May 11, 1905, corresponding to the 9th Waxing of the month of Kason 1267 (Burmese Era), at Mandalay, U Nyein and his sons and daughters, in order to carry on business, execute this agreement as follows : U Nyein will transfer all the properties, which have been in his name up to this date, to the name of the partnership. All the house sites, buildings, rice, paddy, ponies, gharries, gold and money, which have been in existence up to this date, will belong to the partnership. The sums of money, which Maung On Shwe, Maung San Hnyin and Maung Aung Min have taken before this date, will be considered as the money belonging to the partnership. The mill and all machines connected with it, which have been already taken possession of, belong to the partnership. Without the consent of the majority (but not one) of the partners, the husband, wife, or co-heirs of a partner cannot make use of the properties belonging to the partnership. The shares, to which the partners have the right to ownership in all the partnership properties are shown below. Either partner Ma E Yin or partner Ma Thaung will take charge of all the private properties belonging to partnership, such as jewellery, etc. The partnership is responsible for all the debts which have been owed to, or owed by, other people up to this date. The partnership will carry on business in accordance with the wish of the majority of the partners. "

It then gives the shares as follows :—

1. U Nyein has the right of ownership to one-eighth share.

2. Maung On Shwe	}	These five persons have the right of ownership to six-eighth share.
3. Ma E Yin		
4. Maung San Hnyin		
5. Maung Aung Min		
6. Ma Thaung		

7. Maung Po Thaung	}	These two persons have the right of ownership to one-eighth share.
8. Maung Po Ka		

The deed was duly signed by all the executants.

The strange similarity of language between the terms of the provision contained in the second paragraph of Ex. L and the rules laid down in the *Dhammathats* for division of family property on the demise of one of the parents is striking. The paragraph in question provides that "all the house sites, buildings, rice, paddy, ponies, gharries, gold and money which have been in existence up to this date will belong to the partnership." In any ordinary partnership the inclusion of these articles would be regarded as unusual; but bearing in mind the rules of the *Dhammathats* it would be natural, and in the ordinary course, in a deed of partition. Again, the paragraph relating to jewellery appears to be unusual in a deed of partnership designed for carrying on business. The provision is as follows: "Either partner Ma E Yin or partner Ma Thaung" (two of the daughters) "will take charge of all the private properties belonging to the partnership such as jewellery, etc."

These particular provisions appear in their Lordships' opinion to furnish the key to the solution of the question whether Ex. L is a deed of partnership or a deed of partition. U Nyein was about to contract a second marriage. Under the Burmese Law whatever he possessed at the time of contracting the relationship which he contemplated would become on the marriage the common property of his wife and himself. Nothing was more natural than that, influenced by the effect of such an eventuality on the position of his children by Ma Gale, he should, in order to provide for them during his lifetime, whilst he was absolute owner of the properties he possessed, decide upon a partition which would secure a definite share in his or her own right to each child. He accordingly, with the agreement and consent of his sons and daughters, entered into the arrangement embodied in Ex. L. None of them was entitled to any share in his lifetime. By this deed he allotted to five of his children a six-eighth of his property, and to the two younger ones one-eighth between them, retaining for himself an eighth share. The conduct of the parties to a contract reduced into writing may not vary or alter it, but their conduct may help to explain or elucidate a contract open to different meanings. The mode, therefore, in which the sons and daughters of U Nyein dealt with their shares is material: it helps to strengthen the conclusion that Ex. L was more a re-

cord of a division of rights and interest than a deed of partnership.

There were not only independent dealings between one or other of the children, but also between them on one side and Ma Than and U Nyein on the other. In 1907, in a suit brought by the minor son of U Nyein's third son against U Nyein and his other children, the rights of the parties came into debate. In his written statement U Nyein distinctly states that the business of rice-miller was started by him on his own account with his own capital, and that "by way of providing for his children he gave them the shares in the business mentioned in the partnership deed." U Nyein's statement was confirmed by the other defendants in a joint defence filed by them. The attempt to make out they had made that admission under the instigation of U Nyein signally failed in the first Court.

After her marriage with U Nyein, Ma Than appears from the evidence to have assisted him in his business, and although there was no definite separation between U Nyein and his children by Ma Gale, the new menage was carried on quite independently and separately from them.

On the whole, their Lordships have come to the conclusion that Ex. L evidences a partition of the rice-mill business and other property U Nyein possessed at the time. That being so, the question arises whether the provision of law the respondent invokes in her favour excludes Ma Gale's children from sharing in the inheritance of U Nyein. It has to be noticed that U Nyein died nine years after his marriage with Ma Than, and within this period U Nyein and Ma Than appear to have accumulated considerable property. The present claim therefore cannot be regarded as unreasonable or unnatural.

The passage on which the respondent relies is contained in S. 213 of Mr. U Gaung's Digest of the Burmese Buddhist Law, Vol. I, page 276. The heading of the section runs thus: "After partition between children and surviving parent, the latter marries again and dies; the children are not entitled to claim inheritance from the step-father or step-mother."

The rule which follows is in these terms: "After the death of the husband, the wife partitions the property with her

children and marries again taking her share with her. On her death the children of her former marriage cannot claim from their step-father any property which she took to the second marriage ; because they have already obtained their shares. The same rule applies when, after the death of the wife, the husband marries again after having given the children their respective shares." It is stated in the Digest to be extracted from Dhammathat Klaw.

It is contended on behalf of Ma Than that under the latter clause the plaintiffs, having received from U Nyein their respective shares, cannot claim any further share in his inheritance. On the side of the plaintiffs it is urged that this latter rule does not occur in any of the other Dhammathats and ought not therefore to have effect given to it.

Admittedly this is the only passage which expressly declares that the children will not be entitled to share in the inheritance of their father after a partition in his lifetime allotting them specific shares in the property he possessed.

The Burmese Dhammathats are numerous, and the criterion for arriving at a definite conclusion with regard to a particular rule is indicated in the judgment of the Board in the case of *Mah Nhin Bwin v. U Shwe Gone* (1).

Their Lordships, however, do not think it necessary in the present case to go through all the Dhammathats for the purpose of discovering what the other Dhammathats declare.

Nothing has been shown to militate against the authenticity or the binding character of the rule on which the respondent relies ; and in the present state of the authorities, their Lordships are not prepared to dissent from the view expressed by the Judicial Commissioner. They are accordingly of opinion that this appeal fails and should be dismissed.

Their Lordships will humbly advise His Majesty to this effect. There will be no order as to costs.

Solicitor for appellants : *E. Dalgado.*

Solicitors for first respondent : *Lowe and Co.*

## PRIVY COUNCIL.

PRESENT :—LORD DUNEDIN, LORD CARSON AND SIR JOHN EDGE.

Maung Dwe and others . . . . . *Appellants\**  
*v.*  
 Khoo Haung Shein and others . . . . . *Respondents.*

*Buddhist Law—Inheritance—Step-children and step-grandchildren preferred to collaterals—Neglect to perform funeral ceremonies—Whether disqualification.*

The step-children and step-grandchildren of a Burmese Buddhist are entitled to inherit the property of the deceased in preference to collaterals.

Separate residence or neglect to bury may operate as a disqualification of such right but does not constitute a necessary qualification for its acquisition.

*Ma Gun Bon v. Mg. Po Kyaw*, II U B R (1897-01), p. 66 ; *Mg. Sein Thwe v. Ma Shwe Yi*, 10 L B R 397 : 13 B L T 216—approved and followed.

[See 1 B L J 56 for report of the judgment appealed from.]

Judgment . . . . . 21st October, 1924.

LORD DUNEDIN :—This is the case of a disputed succession to the property of a lady named Ma Shwe Kin, a Chinese Buddhist living in Tavoy, who was the third wife and the widow of Khoo Shwe Goon. Khoo Shwe Goon was first married to Ma Lin and by her he had a son now deceased and another son Khoo Ping Hoe, one of the respondents in the appeal. Ma Lin died and Goon married Ma In, by whom he had a son Khoo Ping Kyan, now deceased. Khoo Ping Kyan married and had three sons and a daughter, who are the other respondents. Ma In died, and after some years Goon married his deceased wife's sister Ma Shwe Kin. Goon died in 1917 before his third wife, who died in 1919. He disposed of his own property by will.

Ma Shwe Kin died in 1919 possessed of considerable property, which was her own. She was also entitled to a share of the succession of her mother Pwa Zo. Ma Shwe Kin was survived by a brother and married sister. This brother, the sister and her husband are the appellants in the present case. Originally a question was raised as to whether Goon really ever married his third wife, but it was held in the Courts below that the marriage was sufficiently established by habit and

\* P C Appeal No. 84 of 1923 from the judgment and decree of the Chief Court of Lower Burma in Civil First Appeal No. 221 of 1920.

repute and no question as to that was raised before their Lordships. The case, therefore, resolves itself into the question, who are to be preferred, the step-son and step-grandchildren on the one hand, or the lady's own brother and sister on the other ?

The case was tried before the District Judge, who preferred the appellants. That learned Judge took the view that, though in the case of *Ma Gun Bon v. Maung Po Kywe and another* (1), the grandchildren, as descendants, were preferred to the collaterals, that case really turned, not upon the general principle, but upon the fact that the property there in question had come from the real father and gone to the second wife and thus only reverted to the original family. He also held that, in this case, the step-grandchildren had not lived with the deceased and had not buried her, that ceremony being performed by the brother and sister.

Appeal was taken to the Chief Court of Lower Burma, and the learned Judges in appeal reversed the judgment. They held that the case of *Ma Gun Bon v. Maung Po Kywe and another* (1) proceeded on general principles and not upon the special character of the property in question. They also held that the facts above narrated created no disqualification.

Their Lordships have examined the Digest of Burmese Buddhist Law, which is the available source of reference to the rules of the Dhammathats. They also considered the authorities cited. The leading case on the subject is undoubtedly the case of *Ma Gun Bon v. Maung Po Kywe and another* (1). It is quite true that in that case the property in question had come from the husband to the wife and that it was that property that was the subject of the disputed succession, but the judgment in no way proceeds on that point. There is a large citation of texts as to step-children, and the learned Judge sums up the matter thus :—

“ These texts go to show that step-children are regarded as heirs without limitation, except in the case of ancestral property, and even in that they are granted a share provided the step-parent has lived to have a vested interest in it, or to reach it according to the Burmese expression.”

1. II U B R (1897-01) 66.

This is quite in accordance with certain citations which are to be found in the Dhammathats. Thus S. 6 (Manugye) :—

“There are four kinds of inheritance, namely, (1) that which is obtainable by children, grandchildren and great-grandchildren only ; (2) that which is obtainable by children and step-children.”

and in S. 295 (Manugye),

“The father marries again and both father and step-mother die leaving no offspring of the marriage.

“The rule of partition between the step-children and their step-mother's co-heirs is as follows :—

“The children shall receive the whole of their father's as well as their step-mother's animate and inanimate property. As regards the share of inheritance to which the step-mother was entitled in her deceased parents' estate which still remains undivided, her step-children shall inherit one-half and her co-heirs the remaining half.”

and Manu, to the same effect :—

“The children shall inherit the property owned by the father and step-mother jointly.”

Once it is determined that step-children are descendants they necessarily oust collaterals, for by Buddhist Law the property never ascends as long as it can descend. The learned appeal Judge in this case says :—

“The point of view of the Buddhist Law is undoubtedly based on the community of interest between husband and wife. So strong is the bond between them that, in the absence of natural children the husband's or wife's children, as the case may be, rank as the children of the step-parent in the matter of inheritance to the exclusion of collateral blood relations.”

Their Lordships agree with this statement.

There remains the question whether the appellants are disentitled to succeed, because, first, the respondents did not live with the deceased, and, second, that they did not bury her. The learned counsel for the appellants contended that these services, which he designated by the name of the filial bond, were a condition precedent to the allowance of a step-child's right. Their Lordships cannot accept this view. In the same paragraph, S. 6 of the Digest of Burmese Buddhist Law, heading 4 is :—

“That which should be withheld from children who failed in filial duty.”

and this is explained thus :—

“Among laymen disobedient and idle sons cannot inherit their parents' estate.”

Their Lordships think it clear that conduct can indeed operate as a disqualification of the right, but that it is in no sense a necessary qualification, to obtain the right. They agree with what was said in the case of *Maung Sein Thwe v. Ma Shwe Yi* (2) :—

“We are not prepared to assent to the view that a man who has proved that he is an heir has further to prove that he has not broken off filial relations in such a case as this.”

and again p. 396 :

“Mere separate residence does not now-a-days and by itself prove or even set up an inference of a breach of filial relations such as would deprive a child of his rights.”

Their Lordships, upon the whole matter, agree with what was said by the learned Judges of the Court of Appeal, that in this case there is no forfeiture. It would only be natural that the children, who are all minors, should live with their own mother, and for the same reason, they could not have been the conductors of the funeral ceremony.

As to the hereditary property to which the deceased became entitled in respect of her mother, but which was not as yet in her possession, the judgment is in accordance with the texts quoted.

In view of the fact that Buddhist Law is in many ways obscure and the judgments are few, their Lordships think that it is necessary to make two observations in case this judgment should be used for the purpose of upholding propositions which it does not contain. The step-son here has made common cause with the step-grandchildren and was content that they should share along with him. Their Lordships pronounce no opinion as to what would be the result in a contest between the step-son and the step-grandchildren; but either or both are entitled to exclude the appellants. Further, though the whole theory of succession depends upon the strict Buddhist view that intestacy is compulsory, this has so far been impugned upon that a Chinese Buddhist is allowed to test; which accounts in this case for Goon's will as to his own property.

Their Lordships will humbly advise His Majesty that the appeal shall be dismissed with costs.

Solicitors for appellants : *Henry Hilbery and Son.*  
Solicitor for respondents : *A. M. Bramall.*

PRESENT :—CARR AND J. A. MAUNG GYI, JJ.

Maung Shwe Phwe and five others . . . *Appellants\**  
v.  
Ma Me Hmoke . . . *Respondents.*

*Criminal Procedure Code (Act V of 1898), S. 195, 476—Sanction by successor of Judge trying case—Permissible under terms of amended S. 476, Criminal Procedure Code.*

The Court has jurisdiction to file a complaint only against parties to the proceeding in respect of offences mentioned in S. 195 (c), Criminal Procedure Code.

*C. T. Gurusawmy v. D. K. S. Ebrahim, 2 R 374—referred to.*

Although S. 476, Criminal Procedure Code, requires a written complaint, the sending of a copy of its order by the sanctioning Court in lieu of the complaint is merely a formal defect and does not vitiate the order.

Under the amended provisions of the Criminal Procedure Code sanction under S. 195, Criminal Procedure Code, has been abolished and S. 476 has been so modified as to allow the Court to act either on its own motion or on application. An application made now under S. 476, Criminal Procedure Code, occupies exactly the same position as one made formerly under S. 195, Criminal Procedure Code.

The power of the Court to order prosecution under S. 476, Criminal Procedure Code, may now be exercised by any Judge of the Court concerned, and not only by the Judge who tried the case but the application must be made promptly.

*Begu Singh v. Emperor, 34 C 551; Rahimadulla Sahib v. Emperor, 31 M 140; Aiyakannu Pillai v. Emperor, 32 M 49—explained and dissented from.*

*Dharamdas Kamar v. Sagore Santra, 11 C W N 119—applied.*

Judgment. 8th December, 1924.

CARR, J. :—In Civil Regular Suit No. 24 of 1923, the District Court of Pegu, Ma Me Hmoke was plaintiff and the first appellant Ko Shwe Hpo was the first defendant. The

\*Civil Mis. Appeal No. 17 of 1924 from the order of the District Court of Pegu in C. M. No. 82 of 1923.

other appellants were not parties to that suit. The suit was heard by the Additional District Judge, U E Maung, who, on the 29th September, 1923, decided it in favour of the plaintiff. The defendants had put forward a written agreement, Ex. A, which the Judge believed to be false. On the 17th October, 1923, *i. e.*, only 18 days after the decision of the suit, Ma Mé Hmoke applied under S. 195, Criminal Procedure Code, for sanction to prosecute the appellants under Ss. 465 and 468, Indian Penal Code, in respect of the document Ex. 1. This was presented to the Judge U E Maung who tried the suit. He, equally with Ma Me Hmoke's pleader, overlooked the fact that as the Criminal Procedure Code now stands, sanction to prosecute cannot now be granted under S. 195. He ordered notice to issue to the appellants to show cause. He was then succeeded by U Ba On, who, on the 19th November noted in the diary that sanction did not now appear necessary. He allowed respondent's pleader time to argue the question and on the 28th November an amended application was filed asking that action be taken under S. 476, Criminal Procedure Code. Ultimately, on the 22nd December, the Judge ordered the prosecution of the appellants under the provisions of S. 476, Criminal Procedure Code. It may be noted that he did not strictly comply with the provisions under that section by making a formal complaint, but merely directed a copy of his order to be sent to the District Magistrate for the necessary action. This, in my view, is only a formal defect and does not vitiate the order. This is an appeal against that order. So far as concerns appellants 2 to 6, the order must clearly be set aside. They are not parties to the suit and the decision *C. T. Gurusawmy v. D. K. S. Ebrahim* (1) is a sufficient authority for the proposition that for offences mentioned in S. 195 (c), Criminal Procedure Code, the Court has jurisdiction to file a complaint only against parties to the suit. As regards the first appellant reliance is placed on *Begu Singh v. Emperor* (2), *Rahimadulla Sahib v. Emperor* (3) and *Aiyakannu Pillai v. Emperor* (4). In these cases it was held by Full Benches of the Calcutta and Madras High Courts that action

1. 2 R 374.

2. 34 C 551.

3. 31 M 140.

4. 32 M 49.

under S. 476 can be taken only by the Judge who tried the case and that it must be taken at least very promptly after the conclusion of the trial. I do not think it necessary to discuss those cases in full for in my view they are rendered obsolete by the recent amendments of the Code. The Calcutta case is the leading one. In it, the learned Chief Justice, in arriving at the conclusion that the power was given only to the Judge who tried the case said, "The expression in the section 'is of the opinion that there is ground' 'committed *before* it or brought under its notice in the course of a judicial proceeding' seems to indicate with some clearness that it is the Judge alone who tries the case who can summarily and at once send the case for enquiry to the nearest Magistrate." Now, however sound these observations might have been in respect of the wording of the section as it then stood have no application to the present section, which reads:—"When any Court is, whether on application . . . . . or otherwise, of opinion that it is expedient in the interests of justice that an enquiry should be made into any offence referred to under S. 195, sub-section (1), cl. (b) or cl. (c), which appears to have been committed, or in relation to a proceeding in that Court. . . ." The difference is very significant and in my opinion it is clear that the power may now be exercised by any Judge of the Court concerned and not only by the Judge who tried the case. The learned Chief Justice remarked, "If months after the trial the Court may act under S. 476 it is difficult to appreciate the necessity for S. 195." He pointed out that under S. 195 sanction can be granted subsequently and by the successor of the Judge who tried the case, quoting *Dharāmdas Kamar v. Sagore Santra* (5) as authority for this. The judgments of other learned Judges in that case and in the others mentioned show that they were moved by similar considerations in arriving at their decision. Sanction under S. 195 has now been abolished and S. 476 has been so modified as to allow the Court to act either on its own motion or on application. The application now made under that section occupies exactly the same position as one made formerly under S. 195 and I see no reason whatever why on such an application action should not be taken by the successor of

the Judge who tried the case. On the question of delay there is not, in my opinion, been any undue delay in filing the application in this case. It was filed in little over a fortnight and that it was in the first instance misconceived was the fault of the pleader. It may be added in excuse for him that the amendments of the Code had then been in force for only some six or seven weeks. In my opinion, therefore, there is no ground in law for interfering in this case as regards the first appellant. On the facts also I see no ground for interference. I would therefore dismiss the appeal of the first appellant Mg. Shwe Pho. I would allow the appeals of the remaining appellants under S. 476(b), Criminal Procedure Code, and direct that the complaint as against them be withdrawn.

J. A. MAUNG GYI, J. :—I concur. I should like to note, however, that in such cases, applications should be made promptly. In the special circumstances of the case, however, I consider that the application was sufficiently prompt.

PRESENT :—GODFREY, J.

Barnett Bros., Ltd.	...	Petitioners*
v.		
E. Fowle and one	...	Respondents.

*Civil Procedure Code (Act V of 1908), O. 22, R. 4—Legal representatives of deceased defendant—Substitution of widow and children under O. 22, R. 4—Not permissible per se without administration being taken or it being shown they have intermeddled with estate.*

For a person to be substituted as legal representative of a deceased defendant in a pending suit under O. 22, R. 4, Civil Procedure Code, he must be shown to be either an executor or administrator of the deceased defendant, or, to have intermeddled with the estate of the deceased and brought himself within the provisions of S. 2 (ii), Civil Procedure Code.

The mere fact that the persons proposed to be substituted in place of the deceased defendant are the widow and children of the deceased do not constitute them legal representatives for the purposes of O. 22, R. 4. The remedy of the opposite party in such a case is to apply to have an administrator appointed.

\*Civil Rev. No. 180 of 1924 against the order of the Chief Judge, Small Cause Court, Rangoon, in C R No. 407 of 1923.

*Sukla Nandan v. Rennick* 4 A 192 ; *Framji Dorabji v. Adarji Dorabji*, 18 B 337 ; *P. L. M. Firm v. Stacey*, 9 B L T 122—referred to.

[See also (1910) 20 M L J 984 at p. 985 ; 34 M 395—Ed.]

Judgment. 5th December, 1924.

This is an application to revise the judgment of the Chief Judge, Small Cause Court, dismissing the plaintiffs' suit against the respondents for the recovery of the balance of the price of goods sold and delivered to one E. Fowle. It appears that during the pendency of the suit the defendant E. Fowle died and upon application made, the Court directed that respondents who are the widow and the brother of the deceased defendant be brought on to the record as his legal representatives. It is admitted that the deceased died intestate and that no representation has been taken to his estate. It cannot be disputed that the deceased defendant was, and the respondents are, persons to whom the provisions of the Indian Succession Act would apply and the learned Judge in effect held that the respondents were not legal representatives of the deceased and dismissed the suit against them for that reason. The application upon which the respondents' names were brought on to the record in place of the deceased defendant was made under O. 22, R. 4, Civil Procedure Code, which provides that where the defendant dies and the right to sue survives (which it does in this case) the Court on an application made in that behalf shall cause the legal representative of the deceased defendant to be made a party and he shall proceed with the suit. And the short question for disposal is whether the respondents are or are not the defendant's legal representatives. "Legal representatives" is defined by S. 2 (ii), Civil Procedure Code, as meaning "a person who in law represents the estate of a deceased person and includes any person who intermeddles with the estate of the deceased." It is clear from the Succession Act, S. 179, that the person who in law would represent the estate of the deceased defendant would be either his executor or his administrators. The respondents are neither and since it is also not alleged that they have intermeddled with his estate and so made themselves responsible as executors *de son tort*, the suit will not lie against them. It would further seem that since no representation has as yet been taken out of

the deceased defendant's estate the only course of the plaintiff-applicant would be to take proceedings themselves to have an administrator appointed as no right to the property of an intestate's estate can be established in Court unless letters of administration have been first granted (S. 190, Succession Act). The case of *Sukh Nandan v. Rennick* (1) and *Framji Dorabji v. Adarji Dorabji* (2) are in point and in keeping with the opinion expressed in ruling referred to by the Lower Court. *P. L. M. Firm v. Stacey* (3). For these reasons this application fails and it must accordingly be dismissed.

*Patel* for applicant.

PRESENT :—GODFREY, J.

Ma Ain Lon and one	...	<i>Appellants*</i>
v.		
Ma On Nu	...	<i>Respondent.</i>

*Criminal Procedure Code (Act V of 1898), Ss. 195, 476—Sanction to prosecute for offence under S. 196, Indian Penal Code—Corruptly using document—Mere production by party of false document under order of Court—Not corrupt user.*

The respondent sued the appellants for cancellation of two sale deeds (Exs. I and II) alleged to have been executed by her on the false and fraudulent representation of the appellants and obtained a decree for cancellation. The deeds were produced by the appellants in the course of the trial in obedience to the orders of the Court and were filed by the respondent as her Exhibits. The respondent then obtained sanction for prosecution of the appellants under S. 196, Indian Penal Code, for using as genuine documents which they knew to be false or fabricated.

*Held*, that there had been no deliberate user of the documents by appellants as evidence, that they had disclosed the documents in compliance with an order of the Court and they produced them as they had to do when called upon. Independent volition on their part was entirely absent and they could not have been convicted under S. 196, Indian Penal Code. Nor would the fact that they had sworn that the documents were genuine make it a corrupt and fraudulent user within the meaning of the section.

*Assistant Sessions Judge v. Ramammal*, 36 M 387; *Re Muthiah Chetty*, 36 M 392—referred to.

\*C M Appeal No. 36 of 1924 from the order of the District Court of Hanthawaddy in C. M. Application No. 14 of 1924.

1. 4 All 192.

2. 18 Bom 337.

3. 9 B L T 122.

Judgment 21st November, 1924.

In this matter the appellants appeal against an order by the District Court, Henzada, under S. 476-B, Criminal Procedure Code, charging them with the offence of corruptly using as genuine evidence in Suit No. 20 of 1923 of the Sub-divisional Court, Twante, two documents (Exs. 1 and 2) which they knew to be false or fabricated, an offence which is punishable under S. 196, Indian Penal Code. Application has been previously made to the Sub-divisional Court for sanction for their prosecution in respect of the same offence but this was rejected and it was on appeal from the Sub-divisional Court's order that the order now complained of was passed. It appears that the suit in the Sub-divisional Court was a suit filed by the respondent against the appellants for the cancellation of these very documents, which are registered sale-deeds upon the allegation that they had been executed by the respondent in consequence of the false and fraudulent representation made to her by the appellants, and it was after obtaining a decree for their cancellation upon this ground that she applied for sanction for the appellants' prosecution under S. 196, Indian Penal Code.

It is an essential element of the offence charged that the documents should have been corruptly *used* or attempted to be *used* as true or genuine evidence. Now it is apparent from the nature of the suit filed by the respondent that the production of these documents was a necessary part of her claim to have them delivered up and cancelled. And in furtherance of this she took steps to obtain discovery from the respondent and subsequently, in the course of her examination-in-chief, the respondents were called upon to produce and she did produce the documents in question, which they had, as in duty bound, disclosed in their affidavit of documents. The documents were therefore put in as exhibits in the case, but instead of being marked as the plaintiff-respondent's exhibits, as they should have been (*cf.* S. 163, Evidence Act), they were marked as the defendant-appellants' exhibits. Apart from this, however, it is abundantly clear that in such circumstances there was no deliberate user of the documents by appellants as evidence at all. They disclosed the documents in compliance with an order of the Court, and they produced them as they had to do when called upon. Independent volition on their

part was entirely absent, and it is obvious that they could not have been convicted of an offence under this section.

*Assistant Sessions Judge v. Ramammal* (1).

It is urged further that, since they have sworn in evidence that the documents were genuine, it must be taken that they have corruptly and fraudulently used them within the meaning of the section. This argument appears to me equally unsound, and I am fortified in that view by the ruling of the Madras High Court in the case of *Re Muthiah Chetty* (2).

For these reasons this appeal must be allowed and the order of the District Court set aside.

*Leong* for appellants.

*Maung Ni* for respondent.

END OF VOLUME.

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1. 36 M 387.

2. 36 M 392.

