

THE  
BURMA LAW TIMES

Containing cases determined by the Chief Court of Lower Burma, and the Judicial Commissioner of Upper Burma, and the Financial Commissioner, Burma, and by the Judicial Committee of the Privy Council on appeal from these Courts, also a summary of the cases published in the I. L. R. Series.

EDITED BY

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PRINTED FOR THE EDITOR BY THE BRITISH BURMA PRESS.



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When the owner or occupier has done what he thinks, or alleges he thinks, to be sufficient to make the house sanitary and habitable, if the Committee differ from him, the law does not allow either party to appeal to the Commissioner.

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Considered, Mohammed Holdar vs. Akial Mehaldar, 9, W. R. 118; Framji B. Duster vs. Hormasji Framji, I. L. R., 2 Bom 258; Benodhe Behari Nundi vs. Mohesh Chunder ... ..	
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(1887) Koylash Chandra Shaba vs C. Christophoridi I. L. R. 15 Cal 171.	} referred to.
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Parsana Kumar Khan vs. Uma Chun Hazra, I. C. W. N., p. 140	
Makund Ram vs. Bolind Kishen, I. L. R., 20 All p. 80	
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<i>Civil Procedure Code section 596.</i> —A proceeding under chapter XX of the Civil Procedure Code is not a suit within the meaning of section 596 of the Code. The mere fact that the applicant is a creditor for Rs. 10,000, about which there is no dispute, does not give him a right of appeal to the Privy Council.	
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<i>Complainant, summons issued without examination of.</i> —The principle that it is necessary to examine the complainant before issuing process against the accused is also applicable in cases instituted by municipalities under the Burma Municipal Act. (Burma Act III of 1898). When no injustice has resulted, it is not a fatal defect, vitiating the whole proceedings that the Court failed to examine the complainant before issuing process. Such a defect is cured by section 537, Criminal Procedure Code.	
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- Confessions—retracted—ill-usage.*—Where confessions are retracted it being alleged that they were made in consequence of ill-usage and there is no direct evidence of such ill-usage, confessions are legally admissible, but where there are circumstances which afford grounds of viewing the confessions with suspicion, they must be received with great caution.
- Where an accused person confesses under suspicious circumstances his confession cannot be accepted against himself in the absence of external evidence pointing to its truth.
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- Consideration—compounding debtor.*—A voluntary payment made by a compounding debtor after a composition is complete and pressure on him is removed, cannot be recovered back by him. A compounding debtor pleading want of consideration for a note must set up and show that the promise was not voluntary; or, that it was made under pressure, or, in pursuance of an agreement previous to the composition deed that would have been a fraud on the other creditors.
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- Construction—reasonable doubt as to.*—*Per Hartnoll, J.*—When there is a reasonable doubt as to the meaning of words in a section the benefit of it should be given to the accused and not to the Crown.
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- Indian Limitation Act, Art. 91 and 144.*—A *benami* conveyance is not intended to be an operative instrument. "Where a transactions is once made out to be a mere *benami* it is evident that the *benamidar* absolutely disappears from the title. His name is simply an *alias* for that of the person beneficially interested. The fact that *A* has assumed the name of *B* in order to cheat *X* can be no reason whatever why a Court should assist or permit *B* to cheat *A*." Where the fraudulent intent has not been effected and no creditor has been cheated, *A* can recover the property back. But when the fraudulent intent has been carried out, the Court will help neither party, and then this maxim applies, *In pari delicto potior est conditio possidentis.*"
- Where a conveyance has once been found to be *benami*, it is unnecessary to set it aside as preliminary to obtaining relief.
- There were present at the hearing: LORD MACNAGHTEN, LORD ATKINSON, SIR ANDREW SCOBLE, SIR ARTHUR WILSON. The judgement was delivered by LORD ATKINSON.
- Approved and followed:
- Taylor vs. Bowers, I.Q.B.D., 271.  
 Symes vs. Hughes, L.R. Eq. 9 Eq. 475 and at p. 479.  
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- (1892) Jetha Parkha and others vs. Ramchandra Vitohoba I.L.R. 16 Bom. 689 considered.
- (1822) Beasley vs. Bignold 5 Barn and Ald 355 } followed.  
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- Indian Penal Code, section 65.*—When sentence in default of fine is in excess of the proportion provided by section 65 of the Indian Penal Code, so much of it as is in excess, must be set aside.
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- Indian Penal Code, sections 380 and 215—Per For. C. J.*—Where upon the facts proved, the conclusion is justified that an accused who has taken or agreed to take a gratification for helping to restore stolen property to the owner was himself the thief or engaged in the commission of theft, he is liable to be convicted for theft, but is not liable to be convicted under section 215 of the Indian Penal Code.
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<i>Fox, C. J.</i> —Followed: <i>King Emperor vs. Nga To</i> (1903) 2 L.B.R., 23. Considered: <i>Queen Empress vs. Mahomed Ali</i> , I.L.R., 23 All 81; <i>Nga Oh Gyi, vs. Queen Empress</i> (1889) L.B.S.J., 449; <i>Nga Shwe Kya vs. Queen Empress</i> (1889) L.B.S.J., 461; <i>Queen Empress vs. Nga Tun Bya</i> (1896) L.B.P.J., 226.	
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<i>Letters of administration—when unnecessary.</i> —The holding of letters of administration or a certificate of heirship by one of the plaintiffs who are the surviving partners is unnecessary. (1893) Vaidyanatha Ayyar and others <i>vs.</i> Chinnasami Naik, I. L. R. 17 Mad. 108. (1897) Subramanian Chetty and others <i>vs.</i> Rakku Servai and others, I. L. R. 20 Mad. 232. (1894) Jagmohandas Kilabhai <i>vs.</i> Allu Maria Duskal, I. L. R. 19 Bom. 338. K. V. P. L. Perianen Chetty, <i>vs.</i> Arunga Pather ... ..	620
<i>Letters of administration—when to refuse.</i> —An application for letters of administration with the manifest object of getting possession of property from the person entitled to it on the ground that it was being wasted should not be granted. The proper method of enforcing such right is by a regular suit and procedure under the Probate and Administration Act cannot be used for such purpose. Letters of administration should not be granted where it would be useless to grant it. Ma Pe and one <i>vs.</i> Ma Thein Yin ... ..	149
<i>License to build—indefinite period—irrevocability of.</i> —Where a substantial building has been erected on lands with the permission of the owner thereof obtained for consideration, and where the license has not been granted for any definite length of time, the owner of the land cannot revoke the license. Followed: Ma Min Thi <i>v.</i> Sit Whet, L. B. P. J. 107. Pair-in-Burn and one <i>vs.</i> A. R. M. S. Chiniyah Chetty ... ..	73
<i>Lower Burma Town and Village Lands Act.</i> —Land once appropriated to dwelling places <i>i.e.</i> , constituted village lands under the Lower Burma Town and Village Act, does not cease to be village land and thus outside the jurisdiction Civil Courts by possession thereof and payment of land revenue thereon for 12 years, even though it may have been originally included in the occupant's holding and he and his predecessors may have paid revenue in respect of the whole area originally included in the <i>kwin</i> . Maung Po Thet and one <i>vs.</i> Maung Shwe Lu and one ... ..	36
<i>Lower Burma Town and Village Lands Act.</i> —Under section 41 (a) of the Lower Burma Town and Village Lands Act (IV of 1893) the Court has no jurisdiction to entertain a suit in respect of any claim to any right over land as against Government. The Court, therefore, has no jurisdiction to go into the question whether the Government have the right of filling up a creek, which is a right or a claim to a right over land. Moonshee Morad Bux <i>vs.</i> The Secretary of State ... ..	23
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<i>Maintenance—arrears of.</i> —If the wife neglects to apply for warrants promptly, she must not expect to get the arrears in full but must submit to a reduction. The Magistrate has no jurisdiction to issue an order to pay arrears instead of a warrant under section 488 (3) Criminal Procedure Code. Where the circumstances of the husband have changed for the worse, and the children are admittedly 21, 19, 17 years of age, the Magistrate is bound to enquire into the facts. Maung Tun Myat <i>vs.</i> Ma Shwe Yo ... ..	118
<i>Malicious prosecution—what plaintiff should prove.</i> —In order to succeed in a suit for damages for malicious prosecution plaintiff must prove— (1) that they were innocent of the crime alleged against them ; (2) that their innocence had been pronounced by a competent tribunal ; (3) that there was want of a probable and reasonable cause for the prosecution, or that, in the eye of the Court, the circumstances were inconsistent with such case ; (4) that the proceedings had been initiated in a malicious spirit, that is, from an indirect motive and not in furtherance of justice. (1886) Abrath <i>vs.</i> The North Eastern Railway Company I. R. 11 App. Ca. 247 (1903) Soobramoney Pillay Chetty <i>vs.</i> Maung Po Lu 2 L. B. R. 111 Pollock, section 42 Draft of Civil Wrong Bill. } referred - Padashin and one <i>vs.</i> Maung Lun and one ... .. } of	12

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<i>Maxim</i> — <i>In pari delicto potior est conditio presidentis</i> —A <i>benami</i> conveyance is not intended to be an operative instrument. "Where a transaction is once made out to be a mere <i>benami</i> , it is evident that the <i>benamidar</i> absolutely disappears from the title. His name is simply an <i>alias</i> for that of the person beneficially interested. The fact that A has assumed the name of B in order to cheat X can be no reason whatever why a Court should assist or permit B to cheat A." Where the fraudulent intent has not been effected and no creditor has been cheated, A can recover the property back. But when the fraudulent intent has been carried out, the Court will help neither party, and then this maxim applies, " <i>In pari delicto potior est conditio possidentis</i> ".	
Where a conveyance has once been found to be <i>benami</i> , it is necessary to set it aside as preliminary to obtaining relief.	
There were present at the hearing: LORD MACNAGHTEN, LORD ATKINSON, SIR ANDREW SCOELE, SIR ARTHUR WILSON. The judgment was delivered by LORD ATKINSON.	
Approved and followed:	
Tailors vs. Bowers, I.Q.B.D., 271.	
Symes vs. Hughes, L.R. Eq. 9 Eq. 475 and at p. 479.	
In re Great Berlin Steam Boat Coy., 26 Ch. D. 616.	
T. P. Petherpermal Chetty, vs. R. Muniandy Servai and others	157
<i>Minor</i> — <i>suit by next friend of</i> .—Where in a suit a minor is represented by her father and natural guardian, she is bound by the decree passed therein and she will not be permitted to sue again by another next friend to have determined the same questions determined in the previous suit.	
Ma Bu Lone vs. Ma Myat Sin and two	93
<i>Misjoinder of charges</i> —Offences punishable under sections 467 and 420, I.P.C. and abetment of such offences, section 114, I. P. C., are distinct offences and cannot be tried together—Criminal Procedure section 233. Such a misjoinder necessitates a new trial.	
2 L. B. R. P. 10.	
William DeCruz vs. King Emperor	13
<i>Misjoinder of charges</i> —Two accused cannot be tried together in the same case for three distinct offences.	
Nga Shwe Dwe alias, Nga Dwe and one vs. King Emperor	63
<i>Misjoinder</i> —Two or more persons cannot be jointly tried for two distinct offences unless they are committed in the course of the same transaction.	
King Emperor, vs. Nga Shwe Lok and two others	75
<i>Mortgage</i> — <i>assignee of the equity of redemption</i> —If a mortgaged house is pulled down and a new one erected in its place by the assignee of the equity of redemption, with notice of the mortgage by his assignor, the mortgagee can enforce his security on the new building.	
Followed: Morias vs. Harfeezun, S.D.N.W.P. 432; Ghose: Law of Mortgage, third edition, p. 350 approved.	
Annamalai Chetty vs. Sigappi Ammal and an other	148
<i>Mortgage</i> — <i>decree should direct reconveyance</i> .—Every mortgage-decree should direct that if the defendant should pay the plaintiff the amount due for principal, interest and costs on or before the date fixed for payment, the plaintiff should reconvey the mortgage premises free and clear from all incumbrances done by him, and deliver to defendant all documents in his custody or power relating to such property.	
V. V. R. Lutchman Chetty vs. Maung Shwe Hlwa and one	30
<i>Mortgage</i> — <i>personal remedy</i> .—When the rents of mortgage property, consisting of houses, and not lands, began to be collected less than six months after the mortgage, which was dated 18th April 1895, by the mortgagee under an agreement with the mortgagor and the rents collected were put against the interest due and the mortgagee sued on 19th May 1905.	
Held, following their Lordships of the Privy Council in Ram Din v. Kalka Prasad (1884) I. L. R. 7 All. 502, that the mortgagor's right to a personal remedy against the mortgagee was clearly barred unless the mortgagor is entitled to the benefit of section 10 of the Limitation Act.	
Mohamed Hoosein vs. Abdul Rahim	4
<i>Mortgagee without possession</i> .—Where an application under section 295 of the Civil Procedure Code by a mortgagee of property not in his possession is dismissed and the sale proceeds have been paid away, the High Court will not interfere on revision as the mortgagee has a remedy by a regular suit.	
When the mortgage is not admitted, action under section 295 of the Civil Procedure Code is not appropriate.	
U Hla Baw vs. Muthia Chetty. XII, B. L. R., 325.	
Arumugam Chetty and two others vs. Arunachalam Chetty	40

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*Negotiable Instruments Act, (XXVI of 1881) section 50.*—Title to a negotiable instrument can be acquired either by indorsement or by assignment.  
 A promissory note payable to order and indorsed to order can only be negotiated by indorsement and delivery by the last indorsee to order. Chapter IV of the Negotiable Instruments Act must be taken to deal fully with the subject of negotiation and transfer by such method.  
 The property in a promissory note cannot be assigned by merely handing over the note to another to sue.  
*Quære*: An indorser to order of a promissory note, on the note being returned to him by the indorsee to order can, by striking out his indorsement to order and indorsing the note in blank, make the note payable to a subsequent holder to whom he transferred it by delivery only.  
*Approved of*: Muthar Sahib Maraikar, vs. Kadir Sahib Maraikar (1905) I. L. R., 28, Mad. 544.  
*Referred to*: Harrop vs. Fisher (1861) 10 C.B., N.S., 196.  
 Babu Goridut Bagla vs. Ebrahim Esoof Dooply ... .. 133  
*Next friend—mother suing as.*—Where a mother sues as next friend of her minor sons, the objection that her interest may be adverse is a technical one and ought not to have any weight.  
 Ruthnam Chetty vs. Thengathi Ammal and two others ... .. 15

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*Obstruction—what amount to.*—A possibly strongly worded protest and order or request to leave the premises does not amount to obstruction.  
 Pushing of the officers executing a warrant of attachment out of the house is not justifiable, but the harm done to them is not of such importance or of such a nature that any person of ordinary sense and temper who is not overwhelmed with the importance of his office will complain of. It is a case in which section 95 of the Indian Penal Code is applicable.  
*“On and after 10th August 1906”.*—The words “on or after the 20th August” meant that defendant was to deliver on or within a reasonable time after the 20th August.  
 M. P. Kader Moideen vs. Ko Maung Gyi ... .. 7  
*Onus probandi—adverse possession.*—A person claiming possession of land must commence his case by proving that he has been in possession thereof at some time within twelve years prior to the suit, unless it is admitted by the defendant.  
 Marimuthu Thaaver vs. Omar Ally ... .. 161  
*Opium Act section 4.*—When there is no reliable evidence that accused has exercised any right of ownership over trunks in which opium is found, he cannot be punished under section 4 of the Opium Act.  
 M. A. Mamsa vs. Crown ... .. 115  
*Oral evidence inadmissible to vary the terms of a written document.*—Oral evidence to show that the consideration in a deed is in fact different to that stated in the deed is inadmissible under section 92, Indian Evidence Act.  
 22 All 320 followed.  
 Babu Sheodut Roy Soni Ram, vs. O. R. M. Ramasawmy Chetty ... .. 32  
*Oral evidence to construe document.*—Oral evidence is admissible to show the correct boundaries, although the boundaries are clearly defined in the documents relied on, and admission of such evidence does not contravene the provisions of section 92 of the Indian Evidence Act.  
 Maung Tun Lin and one vs. Maung Lon Gyi ... .. 37  
*Oral evidence to show vendee in deed only agent.*—Section 92 of the Evidence Act does not preclude oral evidence to show that the vendee in a deed of sale is not the real vendee but only an agent of the person claiming to be the real vendee; and such evidence is admissible.  
 Ma Ithai Hnit vs. Yup Shaung Ngaw ... .. 80

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*Partners—breach of trust.*—Where one of two partners obtained a contract from a third party and it was agreed between them that, in consideration of the other partner supplying materials and expenses, the former should not demand and recover any money from

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the third party without the knowledge or order of the other partner ; it is not a breach of trust on the part of the partner obtaining the contract from the third party if he draw the money and appropriate it to his own use.	
<i>Nga Kyaw Yan vs. King Emperor</i> ... ..	101
<i>Personal service when to be disposed of.</i> —The general rule under both the Civil Procedure Code and the rules of the Divorce Courts is that personal service upon the party to be effected should only be disposed with when every reasonable effort has been made to trace him or her without success.	
<i>Maung Shwe Tha vs. (1) Ma Saw Hla, (2) William Andrews, (3) Maung Ba Choe</i> ...	114
<i>Plaint—amendment of.</i> —When the misdescription of a plaintiff is a mere mistake, it will not be allowed to prejudice the case on the merits, and leave to amend the plaint by substituting the name of the real plaintiff in place of the plaintiff in whose name the suit was originally filed, will be granted under section 53 of the Civil Procedure Code even in second appeal, and even if the plaintiff, in whose name the suit was originally filed, was dead when the suit was filed.	
<i>C. P. P. Anamalay Chetty vs. Maung Shwe Thi and one</i> ... ..	39
<i>Plaint—application for leave to sign and verify.</i> —A manager of a limited liability company, registered under the English Companies Act, can file a plaint signed and verified by him without obtaining the permission of the Court to do so, as provided for by section 435, Civil Procedure Code.	
<i>Delhi and London Limited vs. Oldham and others, I.L.R., 21 Cal. p. 60, followed.</i>	
<i>Kruger &amp; Co., Limited vs. M. C. Shaik Abdul Kadir</i> ... ..	42
<i>Pleader—suspending or dismissing.</i> —A pleader cannot be suspended or dismissed under the Legal Practitioners' Act unless he has been allowed an opportunity of defending himself before the authority suspending or dismissing him.	
This principle is applicable to cases of suspension by subordinate courts as well as to suspension and dismissal by a High Court.	
In the matter of <i>professional misconduct of Maung</i> — ... ..	113
<i>Pleadings—determination of a Court must not be inconsistent with the.</i> —It is not open to a Court, and especially a Court of Appeal, to arrive at a determination inconsistent with the case set up.	
The determination in a cause should be founded upon a case either to be found in the pleadings or involved in or consistent with the case thereby made.	
<i>Approved: Mahomed Buksh Khan vs. Hosseini Bibi (1888) I L.R., 15 Cal. 684.</i>	
<i>Followed: Eshen Chunder vs. Shama Charan Bhutto (1866) 11 Moore I. A. 7.</i>	
<i>Mylapore Iyasawmy Vynoozy Moodlier vs. Yeo Kay (1887) I.L.R., 14 Cal. 801.</i>	
<i>Ma Hnin Get and 4 others vs. N. A. Satappa Chetty</i> ... ..	112
<i>Pre-emption—co-heir—Sale to stranger.</i> —Under Buddhist law, a co-heir cannot sell his share of joint ancestral property without offering it first to other co-heirs.	
A sale to a stranger without such an offer is invalid if the co-heirs promptly assert their rights.	
<i>Nga Myaing vs. Mi Baw, S. J. 39, and Ma Ngwe vs. Lu Bu, S.J. 76, followed.</i>	
<i>Ma On vs. Ko Shwe O, S.J. 378; Maung Tha Nu vs. Maung Kya Zan, 2 L.B.R. 176;</i>	
<i>Maung Hlaing vs. Maung Tha Ka Do, P.J., 65, considered and distinguished.</i>	
<i>Maung Mo Thi and one vs. Maung Tha Kwe</i> ... ..	7
<i>Presumption from non-production of available evidence.</i> —If a plaintiff fails to produce evidence which he might and should produce in support of his claim, it may be presumed that if that evidence had been produced it would not have been in his favour.	
The offer to produce it in Appellate Court was too late.	
<i>P. L. A. N. K. Allagappa Chetty vs. Mg. Pwe Li</i> ... ..	9
<i>Presumption under section 30 (2) (a).</i> —When a person with a yearly income of Rs. 50 to 100 is found in possession of seven dozen pints of beer, the Magistrate may legitimately presume that the liquor was not in his possession for private use but for sale.	
<i>The King Emperor vs. Mhwe Aung</i> ... ..	26
<i>Presumption from mutilation of mortgage deed.</i> —Where a lender, not being himself interested in the land mortgaged, advances money to the mortgagor for the purpose of paying off the mortgage, and with money so advanced the mortgage is discharged, it cannot be presumed that the mortgage was kept alive for the benefit of the lender, unless there is clear evidence that such was the intention of the parties.	
From the mere fact that the title deeds were handed over to the lender, it cannot be presumed that it was intended to keep the mortgage alive.	
The mutilation of a mortgage deed goes to show that the intention was to extinguish it.	
<i>Discussed: Apaji vs. Kinji, I. L. R. 6 Bom. 66; Kushol vs. Panamchand, I. L. R. 22 Bom. 169; Mohesh Lal vs. Mohant Bowan Das, I. L. R. 9. Cal. 961; Gokl Das vs. Purnamal, I. L. R., 10 Cal. 1085.</i>	

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<i>Referred to</i> : Ghose's "Law of Mortgage," 3rd Edition, p. 402.	
S. R. M. M. R. M. Chellappa Chetty vs. N. A. P. Chellappa Chetty ... ..	65
<i>Presumption of intent to defraud.</i> —Where a private refiner of illuminant kerosine oil placed his refined illuminant oil in tins prominently bearing the trade mark of a company's illuminant kerosine oil but removed the handles and caps from the company's disused tins and substituted his own handles and caps, and placed paper labels on the tins to indicate that the illuminant oil sold was his own illuminant oil,—not the company's it was held that he was guilty of using a false trade mark and liable to be punished for an offence under section 480 of the Indian Penal Code unless he proved that he had no intention to defraud.	
Where it is proved that an accused person has used a false trade mark it must be presumed, until the contrary be proved, that he had an intent to defraud.	
Followed : Muri Chand vs. Wallace (1907) I. L. R. 34 Cal. 495.	
King Emperor vs. Nga Po Saing ... ..	88
<i>Presumption from habit and repute.</i> —Before the presumption arising from habit and repute can be applied, certain conditions are necessary for its existence.	
(1) There must be some body of neighbours, many or few, or some sort of public, large or small, before repute can arise.	
(2) The habit and repute which alone is effective is habit and repute of that particular status which, in the country in question, is lawful marriage.	
If a woman cohabits with a Burman, whom she knows to be the lawful husband of another woman, the presumption is that she is a mistress and not a wife, and the presumption is strengthened if the cohabitation is behind the back and without the knowledge of the first wife.	
Ma Wun Di and another vs. Ma Kin and others ... ..	125
<i>Probate an application to revoke.</i> —The right of applying for revocation of probate granted by section 234 of the Succession Act is not in any way fettered by section 13 of the Civil Procedure Code, or by the application of a rule adopted in the English Courts.	
<i>Distinguished</i> : Pitamber Girdhar's case, (1881) I.L.R., 5 Bom. 638 ; Komullvehun Dut vs. Nilruttun Mundle, (1878) I.L.R. 4 Cal. 360.	
Dissented from : Brinda Chowdrain vs. Radhin Chowdra in (1885) I.L.R. 11 Cal. 492.	
Nistarina Dabya vs. Brahmomoyi Dabya (1890) I.L.R. 18 Cal. 492.	
<i>Discussed</i> : Bhuggobuthy Dasi (1900) I.L.R. 27 Cal. 927.	
Cecilia King and two vs. Arthur Abrew and two ... ..	81
<i>Probate and Administration Act Ch. VI and VII, section 85.</i> —An application for letters of administration with the manifest object of getting possession of property from the person entitled to it on the ground that it was being wasted should not be granted. The proper method of enforcing such right is by a regular suit and procedure under the Probate and Administration Act cannot be used for such purpose.	
Letters of administration should not be granted where it would be useless to grant it.	
Ma Pe and 1 vs. Ma Thein Yin ... ..	149
<i>Procedure—Insolvency.</i> —In application under the Indian Insolvents Act, the procedure is not that under the Civil Procedure but it is to be, as far as practicable, in accordance with the procedure prescribed by the statute itself.	
In the matter of Yar Ali ... ..	150
<i>Promise under pressure.</i> —A voluntary payment made by a compounding debtor after a composition is complete and pressure on him is removed, cannot be recovered back by him. A compounding debtor pleading want of consideration for a note must set up and show that the promise was not voluntary ; or, that it was made under pressure, or in pursuance of an agreement previous to the composition deed that would have been a fraud on the other creditors.	
Usman Mahomed vs. Jusraj Vacharaj and one ... ..	41
<i>Promissory notes—firm—right to sue.</i> —When promissory notes are drawn in favour of one firm and when partners in that firm change and a new firm is formed, the latter cannot sue on them unless they are endorsed over to them by or on behalf of the former.	
Maung aung Min and three others vs. Mutu Curpen Chetty and two others ... ..	50
<i>Proof of execution of promissory note.</i> —In the absence of description, there is no identification of party executing a pro-note when evidence of execution is taken on commission.	
Maung Tha Noo vs. S. K. R. S. Lutchmanan Chetty ... ..	9
<i>Protection order.</i> —When the Judge in Insolvency has withdrawn the insolvent's protection order, the Appellate Court cannot pending the appeal suspend the order withdrawing the protection because there is nothing which can be suspended.	
It the Appellate Court cannot directly grant a protection order pending an appeal, it has no power to grant it indirectly.	
Re Jacob, agabob 12 B. L. E., 273.	
T. David vs. Shaik Ismail and nine others ... ..	17

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*Provincial Small Cause Court Act, section 17.*—When a Small Cause Court has rejected an application under section 108 of the Civil Procedure Code to set aside a decree ex-parte, because the deposit required by section 17 of the Provincial Small Cause Court Act is not made, it does not bar admission of a fresh application within the period of limitation to set aside the same decree, accompanied by a deposit of the amount of the decree.

I. L. R. 6 Bom. 482	} referred to.	
I. L. R. 8 All 282		
I. L. R. 18 Mad 466		

N. S. Md. Abubaker vs. S. S. Ali ... .. 7

*Provincial Small Cause Court Act, section 25.*—When a Judge stops a party in the middle of his case without giving him any option of calling further witnesses, it is tantamount to refusing to examine witnesses, and it is an illegal act. The High Court will, under such circumstances, interfere in revision.

Rullea Singh vs. sardar Singh ... .. 121

*Provincial Small Cause Courts Act, section 25.*—When a judge of a Court of Small Causes leaves some important facts out of consideration altogether in his judgment, it is a good ground for the interference of the High Court under section 25 of the Provincial Small Cause Courts Act.

Sewnath vs. Maung Bwin ... .. 123

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*Question of fact.*—Held what was a “reasonable time” is a question of fact to be determined by the Court of Small Causes.

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*Question of fact—whether house is fit for human habitation.*—Where the owner or occupier of a house receives a notice under section 130 of the Burma Municipal Act, prohibiting him from using or suffering the said premises to be used for human habitation after three months from the receipt of the notice, or until such time as the Municipal Committee is satisfied that the said premises have been rendered fit for such use and he is afterwards prosecuted under section 180 of the said Act for suffering his house to be so used without the permission of the said Committee, evidence to prove that his house has been rendered fit for human habitation is admissible.

When the owner or occupier has done what he thinks, or alleges he thinks, to be sufficient to make the house sanitary and habitable, if the Committee differ from him, the law does not allow either party to appeal to the Commissioner.

Section 130 of the Burma Municipal Act, does not make the Committee the judge of the question whether the house has been made fit for habitation. It is a question of fact to be decided by the Magistrate if the Committee see fit to prosecute.

J. F. Bretto vs. Rangoon Municipal Committee ... .. 20

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“Reasonable time.”—What was a “reasonable time” is a question of fact to be determined by the Court of Small Causes.

M. P. Kader Moideen vs. Ko Maung Gyi ... .. 7

*Reconveyance-mortgage decree.*—Every mortgage-decree should direct that if the defendant should pay the plaintiff the amount due for principal, interest and costs on or before the date fixed for payment, the plaintiff should reconvey the mortgaged premises free and clear from all incumbrances done by him, and deliver to defendant all documents in his custody or power relating to such property.

Sunder Kaer vs. Rai Shain Krishen, I.L.R., 34 Cal. referred to.

V. V. R. Lutchman Chetty vs. Maung Shwe Hlwa and one ... .. 30

*Reference—when High Court will not interfere on.*—The High Court will not interfere on reference when there is a right of appeal and the appellant has not exercised it, under section 439, Criminal Procedure Code.

King Emperor vs. Yena 4 L. B. R., 49 referred to.

King Emperor vs. Ba Pe and 6 others ... .. 106

*Refusal to register bond.*—Refusal by one party to register a document, entitles the other party to it to sue at once for the return of the consideration: and his suit is not premature if he do so sue.

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<i>Semble</i> : An agreement, having as its object the prevention of a reconciliation between husband and wife is illegal, because it is opposed to public policy; and it will not be enforced by a Court of law.	
<i>Followed</i> : Nga Ngwe vs. Mi Byaw, S. J. 313.	
Maung Pan Aung and one vs. Maung Yauk	74
<i>Remand for a trial de novo—framing of issues by original Court</i> .—When the decree of an original Court is set aside by a Court of Appeal and the case remanded for a new trial on its merits, the original Court is seised of the case <i>de novo</i> and has power to frame new issues.	
Ma Nyein and one vs. Me Mya and nine	77
<i>Rent in advance good payment</i> .—An agreement to pay rent in advance is a perfectly valid and binding agreement. Where rent is paid in advance to a mortgagor in an English mortgage, neither the mortgagee nor his assignee, who merely steps into his shoes, can claim from the tenant rent for the months for which payment in advance has already been made to the mortgagor.	
Toon Chan vs. P. C. Sen (Official Receiver)	165
<i>Res judicata</i> .—Suit for possession of land and declaration that a document on which defendant relied was false, void and ineffective, decreed in consequence of deed of conveyance for Rs. 220, not having been registered and being therefore inadmissible in evidence—No separate decision as to payment of Rs. 220—In a subsequent suit by defendant for the recovery of Rs. 220 and taxes paid to Government while in possession the Judge of the Small Cause Court dismissed the suit as barred by <i>res judicata</i> .	
<i>Held</i> , such suit not barred, as plaintiff was not bound to have asked for the return of Rs. 220 though he might have done so.	
Audnath Doobay vs. Juggoo Goosain	6
<i>Res judicata</i> .—Held section 13 of the Civil Procedure Code does not apply, because the first application could not be held to have been heard and finally decided.	
N. S. Md. Abubaker vs. S. S. Alli	7
<i>Res judicata—partners</i> .—A decree passed ex parte against partners on proof of the service of summons on one partner only is not <i>res judicata</i> on the question of partnership or no partnership.	
Abdul Ali Mahomed Lubhani and one vs. Dada Essach	58
<i>Res judicata—minor</i> .—Where in a suit a minor is represented by her father and natural guardian, she is bound by the decree passed therein and she will not be permitted to sue again by another next friend to have determined the same questions determined in the previous suit.	
Ma Bu Lone vs. Ma Myat Sin and two	93
<i>Restitution—claim for</i> .— <i>Per Fox, C. J.</i> —If any damage is caused to a party in execution of a decree which is afterwards reversed in appeal, the ordinary law of restitution is applicable, and the party is entitled to ask the Court to restore him to the possession of the land which has been taken from him by process of the Court and to order the respondent to pay him at least mesne profits.	
The wording of clause (c) of section 244 of the Code of Civil Procedure is wide enough to cover the order of an original Court acting under section 583 of the Code granting restitution; and an appeal therefore lies from the order of an original Court.	
Under section 41 of the Lower Burma Town and Village Lands Act, the Court is precluded from exercising any jurisdiction over a claim to a right to land as against the Government; and the Court is, therefore, precluded from granting restitution in respect of injury which arose through invasion of the right which the party claimed to the land:	
Lower Burma Town and Village Lands Act (IV of 1898).	
Rodger vs. The Comptoir d'Escompte de Paris, 3. L.R. 465 and Ayyar vs. Subramania (1893) 1. L. R. 23 Mad. 206 considered.	
<i>Per Hartnoll, J.</i> —The right to restitution seems to rest, not on erroneous procedure but on the actual merits of the case, and as this Court cannot enter into them, it cannot investigate the question of restitution.	
J. Moment vs. The Secretary of State	17
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The mutilation of a mortgage deed goes to show that the intention was to extinguish it.

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*Vide*. Koylash Chunder Shaha vs C. Christophoridi (1887) I. L. R. 15 Cal. 171. Ramzan vs. Gerard (1899) I. L. R. 13. All. 100. Dwarkadas vs. Isabhai (1894) I. L. R. 19. Bom. 210. Alagappa Chetty vs. Sarathambal (1894) I. L. R., 19 Bom. 20.

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From the mere fact that the title deeds were handed over to the lender, it cannot be presumed that it was intended to keep the mortgage alive.	
The mutilation of a mortgage deed goes to show that the intention was to extinguish it.	
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also to hear appeals, and, in some cases, has to do a great deal of criminal work as Senior Magistrate of the District, besides going on inspection tours. So that, on the whole, the amount of work done by an average District Judge compares quite favourably with what is done on the Original Side of the Chief Court, and the duration of cases is much shorter.

We do not say that the Cause List alone is responsible for this. There may be other causes, but it seems to us that this is the most prominent and the most unnecessary. If we look at any Monday's board, for instance, we find that it means nothing more than a systematized method of wasting a whole day, probably more, without doing anything very tangible. The greater portion of the morning is spent in hearing applications for fresh summonses or notices and in the settlement of issues. Now all this work can be done just as well in the offices of the Court and of the advocates. Issues can always be filled by consent and if they happen to be defective, they can be resettled on the day of hearing as soon as the pleadings have been read. Then there are a number of uncontested applications for probate, letters of administration, appointment of receivers, and commissioners, or for the examination of witnesses on commission, which, for no reason whatsoever, appear on the Cause List and take up the Court's time.

The arrangement of contested cases is open to graver objections. After the settlement of issues, a contested case is transferred to the list of cases for hearing in turn. It remains there as a rule for about nine months; then all of a sudden we see it in the "Peremptory list," and in usual course it appears on what is known as the "Warning list." It is now that the misfortunes of all parties concerned begin. The more superstitious among us then will probably attribute to its appearance on the most unlucky day in the week, Friday. Once it is there it is liable to be called at any time on and after the Tuesday following.

Now let us see how this works in its bearing upon the different people interested in it. The advocates must always be in attendance. If they happen to be members of a firm they probably manage it with occasional grumbling. If, on the other hand, they happen to practise singly, they must either give up practising in

the Chief Court or arrange to get all their work postponed or otherwise looked after, in all the other different Courts. When neither of these things is possible, advocates simply have to trust in Providence and take their chance of the case being called when they happen to be free or the Court going on without them. This however is not the only evil attendant on this practice. It materially affects the status and organization of the Bar. It leads to several unfortunate results. First of all it necessarily leads to advocates working in partnership, and otherwise reducing the profession to the dead level of a commercial enterprise. Secondly, it leads to an unhealthy concentration of work in a comparatively small number of hands. Thirdly, it deteriorates the quality of work at the Bar because, owing to uncertainty as to the day of hearing advocates have either to keep themselves prepared from day to day, or to wait until the last minute. In the one case the strain is far too great in proportion to the advantage, in the other, they are unable either to do justice to themselves or to their clients.

As for the parties, their predicament is even worse than that of their advocates. In all cases it must seriously interfere with their business for a number of days, long before their attendance is actually required in Court. If, unfortunately, they habitually reside out of Rangoon, it means that they must make arrangements to live in Rangoon all the time between the appearance of their case on the "Warning list" and its final disposal. Should the Insolvency cases intervene, their stay in Rangoon must be further prolonged.

Besides this they have to spend a great deal more than they otherwise would, on costs of witnesses, because they have also to be called from day to day, unless their presence could be obtained by the party calling them at any time, and their subsistence money has to be paid for each attendance.

To the witnesses themselves the annoyance of having to attend from day to day is quite out of all proportion to the recompense they are supposed to get in the shape of subsistence money. They are entitled to far greater consideration than even the parties and their advocates, because it is presumed that in a majority of cases they come to the Court in order to help

it in the administration of justice, and not to further their own interest.

These reasons, therefore, make it quite clear that immediate reform of the present arrangement of cases is necessary. If a fixed date is given for the final hearing of a case, a great deal of the Court's time would be saved and advocates, parties and witnesses will be spared a great deal of inconvenience expense and annoyance.

### Touts and Touting.

A FEW months ago the Registrar of the Chief Court of Lower Burma despatched to the Honorary Secretaries of the Rangoon Bar Library Association and the Rangoon Advocate's Association a communication in which he informed them that the District Magistrate of Rangoon proposed putting up a list of Petition-writers in all the Courts in Rangoon for the information of litigants proceeding to Rangoon with a view to engage a legal representative, and desired to know the views of the members of the respective associations as to what steps would prove useful in stamping out "touting." We are glad to notice that the authorities have at last awoken to the evils of touting, but we regret we are unable to concur in their opinion that the steps proposed will, in even the smallest degree, affect what can only be described as a standing disgrace to the legal profession. We do not believe in mincing matters and we say without the slightest hesitation that if lawyers did not offer a certain percentage of their fees to touts, or consent to a certain percentage thereof being deducted by the touts before being paid over to them, touts would not flourish as they have hitherto done. We are aware that touting is not confined to this province alone or even to India; but we are certain that the ill effects of the system are nowhere more seriously felt than in India and Burma. Perhaps in no other country in the world is the litigant more ignorant of the merits of the lawyers engaged in a cause or less able to form a correct opinion whether or no his legal adviser has done justice to his cause. It is within the memory of some of the old practitioners that touting was unknown in Burma. It is a comparatively recent parasitic growth and was undoubtedly introduced into Burma from India.

It is a well known fact among the legal profession in Rangoon that petition-writers are the greatest touts, and yet it is proposed to advertise their names still further by putting up lists in all the Courts in Rangoon containing their names and placing them as it were under the aegis of the District Magistrate. The result is obvious. Litigants proceeding to Rangoon will have these lists pointed out to them as evidence of the fact that the District Magistrate has approved of these petition-writers as legal advisers. Once in their toils, the litigant is at the mercy of the most unscrupulous and the most incompetent advocate who is willing to pay the highest commission as a reward for questionable services.

It is hoped that, by exhibiting in Court a list of touts, litigants will have sufficient warning, and that touts will be seriously hampered if not deterred from carrying on their nefarious trade. We do not for one moment believe that this will necessarily or even probably result. How are litigants to identify the touts who are thus advertised? A consideration of this question will at once show the futility of any such measures.

It is, however, a matter of considerable difficulty to say what should or should not be done in the matter. Legislation has been more than once proposed but we cannot understand by what means it was proposed to bring home to the tout his delinquency. Unless the offer of a commission were made criminal we do not see how any tout could be convicted. Even in the case of an offer, it would be difficult to obtain more than a single witness who would necessarily be either a lawyer or his clerk and whose evidence alone would not always convince a magistrate that the witness was not, perhaps, after all, mistaken. Legislation however never has been attempted in the matter, and until that attempt has been made and failed, we confess to a feeling of some confidence in the efficacy of a measure that carries with it the menace of imprisonment on conviction.

### Bail.

It is an elementary principle of natural justice that every person accused of an offence should be afforded all reasonable means of defending himself. This principle is, however, seldom remembered by a large majority of the magistracy in Burma who regard bail as an indulgence that can be shown to an accused person only in very

# THE BURMA LAW TIMES.

No. 1.

MAY 1907.

VOL. I.

## Editorial Notes.

WE regret that the publication of this issue had to be delayed owing to the Easter holidays, and the difficulty of gaining access to the records.

THE objects of our Journal have been fully set out in a letter written by us to the different Bar associations in Burma, a copy of which is, for the sake of convenience, inserted in our correspondence columns (p. v.)

IT appears that in the District Court of Pegu, it has been the practice, until recently, not to require the usual schedules with petitions for letters of administration unless and until caveats were filed. This is contrary both to the practice of the Chief Court and to the express provisions of the Succession Act.

WHEN the Chief Judge, in a judgment reported in another column, remarked that the judge was not to visit the sins of the advocate on the client, he administered a very wholesome piece of advice to all judicial officers, which may often be followed with advantage. In another recent case, which unfortunately we do not see our way to report at present, the same judge made very strong strictures upon the conduct of one of the advocates, and insinuated, among other things, that he had made one of his witnesses commit unblushing perjury. If the Judge of the Court of Small Causes had adopted the procedure which the learned Chief Judge recommended in the judgment above referred to, it would have been far more satisfactory from every point of view.

THOSE who are in search of amusement in law courts are recommended to visit some of the courts presided over by Honorary Magistrates. All the rules of procedure and evidence seem to be respected more in the breach than in the observance and often without the least sworn testimony against them, the unfortunate victims are fined out of all proportion either to the gravity of the offence or to the condition of their pockets. It is not unusual to see a fine of ten or fifteen rupees for an offence for which half a crown or even a shilling in England would be considered an ample punishment. If by some chance these magistrates, as well as the different officers in charge of the prosecutions before them, were made to understand that the enactments under which they imposed these fines were not necessarily intended as a means of securing a profitable source of income either to the Government or to the municipality, the public will have good reason to congratulate themselves.

AN advocate went all the way from Rangoon to Myaungmya to present an appeal in person to the Divisional Judge. When he reached the court, he found that the Judge was on tour, and that no one seemed to know where he was at that particular moment. Touring may be a very pleasant thing in itself for the judge, but the advocate in question assures us that he did not find his trip particularly enjoyable. The appeal also got time-barred, and had the judge's absence not amounted to a "sufficient cause" within the omnibus section of the Limitation Act, the appellant would scarcely have blessed the judge or the advocate.

RECENTLY a great deal of unnecessary inconvenience has been caused to advocates on the Appellate side by the cause list being unreasonably long and appeals being put for hearing before single judges after the disposal of a large number of them by the same judges sitting on a Divisional Bench. Another source of inconvenience to advocates is the impossibility of making even short formal applications with reference to appeals before single judges on Bench days. This can be easily remedied by their Honours sitting in their own courts for a few minutes before sitting on the Bench on these days.

SOME of the Magistrates in the Province holding very high powers are so inadequately paid that it is a wonder that their conscience is rendered not more elastic than it is actually found to be. There are cases in which first class Magistrates get a little over two hundred and fifty rupees a month—a pay which, apart from the temptations which it may expose them to, is entirely insufficient to make them independent of many police officers who draw a higher pay than them and have constantly to appear before them.

In a case which was decided the other day by the Western Subdivisional Magistrate, Rangoon, a man was kept in custody pending his trial for nearly eight months, and finally acquitted. We do not suggest that the Magistrate was to blame for the detention of the man in custody for such a long time, but we are bound to say that a little more humanity on the part of the prosecution would probably have better met the ends of justice.

As we were going to press, we received a copy of "Rules and orders applying to the Chief Court of Lower Burma and the Court of Small Causes, Rangoon." So far as we are able to judge at present, it is nothing more than a reprint of Chief Court and Local Government notifications from 23rd April 1900 up to 20th February 1903. We think that its utility would have been considerably increased had the authorities enquired of the Bar Association whether, from their point of view, the rules and

orders had worked satisfactorily since they were first made and whether any changes were necessary before giving them this final shape in book form.

## The Original Side.

### I.—ITS CAUSE LIST.

It is only just a little over six years since the establishment of the Chief Court of Lower Burma. We have not, therefore, had time enough yet to decide whether as a substitute for a chartered High Court it has answered all the judicial requirements of the Province, but we have had ample time and opportunity to see the few rules of procedure and practice which have been framed since the creation of the Court in their working and to decide that there was great room for improvement in them.

The present arrangement of cases, for instance, on the Original Side needs immediate reform. The Cause List as it is arranged is an absurd anomaly, of which the only use seems to be to waste the time of the judge, to embarrass the advocate, mulct the parties in costs, and to cause unnecessary annoyance to witnesses. The only justification for its existence is that it is said to be copied from the chartered High Courts. Such an innovation was in our opinion never necessary in a place where only one judge usually sat on the Original Side, and dates could be easily fixed to suit his own convenience. Further, it is entirely unsuitable in a court where advocates have to work also as attorneys, during the preparatory stages of all cases, and only a single set of costs is allowed. Looking at it from a practical point of view, the first question that arises is, does this system expedite work? We have only to look at the reports on the administration of Civil Justice to know that it does not. The duration of cases is longest in the Chief Court. Taking averages of four years (1902—5) we find that in the Chief Court the average duration of contested cases was 190 days, of uncontested cases 108 days, as against 125 days and 42 days respectively in the District Courts. We must however admit that the volume of original work in the Chief Court is much greater than in an average District Court, but then the District Judge has





exceptional cases, and in those case only in which bail is allowed by law. It is known to all lawyers that it is almost impossible in the districts, and sometimes even in Rangoon, to obtain bail in cases sent up by the Police as well as in non-bailable cases instituted on private complaint.

The causes of this unsatisfactory state of affairs are not difficult to discover. The subordinate magistracy of this province is and has been hitherto very largely recruited from among clerks in the offices of Deputy Commissioners, Commissioners and even of Sub-divisional officers. They seldom possess any educational qualifications that make them worthy of the positions occupied by them, nor can they be expected to have very high ideals of independence and dignity. It is not surprising that under these circumstances they so conspicuously and so often fail in the discharge of their duties and seldom receive that respect which every judicial officer should receive. Only recently a Township Magistrate was so inflated with ideas of dignity that he did not possess that he convicted a pleader for placing his umbrella on the table in court reserved for the use of pleaders.

Then the police in this province have a share in the administration of criminal justice out of all proportion to their importance. Magistrates are frequently afraid to grant bail to an accused, especially in the districts, on the sole ground that if they do so the police will suspect them of taking bribes. It is within our experience that magistrates frequently refuse bail merely because bail is opposed by the police.

The police have the strongest, if not the most honorable, motives in opposing bail. The reason they usually assign is that the accused will abscond—the real reason being that they fear that the accused, if released on bail, will be able to defend himself most effectually, either by inducing witnesses to brave the terrors of the police, or by deterring witnesses from testifying falsely against him. In other words, the police, while objecting to the accused deterring witnesses from going to court, consider it perfectly proper to prevent a witness from going back on what he has once admitted to them, whether truly or falsely, whether intentionally or otherwise. They assume that what the witness has once told them, perhaps under the influence of real or imaginary terrors, and sometimes under prompting, must be true; forgetting that what a witness testifies on

oath is less likely to be false than statements made without any obligation to speak the truth.

### Correspondence.

The following letter was addressed by us to the Secretaries of the different Bar associations in Burma about the middle of March. We regret that it was not more enthusiastically responded to than it was.

Under our joint Editorship we propose to publish during the first week in every month, beginning from April next, a legal journal. It will be called "The Burma Law Times" and will be issued post free at Rs. 10 per annum, payable in advance.

The objects of this publication are—

- (1) to protect the interests of our profession;
- (2) to draw the attention of the authorities to executive and judicial abuses;
- (3) to procure an interchange of ideas between the different Bar associations, in Burma;
- (4) to report and comment on cases of unusual interest.

We trust that you will do your best to bring it into general publicity in the interest of our profession, and contribute to its permanency by securing as many subscribers as possible, and by asking the members of your Association to furnish us with facts and information. We shall always be glad to publish anything which is of general interest without regard to the position of the parties concerned so long as we are satisfied as to the truthfulness, authenticity, and *bona fides* of the information furnished to us. All communication will be treated as absolutely confidential, and if it is so desired, in no case will the name of the writer be published. We shall be grateful if you and other members of your Association will furnish us with any irregularities in the procedure or practice of the Courts in which you appear, or any cases in which advocates are unfairly treated by the judicial authorities. Of course, we do not undertake to publish any matter which is not communicated to us from personal knowledge by the writer. In order to ensure thorough accuracy, we suggest that notes may be taken by the advocate concerned during, or; as soon as possible

after, the occurrence of any fact or incident which is communicated to us.

There is also a correspondance page in our paper, and we hope that you and other members of your Association will make use of it whenever anything suggests itself to you which is likely to interest the Bar or the Bench.

Notes of decided cases in which some important proposition of law or procedure is involved may also be forwarded to us for publication.

To

THE EDITORS,  
*The Burma Law Times.*

DEAR SIRS,

I am a member of the Rangoon Bar and I frequently appear in the Court of Small Causes. I have observed an increasing tendency in that Court to appoint the interpreters of that Court Commissioners in cases in that Court. This does not seem to be at all desirable in the interest of the administration of justice, nor does it appear to me to be at all complimentary to the practitioners in that Court. It cannot be true that there is any difficulty in getting pleaders to accept commissions. On the contrary, it is in my experience that pleaders are only too glad to be appointed Commissioners. Why then should interpreters be appointed? It is desirable that one whose duty is to convey to the Court the evidence of witnesses should also have delegated to him some of the powers of the Court itself?

I am, dear Sir,  
Yours, etc.,  
"CONSUL."

RANGOON:  
22nd April 1907.

TO

THE EDITORS,  
*The Burma Law Times.*

DEAR SIRS,

I should be glad, and I venture to think that the whole legal profession will agree with me, if you could do something towards having the rules in the Court of Small Causes, Rangoon, altered in respect of the necessity of translating the whole of the vernacular portion of every document that is produced in evidence, even

when one is desirous of putting in only a part thereof. It appears that Mr. Bagley made it an inflexible rule of procedure not to allow any document or part of any document to be put in evidence unless the whole of the vernacular portion of that document was translated into English. The costs of a cause are thus often unnecessarily increased; the only persons benefiting thereby being the interpreters of the Court.

RANGOON:  
27th April 1907.

I remain,  
Yours faithfully,  
BOY MOUNTAIN.

### Humours of the Law.

A First Class Magistrate in Burma gave a peculiar reason for passing heavy sentences on certain persons who were being tried by him. In an affray that took place one of the accused' party lost his life at the hands of the complainants. The Magistrate found as a fact that the affray had been started by the complainants. Yet he gave it as a reason why a heavy sentence must be passed on the accused that one of their party had lost his life.

The following are two extracts from what was evidently meant to be a Power-of-attorney:—

"Know all men by these presents that L... .., son of late.....of T., under jurisdiction of Thana Mirsarai in the district of Chittagong, caste Hindu, at present residing at 48, 38th street, Rangoon, have possessed carrying out at present the case No. 174 of 1906, Small Chittagong and I am unable to conduct and manage personally I have made ordained authorized constituted and nominated and appointed by these presents marginal named men to be my true and lawful attorneys for the purpose aforesaid thereon \* \* \* \* \*

"I do hereby ratify and confirm my attorneys so shall lawfully do in and touching the said case or suit by virtue of these presents hereof in witness where of I would have set and subscribed my hand at Rangoon this day 11th day of March 1907."

It is unnecessary to inform the reader that it is the product of the imagination of a petition writer.

# THE BURMA LAW TIMES.

No. 2.

JUNE 1907.

VOL. I.

## Editorial Notes.

PUNCTUALITY, especially in the districts, is a rare virtue and deserves high commendation, but if it is carried to such absurd lengths, as in a case recently brought to our notice, it is apt to cause unnecessary miscarriages of justice. An advocate appeared before Mr. Ford, at Pyapone, on the 17th of last month to argue a criminal appeal. He arrived in court about ten minutes past eleven. Mr. Ford was then engaged in hearing another appeal. After he had disposed of this he told the advocate that his appeal had already been called, and that as he was not present, it had been put down for judgment on the 24th. The advocate answered that he wished to be heard. Mr. Ford refused to hear him on the ground that he had, under similar circumstances, refused to hear another advocate in another case, and that he saw no reason to make an exception in the present case.

Considering the facts that it was only half past eleven when this took place, that the Sessions Judge had no other work for the day, that no judgment had yet been written, and that it was a criminal appeal, the offence, being a few minutes late, in a place where the court is situated at a distance of over a mile from the traveller's bungalow, and no ticca gharries as a rule are available, was so absolutely venial, that it might have been over-looked. It seems to us

that if an appellant is deprived of his legitimate right of being heard by counsel on such grounds, it virtually amounts to denying him justice.

THE learned Chief Judge has, in a recent case which came up in revision, and is reported in this issue, made very strong comments on the doings of Thugyis and Bailiffs in execution matters. We hope that the lesson read to them in this judgment will serve a useful purpose, and that it will be brought home by all judges to their subordinates in the execution departments of their Courts. Ignorance and exaggerated notions of their dignity are the common causes of the abuses which have been the subject of such strong strictures by the learned Chief Judge.

In connection with this case we think it proper to refer to the very common practice in the subordinate courts in the districts of allowing attachment of property far in excess of the claim of the attaching-creditor, and of allowing that creditor to bid at the auction. The natural result is, that, in a small place where bidders are few and far between, the attached property is sold off at a much lower price than it ought to fetch, and the judgment-creditor is the only person who benefits by the sale.

In an execution matter in the Township Court of Kyaikto, a decree-holder applied for attachment and sale of 200 head of cattle in satisfaction of a comparatively small decree. The application was granted and 106 of them were

actually attacked; 93 of these were sold for Rs. 1,238, that is, on an average at Rs. 13 per head, and most of them were bought in by the attaching-creditor with the permission of the Court.

This is not an exceptional instance of the perfunctory way in which judges in the subordinate courts often administer the law and exercise their judicial discretion. Some strong measures, with a view to make them understand their responsibilities, are needed both in the case of these judges and their irresponsible underlings.

SECTION 41 (b) of the Lower Burma Town and Village Lands Act is one of those legislative scandals which are peculiar to this country. We do not believe in the soundness of any enactment which deprives the highest court of judicature in the province of jurisdiction over purely civil rights.

The courts of law in the province, and not the executive authorities, are the most proper and legitimate guardians of the civil rights of the Government, and every departure from this principle involves a serious reflexion both on the courts and the executive, for which there seems to be no special occasion.

The two judgments reported in this number show the peculiar hardships to which this enactment exposes the public. The learned Chief Judge has remarked in one of them that a precedent bearing on the question, which arose there could not be expected, "for it is not often that the legislature absolutely removes the consideration and determination of any claims as against the Government from the jurisdiction of the civil courts as it has done by section 41 of the Lower Burma Town and Village Lands Act." We go further than the learned Chief Judge and say that, it is difficult to find any instance in the whole of British India where of recent years the legislature

has curtailed the jurisdiction of the civil courts in matters which involve the determination of purely civil rights.

THE charging of double fees for urgent translations and copies of proceedings, has led to the prevalence of abuses which it is time should be checked. When an interpreter knows that by the simple process of delay he is able to exact a double fee, it is not likely that, unless his conscience happens to be super-sensitive, he will let an opportunity of increasing his income easily slip. The same argument applies to the copying departments throughout the province. In the Chief Court, urgency fees may be paid to the copyists, and in the subordinate courts they are to be credited in full to Government (Rule 840, sub-section 39).

The result in the Chief Court, therefore, is that unless and until all urgent work is really or ostensibly finished, ordinary copies are at times unnecessarily bound to be delayed. In the other case the position is much worse. The copyists, if they choose, and we have no doubt that they often do, may exact a gratuity amounting to anything between the ordinary and urgent fees, and even *bona fide* applicants for urgent copies who have actually paid double fees, must wait until the people who have "settled" the copyists have obtained their copies. A total abolition of urgent fees and increase in the pay of interpreters and copyists will certainly mitigate, even if it does not entirely eradicate the evils to which parties are liable to be exposed under the present rules.

THE ordinary duties of the Assistant Registrar, Original Side, are so multifarious that it seems that some provision should be made to dispense with his presence in the Court of Sessions, with its prolonged sittings throughout the year. The appointment as Clerk of the Court of a junior

advocate with liberty to practice will probably have the desired effect without the Government incurring any very heavy additional expense.

THE tyranny of red tape is nowhere so rampant as it is at times in the ministerial department of the Original Side of the Chief Court. If one wants what are known as "forthwith" subpoenas, one cannot have them without the Judge's order, that is to say, until after eleven o'clock on the day on which the witnesses are required, because, after the cause list is made out at the close of the day, there is no time for the Assistant Registrar to receive applications.

If the Assistant Registrar is authorized to receive process and subsistence money instead of the bailiff in these cases and to issue subpoenas, both parties and advocates will avail themselves of this procedure more often than they find it convenient to do at present; and, in consequence, applications for postponement of cases on the ground of the non-service of witnesses will be of less frequent occurrence.

THE new rules recently issued by the Registrar, about the arrangement of civil business on the Appellate Side of the Chief Court, have been received by members of the Local Bar with a great deal of diffidence as to their ultimate utility, and are not looked upon with entire satisfaction by a large number of them. We have been so long accustomed to rules being forced on us without the least reference to us or without the least enquiry as to how they are likely to affect us, that it seems almost futile to make a grievance of them. However, we cannot help regretting the fact that the Bench should, even on occasions when it might fitly be otherwise, be entirely out of touch with the Bar. We have no doubt that these rules have been introduced after a great deal of thought and reflexion by the Hon'ble

Judges, but we still think that if the Bar Association had been referred to, some useful suggestions would possibly have been made, which, without necessarily interfering with the objects which the Hon'ble Judges had in view, would have been found somewhat serviceable.

IN the District Court of Hanthawaddy, the Bailiff is the only officer who ordinarily swears affidavits. As he is rather a peripatetic individual like the rest of his kind, a great deal of inconvenience is sometimes caused to parties and advocates, when they have urgent applications, accompanied by affidavits, to file, and he is in the districts, and the Subdivisional Judge refuses either to swear the affidavits or to accept the applications without them.

For one of the most important district courts, the process-serving department also of this court is the most meagre and inefficient. As a rule, we are told there is only one peon available for the service of summonses, and unless an application is made at least ten days before the date of hearing, there is very little chance of witnesses being served.

## The Burma Bar.

### I.

IT is a matter for congratulation that, whatever may be the shortcomings of the Burma Bar, lack of self-complacency is not one of them. It is this supreme quality which makes us so remarkably happy amid circumstances which mortals with less buoyancy of spirits than ourselves will find peculiarly depressing. It has dropped us gradually into that state of beatified mental lethargy which is above all introspection and an intellectual sleep which probably "knows no waking."

We have no desire to preach a homily upon the ethics of our profession, for it would be

both unwelcome and impertinent, but we think it our duty to point out where the evil lies, and whether any remedies are possible to cure it.

The first thing we need is a little more initiative and a little more of that *esprit de corps* which is so absolutely essential to our well-being. That we have been hopelessly wanting in these can be easily proved from an examination of our history within the last forty years or more. Except on one or two extraordinary occasions, even when our most vital interests were concerned, we have shown ourselves incapable of any very great organized action, and our voice has never been heard. In all parts of the civilized world lawyers have materially influenced the course both of legislation and public affairs. No doubt in this country, particularly in this province, Providence looks after its public affairs with her matchless benignity and legislation manages to take care of itself without much human interference; but we still maintain that, until we have some share in both, we must remain far behind that legitimate position which both tradition and history have assigned to our profession in all parts of the globe where the English tongue is spoken and English institutions prevail. To wish for this is no unworthy ambition; not to do so amounts to positive failure in the discharge of our duty both to ourselves and to the public.

Next, what we have to militate against are those causes external and internal, which have reduced the profession to its present unenviable position. Among the former are the growing tendency both in the legislation and in the courts to degrade the profession directly or indirectly on the slightest imaginable provocation. The application of the Legal Practitioners Act was the first direct blow given to our profession by the Legislature. Its extension to members of the English, Scotch and Irish Bars is nothing short of a disgrace; the mere suggestion of a law or statute to regulate the status or discipline of these branches of the profession would, in Great Britain, or, for that matter in her colonies, not only be not tolerated but would be received with the indignation it naturally deserves, and would never be entertained by any self-respecting individual; yet here we have entirely forgotten ourselves and done nothing by way of protest or otherwise to get it modified. Then there is the ever increasing tendency in recent years to lower the dignity of the profession, manifested in the decisions of the Law Courts.

Leaving aside the legal value of these decisions, which we propose to discuss on another occasion, the fact remains that they have abolished all those distinctions between the different branches of the profession, which by the common consent of generations of men, were attached to the bar and have reduced them all alike to a very moderate level of legal respectability which depends not on their own sense of honour and dignity but on the terros of an ill-advised enactment, and its frequent applications. Finally, we have to remember the attitude of the Bench towards the Bar. In other places any disturbance of the harmony between the two would be considered unnatural and harmful. Here, on the contrary, even the fact that there ought to be such a friendly understanding between the Bench and the Bar is often ignored, and when it is recognized, it is made to count for very little. The obvious reason for this state of affairs is the mental aloofness which naturally arises from the peculiar position that men who preside on the Bench, with few exceptions, have never practised at the Bar or come into other than official contact with those who are in the profession. Both by education and habit they acquire frigid modes of thought which are entirely alien to those of the men who appear before them and who are accustomed all their lives to other ways of thinking. The natural consequence is the same as in an ill-assorted union—constant friction due to differences of thought and of temperament.

(To be continued).

#### S. P. C. A. CASES IN THE HONOURARY MAGISTRATES' COURT.

HAVING heard a great many complaints about the perfunctory manner in which S. P. C. A. cases are conducted in the Honourary Magistrates' Court, Rangoon, and of the injustice caused to many of the poorest people in this city, we attended one of the honourary magistrates' courts on Thursday, the 2nd day of May. What we observed during the short time that we stayed there not only confirmed our worst expectations and verified much of what we had been told but we noticed some things which we did not expect to notice in a court sitting for the administration of justice. As we have no desire to give our readers any but the most accurate information, we will give an account of

half a dozen cases that were tried in our presence.

A police constable was ordered to bring Tatayah's bullock, Tatayah being the name of the accused. No one was sworn in this case. The magistrate looked at the bullock from a distance of over 20 feet. The bullock was alleged to be lame. A European Sub-Inspector was telling one of the magistrates something which was not explained to the accused and which could not have been heard by any other person in court. We are unable to say how it happened, but the accused was informed that he had been fined Rs. 2. The whole proceedings appeared to us absolutely unintelligible.

The accused in the next case was one Yenkayah. Again the same Sub-Inspector remained in the box whispering something to one of the magistrates not a word of which was interpreted to the accused. We heard nothing, but imagined that something was being said by the Sub-Inspector whose lips were moving.

The accused was interrogated and answered thus:—

Q.—Has the bullock a sore neck?

A.—No.

Q.—Is he thin?

A.—Yes.

*Sentence:* Fine of Rs. 2.

In the next case was a bullock with an alleged sore neck. On being questioned the owner, who was the accused, denied the sore neck. We presume a galled neck was meant. He was immediately fined Rs. 5, apparently because he denied it. Now, there was no legal evidence recorded. No one was sworn. Nothing of what was said to the magistrates was interpreted to the accused. The magistrates did not even take the trouble to get up and see if the animal had a galled neck; and, for all we know, there may have been no galled neck.

Next was heard a case in which it was alleged that the bullocks were very thin and that the accused had overloaded his cart. Again the same irregularities were observed as before. The magistrates did not examine the bullocks, which did not appear to us to be any thinner than thousands of draught oxen usually are. The load

was not brought before the court, and so it was impossible to judge whether the cart was really overloaded or no. The accused asserted that he had only loaded 250 bricks into his cart. No enquiry was made as to what was a fair load for the accused's bullocks. The magistrate fined him Rs. 6 and informed him that next time he would send him to jail. We saw nothing and heard nothing to call for this remark, and we are sure the accused understood as little about it as, if not less than, we did.

The next two cases were of a galled neck and a heavy load. As the accused in the first case admitted the galled neck he was fined Rs. 3. The case of the heavy load was decided without any evidence at all. A cart containing what appeared to us to be an ordinary load of timber for a pair of bullocks, was pointed out to the court. Thereupon the accused, who said he was the servant of a contractor, was fined Rs. 5.

We left after the above cases had been decided. Other cases remained to be disposed of. We do not know how they terminated. But before we left we had already examined at least 7 bullocks carefully and closely. They seemed to have had nothing wrong with them, and it was a matter of surprise to us why they were brought to Court at all.

#### SECTION 109, CRIMINAL PROCEDURE CODE.

WE should like to have decided by the Chief Court the question whether brothel-keepers, who live in whole or in part on the earnings of prostitutes, can be legally convicted under section 109 (b) of the Criminal Procedure Code and bound down on the ground of having no ostensible means of livelihood. Recently in consequence of a ruling by the late District Magistrate of Rangoon, Mr. Dawson, many prosecutions were instituted and many convictions resulted. We do not, however, find ourselves in accord with the above ruling. To hold that brothel-keepers have no ostensible means of livelihood is not only to allege in one breath what is denied in the next but to give the section a meaning that could never have been contemplated by the Legislature; and this meaning can only be evolved by stretching and twisting the words of the section out of their ordinary and natural

meaning. It is difficult to see why the Legislature did not make it a crime to keep a brothel if such was their intention. It cannot be contended that this case was overlooked, because many crimes that emanate from brothels, or are a natural outcome of the existence of brothels are provided for by the Indian Penal Code. If any doubt existed, it would vanish on remembering that not so many years ago the Legislature with the object of preventing the spread of venereal diseases, made certain provision for the supervision and inspection of prostitutes, though of course, that Act has since been repealed.

### PROCESS PEONS.

THE notion seems to be prevalent among some judicial officers that a plaintiff must accompany the process-server of the court in order to point out the defendant; and they sometimes emphasise their opinion in a manner that scarcely accords with elementary principles of justice. Plaintiffs have frequently had their suits dismissed on this account alone. We remember a case in point. A plaintiff sued in the Court of Small Causes of Rangoon for Rs. 2,000 and described the defendant as "Ko Maung Gyi, Broker, Pazundaung." He did not accompany the process-peon to point out the defendant who remained unserved. Mr. Bagley, the then Judge of the Court, dismissed the suit on this ground. The plaintiff applied to the Chief Court to revise the dismissal order, and Mr. Justice (now Sir Charles) Fox set aside the dismissal order and returned the record for the issue of summons against the defendant, remarking, that the process-server ought to have searched himself for the defendant who was described as a broker residing at Pazundaung. This is in accord with a decision of the Calcutta High Court (*vide* Calcutta Law Journal, Vol. 5, p. 12, n.) where it was held that it is the duty of the peon to go out and use his best endeavours to find the person named, his address having been given; and that a judge was not justified in dismissing an appeal for default of the party or his agent in not going to point out the party named.

Apart from the legal question involved, there is another reason which, in our opinion, is of much greater importance why these decisions ought to be welcomed. From our experience of the Small Cause Court, Rangoon, and other

courts we can say that process-servers always expect plaintiffs to accompany them to point out the defendant or his house. Why it should be necessary for any one to accompany the process-peon to point out a house whose number and situation is sufficiently given we are unable to say. Even in the former case we do not see why the process-peon should not go to the defendant's house, endeavour to find him, and, failing to find him, post the copy of the summons on the outer door of his house. We are aware that it is to the interest of a process-server not to find the defendant unless the plaintiff accompanies him and, of course, pays the garryhire and gives him a "pour boire." And it is just for this very reason that we object to the present practice. The objectionable features of the present system could easily be removed by the issue of necessary orders.

### A RAILWAY POLICE CASE.

THE Extra Additional Magistrate, Rangoon, Maung Aung Kyaw Zan Hla, has just passed orders in a case that recently occupied more than two days of his time. The facts, we are sure, will interest our readers. The case is Criminal Regular Trial No. 118 of 1907.

On the 7th March last, at about 10 a.m., a tinker in the employ of the Burma Railways Company was observed in the railway premises by a railway watchman to be carrying a bundle.

Suspicion being aroused the watchman arrested the tinker with the bundle. In explanation, the latter said he had been sent by the clerk in charge of the Lost Property Office to make certain enquiries from the Assistant Station Master, Mr. Cowsley, as to why this very bundle had not been entered in his Lost Property Register. The clerk in charge of the Lost Property Office having admitted the truth of this was also arrested. The services of the Inspector of Watch and Ward and of the Detective Inspector, Railway Police, a Mr. Valayathan, were next obtained. The tinker's house was searched and some forty different articles that were found there were removed, some because they were suspected by the Watch and Ward, and others because Mr. Valayathan thought the tinker had no right to possess them. Among the things so removed were two wall lamps, a pair of clippers, two razors in cases, a

pair of smoked glasses in case, two boxes containing a dozen plated knives and forks, one pair of silver knotted anklets, one ornament marked with silver and gold, one small broken clock, two glass chimneys, one bottle, two iron hinges, one dealwood box, and some clothes.

On the 9th March a room in a house at Insein was searched. The door of the room was padlocked and had to be broken open. The room was unoccupied—the tenant having left a week or ten days previously. Some articles were found there, inter alia, a waterproof marked B. R. and a bamboo ladder which was leaning against the partition dividing this room from the next.

A woman who was living next door was arrested; the owner of the house and a chetty to whom the house had been mortgaged by way of conditional sale were also taken into custody, and sent up for trial, together with the tinker and the clerk. The third, fourth and fifth accused, the woman, the chetty mortgagee and the owner of the house respectively were fortunate enough to obtain bail at a very early stage of the case. The first accused (the tinker), the 2nd accused (the clerk), were released on bail on the 23rd March, *i.e.*, after being sixteen days in custody.

The first accused, in explanation of the fact of a number of articles, which were undoubtedly the property of the Burma Railways, having been found in his room, told the Court, as he had previously told Inspector Valayathan, that they had been in his room before he was permitted to occupy it and that there were still in his room many other things, the property of the Burma Railways Company, which had not been removed on the day his house was searched; he also explained his possession of other articles by the fact of his having purchased them at sales held by Messrs. Balthazar and Son of unclaimed articles periodically sold by the Burma Railways Company. In cross-examination Inspector Valayathan admitted that he had made absolutely no enquiries to verify the truth of the explanations offered by the tinker. The truth of what the tinker said was made manifest by the prosecution witnesses; and the explanation of the Lost Property office clerk was so reasonable that it was unhesitatingly accepted by the Court. All the accused were discharged, the Magistrate remarking that it was not apparent why the third, fourth and fifth accused had been sent up for trial; nor could the Magistrate quite see why the second accused, the clerk, had been arrested.

The fact remains that two human beings again whom there was really nothing worthy of the name of a case, were kept in custody for six days without apparently any enquiries having been made during the period they were in custody. The Magistrate's powers of remand were clearly abused by some one in this case because the accused could only have been remanded to police custody for the purpose of enabling the police to make enquiries which you now know were never made and which, perhaps, were never tended to have been made.

We should like to see something done to prevent a recurrence of such abuses. At present the police have it in their power to deprive a man of his liberty on the pretext of enquiries being afoot; when, as a matter of fact, suspicion alone is all that they have against the accused, and hopes of something turning up if only the accused can be kept in custody long enough.

### Correspondence.

TO

THE EDITORS,

*The Burma Law Times.*

25th May 1907

DEAR SIRS,

I have practised for many years as a pleader in various parts of this province. During all that time I have occasionally met a few subordinate magistrates and judges who were as patient and gentlemanly on the bench as they were in private life. But I regret to say that my experience has been very unfortunate, in that I have frequently been obliged to appear in cases before magistrates and judges who were renowned for their ill-temper on the bench as well as for the severity of their sentences. I do not wish to say anything about the latter, but about the former I wish to tell you a few facts as to which I can speak personally. I do this all the more gladly, and without hesitation as I saw in your first issue a copy of the letter addressed by you to various Bar associations in Burma in which you indicated you would welcome communications from your readers as to matters of general interest.

There is a judge in the place where I carry on my profession who evidently considers it is accepted as a sure proof of his impartiality if he gets angry in turn with both parties and all their witnesses. The method adopted by him of showing his impartiality has not acquired for him that reputation nor has it brought him fame as a clever, just or equitable judge. I have known a plaintiff say "yes" when he meant to say "no," simply because he was unnecessarily bullied by the judge. This the plaintiff himself assured me of after he left the court a sadder and a wiser man on my questioning him why he admitted in court what he had denied to me when giving instructions. I told him I could not understand why he did not correct himself and say he was mistaken, and he replied that he was afraid that, if he did so, he would be prosecuted for committing perjury.

This same judge too is great on the demeanour of witnesses. Only let a witness hesitate the least bit in his answer and he is immediately labelled "a shuffling and lying witness who is evidently trying to hide the truth from the court." If he looks at the pleader of the party calling him, he is at once declared to be looking for a sign as to how to answer. It is impossible for me to tell you all the great qualities of this judge, but he is certainly "facile princeps" in the art of self-deception. I hope at some future time to send you a list of instances in which his ill-temper has caused a failure of justice and also

of a number of amusing anecdotes connected with his characteristic quality. I enclose my card and remain with many thanks for the use of your columns,

Yours very faithfully,

A. X.

### Humours of the Law.

A PLAINT was filed in the Court of Small Causes, Rangoon, with the following title:—

G. A. v. K. L. V. Press, resident of Dal-housie street, Rangoon, occupation printing.

AN advocate practising in the districts communicates to us the following story:

A Burman applied for attachment of certain property in execution of a money decree. The judge rejected the application on the ground that in the event of an attachment a certain chetty would apply for removal of attachment and the attachment would surely be removed on his application. The Burman returned to his village and extolled the judge as an astrologer who was able to predict the future and to save him unnecessary costs.

# THE BURMA LAW TIMES.

No. 3.

JULY 1907.

VOL. I.

## Editorial Notes.

WE were glad to see Mr. H. H. Bagley, on the 24th ultimo, take his seat again on the bench of the Court of Small Causes after his holiday. He has quite a formidable number of cases to dispose of. The list on Monday, the first of July, consisted of over 100 cases, which, we believe, is a record for the Court of Small Causes, Rangoon.

WHEN a summons issues out of the Court of Small Causes, Rangoon, there is at present nothing on the summons form to indicate to the defendant in which of the two courts the case will be heard. Ordinarily the Additional Judge tries cases of the value of Rs. 150 and under; except in cases where both parties are Burmans, when his jurisdiction enables him to try suits valued at Rs. 500 and under. But suitors do not all know this. It therefore frequently happens that a defendant is waiting for his case in the wrong court and subsequently discovers that it has been called and decreed *ex parte* in the other court. He must then either deposit or give security for the payment of the decretal amount in the event of a decree being passed. This is in all cases a hardship. In the case of a poor man who is unable to do either, the hardship amounts to a denial of Justice; and, in the case of a well-to-do person it means a certain amount of trouble,

worry and expense. In any case, it is not a satisfactory state of affairs and much room is left for the commission of perjury. We think, if it were clearly stated in the summons, in which of the two courts the case would be heard, some injustice would be prevented and an improvement effected on the present system. We are aware that this will give more work to an already overworked and undermanned staff, but we think the utility of the measure will commend itself to the Judge of the Court of Small Causes.

FORMERLY, in criminal appeals, it was not necessary for advocates to file a power. This practice no longer obtains, and, under a circular order of the Chief Court, advocates must file a power in all criminal appeals. The only thing undesirable about this is that it may sometimes happen that, in consequence of the friends of the accused not knowing his whereabouts, it may be impossible for the advocate to file an appeal or argue it, merely because he has not filed a power from his client. The difficulty, of course, can be overcome by the advocate undertaking to do so subsequently and asking for the indulgence of the court in the mean time.

It appears a new rule has been introduced in the District Court of Hanthawaddy and the courts subordinate thereto, with respect to the position of adhesive Court Fee Stamps on plaints and petitions. Stamps must not be affixed on the

left hand margin. Much inconvenience has been caused to advocates through ignorance of this rule. We think it would be desirable if the subordinate courts refrained from framing rules of this nature without consulting the Chief Court.

THESE are some judges who, instead of attending court punctually at 11 A.M., make it a point never to sit on the bench before 12 noon, and even later, regardless of the fact that summonses, notices and subpoenas have all issued for 10 A.M. and advocates and pleaders are kept waiting hour after hour. We think that such conduct is not only improper but that it shows an utter indifference to duty and to the rights of the public. We think the evil is sufficiently great to merit some steps being taken to check it.

THE inclusion of Burma in the "Presidency of Bengal" for the purposes of the Administrator-Generals Act (II of 1874) is an anachronism for which, since the total severance of the Chief Court of this Province from the High Court of Calcutta, there seems to be no valid justification. Great hardship is often caused to claimants against the property of a dead man, whose estate has been in virtue of this law, vested in the Administrator-General of Bengal especially when they happen to be ignorant or unbusiness-like. That a man should die in Burma, and that his estate should pass into the hand of an officer in Calcutta, are ideas entirely unfamiliar to the average man and, at times, he absolutely fails to grasp them. The consequence is that he either does not put forward his claim against the estate or that, when he does, he is told, in the first instance by the Administrator-General and ultimately by the Court, that the claim was not true because it was not made earlier.

It is time that this obvious anomaly was swept off and the Administrator-Generals Act was extended to Burma, as a separate Province, like any one of the Indian Presidencies.

AMONG certain magistrates it is the invariable rule to reserve orders after all evidence has been taken for a number of days. This delay often gives rise to unpleasant reflexions, especially in non-compoundable cases in which both the parties are well to do and the accused is on bail.

SOME legal practitioners who are admitted to practise as "Pleaders" often style themselves "Advocates" both in Rangoon and in the districts. This is contrary to the rules of the Chief Court and to the etiquette of the profession. It is a matter trivial in itself and can do no serious harm to Advocates, but if it is intentionally done it becomes a question which may well be considered by the Hon'ble Judges as well as by the Bar Association.

RULES are often made by the subordinate courts with regard to the presentation and of petitions and appeals and other matters, for the guidance of advocates and pleaders, and posted in the court rooms. If a copy of these rules is, as a matter of practice, sent to the Bar Association, they are more likely to come to the knowledge of advocates than in this way, and a great deal of inconvenience may be saved both to them and to the judges concerned.

IN Revenue cases sometimes a great laxity is observed in matters of evidence. Men are produced in court by thugyis and others who pretend to be the owners or occupiers of the

land in question and upon their admissions the real owners are deprived of possession and the lands are resumed by government. If Revenue officers made it a point to get the parties making such admission identified by evidence other than of thugyis, more satisfactory results may be possibly obtained.

IT is the common practice now-a-days, in cases before the Additional-Judge of the Court of Small Causes, Rangoon, for the defendants to apply for time to file their written statements. Without a single question from the Bench as to what defence they have to offer, time is granted for the purpose, and the case put down for hearing three or even four weeks later. This is clearly opposed both to the object and to the spirit of the Provincial Small Cause Courts Act, which is intended for giving speedy relief to plaintiffs.

We have no doubt that this is the result of the Additional-Judge's great courtesy and desire to do justice, but we cannot help thinking that an unfair advantage is often thus taken of his disposition to give a defendant every opportunity of putting his case before the court.

IN the Divisional Court of Hanthawaddy, a great deal of inconvenience is caused to advocates when the Judge is unable to hear appeals fixed before hand owing to Sessions Work intervening. Unless timely intimation is sent to them all their arrangements for the day are liable to be dislocated.

## The Burma Bar.

II—(continued).

NOW we have to discuss the more unpleasant part of the subject, namely, the internal causes which have contributed so much toward lowering the status of our profession in this province and for which we alone are responsible. The foremost of these is the evil which not long ago we discussed in our columns,—the evil of "Touting," which, as it exists at present, is nothing short of an endemic disease affecting the profession. Unless strong measures are taken to prevent it, it seems to us that both our reputation and status are doomed for ever. First of all we will try and deal with the various forms which "Touts" and "Touting" have assumed and then we will discuss some of the remedies which have been suggested to get rid of them.

To define "Touts" or "Touting" is to attempt something which defies all description. We find ourselves absolutely unequal to the task of defining them. We will therefore rest satisfied with a description of some typical varieties of them.

The finest and, probably, the most pathetic specimen is that of the lawyer acting as his own "tout." This individual is, as a rule, a very early riser, and makes it a point to get to his office long before his actual business requires. He prowls about the apparently deserted corridors, or within the purlieus, of the smaller courts in the earlier hours of the day and waylays any one whose appearance suggests the probability of his being in need of an advocate. He talks to him nicely and smilingly pockets what little he is offered as a sort of earnest-money and guarantee of the balance which is to be brought before the case is called that day. This type of individual indeed is the most business-like, because, whilst he produces the same desirable result, he saves the wages of the "middle" man. His position, moreover, is the most impregnable, because no law that you can frame will ever be able to catch him; we have no desire that he should be touched either, for, with his disappearance will undoubtedly vanish the little of the pathetic attached to our otherwise matter-of-fact profession.

The second variety of "touting" discloses more organized arrangements. Its chief merit is in the employment of two sets of clerks,—clerks who are expected to do clerical work, and clerks who are expected to bring work. The former get a fixed salary, the latter have a small pay and a certain percentage. Owing to this arrangement it is not unusual to find in some offices clerks out of all proportion to the exigencies of office work. We are told on very good authority that, in several offices in which ordinarily there is not enough legitimate work for two or three clerks, half a dozen or even a dozen of them are not an uncommon number.

The next method is for advocates either to be partners with pleaders of thesecond or even of the third grade, or to employ them in their offices as "assistants." Against the former we have no reason to complain expect this, that it is contrary to the etiquette and traditions of our profession. However, the employment of them as "assistants" is open to grave suspicions. We have authority for saying that some of these "assistants" get a monthly salary, and a certain percentage on the amount of work they put into the hands of their employers.

After this comes, the downright out-and-out Tout—the parasite who clings to the profession with the most unmerciful rapacity and feeds upon its vitals with inexhaustible vigour. As soon as he hears of a new arrival he approaches him and draws him into his net with stories of wonderful good he has done to others when they first came, giving their names and the amount of remuneration they paid. He is a veritable highway man who thinks it his legitimate business to attend the arrival of railway trains and steamers from the districts, and bodily captures ignorant cultivators and others who happen to come to Rangoon for legal purposes. If the litigants are by some untoward chance recommended to a lawyer, he easily persuades them that he is dead or has left the place, or, when this fails, that he is good for nothing. These predatory excursions do not end here; they are often carried to the very doors of the advocates, and it is not unusual for him triumphantly to seize his prey almost within their sight. Moreover, he never sticks to the same man, as the length of time he would serve his employer depends upon the elasticity of the remuneration available in the "Touting" market.

The last, if not the least, is the *occasional* Tout. This is sometimes a pleader in the district who patronizes an advocate in Rangoon by sending him appeals for consideration at the recognized rates. At other times, he is the agent of a commercial firm who directs work into the proper channel in return for a stipulated percentage.

(To be continued).

#### INTERPRETATION IN COURTS IN BURMA.

THAT the interpretation in our courts is not of the best, or even what it ought to be and might easily be, has long been apparent and accepted as a truth among the members of the legal profession. No one has however, hitherto publicly stated what has long been known to be true. Now, however, that our learned Chief Judge, in a case tried by him at the last criminal sessions of the Chief Court and reported elsewhere in this number, has admitted that the quality of the interpretation in our courts was not very satisfactory, our observations on the subject will no doubt be listened to with greater attention.

We do not think that the local Government has realised the peculiar circumstances of this province in making provision for good interpretation in our courts of law. We are aware that, since the institution of the Chief Court, much has been done to improve the quality of interpretation in Burma by evolving something like order out of chaos. Hitherto interpreters were appointed from among local applicants. Sometimes the selections were fortunate, but often men were appointed without possessing the necessary qualifications. Since the institution of the Chief Court a system has been introduced and grades of interpreters established. This is no doubt highly commendable, but the method of selecting interpreters leaves much to be desired. It does not follow that, because one has acquired certain educational qualifications, one is necessarily a good interpreter. We know of Masters of Arts who are totally unfit to be interpreters and Bachelors of Arts who ought never to have been selected to fill the vacant appointments. An interpreter must not only have a good grasp of

English but he must possess in no small degree the qualities of patience, sympathy, imagination, tact, memory, presence of mind and attentiveness. Few men are born with these qualities—most men can develop them with sufficient application. But what inducement has a man of ability to apply himself to this profession when the horizon of his aspiration is so limited as is that of the interpreters in Burma. If he is a man of more than average ability and some parts, he, not unnaturally, accepts the appointment as a step to obtaining some other more congenial and more profitable employment. He comes to Burma with the determination of looking out for something that will remunerate him better. Not unnaturally he casts his eyes on the profession of the law and, in course of time, he appears as a pleader and thanks his stars that he is no longer an interpreter. Vacancies will thus occur with a frequency that will necessitate further appointments of raw hands with the inevitable result, that a large proportion of interpreters will be learning their work at the expense of litigants and making experiments in syntax and grammar to the astonishment of all who can understand and judge. It is this frequency of change that is so detrimental to justice in a country like Burma. There is, and has long been, an alien population in this country out of all proportion to that usually existing in all other countries of the world, and it is for this large alien population, to whom the government is largely indebted for the prosperity of this province, that some better provision in the matter of interpretation ought to be made than at present exists.

Although the interpretation in the courts in Rangoon is by no means good, or even satisfactory, it is much better than the quality of interpretation in the district and subordinate courts outside Rangoon. We have met Tamil interpreters acting as Hindustani interpreters who were so obviously deficient in a fair knowledge of colloquial Hindustanee that we could not understand why they were allowed to interpret on any other supposition than that no better interpreter was available. The quantity of injustice that must inevitably result under such circumstances is too awful to contemplate, and no considerations of expense ought to be allowed to prevail over the urgent necessity of appointing efficient interpreters in all courts. To give point to our remarks, we have not the slightest hesitation in venturing to affirm that there

are not three tolerably efficient Hindustani interpreters in the courts outside of Rangoon. We are not qualified to speak as to the Tamil, Telugu, Bengali, Chittagonian, or Chinese interpreters, but we believe that the remarks about the Hindustani interpreters will apply to them with equal, if not with greater, force.

Unlike Burma, India possesses a population far more homogenous, and it is seldom that an efficient interpreter cannot be obtained. Whole districts are populated by people with one common tongue and hundreds of efficient applicants present themselves for selection to a single appointment. In Burma the conditions are very different. Educated Indians find a more profitable scope for their abilities than that of acting as Interpreters, and when they do obtain such an appointment, their one object is to leave it as soon as possible for a better and more profitable calling.

The remedy for all these abuses lies solely in the power of the local Government. The courts of law of this province, like all other provinces in India, are a source of great profit to Government, and if some of the vast sums thus obtained were spent in increasing the efficiency of the courts of justice, we should bear less of the evils of bad interpretation and the public would rest satisfied in the knowledge that the best was being done to prevent the abuses that at present occur daily.

The establishment of a training school, a short period of probation, and an increase in pay would go far towards putting things on a satisfactory basis, and that at a cost small in proportion to the great benefits conferred on the public.

#### ENHANCED SENTENCES.

THERE is no section of the Indian Penal Code which is more liable to abuse than section 75, which provides enhanced punishment in case of a second conviction for theft and other offences against property. In the hands of some judicial officers it is apt to be too literally applied to cases which the Legislature never intended it should cover.

Mr. Po Sa, the Special Power Magistrate of Hanthawaddy, on the 5th of June last in Criminal

Regular Trial No. 32 of 1907, sentenced a man, named Nga Po Sein, to four years' rigorous imprisonment, three months of which were to be spent in solitary confinement, and thirty stripes, for the theft of a fowl valued at six annas under Section 380, of the Indian Penal Code. The accused admitted three previous convictions against himself. The first one was on the 14th August 1895, the second on the 23rd August 1897, and the third on the 31st August 1898. On the last occasion he was sentenced to eighteen months', rigorous imprisonment, so that he got out of jail seven years and a half ago, yet, in passing sentence, which practically embraces all the forms of corporal punishment which the law provides, the Magistrate said that the prisoner was an "incorrigible and habitual" offender. There is nothing on the record to show the nature of the thefts on the previous occasions, and there is no evidence, to show what kind of life the accused had led during the last seven years and a half, and as there was no other conviction, the court was bound to presume that he had tried to lead a good life and reform himself.

The accused appears from his statement to be forty-four years of age that is, just one year short of the limit which, under the Criminal Procedure Code, would exempt him from corporal punishment under the Whipping Act, and there is nothing on the record to show that, though the accused said he was forty-four, he was not more than that. Whipping in a case when there is also a sentence of four years rigorous imprisonment can never act as a deterrent, be cause, by the time the prisoner is out of jail, the memory of physical pain is as likely to have vanished as the sense of humiliation, especially if he is a hardened criminal.

Under these circumstances it is no exaggeration to say that the prisoner was neither a habitual nor incorrigible offender, and that the harsh sentence passed on him was as unnecessary as it was cruel.

#### VEXATIOUS PROSECUTIONS.

THAT outward respectability and ample means of livelihood do not ensure immunity from police prosecutions under section 109. Criminal Procedure Code is amply illustrated by

a case which was decided some time ago by Mr. Godber, Western Subdivisional Magistrate, Rangoon. We have reported in these columns Mr. Godber's judgment with a view to show what ingenuity even some of the highest police officers are capable of displaying when it is a question of distorting the provisions of any law which apparently furnishes the slightest loophole for police interference.

This was a case in which a prosecution under section 109 was sanctioned, by the Commissioner of Police, of a man who, though admittedly a man of means, had no "ostensible means of livelihood" because he happened to supplement his income by having an interest in a brothel. As would appear from Mr. Godber's judgment, what was proved from the evidence of Mr. Summers, the then Assistant Commissioner of Police, and the prime mover in this unjust prosecution, was a complete refutation of the charge against the accused. This is, however, not the only absurdity of the whole proceeding. The reasons for instituting it are far more absurd and call for much more severe comment, because, if they were allowed to prevail, no man would be certain of not being dragged into the police courts some time or other. Mr. Summers openly admitted in his evidence that the only reasons why accused was brought into Court were, that he was a man of means who could defend himself, and that an authoritative ruling as to whether a brothel-keeper could be prosecuted under section 109 of the Criminal Procedure Code was necessary.

If Mr. Summers wanted to know whether section 109 was applicable to brothel-keepers, he had no right to make an experiment at the expense of a private individual. Probably a reference to the Government Prosecutor or to the Government Advocate would have satisfied Mr. Summers' thirst for legal information as effectually as this mock trial, and would have brought much less discredit on the police department. The open suggestion moreover that this was a test case might, by a magistrate of less independence than Mr. Godber have been construed as a hint that conviction was desired by higher authorities, and grave injustice might have been done to a man for no reason whatsoever.

In view of such utterly groundless prosecutions, we cannot help thinking that a curtailment

of the immunity from personal responsibility enjoyed by police and other officials would be of some advantage to the public, if it could be effected. Under section 245 of the Criminal Procedure Code, a private complainant is liable to pay to the accused compensation not exceeding fifty rupees, if his complaint is found to be frivolous or vexatious; and there seems to be no obvious reason why the provisions of this section, in course of time, be not extended to frivolous and vexatious complaints by the Crown, as in the present instance.

*The following judgment was delivered on the 31st October 1906 by Mr. H. W. Godber, Western Subdivisional Magistrate, Rangoon in Criminal Trial No. 131 of 1906. King Emperor vs. Nga Hpo Kha.*

THE prosecution of the accused was sanctioned and he has been sent up for trial, charged with having no ostensible means of subsistence, and being unable to give a satisfactory account of himself. Two questions of interpretation are involved in this case, the meaning of the words ostensible and satisfactory.

Ostensible means that which can be shown or seen, put forth or held out as real, actual or intended apparent and professed.

Satisfactory means that which affords satisfaction, that which fully gratifies, that which fulfils all demands and requirements.

The question is whether accused has no ostensible means of livelihood, that is, whether his means of livelihood are ostensible and whether he has failed to give a satisfactory account of himself.

If has been proved beyond all doubt that the accused, Maung Hpo Kha, is possessed of means, that he is well off, that he drive's a nice turnout, is always respectably dressed, that he is the owner of the racing pony "Aye Sein" which has won several races in Rangoon and that the said animal to a racing man is worth from Rs. 3,000 to 5,000, that the accused is a man of substance, that he pays rent Rs. 450 per mensem for his house No. 54 in 28th street, that he does a big business in buying paddy and selling the same at a considerable profit, and that his profits this year exceeded Rs. 3,000. The only reason

why accused Po Kha has been called upon to furnish security is because he keeps a brothel and because he is a man of means who can afford to defend himself. The object of this prosecution is to obtain an authoritative ruling as to whether a brothel-keeper can be prosecuted under section 109 of the Civil Proceeds Code. The accused admits that he keeps a few girls who willingly prostitute themselves and that from this source a small income is derived which is insufficient to support himself and his family in the style in which he now lives.

The keeping of a brothel is not unlawful as far as I am aware; if this was so why are streets in Rangoon set aside for such purposes and why are they tolerated and continue to be tolerated? I consider that accused's means of livelihood are ostensible and that he has given a very satisfactory account of himself.

I therefore acquit the accused Maung Po Kha.

The following remarks by the Chief Judge, in Criminal Session Trial No. 42 of 1907 of the Chief Court (King Emperor vs. Holo Khan), will be of interest:

\* \* \* \* \*

"No doubt there are discrepancies between the various statements; and as regards some of them they may be entirely due to the magistrate not having fully understood the meaning of what the men said. I am sorry to say that our interpretation in these Courts is not of the very best, and sometimes errors arise and something is put down that really the witnesses have not said and have not meant; the police report has been relied upon as giving an entirely different story to what the old man, Nanda Coomar, told in this Court. The police paper makes it that, on this day the accused went to the complainant about this note in the first instance. Well, if errors creep into depositions in courts through interpretations, they are much more frequent in these police reports, where you have a Burmese constable who does not fully understand the language in which the complaint is pronounced and, in taking it down, he really does not fully understand what is being said".

\* \* \* \* \*

## Correspondence.

To

THE EDITORS,

*The Burma Law Times.*

DEAR SIRS,

It is common, I imagine, to every barrister, or other legal practitioner, to hear it stated in society (thoughtlessly and superficially no doubt), that the practice of the law is dishonest and sultifying. As one of the profession of a barrister, I have always fallen back in argument on the well known discussion between the great Boswell and the learned Doctor Johnson, which it would not be dishonouring your journal to print, though, heaven only knows, how often it has appeared in type before.

*Boswell*: Do you not think that the practice of the law, in some degree, hurts the nice feelings of honesty?

*Johnson*: Why, no, sir, if you act properly. You are not to deceive your clients with false representations of your opinion; you are not to tell lies to a judge.

*Boswell*: But what do you think of supporting a cause which you know to be bad?

*Johnson*: Sir, you do not know it to be good or bad till the judge determines it. I have said that you are to state facts fairly; so that your thinking, or what you call knowing, a cause to be bad must be from reasoning, must be from your supposing your arguments to be weak and inconclusive. But, sir, that is not enough. An argument which does not convince yourself may convince the judge to whom you urge it; and if it does convince him, why, then, sir, you are wrong, and he is right. It is his business to judge, and you are not to be confident in your opinion that a cause is bad, but to say all you can for your client, and then hear the judge's opinion.

*Boswell*: But, sir, does not affecting a warmth when you have no warmth, and appearing to be clearly of one opinion when you are in reality of another opinion, does not such dissimulation impair one's honesty? Is there not some danger that a lawyer may put on the same mask in common life in the intercourse with his friends?

*Johnson*: Why, no, sir, everybody knows you are paid for affecting warmth for your client; and it is, therefore, properly, no dissimulation: the moment you come from the bar you resume your usual behaviour. Sir, a man will no more carry the artifice of the bar into the common intercourse of society, than a man who is paid for tumbling upon his hands will continue to tumble upon his hand when he should walk on his feet.

I have found this reference quite successful in refuting arguments against the honesty of the profession of the practice of the law. Doctor Johnson was a man of letters purely, and his biographer, James Boswell, had been a student of law, ~~and not~~ a practitioner. I trust this dialogue will be worthy of report in your columns for the sake of keeping it ~~alive~~ as a defence of us studying and practising the law, ~~from~~ evil repute.

RANGOON:

Yours faithfully,

The 30th June 1907. } CLARENCE HAMLYN

## Humours of the Law.

A LOCAL advocate, in whose veracity we have absolute confidence, has communicated to us the following anecdote:

Some time ago he appeared before a Burman judge in the district. His opponent cited a number of cases from the different Indian High Courts. In reply, after explaining to the judge how inconvenient it was to travel so far in search of Indian rulings, he said:

I only refer your honour for the law on this point to a little book under your honour's writing pad. If your honour finds that the law there is in my favour, your honour can give judgment in my favour; on the other hand, if your honour find it otherwise your honour may decide accordingly."

We are assured that judgment was delivered in conformity with the entry in the little book.

In one of the subdivisional courts in the districts the following order was actually passed a couple of months ago :

" Complaint received 406 Indian Penal Code. Complainant examined. Application also received for an injunction and found accused disposing of certain property; injunction granted under section 53, Specific Relief Act, forbidding disposal of the property or removal until the further order of this court; issue warrant of arrest of accused and production warrant before me."

*Note.*—Section 53 of the Act quoted runs thus ;

" Temporary injunctions are such as are to continue until a specified time, or until the further order of the court. They may be granted at any period of a suit, and are regulated by the Code of Civil Procedure."

\* \* \* \* \*







# THE BURMA LAW TIMES.

No. 4.

AUGUST 1907.

VOL. I.

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*The Subscription for "The Burma Law Times" is Rs. 10 per annum, payable in advance.*

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*The Editors hope to issue a volume a year consisting of 12 numbers, one to be issued monthly.*

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## Editorial Notes.

WHILST cases are still pending, they are often freely discussed in newspapers. Apart from the question whether such a discussion involves contempt of court, we consider that the newspapers, in publishing such matter, and the public in writing it, are making light of a moral responsibility which binds every man to assist in the proper administration of justice, and forbids him from interfering with its course directly or indirectly. We have no doubt that the editor of any responsible paper would refrain from permitting a further discussion of actual questions before a court in his columns if his attention was drawn in time to its inadvisability by the advocates or the court concerned or the Registrar.

It seems that it is not the practice in the Police Courts to attach a list of witnesses to the complaints presented to magistrates. There is no express provision of the Code which makes the filing of such a list obligatory; but there is, on the other hand, nothing in the Code to prevent magistrates from insisting on it. Perjury is very common in this country, and this laxity in procedure no doubt tends to increase it, by enabling the complainant to produce fresh witnesses without being found out, as the case develops. In cognizable cases, if a witness not named or examined by the police is produced, great stress is laid upon the fact, and the chances are that, even if the witness speaks the truth, he is not likely to be believed. If this is so in cognizable cases, there is no obvious reason why it should be otherwise in cases instituted upon complaint, when a witness, whose name is not given with the complaint, is produced subsequently by the complainant.

WE have often noticed advocates and pleaders displaying an undue and misplaced anxiety not to waste the time of the court. It seems to us that they forget that their first duty is to their client, and that the time of the court is only of secondary consideration. If, in the interests of his client, it does become necessary to occupy a great deal of the time of the court, the advocate should not for a moment hesitate to do so, and

he should under no circumstances be induced to postpone the interests of his client to the convenience of the court. It is a matter of considerable difficulty to know when one has said enough in the interests of one's client. Experience will often enable an advocate to judge when he has said enough, but what is wanted more than anything else is a due sense of proportion.

THERE is a tendency both among advocates to apply for, and among magistrates to issue, a warrant when a summons would easily meet the requirements of the case. These applications are very frequent, particularly in cases of criminal breach of trust and cheating, which often really involve disputes of a civil nature, but which, with the least bit of legal juggling, on the part of an expert criminal lawyer, are given the appearance of offences punishable under the Indian Penal Code. When magistrates do not believe the case to be genuine, they try to meet it half way by issuing a warrant and granting bail. Even this, in our opinion, is unnecessary, and is certainly opposed to the spirit of the legislation and to the directions given by the Hon'ble Judges in paragraphs 157 and 158 of the Lower Burma Courts Manual, viz:—

159. "Schedule II of the Code distinguishes, in column 4, the offences for which a summons and those for which a warrant should *ordinarily* issue in the first instance, and it is left to the discretion of the magistrate to issue a summons instead of a warrant when he sees fit."

158. "In exercising this discretion, magistrates must be guided by the circumstances of each individual case, the main point for consideration being whether, having regard to the nature of the offence charged, and the age, sex, position, etc., of the accused, his appearance can be secured or not without his arrest. For instance, it would very seldom be necessary to issue a

warrant against a person of settled residence for an alleged offence under section 504, Penal Code."

If these directions are consistently carried out a number of cases, which are only brought with a view to put pressure upon the accused to settle, in a speedy way, a matter which ought really to form the subject matter of a civil suit, will never be brought into the police courts.

WE think the time has come for some steps to be taken to put a stop to the gross abuses that result during the trial of causes from the indifference with which some medical practitioners in Rangoon grant false certificates of the illness of parties and witnesses, and the readiness of courts to accept such certificates without further question. The evil is sufficiently great to deserve immediate attention. We think that, if the matter were brought to the notice of the medical gentlemen concerned, many of them, who now are guilty of the impropriety referred to, would cease to indulge in a practice so utterly vicious and so inconsistent with the honour of their noble profession. If they are unable to find a remedy themselves, then we hope the hon'ble judges of the Chief Court will take the matter in hand and apply the remedy. Medical certificates have no doubt been hitherto accepted in courts of law in direct violation of the rules of evidence and procedure, more from a desire to spare the services of medical practitioners for their patients, to many of whom the absence of their physician in court would be fraught with serious consequences; but if the indulgence which courts and members of the legal profession have hitherto shown to members of the medical profession is found to be unduly abused so as to thwart the ends of justice, the only possible course to adopt will be to refuse to accept as true statements in all medical certificates and to make the presence of the medical gentlemen in court always obligatory.

UNDER the rules of the Original Side of the Chief Court, it is obligatory on parties and pleaders to send a copy or copies of pleadings, petitions, and affidavits to the opposite party or pleader within twenty-four hours of the time of presentation of the document (Rule, g). In the Court of Small Causes the same rule obtains, except that the document must be served not less than twenty-four hours before the date fixed for hearing (Rule 9, S. C. C). The Lower Burma Courts Manual, so far as we are aware, makes no such provision for the subordinate courts, and a great deal of inconvenience is caused to advocates when copies of these documents are not served on them by the parties filing them, and unnecessary postponements become almost inevitable. If a circular was issued by the Registrar, incorporating this rule in the Lower Burma Courts Manual, it would facilitate matters a great deal.

IN Civil Regular No. 119 of 1905 (Maung So Pè vs. Mah Ngwe Hnit and Maung Ba E), the plaintiff obtained a decree for redemption of certain land, in the Subdivisional Court of Insein. The first defendant was appointed guardian *ad litem* to the second, who was, and is still a minor.

Under the redemption decree the plaintiff deposited the decretal amount in Court. The second defendant put in an application, signed by himself and a petition-writer, Maung Kay, asking that he may be allowed to withdraw the amount deposited to the credit of the suit from the Court. On the 9th of May 1907, the following order was passed by Mr. Po Sa, the Subdivisional Judge of Insein :—

“Applicant is a minor: but he is a family man. Let money be paid to applicant.”

On the face of it, it is an illegal order which ought never to have been passed. In the first place, there is no evidence on the record to prove that the applicant was a “family man.” In the second place, even if there was such evidence, to say that an ignorant boy, who marries before his time and has a family, ceases to be a minor for any purpose, is to abolish the law relating to minors, and the liability attached to the conduct of those who act on behalf of minors. This is not a case of a *bonâ fide* mistake on the part of the Judge as to the age of the applicant; because, the fact that he is a minor is recorded by him and otherwise appears clearly from the record. In our opinion there seems to be no justification for this deliberate violation of the provisions of the Civil Procedure Code relating to minors, and it is a question to be considered whether no steps should be taken to safe-guard the interests of minors in future in conformity with the Code. The conduct of the petition-writer, Maung Kay, who signed this petition, unless he can show that the applicant had succeeded in deceiving him as to his age, also requires some satisfactory explanation. The passive attitude adopted by the first defendant, who was guardian *ad litem*, is alike open to blame, and we are not quite confident that, should any fraud be ultimately proved to be at the bottom of this petition, she will not be held liable.

#### THE HONORARY MAGISTRATES.

THE two following cases typically illustrate the practice and procedure in the courts presided over by Honorary Magistrates.

In Criminal Trial No. 1217 of 1907, one Ram Kanto Misser was tried under section 352 of the Indian Penal Code along with eight other men. He was fined Rs. 10 and ordered to pay Rs. 5

costs or, in default, to undergo one week's rigorous imprisonment. The others were acquitted. He appealed to the District Magistrate, who acquitted him, and the following facts appear from the record: (1) The case was actually tried by a bench consisting of two magistrates; (2) The certified copy of the judgment furnished to the applicant purported to show that the judgment was signed by two entirely different magistrates; (3) When the original record was received by the District Magistrate, it was found that the judgment was not signed by any magistrate at all.

In case No. 2593 of 1907, a man named Rajnant Singh was brought before the Municipal Court, under section 106 (d) of the Municipal Act. He appeared with his pleader and denied that he was liable to be prosecuted, and two witnesses were examined on behalf of the Municipality, and he was fined Rs. 10, on the ground that he had pleaded "guilty"! Mr. Camton, who appeared for the respondent, appealed to the District Magistrate, and from his affidavit and the record it appeared that the plea of "guilty" was incorrectly recorded. The conviction was quashed on this ground.

#### BAIL.

THE following extract from the Calcutta Weekly Notes of the 24th of June (volume xi, page ccxxi), and the Home Secretary's Circular therein referred to, will be of use to magistrates judges and lawyers, in questions relating to bail.

Mr. Jackson, in moving for bail before Mitter and Gasperz, J. J., on behalf of Nabi Bux and three others who were in Kishorgung jail since the 26th of May last, stated, that there was a fishery dispute in a certain village and that complaints were lodged with the police by both sides. The first information report was under section 326, Indian Penal Code, alleging that the petitioners had committed grievous hurt.

On the strength of this information alone the petitioners were arrested and sent to *hajut*, bail being refused. They moved the magistrate for bail without effect. Next they approached the sessions judge who, in refusing bail, remarked: "No cause is shown why the petitioners should be released on bail."

Mr. Jackson, after reading this portion of the order sheet remarked: My lord, I protest against this sort of thing.

*Gasperz, J.*—Has any evidence been recorded?

*Mr. Jackson.*—None.

*Mitter, J.*—You better take a rule.

*Mr. Jackson.*—then protested against the refusal of the magistrate to grant bail.

*Mitter, J.*—What should be the amount of bail?

*Mr. Jackson.*—Bail to the satisfaction of the magistrate.

Mr. Jackson, referring to the sessions judge's order also, protested against his refusal to grant bail.

*Mitter, J.*—I quite agree with you. My views are the same, you know. I let out Jehore Mull, \* the accused in the well-known Calcutta murder case, on bail.

*Mr. Jackson.*—And what happened, my lord? He was acquitted, the learned judge charging the jury for an acquittal.

*Mitter, J.*—And, curiously, a few days after I passed the order letting out Jehore Mull on bail, there was issued an order of the Home Secretary in England enjoining upon all judges to admit accused persons to bail save and except in exceptional cases. My view is that, unless a very strong *prima facie* case is made out, an accused person should be allowed bail.

The Home Secretary's circular to the clerks to justices is as follows:

HOME OFFICE, WHITE HALL,

6th August 1906.

SIR,—I am directed by the Secretary of State to say, for the information of the justices, that he has had under his notice from time to time the

\* Reported 10 C.W.N., p. 1093.

fact that persons committed for trial at the assizes or quarter sessions are frequently detained in prison for long periods before being brought to trial. After consultation with the Lord Chancellor and the Lord Chief Justice, he thinks it right to bring the matter before the justices of the peace throughout the country and to urge them to use freely the discretion vested in them as to the admission of defendants to bail. When a person who is charged with a minor offence appears to have little or no means, and is not believed to belong to the criminal, vagrant's or homeless classes, the justices should, generally, in the Secretary of State's view, grant the accused his release pending trial, either on his own recognisances or on bail in such small amount as he may reasonably be expected to find. Such persons, as are here contemplated, are not of the class who would readily desire to evade justice by leaving their homes and escaping elsewhere; their lack of means would make it difficult for them even if they wished to do so; and if they make the attempt, the risk that they might succeed in altogether evading the vigilance of the Police is probably not very great.

*\*If there is in some cases a risk that the interests of justice might possibly suffer by reason of an increased readiness to grant bail, the object of diminishing the number of cases in which innocent persons are imprisoned is, in the Secretary of State's opinion, of so great importance that risk should be taken. If the present practice of the justices of your bench is not in accordance with the principles indicated in this letter, Mr. Gladstone would strongly urge that these principles should henceforward be adopted in dealing with cases which may come before them.*

I AM, SIR,

Your most obedient servant,

M. CHALMERS.

\* The original is not in italics.

#### UNREPRESENTED PARTIES.

IT seems a trite saying that, it is the duty of magistrates and judges not only to hear and examine parties and their witnesses, but also to investigate themselves into the truth or falsity of the contentions raised before them. When the parties are represented by advocates or pleaders on both sides, it is an easy matter for the judge or magistrate, for he is materially assisted by the practitioners who, in doing their best for their respective clients, bring to the notice of the court the salient points in the case. When, however, only one of the parties is represented by a legal adviser, or both parties appear in person, it is usually a matter of considerable difficulty so to try the case that justice shall not miscarry.

Judges and magistrates usually think they have done their duty if they allow the party concerned, be he plaintiff, defendant, complainant or accused, an opportunity of cross-examining the opposite party and his witnesses and the stereotyped interrogatory, "Have you any questions to ask?" seems to be about the extent of their solicitude that a party not represented by an advocate is not placed at a disadvantage in being without legal assistance. Something more undoubtedly ought to be done by the judge or magistrate.

In civil cases it is only a matter of rupees annas and pies, but it is particularly hard and unfair in criminal cases when one poor and ignorant is falsely accused and has to defend himself against, perhaps, a rich enemy who has not only instigated the complaint but has furnished the wherewithal to prosecute the accused. In our opinion it is undoubtedly the duty of the magistrate, in cases where the accused is unrepresented by a pleader or advocate, to endeavour to the best of his ability to sift, test and examine the truth of the charge by methods similar to those employed by pleaders or advocates. If this were done, we cannot but think that the number of convictions in cases in which the accused is undefended would be perceptibly smaller.

Magistrates in Burma are, however, often concerned more with their percentages of convictions than with the fact that they have done justice to the accused; and it is perhaps for this reason that they are often so apathetic where

the interests of the accused conflict with their own. A certain class of magistrates are weak enough to allow their judgments to be influenced by what they believe the police will think and say; and they often convict because they are afraid to acquit, especially in cases in which the police have intimated to the magistrate that a conviction was by them considered desirable. We have seen hundreds of cases, both criminal and civil, in which judges and magistrates have displayed an absolute disregard of their duty to the undefended party, and very few cases in which the court has troubled itself with doing what was the least that could have been expected of it. This could not occur were the bench as a rule recruited from a class of men imbued with a strong sense of justice, whose sole concern in the trial of cases would be a determination to decide rightly, be the consequences what they may.

### The Burma Bar.

III—(continued).

NOW we have come to a stage, when we have discovered, like Mr. Tulliver, that we live in an uncommonly "puzzling world" where one does not know what to talk without being "puzzled." The subject before us is one of unusual difficulty. It is one thing to discover the various types of a microbe, and it is another and a more difficult one to find a remedy which would either destroy it or make it entirely innocuous. What we have found is that "Touting" is a disease which has become endemic; that it is probably caused by germs the virulence of which depends upon the moral qualities of the victim; that it is like measles, it attacks more often the weaker and younger constitutions, than the tougher and older ones; that, like measles also, when it makes the latter its victims, the result is more disastrous than in the case of the former.

Such being the characteristics of this disease, it is manifest that, until very strong and drastic measures are taken, and every one concerned submits to the ordeal of a thorough disinfection, it would be a hard task to crush it out or even to reduce its virulence to any very great

extent. No doubt drastic measures and disinfection applied to physical disease are hard things, and they are harder still when applied to moral disease, but it is time that we laid aside, such sentimentality and, animated by a more manly spirit, took the matter in hand and freed ourselves from the degradation and dishonour to which all, who persistently live in an atmosphere of moral filth, are exposed.

The first measure necessary to this end is to bring the "Tout" within the pale of the criminal law, by penalizing "Touting" of every description. This would undoubtedly require some legislative changes. These could be effected in two ways: *firstly*, by getting the Legal Practitioners' Act (XVIII of 1879) modified: or, *secondly* by asking the Local Government to move the Governor-General in council, to legislate specially with reference to Burma.

We will consider the former position first. In the Legal Practitioners Act, as it first came into force, there was no attempt made at defining a "Tout;" but by Act XI of 1896, a definition was added which, we must say, is not a creditable specimen of legislative work, and has proved to be an absolute failure, so far as carrying out the object for which it was introduced is concerned. It says, section 3—

" 'Tout' means a person who procures the employment in any legal business of any legal practitioner in consideration of any remuneration *moving from such practitioner*, or proposes to a legal practitioner to procure his employment in any legal business in consideration of *such remuneration*." It is evident from this definition that, unless the remuneration moves from a practitioner, manifestly in one case and presumably in the other, a man is not a "tout." Taking an extreme case, then, any impudent rascal of a tout may come to our office and worry us and yet unless we are prepared to offer him a remuneration and swear to it, we cannot get him punished. It seems to us that, if this is the view of the law deducible from this definition, it is intended more to protect the "tout" than the practitioner, and a radical reform is necessary and it cannot be adopted on better lines than the description of "Touting" given in the repealed Lower Burma Courts Act (XI of 1889, section 81). Under the heading "Touting" we find—

"Whoever commits any of the following offences:—

- (a) solicits or receives from any legal practitioner any gratification in consideration of procuring or having procured his employment in any legal business;
- (b) retains any gratification out of remuneration paid or delivered or agreed to be paid or delivered to any legal practitioner for such employment;
- (c) being a legal practitioner, tenders, gives, or consents to the retention of any gratification for procuring or having procured the employment in any legal business of himself or any other legal practitioner,

shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to five hundred rupees, or with both."

In this definition there is a complete provision for all cases, at least of the more virulent kind, and a remedy for effectually stopping them, and there seems to be no obvious reason why no steps should be taken by the Bar or the Chief Court to get the Legal Practitioners Act modified in this way. In Upper Burma, under the Upper Burma Civil Courts Regulation (I of 1896), the rule exists in these very words, and, so far as we are aware, has not been repealed. Under the rules of the High Court of Calcutta, a "tout" is liable to be sentenced to be imprisoned, if he is within the jurisdiction of the High Court.

With regard to the second position, namely, special legislation directed to Burma, we may briefly state that a modification of the second schedule to the Lower Burma Courts Act of 1900, under which section 81, above referred to, of the old Lower Burma Lower Courts Act (XI of 1889) was repealed along with so much "as had not been repealed before," is all that is necessary, and could be effected by adding in the schedule, "except section 81." It was a great pity that this section was allowed to perish along with the rest of the Act and we hope that, before long, it will be restored, especially as no reason has been given as to why it was not

saved when the new Lower Burma Courts Act was enacted.

In our next issue we hope to offer some further suggestions. In the meanwhile we earnestly request our readers to discuss the subject in the correspondence columns of our Journal or in those of any other which may be accessible to them, if they have at all at heart the interests and honour, of their profession with a view to stamping out this most abominable of all evils to which we have so long allowed ourselves to be subjected.

*(To be continued)*

#### REMAND : SECTION 167, CRIMINAL PROCEDURE CODE.

REMANDS in this province are frequently granted as a matter of course, so long as the total period during which the accused is remanded to police custody does not exceed fifteen days. Magistrates seldom satisfy themselves that there is really any case against the accused. Often the oral statement of a police officer; frequently nothing more than a written request by a police officer; and sometimes a sheaf of police papers containing the records of police investigation in the case, are sufficient to obtain an order of remand. We cannot believe that it does not frequently happen that, after being arrested and imprisoned for fifteen days, a man is released on the ground that there is no case against him. It is no satisfaction to any one to know that it took fifteen days to discover his innocence. Had he been arrested at the instance of a private individual he would have had an opportunity of obtaining satisfaction in a court of law, but as the injury has been done to him by an irresponsible police officer, he must rest contented with the knowledge that he has no remedy. Much of the injustice that necessarily results from a system which has patent disadvantages can easily be prevented by the adoption of precautions that are as simple as they will be effective.

By the above statement we do mean to assert that there are absolutely no directions in existence as to the correct procedure to be followed in remands. The paragraphs numbered 132 to 139 on pages 50 and 51 of the Lower Burma

Courts Manual are no doubt very excellent guides, but we regret they do not contain much of what ought to be included and do contain something that might with advantage be altered.

They provide that the accused shall have an opportunity of showing cause against the order of remand, but they say nothing as to the duty of the magistrate in informing the accused of the facts of the case against him and the reasons which prompt the magistrate in granting a remand. The accused cannot very well show cause why an application for a remand should not be granted without knowing the facts on which the application is made. And although paragraph 136 states that a bald statement that the police want time to examine witnesses is not a sufficient reason for a remand, it is not untrue to say that a very large percentage of remands are granted for this reason, and this reason alone.

In the first place we think that the police should satisfy the magistrate that they have some valid reason for **keeping the** accused in custody. Oral statements of police officers unless made under the sanction of an oath should not be accepted, and if statements are made not on oath, a written application, with the reasons for the application, should be presented and, where possible it should be stated in the application who are the witnesses and what they are prepared to swear to. Summaries of what the witnesses will say will be found sufficient for this purpose. The application should be signed by the magistrate numbered and registered; and all future applications for remands in the same case should be numbered with the same number and filed with the first application. This precaution is necessary, as it does sometimes happen that the accused is eventually sent up for trial on facts very different to what was alleged in the earlier stages of the case and it is absolutely necessary that the magistrate should know all the circumstances under which a new case not originally alleged against the accused has been raised up against him. All the police papers should be sealed with the seal of the court, and signed and dated by the magistrate. We have heard of police papers being altered and fresh papers substituted for the old and in our second number we reported a case in which two of the accused were kept in police custody for sixteen days when there was really no

evidence against them. In that case all the police papers were not placed before the trying magistrate; and we have not yet discovered the reason for this omission.

If the magistrate is satisfied that valid grounds for a remand have been made out, it will be his duty next to enquire for what period he should remand the accused. In no case should a magistrate, in our opinion, remand the accused for a period longer than what in his opinion will suffice for the police to place before him particulars of any further evidence they shall have obtained against the accused, and which the magistrate at the time of granting the remand reasonably considers will probably be obtained if a remand is granted. The shortest period should be preferred, consistent with the claims of public justice, which should not always be placed before the claims of the accused to the protection of the laws of his country. In trying to do what is just the magistrate should take care that he is not unjust to the accused.

Much of the evils of the present system will be removed by the adoption of the measures above indicated. There is, however, another and, in our opinion, a **very important** safeguard against such abuses, and that is, that the magistrate should consider any explanations the accused may have to offer, after having explained to him by the court the salient facts that the police hope to prove against him. It will thus frequently happen that an innocent person will in a few words satisfy the court that there is nothing more than suspicion against him, or, that the admitted facts are capable of a construction consistent with his innocence. It is of course usually advisable for the accused to keep his own counsel until placed on his trial, but if he has retained an advocate on his behalf and has fully instructed him as to the facts of the case, it can do no harm to place before the court the true facts, if such facts are easy of proof and impossible to be controverted. In a case that recently came under our notice, the accused was alleged to have been in dishonest possession of railway property, he being a railway employè, whereas the fact was, that he had been given quarters in premises that had formerly been used for storing railway goods, which had not all been removed even till the conclusion of the trial. This fact was not disclosed to the court by the

police to whom it had been told by the accused and who could at once have verified, as appeared from the evidence, the fact alleged by the accused. We think if this fact had been brought to the notice of the court on the day of the first remand, the police would have found it difficult to get a second remand without satisfying the court that the allegation of the accused was untrue; and, in all probability, the accused would have been released on bail on his own recognizances. The police owe a duty to the accused no less than to the public, and since, in their zeal to secure a conviction, they too frequently disregard this obvious truth, it is necessary that some greater precautions should be adopted to prevent such abuses than are provided by the meagre provisions of the Code of Criminal Procedure and the rules framed by the Chief Court with regard to the procedure to be adopted in cases of remands.

#### THE MUNICIPAL COURT.

THE barbarous instincts of our nature die hard. It is probably for this reason that we cling with grim tenacity to what is least connected with our notions of civilization, or try to reproduce in our time what we have often condemned as barbarous in the past.

It is impossible for us, therefore, to give any other than this explanation of the working and constitution of the Municipal court in Rangoon. In our opinion it is absolutely reminiscent of the barbarous days of medieval Feudalism, when justice was administered rather on "fiscal" than any other basis. Each lord of the "manor" had his own court where his steward sat and dispensed justice, of which the avowed object was to collect a comfortable sum of money, by way of fines, for his master. This is exactly what we have reproduced in our municipal court of to-day. It is presided over by two honorary magistrates, one of whom is almost invariably a municipal commissioner, and member of one of the sub-committees. We do not for a moment wish to suggest that it is impossible for such a magistrate to be impartial, but we do contend that it is a state of affairs highly unsatisfactory from every point of view. It shakes the confidence of the public by giving the court the appearance of a partizan, and it certainly militates against that

inherent principle of the administration of justice which makes it imperative that those who administer the law should not be identical with those who ask for it. The fact that the Legislature has made an exception in favour of Municipal commissioners sitting as honorary magistrate and dealing with municipal cases, is no justification for violating the principle if it can be easily observed.

This is not the only evil attached to this court. In its working, it looks very much as if it was intended by the Government as a legalized method of increasing municipal revenue. Every year the municipality makes a profit of ten to fifteen thousand rupees out of this court. One need scarcely be surprised at this result, because, in our opinion, it is manufactured almost exclusively by municipal machinery. One of the Magistrates, as we have seen, is invariably a municipal commissioner. The complainant is the municipality in some form or other. The prosecutor is a municipal stipendiary. The witnesses are municipal servants. The law administered is the Municipal Act, and its interpretation is usually on municipal lines.

We think that it is now high time that this intolerable anomaly was wiped out, and some other means was devised to administer justice in municipal cases. There are obviously two ways of securing this. *Firstly* by enacting that no man could be convicted on the evidence of a municipal servant or expert without being corroborated by that of an independent witness. If this could be effected it would be most satisfactory, but it would involve such an amount of extra expenditure that, at least for some time, it is not possible. Then the next alternative is to make the court entirely independent of Municipal influence. This can be done by the Local Government asking the municipality to lay at their disposal an adequate sum of money every year for the maintenance of a special court. Considering the revenue obtained from fines this is quite feasible. From this fund, the Local Government should provide a magistrate of their own choice. The present municipal prosecutor also should be made a gazetted officer under the Local Government, like the public prosecutor, and his prospects should depend in no way upon the wishes of the municipality, or upon the fines realized.

Until some reforms are introduced on these or any other lines, which may seem expedient to the authorities, we must confess to a feeling of diffidence in the efficacy of our administration of justice, and the public must continue to be the victims of the tyranny of a large number of municipal underlings who derive a comfortable income by a carefully administered threat to the ignorant people of applying the Municipal Act, unless matters are more amicably settled out of court.

*1st August, P.S.*—Whilst we were sending this to the press we saw Major Williams, the Municipal Health Officer, sitting on the bench with the honorary magistrates whilst prosecutions instituted by his department were being proceeded with. We refrain from discussing at any great length the expediency of this novel method of getting justice administered, until we have had time enough to become familiar with the idea, but we venture to say that the impression left on our minds, was that the decisions of the magistrates were not uninfluenced by the inaudible remarks made to them by Major Williams.

This state of affairs is so scandalous on the face of it that it is scarcely necessary to quote an authority to show that it has been condemned by judges. But if one was needed, we would draw the attention of our readers to the judgment of a full bench of the High Court of Bombay, delivered by Sir Michael Westropp, in *Reg. vs. Kashinath Dinker* (8. B. H. C. R. p. 126). It is a judgment so full of judicial wisdom and displays such a keen sense of justice, that no judge, lawyer, or police officer who bore it in mind, would be ever likely to go wrong in questions affecting the conduct of prosecutions. In this case, a magistrate, who, in the first instance, had tried and convicted the accused, was appointed Crown prosecutor to conduct an enquiry subsequently directed in the same case. Referring to this, the learned Chief Justice said (p. 153): "The appointment..... was a most improper and singular proceeding. To convert a judge into an advocate seeking to uphold his own decision before another tribunal, is, so far as we know, at least in the annals of British jurisprudence, quite unprecedented, and most objectionable, as he has a personal interest in the case, which a public prosecutor should not have." This is precisely the principle

which, in our opinion, Major Williams has violated by his action. He has a personal interest in the prosecutions, in so far as they are sanctioned by him as the head of his department. He has a perfect right to appear in court to give evidence on oath, but he has no right to sit on the bench beside the magistrates nor to converse, with them during the trial of cases.

In the same judgment the learned Chief Justice remarks towards the end (page 161): "It is not desirable that magistrates, whose decisions are under appeal, or who have been engaged in promoting the prosecution, or officers of police concerned in the case, at the hearing should sit beside or near the judge, or should converse with him; and we consider the verbal communications and notes which passed between the Magistrate and the judge in this case highly irregular, and, if such a practice be persisted in, as calling for serious action. If there be any fact, supposed to be in the knowledge of the magistrate, and which the judge considers necessary for the proper determination of the case before him, he should examine the magistrate as a witness, upon oath or solemn affirmation, according to his creed." Major Williams' position is exactly the same as that of the magistrate "engaged in promoting the prosecution," referred to in this passage, and we hope that some steps will be taken to prevent a recurrence of such unjustifiable conduct on his part or on that of any other municipal officer.

### Correspondence.

To

THE EDITORS,

*Burma Law Times, Rangoon.*

DEAR SIRS,

A few days ago I sent you a case\* for publication in your paper, *The Burma Law Times*, of the Court of Township Judge of Kyaikto, in which the door of justice that Court closed against a

\* The Editors regret that they have been unable to publish this case, as a certified copy of the record has not yet been received by them to verify the facts which are rather of an unusual nature.

They hope to publish it in their next issue.

poor woman under section, 381, Civil Procedure Code.

I am now sending you another case of the same Court decided under the same law. This is the Civil Regular Suit No. 355 of 1907 of the Court of Township Judge of Kyaikto; in this case one poor cooly, named Karpanan sued Kupa Pitchay Rawtor and Abubaker Rawtor, the two rich Duni gardeners, for the recovery of Rs. 95 due to the plaintiff as balance of his wages on account of the work done for the defendants. The plaintiff is apparently the resident of Madras Presidency. On the day fixed for framing the issues in this case, a petition was filed by the defendants under section 380, Civil Procedure Code, to call upon the plaintiff to furnish security for their costs in the event of plaintiff losing his case. Judge thereupon made an order calling upon the plaintiff to furnish security for the defendants costs, as prayed by them, in the sum of Rs. 25. It was urged on the plaintiffs behalf that he resides within British India, and, accordingly, section 380, Civil Procedure Code, does not apply to him. The Judge rejected this plea and on his (plaintiff) refusing to furnish the security asked for, because it was too excessive, dismissed his suit under section 381 of the Civil Procedure Code.

\* \* \* \* \*

Yours faithfully,

17th July 1907.

A BY-LOOKER.

### Humours of the Law.

A WOMAN was recently a defendant in the Court of Small Causes, Rangoon. In the plaint she was described as "A. B., the unemployed wife of C. D." On being asked to explain what was meant, the pleader, who appeared for the plaintiff, could give no other explanation than that her husband was dead.

THE equitable doctrine, that a person asking for equitable relief must come to court with clean hands, was recently the subject of a novel interpretation. An insolvent who had filed his schedule, from which it appeared that he had no properties whatever, was represented by a learned member of the legal profession. After a rather long and eloquent address, he wound up by saying that his client was entitled to his personal discharge as he had come to court with clean hands.

AN interpreter's commendable ingenuity is brought to our notice. The stamp on a promissory note bore two thumb impressions—one of the left and the other of the right hand. Our interpreter was at first a bit puzzled how to carry out the rule that everything appearing on a document must be translated. However, after a little reflexion he saw a way out of his difficulty, and the astonished suitor was somewhat puzzled to understand the meaning of two hands drawn in ink which appeared on the translation furnished to him. We do not know what charge the interpreter made for these two drawings, but we think he was clearly entitled to charge as for ten words—a word for each finger.



# THE BURMA LAW TIMES.

No. 5.

SEPTEMBER 1907.

VOL. I.

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*The Subscription for "The Burma Law Times" is Rs. 10 per annum, payable in advance.*

*Subscribers not receiving their numbers should communicate with the Editors as soon as possible.*

*All communications should be addressed to the Editors, No. 1, Barr Street, Rangoon, who should be informed without delay of all changes of Subscribers' addresses.*

*The Editors hope to issue a volume a year consisting of 12 numbers, one to be issued monthly.*

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## Editorial Notes.

THE appointment of Mr Justice Moore as a temporary Additional Judge of the Chief Court is welcome for more than one reason. It goes without saying that during the short time he has officiated as a judge of the Chief Court he has won golden opinions from the whole bar not only for his unfailing urbanity, courtesy and patience, but also for his clear grasp both of law and facts. His continuance as a judge of the Chief Court after it appeared that his connexion therewith was threatened, is therefore most welcome.

The appointment of an additional judge became long ago necessary. It is a well-known fact that there are large arrears both on the original and appellate side, which can only be decreased by the appointment of extra judges either temporarily or permanently. If four judges have been unable to keep pace with the increase of work in the past, it is not at all likely that they will be able to do so in the future, with the amount of work increasing as steadily as it has done hitherto. We do not believe that even five judges will be able to cope with the amount of work in the Chief Court, and if they do, we do not think they will be able to do justice to it. In no profession in the world is the work less mechanical than in that of the law, and no judge of a superior court ought to be expected to work efficiently for more than six hours a day.

THE stifling atmosphere, and the utter want of ventilation in the building, used for the last seven years and more for the Small Cause Court, Rangoon, calls for something more than passing notice. Those who have never entered that building are invited to pay it a visit with the object of satisfying themselves of the truth or our statement. Built originally for use as a godown, its destiny raised it to the dignity of a court house. The following remarks, made by the Recorder of

London at the Central Criminal Court during the July sessions of that Court, are so apposite that we quote them, feeling sure of their appropriateness with reference to the Court of Small Causes, Rangoon. We quote from *The Law Times* of July 27th, 1907.

In the course of the morning the ventilation of the court became the subject of some adverse criticism at the hands of the Recorder. "We are," he remarked to a member of the bar, "compelled to live here under a system of compressed air, which is most injurious and which is enough to stifle you." Later on, being appealed to to allow a window to be opened, the Recorder said it was impossible to open one. If a window was opened he was told that the whole ventilating system would be thrown out of gear. It was the most extraordinary system invented since the world began. He and the members of the bar, however, were trifling sufferers compared with the officers of the court, who had to be here all the year round, and he hoped it would not kill any of them. The oppression of this place when he entered it that morning from the open air was quite overpowering. In the afternoon the Recorder said, he should really have to adjourn, as the heat of the court was so great. It was like walking into an oven. It was perfectly monstrous. Later on, the Recorder said he was informed that "the engines had broken down." As far as he was concerned, he wished they would never get right again.

OATHS and affirmations, as administered in our courts, are not always in the formulæ laid down by the Chief Court. We once heard an interpreter affirm a witness thus:

"The evidence I give in this case is true, quite true. Help me, God!"

SOME time ago a European policeman, who was being cross-examined in one of the honorary magistrates' courts, threw a book at the advocate cross-examining him. The honorary magistrates did nothing, and the advocate had no

other remedy than a report of the matter to the District Magistrate and to the Commissioner of Police. The European policeman apologised subsequently to the advocate, but the gross contempt of court, of which he was guilty, remained totally unpurged.

THE Chief Court has just issued a circular discouraging the practice of issuing attachments and arrests, before judgment, without notice to the respondent. In the opinion of the hon'ble judges such an application is rarely necessary.

We are at one with the hon'ble judges of the Chief Court on this question. Such applications have hitherto been more often made with sinister objects than *bona fide*. In nearly every false claim, they accompany the plaints as a matter of course, and one of their great objects, with fraudulent plaintiffs, has been to prevent defendants from offering any effectual resistance to suits, false in their foundation and malicious in their inception. They cause a great deal of unnecessary hardship, and as it rarely happens that the dismissal of the false claims brings with it any compensation to the much wronged defendant, fraudulent plaintiffs remain undeterred from repeating an act which results in no loss to themselves, and which offers such golden opportunities of snatching decrees.

THE staff of Hindustani interpreters is quite insufficient for the needs of the various courts in the town of Rangoon. Sometimes cases are unnecessarily postponed, and our attention has been called to a case in the Subdivisional Court of Insein which has already been twice postponed for want of an interpreter, although special days had been set apart for hearing that case.

## POLICE MAPS.

In most cases before courts of session, chiefly in murder and dacoity trials, there is produced, for the prosecution, a witness, generally a constable, who avers that he made the map of the scene of crime filed on the record; so and so pointed out such and such a place, and he has entered the places correctly. Presumably the object of this is to give the court some idea of the relative positions referred to in the evidence, but a very brief experience of sessions practice suffices to reveal the fact, that such maps are not to be relied on implicitly. In the first place, the plans are hardly ever, if at all, drawn to scale, and the writer has come across several of them which are absolutely misleading, in spite of the elaborate table of distances which is always appended. Secondly, with the exception of rivers and creeks, no physical aspects are shown. In many cases, where it is necessary to trace the alleged movements of the accused, one would like to see the various roads outlined; the distance between two villages may not be great as the crow flies, but the path may take a round-about course, sometimes across *kwins* and through dense jungle. One is always left to imagine fields and woods, and the pathway through them. Hence, when it is necessary to fix, with some degree of certainty, the times at which an accused person is said to have left one village and arrived at another, it would certainly be prejudicial to the defence if the villages were shown apparently close to each other; while the importance of detailed delineation will clearly be acknowledged in cases in which an *alibi* is set up. However, these are not the only defects of police maps; in some cases, the plans are hopelessly inaccurate, though, perhaps, not intentionally so, while in others localities are denoted without any proof. The following state of circumstances was met with in a dacoity case which came up, on appeal, quite recently: The accused lived at

village *A* and were alleged to have committed dacoity at village *B*; after helping themselves to all the valuables in the house, they dragged the inmates away with them into the fields; some of these were released at a certain spot, and the rest at another; these spots were shown on the police map as being in a direct line between the two villages. Now, if these places had been proved to be correct, it would have been strong circumstantial evidence against the accused, and might have gone a long way towards establishing a clear case against them; but no proof was forthcoming, and the sessions judge rightly attached no weight to these particular items on the map.

Maps and plans are always carefully scrutinised in civil cases, and the clearest proof is required. It is, to say the least, anomalous that, in cases where life or liberty is at stake, the crude efforts at draughtsmanship of a third class jungle constable should be received in evidence against the accused.

M. O.

## UNCONSTITUTIONAL LEGISLATION.

LOWER BURMA TOWN AND VILLAGE LANDS ACT  
(IV OF 1898), SECTION 41 (b).

WE have more than once pointed out that section 41 (b) of the Lower Burma Town and Village Lands Act, which deprives civil courts of jurisdiction in disputes with Government in respect of land within the meaning of the Act, is one of those pieces of legislative enactments which would be considered a perfect scandal in any other part of the British empire and would not be tolerated for a single minute. That it is objectionable in principle, few would deny. It is contrary to the traditions of British justice and equity because in no case has a British Government been known to take shelter behind anything which the British courts could not support

in the exercise of their ordinary civil jurisdiction. We now propose to deal with it from an entirely different point of view. Looking at it more closely, it appears that there is great room for doubting whether it is an enactment which, in its bearing upon the jurisdiction of the civil courts, is properly and constitutionally made, and whether, if it is not so, the civil courts in this province are bound by it.

In order to deal with the first question, namely, whether the provision of the Act is constitutional, we must go a little into the history of legislation in this country and the legislative powers which are constitutionally conferred upon the various legislative bodies.

The Council of the Lieutenant-Governor, Lower Burma, was created by proclamation of the Governor-General in Council under section 49 (section 46), 24 and 25 Vict., C. 67 (1861), dated the 9th of April 1897 (Home Department Notification No. 509), which says :

“The Governor-General is pleased to constitute the territories at present under the administration of the Chief Commissioner of Burma to be, for the purpose of the Indian Councils Act, 1861 (24 and 25 Vict., C. 67,) a province, to which the provisions of that Act touching the making of laws and regulations for the peace and good government of the Presidencies of Fort St. George and Bombay, shall be applicable, and further, to appoint Sir Frederic William Fryer, K.C.S.I., of the Indian Civil Service, now Chief Commissioner of Burma, to be the first Lieutenant-Governor of that province with all powers and authority incident to such office.

“2. The Governor-General in Council is further pleased to specify the 1st day of May 1897 as the period at which the said provisions shall take effect, and nine as the number of councillors

whom the Lieutenant-Governor may nominate for his assistance in making laws and regulations.”

The local council, therefore, derives its power to legislate under this proclamation, subject to the other provisions of 24 and 25 Vict., C. 67. Then the next question is, What are these powers? Section 48 of the Statute says :

“It shall be lawful for every such Lieutenant-Governor in Council thus constituted to make laws for the peace and good government of his respective division, province, or territory, and except, as otherwise hereinbefore specially provided, all the provisions in this Act contained respecting the nomination of additional members for the purpose of making laws and regulations for the presidencies of Fort St. George and Bombay, and limiting the power of the Governors in Council of Fort St. George and Bombay for the purpose of making laws and regulations, and respecting the conduct of business in the meeting of such council for that purpose and respecting the power of the Governor-General to declare or withhold his assent to laws or regulations made by the Governors in Council of Fort St. George and Bombay, and respecting the power of Her Majesty to disallow the same, shall apply to laws or regulations to be made by any such Lieutenant-Governor in Council.”

Thus, the powers of the Lieutenant-Governor in Council are exactly the same, and subject to the same limitations, as those of the Governors in Council of the presidencies of Bombay and Madras. These powers and limitations are defined in section 42 and section 43 of the same Statute. Section 42 says :

“The Governors of each of the said presidencies in council shall have power, at meetings for the purpose of making laws and regulations

as aforesaid, and subject to the provisions here-  
in contained, to make laws and regulations for  
the peace and good government of such presi-  
dency, and for that purpose to repeal and amend  
any laws or regulations made prior to the coming  
into operation of this Act by any authority in  
India so far as they affect such presidency :

*"Provided always, that such Governor in Council shall not have the power of making any laws or regulations which shall in any way affect any of the provisions of this Act or of any other Act of Parliament in force or hereafter to be in force in such Presidency."* Section 43 further limits the powers of the Governors in Council, by making the previous sanction of the Governor-General in Council necessary before making any laws or regulations in certain cases, which it is not essential to reproduce in this place.

These powers are further subject to the limitation placed by section 22 of the Statute, which defines the powers of the Governor-General in Council. After numerating these the section goes on to say :

*".....And the laws and regulations so to be made by the Governor-General in Council shall control and supersede any laws and regulations in any wise repugnant thereto which shall have been made prior thereto by the Governors of the presidencies of Fort St. George and Bombay, respectively, in Council, or the Governor or Lieutenant-Governor in Council of any presidency or other territory for which a council may be appointed, with power to make laws and regulations, under and by virtue of this Act."*

These provisions form the express limitations placed upon the local legislatures, but there are others which follow necessarily by implication. Section 22 of the Statute defines the powers of the Governor-General in Council. It would

seem that the limitations there placed upon the Governor-General in Council would undoubtedly apply to the Governors and Lieutenant Govern-  
ors in Council. Section 22 says :

*"Provided always, that the said Governor-General in Council shall not have the power of making any laws or regulations which shall repeal or in any way affect any of the provisions of this Act"* or certain other Acts, among which is specifically mentioned 21 and 22 Vict., C. 106.

Summarizing these provisions, it must be admitted that, in order that a local Act may be constitutionally valid, it must fulfil the following conditions :

(i) It must not in any way repeal, or affect in any way any of the provisions of any Act of Parliament, especially 21 and 22 Vict., C. 106, which, along with others, has been specifically mentioned :

(ii) It must not in any wise be repugnant to the laws and regulations made by the Governor-General in Council, because, if it is so, it is controlled and superseded by the latter :

(iii) That in each case it must be for the "peace and good government" of the presidency or province.

Now let us apply these tests to the Act in question, namely, The Lower Burma Town and Village Lands Act (IV of 1898). It was passed by the Lieutenant-Governor on the 7th March 1898, and received the assent of the Governor-General on the 5th May 1898. The preamble of the Act is as follows :

*"An Act to declare and amend the law relating to interests in land in towns and villages in Lower Burma."*

"Whereas it is expedient to declare and amend the law relating to interests in land in towns and villages in Lower Burma, and to provide for the assessment and recovery of the revenue and other Government demands in respect thereof, and for other matters connected therewith; It is hereby enacted as follows:—  
Section 41 says:

"No civil court shall have jurisdiction to determine—

- (a) any matter which, under this Act, is determined by the revenue officer;
- (b) any claim to any right over land as against the Government."

Applying the first test, we find that this section 41 (b), by depriving the courts of jurisdiction over rights to land even if they refer purely to civil claims, affects the provisions of section 65 of 21 and 22 Vict., C. 106, under which the Crown, or the Secretary of State, has expressly submitted himself to the jurisdiction of ordinary civil courts in all cases. Section 65 says:

"The Secretary of State in Council shall and may sue and be sued, as well in India as in England, by the name of the Secretary of State in Council as a body corporate, and all persons and bodies politic shall and may have and take the same suits, remedies, and proceedings, legal and equitable, against the Secretary of State in Council of India as they could have done against the said company\* ; and the property and effects hereby vested in Her Majesty for the purposes of the Government of India, or acquired for the said purposes, shall be subject and liable to the same judgments and executions as they would while vested in the said Company have been liable to

\* East India Company.

in respect of debts and liabilities lawfully contracted and incurred by the said Company."

Thus the Crown has given to its subjects the rights to institute the same suits and ask for the same remedies against itself as they had against the East India Company, without any reserve or qualification: and it cannot take shelter behind any local Act or enactment until this statute is repealed. That the East India Company was liable to be sued both on contracts and for torts, there is no doubt, whether they related to land or any other subject matter. In the *Secretary of State for India vs. Hari Bhanji* (1), this question is fully discussed. At page 277 we find:

"It is an acknowledged attribute of sovereignty, and has been described as a rule of universal law, that a sovereign is not liable to suit in his own courts without his consent. Consequently, in *England*, the form of procedure permitted to a subject who considers himself aggrieved by an act of the crown, is by petition of right. When an order has been passed that justice be done, and not before, the courts are at liberty to inquire whether the claim is of such a nature that it can be maintained, and whether it is well founded.

"The East India Company was not a sovereign, and the personal exemption from suit, which is the attribute of sovereignty, did not attach to it. *Nabob of the Carnatic vs. East India Company* (2); *Bank of Bengal vs. East India Company* (3); *The Peninsular and Oriental Steam Navigation Company vs. The Secretary of State* (4), where the court expressed its entire concurrence in the

(1) I.L.R., 5 Mad., p. 273 (1882).

(2) 1 Vesey, Jr.; 370, 2 Vesey, Jr., 56; S. C. 4 Brown's Chancery Cases 179.

(3) Bignell (Calcutta Reports) 120, cited in Bourke, part VII, p. 180.

(4) Bourke, part VII, p.p. 166--188.

opinion expressed by Chief Justice Grey, that the fact of the Company having been invested with powers usually called sovereign powers did not constitute them sovereigns. And this is further shown by the circumstances that the Company was held liable for the negligence or misconduct of its officers in cases in which the sovereign would not have been held liable, even on petition of right. Not only was the Company liable to suit in the courts of the sovereign, but it also submitted to the jurisdiction of its own courts. (Regulation III of 1793, Bengal, Preamble).

“On the assumption by the Crown of the direct government of British India, it was provided that persons should have the same suits and remedies against the Secretary of State in Council as they had theretofore been entitled to maintain and pursue against the Company. Consequently the Secretary of State in Council cannot, in this country, claim, on behalf of the Crown, the prerogative of immunity from suit.”

From this it is quite clear that the Crown can claim no immunity from suit, no matter what the character of it may be. It must be admitted, however, that there is one exception to this rule. The civil courts have no jurisdiction in cases in which the Act complained against is an “Act of State,” that is to say, it must be an Act which derives its sanction from the King’s prerogative or from Parliament, and not from “Municipal law.” The moment the Secretary of State or his deputy professes to do an act under sanction of municipal law, the civil courts have jurisdiction, and the mere fact that the act is an act done by the sovereign or his representative, does not oust them of that jurisdiction (5). It follows, therefore, that the revenue authorities in this province cannot deprive the civil courts of their jurisdiction over acts which are not acts of state, that is acts which do not derive their sanction from ‘Municipal’ law. It would be absurd to argue that, when the revenue authorities, for instance, enter into a contract, just like any private individual, for the sale or lease of land, they are doing an act of ‘state ;’

(5) 7, Moo. I. A., 476.

for it has been held repeatedly, that when the sovereign power does an act which can be done by a private individual, that act ceases to be an act of state, and the civil courts are not deprived of jurisdiction (4). Further, it has been decided that when the Crown, by itself or through its servants, purports to do, as an act of state, an act which it has been precluded from doing by statute, the civil courts have the right to declare that it is not an act of state over which they have no jurisdiction. In *Damodar Ghardhan vs. Deoram Kanji* (6), their Lordships of the Privy Council observed : “The Governor-General in Council being precluded by the Act 24 and 25 Vict., C. 67, section 22, from legislating directly as to sovereignty or dominion of the Crown over any part of its territories in India, or as to the allegiance of British subjects, could not, by any legislative Act, purporting to make a notification in a Government gazette conclusive evidence of a cession of territory, exclude enquiry as to the nature and “lawfulness of that cession.” Applying the same argument to the subject under enquiry, it must be admitted that, by passing an Act which it was precluded from passing, the local legislature cannot escape an enquiry in a civil court as to the propriety or lawfulness of passing that Act.

Nor can the executive authorities take up the other position, namely, that their Acts did not derive their sanction from Municipal law, for the Act IV of 1898 is a Municipal law, on the face of it, even assuming that it is a valid law, which it is not, so far as section 41 (b) is concerned. They derive the whole of their power and exclusive jurisdiction from Municipal law, and, that being so, they have no immunity from suit in a civil court.

II. Applying the second test, it appears that section 41 (b) is repugnant to the Lower Burma Courts Act (VII of 1900) passed by the Governor-General in Council, and is therefore, invalid, as being contrary to section 22 of 24 and 25 Vict., C. 67, cited above.

The Lower Burma Courts Act was passed two years later than the local Act IV of 1898. Under section 8, it declared (1) :

“The Chief Court shall be the highest civil court of appeal, and the highest court of criminal

(4) *Peninsular and Oriental Steam Navigation Company*, cited above.

(6) I. L. R., 1 Bom. 367 (461) ; S. C. L. R. 3. I. A. 12.

appeal and revision in and for Lower Burma and shall.....(c) be the principal Civil and Criminal court of original jurisdiction for the Rangoon Town."

These words are very general, and no other construction can be placed on them than that the Legislature intended that the Chief Court shall be the highest court of judicature and shall have jurisdiction over all cases in the whole province, without exception, for it is a cardinal principle of the interpretation of statutes, that what the Legislature has not expressly taken away by statute from the highest court, it has intended to grant and has granted. In *Amant Bagam vs. Bajan Lal*, (7) Mr. Justice Mahomed observed: "While in cases of taxation everything is to receive a strict construction in favour of the subject, in questions of jurisdiction the presumption is in favour of giving jurisdiction to the highest court—a view which is in keeping with the principles upon which the Full Bench ruling of this Court in *Nidhi Lall vs. Mazhar Husain* (8) proceeded." Having regard to this proposition, if the Governor-General in Council had intended to restrict the jurisdiction of the Chief Court, there would have been a special saving clause, and some such words as "except in cases relating to land within the meaning of section 41(b) of the local Act of 1898" would have been introduced. But as no such words were added, it must be presumed that it had no intention of restricting or curtailing the jurisdiction of the Chief Court, and that the effect of section 41(b) was nugatory, as being repugnant to the Act, which, under operation of sections 22 of 24 and 25 Vict., C. 67, cited above, must be taken to have superseded it.

There is another point which, though it has very little direct bearing on the question before us, deserves consideration.

It is a matter open to argument whether the Local Government have any legislative power to interfere with the courts of justice. As we have shown before their legislative powers are confined to laws and regulations for the "peace and good government of the province," but there is no authority for saying that the laws and regulations

contemplated there, confer on the Lieutenant-Governor in Council any power to legislate with reference to the actual courts of law. In fact the Statute 24 and 25 Vict., C. 67, seems to lend countenance, if construed as strictly as it should be, to the opposite view. Whilst, on the one hand, it is absolutely silent as to the powers of the Governors and Lieutenant-Governors in Council to legislate with reference to the courts of justice, on the other it expressly authorizes the Governor-General in Council to legislate with reference to them, subject, of course, to the limitations which we have noted before (section 22 of 24 and 25 Vict., C. 27). From this it may be legitimately presumed that the Legislature never intended that the local councils should have legislative powers with regard to the courts of justice, for, if it had so intended, it would expressly have conferred them as in the case of the Governor-General in Council.

III. Now we pass on to the third and last test, namely, whether this law is for the "peace and good government" of the province. In order to do this we must examine the effect of this Act. It applies to the whole of Lower Burma, except the hill district of Arakan. It purports to "declare and amend the law relating to land in towns and villages." It deprives all the civil courts, without exception, of jurisdiction to determine any claim as against the Government over any land. In other words, it places the citizens of a whole province at the mercy of the revenue authorities, who may deal with their rights, most jealously cherished in other parts of the world, in any way they choose; it enables the revenue authorities, if they wish, to break any contract for the sale or lease of land; it frees them, if they choose, from any liability in damages for any tort committed against a private individual in the exercise of their own right of enjoyment; in fact, it confers total immunity on the revenue authorities in all cases in which, if this Act had not been passed, they would have been liable under the ordinary civil law, in ordinary civil courts.

It is needless to define what "peace and good government" means because we have been discussing these terms since the days of Aristotle and before, down to our times and we have come to no conclusions which seem applicable in all cases. It is sufficient to observe, therefore, that any Act which has the effect of depriving

(7) I. L. R. 8 All. (1886). 438 (444) F. B.

(8) I. L. R. 7 All. 230.

citizens of their most important rights and of conferring immunity from suit on the revenue and executive authorities in cases which involve the determination of purely civil rights referring to land, is not an act for the "peace and good government" of the province. The utmost straining of language cannot bring it within that category without attaching an imaginary or absurd meaning to simple words which scarcely need any explanation.

To sum up the whole position, then, it seems that section 41(b) is an unconstitutional enactment, because it is contrary to an Act of Parliament, it is repugnant to an Act of the Governor-General in Council and, it exceeds the power conferred on the local legislative Council, being not an act for the "peace and good government of the province."

This being so, the next question is—Are the courts in this province bound by it? Clearly not. It is a fundamental principle of constitutional law, that any enactment which is passed by a legislative body which has no authority to pass it, has no legal existence, and is no law at all; and courts need not and cannot carry it out, because there is nothing which they can carry out.

This is the principle on which the English Courts and the Supreme Court of the United States have always acted, and the High Courts in India are not bound to follow any other principle.

In *Reg. v. Edward Reay* (8), the High Court of Bombay refused to consider itself bound by an Act of the Bombay Legislative Council which affected the rights of European British subjects secured to them by an Act of Parliament, and it would seem that the Legislature considered that the High Court was right, because it thought it necessary to extend the powers of the Governor-General in Council under 24 and 25 Vict., C. 67, by passing another Statute, 33 and 34 Vict., C. 62.

(8) 7 Bom. H. R. Cr. C., p. 6.

#### A REVENUE CASE.

IN Revenue Appeal No. 85 of 1907, in the Court of the Commissioner of Pegu, facts appear which throw some light on the doings of *thugyi*s. A man, named Ram Dayal, had a lease of Government garden land near Insein, since 1895. In December 1906, he was served with a notice to show cause why his lease should not be cancelled, on the ground that he had not cultivated the land according to the terms of the lease. The Subdivisional Officer, Insein, reported that he had personally inspected the land in question and that there were only about 30 trees on the land. He recommended, on this ground, that the lease should be cancelled. The Deputy Commissioner agreed with him and cancelled it. On appeal, the Commissioner of Pegu sent the case back for further report on this point as well as for verifying certain statements which had been made by the appellant in his grounds of appeal. On this second occasion the Township Officer, Insein, went and inspected the land with the *thugyi*, and he reported that there were 102 trees, from 7 to 12 years old. When this new report arrived, both the Deputy Commissioner and the Commissioner agreed that there was no occasion for cancellation of the lease, and the former order was reversed.

The question with which we are concerned is: How was it that the Subdivisional and the Township Officers happened to make reports so totally different with regard to such a simple fact as the counting of trees on a particular piece of land? No reasonable man could doubt for a moment that the Subdivisional Officer's report was correct, or that he went to the land on which he reports, as he says, he did. Taking his statement as absolutely true, and we can not take it in any other way, the only inference which we can draw is, that he was not taken to the land in question, but to another absolutely different piece of land, either by the *thugyi* or some other person. So far as we are aware, no enquiry has been ordered to find out the person responsible for this, and we can not help regretting that, though justice has been done to the lessee, an act of gross fraud on the part of a subordinate on his superior has been allowed to pass undetected and unpunished by the revenue authorities.

### Humours of the Law.

A PRISONER, who had been convicted of the offence of dacoity and sentenced to ten years rigorous imprisonment, appealed from jail and, *inter alia*, his ground of appeal was thus worded :

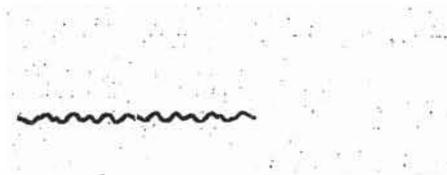
"Your appellant therefore very sad to undergo the term of ten years transportation for the sake of Rs. 9, as shared money of the dacoited property."

THE following prayer in a plaint in the local courts must have been the result of reading Bentham on Legislation :

"Wherefore plaintiff prays that the pro-notes filed in C. R. No. — of 190—, may be sent for by this court and used as evidence in this case ; and that a judgment and decree for Rs. — may be passed against the first and second principal defendants in the presence of the *pro forma* third defendant."

A magistrate, with first class powers, thus recorded the deposition of a witness examined by him :

"By this stroke I became sat down suspending on my hand on ground."







# THE BURMA LAW TIMES.

No. 6.

OCTOBER 1907.

VOL. I.

*The Subscription for "The Burma Law Times" is Rs. 10 per annum, payable in advance.*

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## Editorial Notes.

IN another column we publish a copy of a letter addressed by the Bar Association of Pegu to the District Judge of Pegu, complaining of the impertinence of some of the subordinate ministerial officers of the courts at Pegu. Mr. McCallum, who was then District Judge, it appears, promised to look into the matter. We hope that, though he is gone on leave, his successor has enquired into it, and done something toward redressing the grievances laid before him. We have also had occasion to experience this very thing which the local Bar are complaining of, and we feel that we are guilty of no exaggeration when we say that for discourtesy, impertinence and slackness on the part of the subordinate officials it would be difficult for any other district to surpass Pegu.

THE draft of the new Civil Procedure Code has already appeared and we are on the eve on a great reform in the law of Procedure. The arrangement of the Code of Civil Procedure into two parts is an excellent plan and will go a long way towards facilitating the introduction of reforms in procedure from time to time as experience shows to be necessary and useful. The Legislature so far as we can judge from the provisions of the draft, have no intention definitely to abolish imprisonment for debt and to introduce some reforms on the lines of the Debtors Act of 1869 in England. The effect of the draft bill amounts to this that, if the court does not exercise its wide discretion, under Order XXI, Rule 40, and release the judgment-debtor or disallow the application for his arrest and imprisonment, it shall inform the judgment-debtor that he may apply to be declared an insolvent, and that he will be discharged if he has not committed any act of bad faith regarding the subject of the application and if he complies with the provisions of the law of insolvency for the time being in force. And if Courts, as they too often do, fail to exercise their discretion under this law an honest debtor who cannot immediately pay a grasping judgment creditor must go to jail for six months or apply for the benefit of the Act for the relief of insolvent debtors. The result must be a great increase of insolvency cases and an unnecessary waste of the time of insolvency courts.

WE draw the attention of our readers to two cases (Nga Shan Byu and two *vs.* King Emperor, and Nga Kyaw Gaung and three *vs.* King Emperor) reported in this issue. In both of these cases, the accused confessed and retracted their confessions, alleging ill-treatment and other inducement as the cause of their having confessed. It is a matter of common knowledge that accused persons are too frequently ill treated in order to induce them to confess and it is seldom that it lies in the power of the accused to prove ill-treatment by the police. The most he can do is to point to circumstances, as in these two cases, which go to make it highly improbable that the confessions were voluntary. As Mr. Justice Moore pointed out in *Nga Kyaw Gaung and three vs. King Emperor*, although, in the absence of evidence to justify a finding that there was actual ill-treatment, the confessions are legally admissible, they must, in view of the circumstances under which they were made, be received with great caution. In this case, the learned Judge also suggests an enquiry by the District Magistrate as to certain gross improprieties that were committed by the police. We hope the District Magistrate referred to has taken steps in the matter and we should be glad to hear of the result of the enquiry held by him.

The following is the letter referred to elsewhere in this issue.

FROM

THE HONORARY SECRETARY,  
 PEGU BAR ASSOCIATION,  
*Pegu.*

TO

THE DISTRICT JUDGE,  
*Pegu.*

*Dated Pegu, the 21st August 1907.*

SIR,

I AM directed by the members of the Pegu Bar Association to bring the following facts to your notice :

1. That the members have in numerous instances been denied the privilege of inspecting the proceedings of cases pending in the civil courts in which they are engaged, notwithstanding the authority conferred upon them under the Lower Burma Courts Manual.

2. That the copyists attached to this Court and the subordinate courts have delayed in furnishing certified copies of proceedings to members who have applied for them, and that they are unable to obtain them without extreme difficulty, trouble and loss of time.

3. That the Court-fee stamps given to the clerks for the issue of process, etc., have, in most cases, been mislaid and the clerks sometimes denied the receipt of them which, therefore, clearly renders it obligatory that the clerks should be directed to give receipts for them to save the litigants from loss and unnecessary trouble.

4. That miscellaneous petitions for the withdrawal of moneys deposited with the Bailiff have often been lost in the course of transmission from the clerks to the Bailiff, the one holding the other responsible for the loss, which illustrates the want of such petitions being despatched from one officer to the other in a despatch-book, to be kept for the purpose.

5. That money deposited with the Bailiff to the credit of the litigants cannot be withdrawn without considerable delay, which is contrary to the express wishes of the Local Government.

Under the above circumstances the members are desirous that you will be so pleased as to warn the parties concerned against the repetition of the irregularities aforesaid in future, and introduce the reforms by framing certain rules for their guidance.

I have the honour to be,

SIR,

Your most obedient servant,

S. M. ALI,

*Honorary Secretary,  
 Bar Association, Pegu*

## Correspondence.

To  
THE EDITORS,  
"Burma Law Times."  
DEAR SIRS,

WITH regard to the article on "Police maps," published in your September number, the following extract may be of interest. It is taken from the judgment passed by Mr. G. F. Christie, Sessions Judge of Tenasserim, in Sessions Trial No. 66 of 1907, and reported in the *Tenasserim Herald* on 3rd October 1907. The charge was one of 'culpable homicide not amounting to murder.' The learned Judge says: "The plan of the house and surroundings produced in evidence by the police was so very deficient, that I visited the scene together with the assessors, accused and witnesses, and myself prepared a plan which will, I think, give a clearer idea of the events described by the witnesses."

Your faithfully,

M. O.

## Humours of the Law.

THE following is the prayer of a petition filed in the Court of Small Causes, Rangoon:

"Wherefore Your Honor's petitioner prays that he may be allowed to withdraw the suit against the said defendant *with or without Your Honor's leave* to bring a fresh suit *as Your Honor pleases* for which act of kindness as in duty bound he shall ever pray.

WITNESSES who were interrogated on commission were much puzzled by this simple question:

"Will anybody borrow money for urgent business, if they are short of it on the way where

there is a friend from whom he can easily get the money?"

IN a recent case a magistrate sentenced to imprisonment and fine a Burman who, to protect his daughter who, he had good reasons to believe, was in danger of being raped, got on top of a house, undid the roof and jumped with a *dah* into a room where the abductor had hid the girl and himself. The accused was convicted of house breaking! He was acquitted on appeal to the Chief Court.

## THE LAW OF IMPRISONMENT FOR DEBT IN INDIA.

ONE of the greatest blots on the pages of the history of civilization is the practice of imprisonment for debt. Till the middle of the last century, a debtor was regarded as a *quasi-criminal* and treated as such. He could not only be arrested on mesne process but, by a writ of *capias ad satiesfaciendum*, he could be detained in prison till he paid, and even during his lifetime if he failed to pay. Such excessive severity naturally met with disapproval, and the establishment of the law of bankruptcy was intended to bring relief to persons ruined by trade who gave up for rateable distribution amongst their creditors whatever property they possessed at the time of their bankruptcy. Hence a long series of enactments, beginning with 34 Hen. 8, C. 4, passed in 1552. This statute and 13 Eliz. C. 7 (1570) and 1 Jas. 1 C. 15. (1604), failed in their object as they were found to be imperfect and very lenient towards frauds by bankrupts. The necessity of more elaborate legislation was recognised, and the Act 21, Jas. 1, C. 19, s. 7 (1623), punished with sufficient

severity a fraudulent bankrupt when it enacted that "The bankrupt that fraudulently concealth his goods to the value of £20, or rendereth not some just reason why he became bankrupt, shall he set upon the pillory for 2 hours and lose one ear." A further step in severity was taken when by 5, Geo. 2, C. 30, s. 1, an omission to surrender for six weeks, non-compliance with the requisitions of the statute and in particular the concealment of property to the value of £20, or of papers and books of account was made felony without benefit of clergy. This excessive severity defeated the objects the statute had in view. It is said that during the 77 years following the passing of this statute, although there were 40,000 bankrupts and fraudulent bankruptcy, and concealment of property had become proverbial, yet there were scarcely ten prosecutions and not more than three executions. Successive statutes elaborated and amended the law of bankruptcy till the punishment became much less severe. By 1 Geo 4., C. 115., s. 1, the offence ceased to be a capital felony, and became punishable by transportation for life, or any other term not less than seven years, or by imprisonment with or without hard labour up to seven years. The Act of 1849 (12 and 13 Vict., C. 106., s. 251) reduced the period of imprisonment to three years with hard labour for the offences of destroying or falsifying books, obtaining goods on credit under the false pretence of carrying on business within three months of bankruptcy. It was not however till 1869 that imprisonment for debt was abolished in England. In that year two Acts were passed: The Debtors Act (32 and 33 Vict., C. 62) and the Bankruptcy Act, (32 and 33 Vict. C. 71. The greater part of the offences punishable under the Debtors Act consists in omissions to comply with the provisions

of the Bankruptcy Act and renders bankrupts liable to imprisonment with or without hard labour according to the nature of the offence and whether it is a felony or misdemeanor. The Debtors Act was passed for the abolition of imprisonment for debt, for the punishment of fraudulent debtors and for other purposes. Imprisonment for debt was abolished with certain exceptions and then the term of imprisonment cannot exceed one year. A debtor can under that Act be imprisoned, if he makes default in payment of any penalty except in the case of a penalty payable in respect of any contract; of any sum summarily recoverable before a justice or justices of peace; of any sum due by a trustee or person acting in a fiduciary capacity; of any sum ordered to be paid by a solicitor or attorney for misconduct; of any sum ordered to be paid by an insolvency court for the benefit of creditors and sums ordered to be paid under the Act itself (section 4). Under section 5, any court may commit to jail, for a period not exceeding six weeks or until payment, any person making default in payment of any sum decreed by a court or any sum ordered to be paid: Provided that it must always be proved that he has or has had since judgment or the date of the order directing payment the means to pay and neglects or refuses to pay. And a court has power to order payment by instalments. The Act further abolished (section 6) imprisonment on mesne process, but conferred the power on a court of arresting and imprisoning for a period not exceeding six months, or releasing on sufficient security for his due appearance being given, a defendant who owes a sum of £50 or upwards and who is about to quit England, if the absence of the defendant will materially prejudice the prosecution of the plaintiff's suit. When the action is for the recovery of a penalty other than a penalty due in respect of any contract, the

NOTE.—Vide Stephen's *History of the Criminal Law of England*.

security shall be for the payment of the judgment debt or that the defendant shall be rendered to jail.

In India, ten years prior to the passing of the Debtors Act, the Indian Legislature in an Act (1) intituted "An Act for simplifying the Procedure of the Courts of Civil Jurisdiction not established by Royal Charter," for the first time introduced statutory provisions dealing with debtors and enunciated the law of imprisonment for debt. It is unnecessary to reproduce here the sections of that Act but the main features of the subject may be glanced at. Any person arrested in execution of a decree could, on being brought before the court, apply to be discharged on the ground of poverty, or, if possessed of property, of his willingness to place all at the disposal of the court (section 273). The Court, proceeds the Act, shall then, in the presence of the plaintiff, examine the judgment-debtor as to his then circumstances and future means and shall call upon the plaintiff to show cause why he should not proceed against the defendant's property and why the defendant should not be discharged. The court may also, pending the hearing of the application, leave the defendant in custody of the bailiff, or release him on giving security. If, ultimately, the court was satisfied, the defendant would be discharged (section 274). He was, however, always subject to be rearrested and imprisoned if he had committed any act of bad faith (section 275).

Even after the judgment-debtor was committed to jail, he could apply for his discharge and if, after a procedure similar to that stated above, the court was satisfied or the plaintiff failed to prove that the defendant had committed an act of bad faith, it was bound to release him from custody (section 281). He could, however,

be rearrested if any act of bad faith were proved on his part; and the court had the power to send the defendant to the magistrate to be dealt with according to law.

Under this Act both men and women could be arrested and imprisoned for debt.

The period of imprisonment varied. If the judgment debt was under Rs. 50, the period was not to exceed six weeks; if over Rs. 50 and under Rs. 500 six months, and if over Rs. 500 two years.

The next statute in India dealing with imprisonment for debt was Act X of 1877. This Act was distinctly a retrograde measure as it deprived the court which passed the decree of the discretion which the previous statute had conferred. If the decree was for payment of money the court had the power for sufficient reason to order the amount to be paid by instalments (section 210). And after the passing of the decree an order to pay by instalments could not be made without the consent of the judgment creditor, (§ 210).

The judgment debtor could only be discharged from jail before the expiry of the period of imprisonment and without payment and against the wish of the judgment-creditor, if the decree was otherwise fully satisfied, or if the judgment-creditor failed to deposit the necessary subsistence allowance, or if the judgment-debtor was declared an insolvent. The act provided a procedure by means of which judgment-debtors could obtain their discharge, (section 344—360).

The Act did not abolish the imprisonment of women for debt but reduced the maximum period of imprisonment to six months. Where the amount due was over Rs. 50 the period was six months, and six weeks if under.

(1) Act VIII of 1859.

A little less than five years latest the law on the subject was again altered and the introduction of sections 245A, 245B, and 337 A, marked a great advance on the former law. No woman could be arrested or imprisoned in execution of a decree for money (section 245A). The court was also granted a discretionary power of issuing a notice to the judgment-debtor, to show cause why he should not be committed to jail in execution of the decree (section 245B). "When the judgment-debtor appears before the court on receiving a notice under section 245B or on being brought up under arrest and it appears to the court that the judgment-debtor is unable from poverty or other sufficient cause to pay the amount of the decree or, if that amount is payable by instalments, the amount of any instalment thereof, the court may upon such terms as it thinks fit make an order disallowing the application for his arrest and imprisonment or directing his release, as the case may be.

"Before making any such order the court may take into consideration the following matters:—

- (a) the decree being for a sum for which the judgment-debtor was bound as a trustee or as acting in any other fiduciary capacity to account;
- (b) the transfer, concealment or removal by the judgment-debtor of any property or any other act of bad faith with the object or effect of defeating or delaying creditors;
- (c) any undue or unreasonable preference given to any creditor;
- (d) the possession of means to pay either the whole or part of the decree since the date thereof;
- (e) the likelihood of the judgment-debtor absconding.

And during the consideration of these matters the court may keep the judgment-debtor in custody or release him on giving security."

The object of passing the Debtors Act was to abolish imprisonment for debt in the case of honest debtors. The intention of the Legislature clearly was to put pressure on the fraudulent debtor and compel him to pay by sending him to jail. It was in this sense vindictive (2). For the Act enables the court to sentence the fraudulent debtor to hard labour for a period not exceeding two years. It was, in short, an Act aimed principally at fraudulent debtors, and most of the penalties prescribed were for breaches of some of the provisions of the Bankruptcy Act. The Debtors Act was clearly meant to be an adjunct of the Bankruptcy Act and was to be worked side by side with it. It does not however appear that such was the scope and object of the sections of the Civil Procedure Code of 1882 relating to imprisonment for debt. The object appears to be not to abolish imprisonment of an honest debtor for debt but rather to enable the judgment-creditor to recover his money. It leaves the court a discretion and it gives indications of how that discretion is to be exercised. It is difficult to understand quite why, if such had not been the intention of the Legislature, the word "may" and not "shall" occurs in section 337A of the Code. The Legislature clearly intended by means of section 337A to relieve the insolvency courts of much of their labour as well as to remove much of the oppression that necessarily resulted from the operation of a law which regarded the debtor as a *quasi* criminal.

(2) Per Jessel. M. R. in *Marris v. Ingram* (41. L. T. Rep. 613.—13 Ch. D. W. p. 343).

From what has been previously stated about the provisions of the Debtors Act and the Civil Procedure Code, it is clear that the Debtors Act is not only a more elaborately and carefully written statute than the provisions of the Civil Procedure Code relating to imprisonment for debt, but that it also far surpasses the latter in its sense of the great injustice hitherto done to honest debtors. By this it must not be understood that the provisions of the Civil Procedure Code are not wide enough, if wisely interpreted, to afford all the necessary relief to honest debtors, and it is proposed to show that by a wise and judicial exercise of the court's discretion no honest debtor need go to jail. Section 210 empowers a court for any sufficient reason to order payment of the decree by instalments but after the decree an order for instalments cannot be made without the consent of the decree-holder. It has been held in *Subatollah Sircur vs. Thomson* (1Hyd. 98) that an order for instalments should be made when the debtor shows his bona fides by offering to pay anything like a fair proportion of his debt at once. And it is submitted that where a debtor is ill, or out of employment or has such other pressing debts and other obligations to discharge that he cannot possibly pay anything more than a portion of the decretal amount every month, the court will be exercising a sound judicial discretion if it orders a payment by instalments. In *Bachchu vs. Madad Ali* (3) it was held by the Allahbad High Court in a case under the Act of 1877 (Act X of 1877) that there was nothing in section 210 authorising a court to direct that the amount of a decree should be paid within a fixed time from its date, and a court has no power under this section to stay execution of a decree for a fixed period.

Even when the judgment-debtor is brought before the court under arrest in execution of a

decree or appears in obedience to a notice under section 245B, and it appears to the court that either through poverty or other sufficient cause the judgment-debtor cannot pay the amount of the decree or any instalment ordered to be paid under the decree, the court may disallow the application for his arrest or imprisonment or direct his release.

In using the words "poverty or other sufficient cause" the Legislature intended to make the section apparently as comprehensive as possible. Its intention was clearly to leave the discretion of the court as unfettered as possible. The meaning of the word poverty is known by everyone, but it is submitted that it must be construed according to the circumstances and position in life of the judgment-debtor. Poverty is a relative term and must be construed in each case by its own peculiar circumstances.

In order to satisfy the court that he is entitled to the benefit of the discretion granted to the court under section 337A, a judgment-debtor will be well advised if he places before the court all his circumstances. If he is in employment he should state how much his income is; how much his house rent, if he is renting a house; how much it costs him to live; he should, if he can do so, show to the court that he has not lived extravagantly or beyond his means; if he has been out of employment at any time he should bring that to the notice of the court. He should state if there are any persons dependant on him and if he is a married man and has children, he should state how many and show how much it costs him to clothe, feed and educate them. If he has incurred debts through sickness or other misfortune, that should be stated. He should also draw the court's attention to his other obligations. There may be other decrees against him or orders to

(3) 1. L. R., 2 All. 649.

pay by instalments to other creditors. He may have other pressing debts and equally pressing necessary expenditure. All these things are, it is submitted, relevant to the issue, whether through poverty or other sufficient cause he is unable to pay the amount of the decree or any instalment ordered to be paid. The court, it is submitted, has no power to order payment by instalments under section 337A of the Civil Procedure Code. It is only under section 210 that such an order can be passed. So if the judgment-debtor cannot pay the whole of the decretal amount and the judgment-creditor does not consent to the alteration of the decree under section 210, the court has no other option under section 337A than to release him or disallow the application for his arrest and imprisonment, if the court is satisfied that either through poverty or other sufficient cause he cannot obey its order to pay the whole or any instalment. On consideration of the matters mentioned in subsections (a) to (e), the court considers that he ought not to enjoy the benefit of its discretionary power.

The matters that the Legislature has considered worthy of the courts consideration in three of these subsections are matters that an insolvent Court must consider in an application for the benefit of the Act for the relief of Insolvent debtors. If an insolvent were proved guilty of any of the acts mentioned therein, an insolvent court would be justified in refusing to grant an application for the personal discharge of the insolvent; and as a similar conclusion would justify a court in refusing to exercise its discretion under section 337A it is apparent that the Legislature, though it did not in clear terms abolish imprisonment for debt, intended it to be understood that a court would be exercising a sound judicial discretion in committing to jail none but fraudulent debtors, debtors who had

since the decree had the means to pay and had failed to pay, and debtors who were likely to abscond or leave the jurisdiction of the court with the object or effect of obstructing or delaying the decree-holder in the exercise of the decree.

It has been held in *ex parte Koster*. In *re Parke*(4) that it is "utterly immaterial how the debtor obtained the means of paying the debt—whether he obtained it by gift, charity or any other means." In that case a debtor had been ordered to pay the amount of a decree by monthly instalments of £5 and it was proved that he had, prior to and since the date of the decree, been in receipt of a weekly compassionate allowance from his brother of £5. In the opinion of Lindley, L.J., it did "not follow, in the absence of fuller information as to his position, that he has had the means of paying the debt." And again it was held in *McIntosh vs. Simkins* (5) was held that the mere fact that the judgment-debtor lived in a house of the apparent rental of £60 per annum was not proof of sufficient means to pay a sum of £4-10s. It is clear therefore that before it can be taken that a judgment-debtor has means of paying the debt—his circumstances must be taken into consideration. Like poverty, a man's means, is a relative term, and can only be rightly gauged after taking into consideration all his circumstances.

The conclusion is inevitable after a consideration of all these facts, that section 337A of the Civil Procedure Code is something quite apart from the Insolvency Act. It does not, like the Debtors Act provide any punishments for breaches of any of the provisions of the Insolvency Act. It is not meant to be worked along with that Act, nor does the Legislature in framing it appear to have had any intention of abolishing imprisonment for debt. It is however, just to say that its intention in framing this section was to relieve to a large extent the labours of the insolvent court by not unnecessary driving judgment-debtors to that court. If judiciously interpreted, its provisions ought to make it unnecessary for an honest debtor who cannot pay but yet desires and intends to do so, to seek the benefit of the Act for the Relief of Insolvent Debtors.

(4) L. R. 14 Q. B. D. 597.

(5) L. R. Q. B. D. (1901) 487.

# THE BURMA LAW TIMES.

No. 7.

NOVEMBER 1907.

VOL. II.

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## Editorial Notes.

THE resignation of Mr. Lentaigne following close upon that of Mr. Giles, is bound to give rise to various reflexions. In a place where political reasons do not ordinarily lead to resignations, the only reasons one can assign are that the remuneration is not sufficiently high or, that the amount of work expected from legal officers is far in excess of what obtains elsewhere. In either case it is scarcely a matter on which the local Government may be congratulated.

There is no doubt that, except in the Presidency towns, there is a tendency on the part of the local Governments to look upon their law officers not as their legal advisers but as their ministerial officers.

We have known occasions on which local Governments, for instance, have made the Government Advocate appear even in cases of no particular importance, not only in the Chief Courts but also in the subordinate courts. If the Government Advocate corresponds to the Advocate-General, such action on the part of local Governments is inexplicable. It degrades the officer and does not benefit Government in the long run, for the remuneration they offer for all this work is not sufficiently high to attract any man to the post who has any decent independent private practice. The salary of the Government Advocate must be, like that of the Advocate-General, treated merely as a retainer on behalf of Government and additional fees ought to be paid when Government actually instruct him. Unless this is done the local Government must be prepared for frequent changes and the public for indifferent work.

Of late there has been a feeling of general dissatisfaction among members of the various bars in the Delta Division.

Mr. Ford, the Divisional Judge, has, it seems, the habit of calling appeals and cases when they are least expected by advocates.

It is not unusual for him to call appeals after 4 p.m., or to keep advocates waiting until

5-30 p.m. or later without telling them whether their appeals will be called that particular day.

Instances have been communicated to us in which, after keeping advocates waiting from 11 a.m. to 6 p.m., appeals have been postponed. Though a little forethought might have enabled the judge to do so much earlier in the day. All this is often due to the judge fixing appeals on days on which he has sessions or other work—an arrangement which is easily avoided by judges in other districts.

We publish in another column a copy of a letter addressed by Mr. Leveson, District Magistrate, to the Honorary Secretary of the Bar Library Association. We hope that other judges and magistrates will follow the commendable example set by Mr. Leveson, of consulting members of the Bar before putting rules into force which concern them almost as much as the rest of the public.

As the matter is likely to be discussed very soon at a meeting of the Bar Association,\* we refrain from discussing the proposed rules in detail. We venture, however, to make two suggestions. Under rule 4 it is laid down that all complaints in which advocates appear will ordinarily be fixed for first hearing (that is, for hearing preliminary to the issue of process if any) on the day following its presentation. This will sometimes cause hardship to complainants, by giving a kind of warning to the accused to run away before any warrant is issued for his arrest. In order to prevent this if some alteration were made by the addition of some such words as these: "except cases in which the immediate arrest of the accused is necessary," it may possibly make the rule more useful.

\* A committee has since been formed to report on these rules.

We also suggest that custody cases may be separated from non-custody cases, as also, when possible, defended from undefended ones, and separate days of the week or, if that is not feasible, separate hours of each day, be fixed for their trial.

THE practice of appointing policemen as prosecutors in the subordinate courts is open to grave objections. There is no part of the province where pleaders of the lower grades are not available for the purpose. They would at least possess a certain amount of legal knowledge and education of which these policemen are often entirely innocent and have a little independence which is probably as useful in the interest of justice as the desirability of obtaining convictions.

THERE is only one copyist in the Court of Small Causes. He costs the court Rs. 720 a year, and the court gets over Rs. 2,000, in copying fees, out of his work.

It is a source of no little trouble and annoyance to the public to have to wait for a number of days for copies of proceedings.

It is painful to think that even Government and courts of law cannot be sufficiently above ordinary commercial considerations to sacrifice a little income to public convenience.

THE Bar Library Association has at last taken the "Touting" question in hand. At a special general meeting called for the purpose, a Committee consisting of Messrs Broadbent, Dawson, De Glanville, A. B. Banerji, and Ginwala, was elected to investigate into the matter and to report what remedies should be adopted to cure the evil. If our mofussil readers have any

suggestions to make, we hope that they will communicate them to the Committee.

There may be a difference of opinion as to the necessity or propriety of capital punishment, but we think that no one would be so unreasonable as to say that any man should be hanged without a fair trial; and yet this is exactly what happens almost every day in Burma.

In courts more perfect than those of this province, a man does not get a fair trial in our opinion, if he is sentenced to death without being defended by an advocate. In most Indian courts this principle is recognized, and in all murder cases in which the accused is unable to engage a pleader to defend him, the court supplies him with one. The following extracts from the criminal circulars of the High Court of Bombay furnish some useful suggestions, and we hope that before long some steps would be taken by the hon'ble judges, in the interest of humanity, to supply undefended men charged with murder with advocates:

"In every murder case tried in a Court of Sessions in which the accused person is unable to pay for legal advice, and in every case before the High Court, in which a sentence of death is referred for confirmation, and the convict is unrepresented, a pleader shall be requested by the court to undertake the defence, and his remuneration shall be paid by Government.

(*Bombay Government Resolution, J. D. No. 7325, dated 21st October 1884.*)

"The services of a pleader should be made available in the High Court in the cases in which a sentence is sought on revision to be enhanced to a sentence of death. (*Bombay Government Resolution, J. D. No. 1795, dated 2nd April 1887.*)

"A pleader should not ordinarily be appointed by the Sessions Court if the Committing Magistrate certifies that the accused person is able to pay for legal advice, nor if the accused has been defended by a pleader in the Magistrate's Court. It is desirable that the pleader should always be appointed in sufficient time to enable him to take copies of the depositions (which should be furnished free of costs and paid for in the same manner as copies supplied to the Public Prosecutor) before the commencement of trial. If the accused plead guilty, or if at the last moment he appoints another pleader, the pleader appointed by the Court should still be allowed his fee for the day. In the latter case the copies already prepared will be available on payment for the use of the pleader appointed by the accused. (*Bombay Government Resolution, J. D. No. 7979, dated 17th 1884.*)

\* \* \* \* \*

"When a pleader is not appointed in murder cases, in which the accused is unable to pay for legal advice and is unrepresented, the reason for not appointing a pleader should be stated in the record. (*High Court Circular No. 511, dated 15th March 1898.*)"

A GREAT deal of money is wasted in translation fees in the Court of Small Causes, owing to the practice of plaintiffs of having all their documents translated at the time of filing their suits. Under section 59 of the Civil Procedure Code, it is not obligatory on the plaintiff to file a document with his plaint unless he is suing on it, so that this is the only document which he need have translated at that stage of the case. Other documents, such as vouchers, entries in books of account, etc., he can enter in a list as

documents on which he relies. These can be translated if the defendant appears and the case is contested.

If the plaintiff has them translated without the defendant contesting the case, the court should let him do so at his own risk, by allowing him no costs for these translations, for it is extremely unfair to the defendant to make him pay for the cost of the production of unnecessary evidence.

LEGAL CURIOSITIES.

I.

ONE would scarcely suppose that the psychological difference (if there is any) between the meanings of such common words as *probably* and *likely*, which most people use indifferently, as if it made no difference, may hang a human being; yet this is the effect of one of the judgments of the Chief Court (1). At page 129 we find:

“In cases in which death ensues from violence used, and there is no evidence of intention other than what is to be inferred from the accused’s act, it appears to me to be necessary to consider whether the accused must have known when committing the act that—

- (1) it *might possibly* but was unlikely to cause death or injury sufficient in the ordinary course of nature to cause death;
- (2) that it was *likely* to cause death or injury sufficient in the ordinary course of nature to cause death;

- (3) that it *probably* would cause death or injury sufficient in the ordinary course of nature to cause death.

If the act falls within the first category it would not amount to more than hurt or grievous hurt; if under the second category, it would be culpable homicide not amounting to murder; if under the third category, it would amount to murder.”

A juror who would so grasp the difference between the two words (for the second category does not differ from the third in any other respect) as to give a correct verdict would be uncommonly clever; but we are bound to add that such a man would be setting a slightly lower value on human life than it is probably worth even in this country.

II.

As the law is administered at present, it is safer for a criminal to knock out both the eyes of a man than to steal two of his coats on two different occasions; for the highest punishment he can get in the former case is seven years’ rigorous imprisonment; in the latter ten years’ rigorous imprisonment or even transportation for life. What is better for him if he repeats the former offence, he gets no more than seven years’ again, but if he repeats the latter, he is liable to ten years rigorous imprisonment or transportation for life (section 75 of the Indian Penal Code). This is no doubt a highly civilized method of reducing crime but it places us exactly where we were a thousand years ago; because, though the law pretends to be otherwise, it still regards, as this instance shows, man’s property of greater importance than man’s person. This proposition is further illustrated by the Whipping Act (VI of 1864) under which a man is liable to be whipped

(1) *Shwe Hla U vs. The King Emperor*, 2 L. B. R. (1903), 128

for the first theft, but not if he is guilty of grievous hurt, rape, or any other offence in which violence on the human body is committed, unless there has been a previous conviction for a similar offence. Whipping, which is probably the most degrading of all punishments sanctioned by the law, is, therefore, considered a fitter punishment for a sneak who commits a petty offence without the use of any force, than for a bully or a ruffian, who violates a human body. Perhaps our love of sport has something to do with our kindness for the latter.

III.

ANY man who has had the misfortune to be brought into court, will do better, if he values his peace of mind, to plead guilty or otherwise get convicted and pay a fine or even go to jail than to be discharged or acquitted; for, in the former case, it is not often that any one will apply for enhancement of sentence; but in the latter case there is every probability of his being dragged into court again for the same offence.

If he is discharged, a ruling of this court (2) authorizes any magistrate to take fresh proceedings against him on exactly the same evidence as before. If he is acquitted, the local Government will very likely drag him back into court. Some recent instances show that it is not necessary that the interest of justice should always be involved to move the local Government to appeal against an acquittal (3).

THE BAR AND THE NEW CIVIL PROCEDURE CODE.

THERE is a tardy but a welcome recognition in the new Civil Procedure Code Bill of the

(2) King Emperor vs. Nga Pyu Di and others, 2 L. B. R. (1903) 27.

(3) King Emperor vs. Nga Po Saing, I. B. L. T. 88: The Burma Oil Company, were the complainants.

principle that practising lawyers ought always to have a voice in the formation of rules of procedure or practice under the Code. Sections 121 to 124 of the Bill are as follows:

121. "The rules in the First Schedule shall have effect as if enacted in the body of this Code until annulled or altered in accordance with the provisions of this Part.

Effect of rules in First schedule.

122. High Courts established under the Indian High Courts Act, 1861 and the Chief Courts, of the Punjab and Lower Burma, may, subject to such provisions, from time to time make rules relating to the procedure of Civil Courts, and may by such rules annul, alter or add to all or any of the rules in the First Schedule.

Power to make rules.

123. (1) A Committee, to be called the Rule Committee, shall be constituted at each of the towns of Calcutta, Madras, Bombay, Allahabad, Lahore and Rangoon.

Constituted of Rules committees in certain provinces.

(2) Each such Committee shall consist of the following persons, namely:—

(a) three judges of the High Court established at the town at which such Committee is constituted, one of whom at least has served as a District Judge or (in the Punjab or Burma) a Divisional Judge for three years;

(b) a barrister practising in that Court;

(c) an advocate (not being a barrister) or vakil or pleader practising in that court, and

(d) in the towns of Calcutta, Madras and Bombay, an attorney.

(3) The members of each such Committee shall be appointed by the Chief Justice or Chief

Judge, who shall also nominate one of their number to be president :

Provided that, if the Chief Justice or Chief Judge elects to be himself a member of a Committee, the number of other judges appointed to be members shall be two, the Chief Justice or Chief Judge shall be the President of the Committee.

(4) Each member of any such Committee shall hold office for such period as may be prescribed by the Chief Justice or Chief Judge in this behalf ; and whenever any member retires, resigns, dies or ceases to reside in the province in which the Committee was constituted, or becomes incapable of acting as a member of the Committee, the said Chief Justice or Chief Judge may appoint another person to be a member in his stead.

(5) There shall be a Secretary to each such Committee, who shall be appointed by the Chief Justice or Chief Judge and shall receive such remuneration as may be provided in this behalf by the Governor-General in Council or by the local Government, as the case may be.

124. Every Rule Committee shall make a report to the High Court established at the town at which it is constituted or any proposal to annual, alter or add to the rules in the First Schedule or to make new rules, and before making any rules under the provisions of this Code, the High Court shall take such report into consideration."

These sections have been copied from the English Judicature Acts, under which a committee consisting of judges alone is constituted for a similar purpose. The fact that it consists of judges alone makes no difference, because all of them have been practising barristers of long standing and many of them have been in

the first rank in their profession before rising to the Bench.

These sections, however, as applied to Burma, are open to some objections. In the first place, there seems to be no obvious reason, except that attorneys, as a distinct class of lawyers, do not exist here, why there should be only two practising lawyers instead of three on the committee. It is even more essential here than in the High Courts that there should be at least as many practising lawyers as judges on the committee ; for, it may happen that the Chief Judge may be a civilian, and he may elect two civilian judges to the other two places there being no restriction on his choice ; or that if the Chief Judge is a barrister, and does not choose to be on the committee, there may be only one barrister judge on the committee.

No serious consequences are likely to follow if there are more civilian than barrister judges on the committee, except that, in the former case, there is a strong probability of a little more rigidity and of red tape being introduced into them than is desirable, all things considered. For these reasons we suggest that the Local Bar should propose that this rule should be so altered that there would always be on this committee at least two barrister judges.

Besides very few would doubt that conditions of life are different in the districts from what they are here. If the new arrangement of the Code is intended to make the rules suitable to the requirements of each place, then different rules will be required for different districts, especially in execution proceedings. In order to facilitate this object to a certain extent, it would be desirable to place an advocate practising in the districts on the committee in Burma, where they have an attorney in the presidency towns.

The proviso that the civilian judge on the committee in Burma must at least have served as a Divisional judge for three years would lead to some complications, because, the Lower Burma Courts Act (unlike the charter of 1861,\* which enacts that no civilian unless he is of ten years standing and has served for at least three years as a zilla judge should be appointed a judge of the High Court) imposes no limitation on the choice of civilian judges and it may happen that there may not be a single judge on the bench of such standing.

THE INTERPRETERS OF THE CHIEF COURT.

If there is any department in the Chief Court at present which needs thorough re-organization it is that of the interpreters. Considering the fact that it was only three years ago that the matter was taken in hand and settled, the demand would seem to be premature at first sight, but we have observed the present system in its working for some time and taken a considerable amount of pains to study it and we find that the sooner some changes were made the better it would be for most people who are brought into contact with this department. The present arrangement, it appears to us, is unsatisfactory from two points of view :

\* 24 and 25. Vict., c. 104.

(1) It is not fair to a majority of the interpreters.

(2) It is not fair to the public.

Dealing with the first, we are bound to admit that the Chief Judge did his best about three years ago to protect the interests of all the interpreters, by introducing the gradation list so that each interpreter would get his pay according to his grade, independently of the court to which he was attached. This, however, has wholly failed, because of the fusion of the translation and the interpretation departments and the practice of allowing each interpreter to retain the fees for translation done by him for the court to which he happened to be attached for the time being. The result has been that some interpreters receive little or nothing over and above their gradation pay, and others get two or three times as much. This applies with peculiar force to those men who are more or less permanently attached to the Police Courts or to the Court of Small Causes: In the former case there is very little translation work to do which is paid for; in the latter a great deal more than each man can comfortably or honestly do. Thus it appears that accident plays a far more important part in regulating the incomes of the interpreters than merit or standing, and it is not a matter for surprise if there is a great deal of heart-burning among them. Perhaps an illustration will make our contention clearer. We take the figures for July, which happen to be the latest at our disposal, to show the earnings in translation fees alone of the various interpreters :

	Burmese.	Chinese.	Hindustani.	Tamil and Telugu.	Gujarati.	Marwari and Sindhi.	Chittagonian, two interpreters.
	1st grade.	1st Grade *	5th Grade.	2nd Grade.	1st Grade.	3rd Grade.	
	Rs.	Rs.	Rs.	Rs.	Rs.	Rs.	Rs.
Chief Court ...	120	57	6	140	32	20	78 12 0
	3rd grade.		3rd Grade.	3rd Grade.			
	Rs.	...	Rs.	Rs.			
Court of Small Causes ...	229		229 12 0 †	568	†	‡	

\* Work for both the courts.

† Interpreter in Gujarati, Marwari and Sindhi also

‡ see Hindustani columns

These figures show that the interpreters who, by some lucky chance, happen to be placed in the Court of Small Causes, are much better off than the Chief Court Interpreters. We have entirely omitted the Police Courts interpreters, because they get almost nothing.

We shall now take up the second point of view. If the interpreters have some reason to complain, the public have a far greater one, because they are simply mulcted in urgent translation fees by the interpreters of the Court of Small Causes, or they are made to wait for days and days, sometimes by way of punishment, sometimes for want of time. The translation of even an ordinary signature, which would take about half a minute, is often not returned for a week or even ten days, and parties have to call for it day after day until it is returned. If these men have no time to attend to their work, there is no obvious reason why a portion of it should not be handed over to other interpreters who are often doing nothing at all. It is positively unfair that the public should be made to pay twice the ordinary fees, because we choose to have a system which is not in keeping, good as it may have been once, with the requirements of the present day. In order to remedy these evils, alterations on some such lines as the following may be made with advantage. First of all the interpretation and the translation departments ought to be completely separated. Those men who work in the court ought never to have any translation work, for which there ought to be a separate staff. All the translation fees should be credited to the Government, and the pay, both of the interpreters and the translators, ought to be increased proportionately. This will offer distinctly greater facilities to the public on the one hand, and would attract better men to the service on the other, besides making the work a great deal cheaper than it is at present. In the High Court of Bombay this system was adopted years ago. It has worked admirably there, and there is no reason why, if introduced here, it should not do the same.

### THE HIGH COURT'S.

Gopichand Bothra *vs* Kasimunnissa Khatun.  
I. L. R., 34 Cal. 836.

*Civil Procedure Code, sections 284 and 285*

Where the same property is under attachment by two courts of different grades, a sale effected by the court of a lower grade is not a nullity.

Jadu Lal Sahu *vs* Lewis.

I. L. R., 34 Cal. 48.

*Sanction for prosecution—section 195, Criminal Procedure Code—pendency for appeal—practice.*

Where the question was whether the respondents in a civil appeal should be allowed to act as private prosecutors under section 195 of the Criminal Procedure Code when their so doing would certainly delay and possibly defeat the appeal of the petitioners, and when the lower appellate court had declared that the evidence on which the respondents proposed to proceed appeared to it to be unsatisfactory to a great extent.

*Held*, that it was neither necessary nor desirable to grant sanction to one of the parties, and that the proper procedure in a case of that kind was to await the conclusion of the litigation and then to move the higher courts to take action, if necessary, in the ends of public justice.

Balbhadra *vs* Bhowani.

I. L. R., 34 Cal. 853.

*Gift—section 123, Transfer of Property Act—delivery of possession.*

According to section 123 of the Act a deed of gift being registered is valid whether accompanied by possession or not.

I. L. R., 25 All. 358 followed.

Jogendra Chandra Sen vs. Wazidunnissa Kahton.  
I. L. R., 34 Cal. 860.

*Inherent power of court—section 583, Civil Procedure Code.*

The High Court made an order dismissing the application for leave to appeal to His Majesty in Council, with costs.

*Held*, that there was inherent power in the court to make an order as to costs as it did in the present case, and that by analogy to section 583, Civil Procedure Code, the proper court to execute the order was the lower court.

Mahomed Mehdi Beka.

vs.

Mohini Kanta Shah Chowdhry.

I. L., 34 Cal. 874.

*Limitation—section 230, Civil Procedure Code.*

The rule of law is that it is only the last decree that can be executed and that limitation, therefore, would begin to run from the date of the appellate decree and not from that of the original decree.

Dildar Ali Khan vs. Bhawani Sahai Singh.  
I. L. R., 34 Cal. 878.

*Costs—partition—appeal.*

Costs in a partition suit up to the stage of the preliminary decree should ordinarily be borne by parties themselves. If there has been a frivolous contest, the party, by reason of whose opposition unnecessary costs were incurred, might be made liable.

An appeal will lie upon a question of costs when a matter of principle is involved.

Abir Paramanik vs. Jahar Mahomed Mandal.  
I. L. R., 34 Cal. 886.

*Mortgage—Solehnama—Transfers of Property Act, section 89—execution.*

A suit on a mortgage was adjusted and a decree made treating a solehnama filed by the

parties as a part of the decree. It was agreed that the amount due was to be paid by instalments and that on failure to pay the money covered by the instalments, the mortgaged property should be sold for realization of the amount.

*Held*, that the decree was valid in law and that section 89 of the Transfer of Property Act did not exclude other ways of enforcing a decree where the state of things contemplated by that section did not exist.

Surendra Nath Sarkar vs. Atul Chandra Roy.  
I. L. R., 34 Cal. 892.

*Minor—guardian and ward—suit for account—he who seeks equity must do equity.*

*Held*, where a minor comes to a court to have an account taken as between himself and his agent, and it is found on taking that account that the agent has made certain advances to the guardian—the only person to whom he could make advances as representing the minor—and those have been applied for the benefit of the minor, the agent ought to be allowed those advances, in taking the accounts. The plaintiff seeks relief from a court administering equity, and he must do equity himself.

I. L. R., 11 Bom. 551, distinguished.

Madhubandas vs. Naraindas.

I. L. R., 29 All. 535.

*Limitation Act—article 175C.*

*Held*.—That article 175C of the second schedule to the Indian Limitation Act applies as well to appeals from appellate decrees so to appeals from original decrees.

I. L. R., 28 Mad. 498, followed.  
I. L. R., 29 Mad. 529, dissented from.

Dost Mohomed Khan vs. Mani Ram.  
I. L. R., Ail. 537.

*Pauper suit—Civil Procedure Code, section 411.*

*Held*, There is no doubt that under the provisions of section 411 of the Code of Civil

Procedure the court fee payable in a pauper suit is a first charge on the subject matter of the suit and is recoverable by Government from any party ordered by the decree to pay the same, but it is not payable out of the property of a prior mortgagee of the property.

I. L. R., 2 All. 196, overruled.

Achhaibar Dube vs. Tapasi Dube.

I. L. R., 29 All. 573.

*Civil Procedure Code, section 317—one of the two joint decree-holders purchasing at auction sale.*

*Held*, that section 317 of Code of Civil Procedure did not preclude the other joint decree-holder from suing for a declaration that the property so purchased was the joint property of himself and the actual purchaser. That section was enacted to put an end to *benami* purchases, but it could never operate to bar a suit brought by one of the partners for a declaration that the property purchased was partnership property.

Kunai I all vs. Kundan Bibi.

I. L. R., 29 All. 571.

*Act No. V of 1882—(Indian Easements Act), sections 15 and 28(C).*

Where a plaintiff is claiming relief upon the ground that his prescriptive right to the passage of light and air to a certain window has been interfered with, it is enough to show that the right has in fact been interfered with. The plaintiff is not obliged to go further and show that he has suffered actual damage thereby.

Nattu Krishnama Chariar vs. Aunagara Chariar,  
30 Mad. 353.

*Transfer of Property Act, section 85.*

A party holding two mortgages on the same property and suing on the first mortgage alone, is in respect of the second mortgage a party to the suit under section 85 of the Transfer of Property Act, and if he omits to mention his second

mortgage and the property is ordered to be sold free of such mortgage, he cannot afterwards sue to enforce his second mortgage against such property.

I. L. R., 20 All. 322, dissented from.

I. L. R., 25 Mad. 108, followed.

Dharni Kota Venkaya

vs.

Budhrayu Surayya Garu.

I. L. R., 30 Mad. 363.

*Transfer of Property Act, section 99.*

A mortgagee sued the mortgagor for an instalment of the mortgage debt and obtained a simple money decree. In execution of such decree, the mortgagee brought to sale and purchased the mortgaged property. In a suit by mortgagor brought to redeem the mortgaged property.

*Held*, that the mortgagor, having been a party to the decree and to the order of sale, was not entitled to redeem.

I. L. R., 22 Mad. 372, followed.

I. L. R., 22 Bom. 624 and 5 B. L. R., P. 450, dissented from.

## Correspondence.

Letter addressed by H. A. LEVESON, Esq, District Magistrate, Rangoon, to the Honorary Secretary, Bar Library Association, dated the 31st October 1907.

I HAVE the honour to inform you that I have received the orders of the Chief Court to introduce into the Rangoon magisterial courts a new system of distribution of work. I have accordingly drafted a set of rules of which I forward herewith a copy and shall be much

obliged if you will be so good as to lay it before the members of your Association for favour of criticism and suggestions.

2. The primary objects of the proposed system are to facilitate the speedy disposal of the business of the courts and to minimise as far as possible the waste of time of persons attending thereat. I am of opinion that this can best be done by placing the duty of distribution among the different courts of all cases brought up in the hands of one magistrate, and as a matter of convenience, in the hands of the District Magistrate. To carry out this system involves the issue of rules on various points of detail, and I shall be very glad of the views of your members as to whether the rules I have drafted are likely to meet the convenience of all parties concerned, or on what points they can be improved.

3. I shall be much obliged if you can kindly favour me with a reply at your earliest convenience as I propose introducing the system with effect from the 1st January 1908.

1. All cases entered in the Police Register of unimportant cases will be laid before the Honorary Magistrate Benches.

2. Complaints of offences which the Honorary Magistrate Benches are empowered to take cognizance of and to try may be laid before such Benches.

3. With exception of the cases mentioned in 1 and 2, all other cases, whether on complaint or police report, will be first laid before the District Magistrate for orders as to the court by which they will be tried.

4. The District Magistrate will sit at 10-30 a.m. for the presentation of complaints and miscellaneous applications. Complaints presented by advocates will ordinarily be fixed for first

hearing (*i.e.*, examination of complainant and enquiry before issue of process if any) on the following day at 10-30 a.m.

5. All police cases ready to be sent up (*i.e.* with witnesses in attendance) will be laid before the District Magistrate for distribution at 11 a.m. Application for the transfer of such cases to any particular court (*e.g.*, in the case of cross-cases, etc.) should, whenever feasible, be presented at the same time.

6. All stipendiary magistrates will sit punctually at 10-30 a.m., for the hearing of complaints referred to them and disposing of miscellaneous business. They will then be in a position to commence the hearing of police cases referred to them or of previously adjourned cases not later than 11-30 a.m.

7. When fixing dates for postponed hearings magistrates should ordinarily, unless such postponed hearing is likely to be a protracted one, fix such cases for 2-30 p.m., and note the same on all processes issued. When a protracted hearing is anticipated 11-30 should be fixed, and in either case the fact should be noted on the cause list for the day of hearing.

8. Police cases not ready for presentation at 11 a.m. should be laid before the District Magistrate at 2 p.m. Ordinarily the witnesses should not be called but they may be so called in special cases or when the cases are not likely to be protracted.

9. At the conclusion of each day every magistrate's cause list for the following day should be carefully prepared with notes of probable duration of cases so as to be laid before the District Magistrate on the following morning.



# THE BURMA LAW TIMES.

No. 8.

DECEMBER 1907.

VOL. I.

*The Subscription for "The Burma Law Times" is Rs. 10 per annum, payable in advance.*

*Subscribers not receiving their numbers should communicate with the Editors as soon as possible*

*All communications should be addressed to the Editors, No. 1, Barr Street, Rangoon, who should be informed without delay of all changes of Subscribers' addresses.*

*The Editors hope to issue a volume a year consisting of 12 numbers, one to be issued monthly.*

## Editorial Notes.

WE wish all our readers a happy new year, and we say in the words of an American chaplain in an American court, ending a customary function: "God bless this court and bless these lawyers and make them feel that life is short and time is precious, and that it is not to be wasted in idle declamation! Amen!"

IF there is any truth in this statement, that the generous impulses of our nature are at their strongest at the beginning of the new year, we propose that we should all begin it by starting a Benevolent Fund for the use of old and unfortunate members of our profession who have, owing to stress of circumstances, been reduced to want

and destitution. We suggest that if all of us contribute what little we can towards it every month, we may be able to do some very useful work with the amount collected. That there is need for such an arrangement the recent unfortunate instance of Mr. Vaillant clearly shows. We take this opportunity of requesting those who wish to help a professional brother in real need to send their contributions to Mr. E. A. Villa, who has kindly started a list for Mr. Vaillant's benefit.

WE regret to hear that Mr. Justice Ormond has been very ill and that he is likely to take six months leave on medical certificate. We wish him a speedy recovery.

THERE is a very strong rumour at the Bar that a member of one of the Indian Bars is going to be appointed in place of Mr. Justice Ormond during his absence on leave. The appointment of a barrister practising in India to officiate as a judge in Burma is, for obvious reasons, based on a sound principle, especially if we bear in mind the fact that all advocates practising here come into direct contact with their clients. But we must confess that in this arrangement there is proof, for once, of distinctly unbusiness-like method on the part of the Local Government, because, though we import men from India with the slightest or no provoca-

tion, we seldom export any one from Burma in exchange. We cannot imagine that we submit to this practice, because any man that the Government of India choose to send out is good enough for Burma whilst no man that the Government of Burma can recommend is fit to preside on an Indian Bench. We ought to have sufficient self-respect by now to resist this treatment, and to act more in conformity with the recognized rules of the theories of exchanges at least.

IT seems to us that, among the lower grades of ministerial officers, some of the bailiffs are pre-eminently the most unprincipled and extortionate in their practices. When an application for bail, for instance, is granted, and the friends of the prisoner are unable to deposit cash, a large sum of money is often demanded by them on pain of the report being delayed and the accused being detained in jail for a number of days.

We may say that in all cases in which the party shows any anxiety that the matter should be hurried, some of these men find their opportunity and profit by it as they best can under the circumstances. If advocates reported them to their superior officers whenever cases of this sort came within their experience, they would be performing a duty which would benefit the public in no small degree.

IT is said that, in the Court of Small Causes, litigants make money out of advocate's fees. On payment of a ridiculously small fee they get a pleader to file his power and sign a plaint, which they have written themselves or have had written by a petition writer; when the case is called they appear in person, get the advocate's

fees taxed in usual course and pocket the difference between the fee actually paid and the fee allowed by the court.

IT is with feelings of no little regret and disappointment that we record or rather repeat the fact that the Burma Bar as a whole is distinctly lacking in a sense of duty both toward itself and toward the public. We speak this from our own experience during the past few months in connection with our journal.

WE have never had the intention of working the *Burma Law Times* on a commercial basis and therefore we do not complain that we see no prospect of amassing a fortune out of our editorial labours. In fact, from a financial point of view, the support that we have received from the members of the local and mofussil Bars, and to a certain extent from some judicial officers who like to hear and even pay for the information that we are able to place at their disposal about things and persons which would or ought to interest them naturally, has far exceeded the modest expectations with which we started eight months ago; and though we shall always be glad of any financial aid which would place our journal on a more permanent basis we shall never despond from a purely monetary point of view, so long as we continue to receive the support of those who are already on our list of subscribers.

WHAT makes us despond is the utter helplessness and the extraordinary lethargy displayed by our professional brothers in matters touching their own existence and interest. We have appealed to them in every imaginable way

to exert themselves a little more than they have so far done and to co-operate with us in furthering the objects we have in view of maintaining the dignity of the courts and of the profession; but we are constrained to admit that we have almost wholly failed in getting any praiseworthy response from them. In order to obtain information we have written circular letters to the different associations; we have addressed individual letters in certain cases to individual members of the Bar: and we have made appeals either personally or whenever possible through the medium of the journal and the nett results that we have obtained are to be found in the barren correspondence columns of our journal.

MEMBERS practising in the mofussil especially, who, if they wished, could flood our columns with good and reliable information, do not write to us. Some of them tell us they have no time and others are afraid to incur the displeasure of the judicial officers before whom they practise should their names be found out. Such an attitude of mind is entirely unworthy of a profession which has always prided itself on its manliness and fearless discharge of duty, not to say that it is absolutely unjust to ourselves and to the judicial officers themselves. For we are directly accused of not being able to preserve anonymity which we guarantee, and the officers of bearing imaginary spite. No healthy minded man or official minds fair criticism, and, if he does it is no part of our duty to flatter him by refraining from it if the occasion requires. Our own experience, we assure our readers, has been on the whole very pleasant, and with the exception of one or two men whose temperaments in our opinion were not redeemed by the softening influence of culture of any kind, we have received very countons treatment when.

ever we have had occasion to deal with them either in our editorial or our professional capacity; and we are quite certain that our correspondents, even if they wrote in their own names, incur no risk of being treated otherwise.

OUR mofussil readers must not imagine that their brethren in Rangoon have been more energetic, because we have not referred to them at any great length. We should have done so if we had not been fully convinced that in Rangoon the necessity of making money was so great for obvious reasons, that it naturally took up one's whole time, and permitted; of no other duties being performed.

#### JUDICIAL TRANSFERS.

MR. J. L. MCCALLUM, according to the *Burma Gazette* of the 14th instant, on his return from privilege leave, is appointed to be Assistant Settlement Officer, Pakoku district. This is the most recent instance in which the Local Government have practically smuggled into the Revenue Department an officer who they knew, or ought to know, would, in course of time, have made a very successful judicial officer. It seems to be the official tradition in this province, that as soon as any officer gives promise of being able and useful, he must be withdrawn into the Revenue Department or the secretariat, unless, of course, as in some cases, he happens to be not particularly popular in quarters which determine his sublunar destinies. This subordination of the judiciary to administrative expediency is wholly wrong in principle, not to say that it is utterly unworthy of any form of civilized government. It is contrary to our notions of duty, and it is opposed to the well-re-cognized methods of Indian Government. In India, if an officer was

withdrawn into the Revenue Department after a certain time, it would be considered a perfect scandal: and there have been cases in which there has been serious friction, owing to a difference of opinion on this point, between the head of the judiciary and the executive. Here, however, these events happen as if they were part of the natural order of things, because we are told, and even asked to believe, that conditions are so different in Burma from those in India, that any kind of judicial system ought to work as well as any other and that any officer whom the Local Government can spare is as good as any other to administer justice. This is casuistry so patent that we need neither take nor discuss it seriously.

We contend that the highest court in the province ought to have full control over judicial officers if it is intended that it should discharge its duties properly, and officers once appointed to the judicial service should not, except under unavoidable circumstances, be withdrawn without its consent or recommendation. If this is not done it will be impossible for the court to exercise proper disciplinary authority over its subordinates, because, unless the latter are made to feel that they can be punished by their immediate superiors, or that their future depends on their good opinion, they will hardly be thoroughly obedient.

It is ordinarily assumed in Burma that though experience is indispensable to writing a plausible despatch to the Government of India, it need form no necessary part of the training of a man who deals with questions of life and death. If it was otherwise, some attempt certainly would be made by the Local Government to give some sort of a special training to its judicial officers, before trusting them with high and responsible duties. Far from this being the case, an officer is transferred more often than not,

as soon as he has barely left what may be called his judicial *kindergarten*, and placed in a department where there is no chance of his keeping up or cultivating the knowledge that he has acquired as a judicial officer.

Moreover, this transfer of a young officer from the judicial to a totally different department is open to another objection. The judicial department has to pay for the experience by which the revenue authorities are ultimately going to profit, which is all the more unreasonable, for no officer is so expensive as one who is acquiring experience. That the Local Government are thoroughly conscious of this fact is quite evident from their practice of placing fresh arrivals, whenever convenient, in the judicial department where they make a number of experiments as it were in *corpore vili* on all classes of men, until they are fit to be transferred elsewhere.

#### MURDER CASES.

In our last issue we pointed out the advisability of Government furnishing at its own expense an advocate to defend a man charged with murder, when he is undefended, and we re-produced certain rules issued by the High Court of Bombay for the guidance of the subordinate courts in such cases. The practice of the High Court of Bombay is not exceptional, because the other High Courts, so far as we can ascertain, have also similar rules. In Burma the need for introducing this reform is far greater than in any other province, because of the exceptional circumstance (which few who have taken the trouble of going through the history of services in Burma would doubt) that the average previous experience as a purely judicial officer of a sessions judge is of much shorter duration as a rule than that of an average sessions judge in India.

We have no desire to cast any reflexion upon any judicial officers in particular. We merely state it as a general proposition and we say, that it embraces the whole of the subordinate judiciary. We have known officiating Deputy Commissioners and district magistrates of four years standing. We have known a District judge with even less experience than that; and we have seen special power magistrates with no more experience. A subdivisional judge or magistrate with less than two years' experience is not an uncommon phenomenon.

All this, however is by the way. What we are concerned with here is the necessity of furnishing undefended men in murder cases with advocates free of cost. If a practical illustration is needed of the liability of an accused person being hanged without a proper trial, just because he happens to be undefended, it may be found in *King Emperor vs. Nga Paw* (1). This was a case in which the accused was tried for murder. In the course of his judgment the learned judge said: "I confess I feel some doubt as to his sanity, owing to the nature and circumstances of his act.\* Still, it must be borne in mind, that there is such a thing in the East as running amuck. I do not indeed remember to have heard of a case of a Burman running amuck. Still the present case may well be one of running amuck. 'In most of these cases,' says Mr. Mayne, 'the judges appear to have, in my opinion wisely, exacted the extreme penalty of death' (*Criminal Law of India, third edition, page 424*). It certainly appears to me that, having regard to the tendency of the Asiatic to run amuck, it would be highly inexpe-

dient in a case of this kind to remit the extreme penalty of the law because of the possibility that the offender may be insane."

In spite of this doubt in the mind of the judge, and without in the least taking the trouble to try this preliminary issue as to the sanity of the accused, as he was bound to do, and as would probably have been pointed out to him, had the man been defended, he sentenced the unfortunate man, in furtherance of expediency, to death. Fortunately for him, the Code provides that a sentence of death should be confirmed by the High Court before it can be carried out, and the Superintendent of Jail, in submitting his report, happened to suggest that the man was of unsound mind. The learned Chief Judge and Mr. Justice Moore, before whom the case came up, with an amount of care and conscientiousness which ought to be an example to many other judges, examined before them the Superintendent, who was a medical man, upon the prisoner's sanity and ordered that all available witnesses should be found out and their statements taken as to his history and his antecedents. From the evidence of the medical man it appeared that he believed that at the time the prisoner committed the act proved against him, he was of unsound mind. The evidence as to his history and antecedents, as recorded under the orders of the Chief Court, was unsatisfactory and, except the fact that some time previous to the commission of this offence the prisoner was seen violently striking house-posts with a stick, no symptoms of insanity were discerned. The hon'ble judges refused to accept the explanation of the medical man to the extent of acquitting the accused, but they thought it of sufficient value to alter the sentence to one of transportation for life.

From this it is quite clear that, even apart from the higher question, that of humanity, a

(1) Reported at page 105 of this issue.

\* No.—motive is assigned or suggested to explain the murder: *Ed.*

great deal of time had to be wasted by the hon'ble judges, in investigating facts, which, if the sessions court had been assisted by an advocate, would naturally and legally have been investigated by that court. As this state of affairs is not of infrequent occurrence, some provision ought to be made to protect prisoners from the possibility of suffering the most terrible punishment the law provides, without the clearest proof that it is actually deserved.

### Correspondence.\*

TO THE EDITOR,

*Burma Law Times.*

SIR,

ANY one who has anything to do with the Rangoon courts must endorse your views as expressed in the last issue of the *Burma Law Times*. You have dealt with the subject from two standpoints: those of the interpreters themselves and of the public. From the point of view of the latter, the present anomalies, inconvenience, and avoidable trouble admit of an easy solution and that on the lines of the present system. Pending the elaborate and necessary reforms which you have suggested, why not that be done in respect of Tamil and Hindustani work in the Small Causes Court which is every day done in case of Bengali and Chittagonian languages? though there is one Bengali interpreter attached to the Small Causes Court, the whole translation work is distributed among three men, some of whom are posted to the Police courts. In case of these languages there is no queer rule or practice limiting the remunerative translation work to one man alone. Experience shows that

this equitable distribution has conduced to smooth working for all concerned. Why not, then distribute also the enormous Tamil and Hindustani translations among all the interpreters of the Small Causes Court and the Police Courts? So far as I know, only two fortunate men absorb the whole Tamil work and one single person the whole Hindustani work and translations of allied vernaculars to the entire and inexplicable exclusion of four Tamil and at least three Hindustani officers. The effects of this inequitable process you have indicated with your usual thoroughness. But those who actually come in daily contact with Small Cause Court subordinates feel that the grievances of the public are serious. The Bench Clerk is cashier, registering clerk, and Burmese interpreter all in one, so that no document, however urgent, can be registered for translation except as a favour or for a consideration in the form of double fee while the court is sitting. The amount of unnecessary translations which litigants are made to produce may be illustrated by the example of a suit for Rs. 150 in which the translation charges were first made out to be Rs. 110 and then considerably reduced why or how is not known. There is no question about the competence of the officers on the Police Court staff. Some of them are Masters of Arts and some are appointed examiners in Indian Universities. But I would leave to the authorities the question of individual efficiency. The public fail to see why they should be put to so much annoyance and expense by the perpetuation of the present system when an easy remedy lies in a fairer distribution of work and the consequent relief of congestion.

Yours etc.,

A.

\* The Editor do not necessarily identify themselves with the views of their correspondents.

## THE HIGH COURTS.

Dinshaw Sorabji vs. Dinshaw Sorabji.

I. L. R., 31 Bom., p. 472.

*Indian Succession Act, section 78—exercising general power of appointment.*

Sections 24 and 27 of the English Wills Act (7 Will. IV and I Vic., c. 26) reproduce in concrete form the general principles of law which are again reproduced in section 78 of the Indian Succession Act. The proposition of law laid down as the result of the joint operation of sections 24 and 27 of the Wills Act and deducible from the English authorities is, as stated in Farwell on Powers, at page 222, that "a general power of appointment may be well exercised by a will executed previously to the creation of the power, and that, too, by a mere residuary gift."

Prakas Chunder Dutt vs. Emperor.

I. L. R., 34 Cal. 918.

*Criminal Procedure Code—section 528—irregularity.*

It is incumbent on the officer empowered to transfer a case from one court to another to record his reasons for so doing when he directs a transfer. The omission to do so would only be an irregularity and is not a ground for setting aside the order where it has not prejudiced the accused.

Khater Mistri v. Sadruddi Khan.

I. L. R. 34 Cal. 922.

*Landlord and tenant—previous suit for rent—tenancy not proved—subsequent suit to eject the defendant as trespasser.*

In a previous suit for rent the defendant denied the relationship of landlord and tenant and the plaintiff's suit was dismissed. Plaintiff now brought a suit to eject the defendant as a trespasser. It was held that the defendant was in the position of a trespasser and was liable to be ejected.

Fayj Dhali vs. Aftabuddin Sirdar.

2 C. W. N. 755 followed.

Dindayal Mozundar vs. Emperor I. L. R. 34 Cal. 935.

*Security to keep the peace—Criminal Procedure Code, section 107— which party to be bound down—riparian right.*

The preventive jurisdiction of a magistrate must be exercised with caution. In a case involving the question of possession of land, a finding as to the present possession may be sufficient. But, in most other cases, if there are doubts as to the respective rights and obligations, both parties may be bound down until the rights and obligations are determined by a proper tribunal. Where, however, no doubt exists, the party in the wrong should be bound down and prevented from illegally exercising an alleged claim, or, in other words, the party who has clearly the legal right should be allowed to exercise such right without opposition, the other party being bound down. An attempt to ascertain legal rights should always be made by the magistrate before he directs one party to be bound down.

The right to the foreshore is a riparian right and ordinarily goes with the land above and, except as to certain well recognized rights appurtenant to navigation, etc., the proprietary right is seldom capable of denial.

Balaram vs. Mangta Dass.

I. L. R. 34 Cal. 941 (Special Bench).

*Limitation—section 4, Act XV of 1877—Civil Procedure Code, section 542—Full Bench decision.*

Held, that though an objection upon the question of limitation was not raised in the memorandum of appeal, leave should yet be given to argue it, as the point arose on the face of the plaint, and no question of fact had to be enquired into to enable the court to dispose of it, and that, when the point was thus taken, the court was bound to give effect to it, the provisions of section 4 of the Limitation Act being mandatory.

*Per Woodroffe, J. (dissenting).* That under the circumstances of the case it was a fair and proper exercise of discretion to disallow, under section 542, Civil Procedure Code, the objection which had not been set out in the grounds of appeal.

*Per curiam.* A decision of the Full Bench cannot be challenged and is binding on the court till it is set aside by the judicial committee or overruled by a special bench of the particular court constituted for the purpose.

Ijjatulla Bhuyan vs. Chandra Mohun Banerjee.  
I. L. R., 34 Cal. 954.

Valuation—section 50, Civil Procedure Code—forum of appeal.

Where a plaintiff fixes a certain sum as the amount of his claim only approximately or tentatively, and prays that the amount may be ascertained in the suit, the amount found due to him must generally be regarded as the value of the original suit for the purpose of determining the forum of appeal.

Dular Koer vs. Dwarkanath Misser.  
I. L. R., 24 Cal. 971.

Restitution of conjugal rights—defence—cruelty.

*Per Harrington, J.*—It would not be safe to say that whatever is a defence to an action for restitution of conjugal rights in the case of a European would also be in every case a defence in the case of a Hindu, but the court is not bound, in the case of Europeans and Indians alike, to order a wife to return to her husband if there is reasonable ground for apprehending that a return to her husband will imperil her safety. It is also held that the court was not bound to send a Brahmin lady to reside in a house in which her husband kept a low caste prostitute. It might be well open to argument that to impose on a high caste Brahmin lady the society of a low caste prostitute was such a gross breach of marital obligation as to justify the court in refusing a decree.

Najimuddin Ahmed vs. Albert Puech.  
29 All. 584.

Civil Procedure Code, section 522—award—Limitation Act, section 12 and article 158—Appeal.

The court is not to pass a decree upon an award until the time within which the application to set it aside has expired, otherwise, the decree would be premature, and consequently, notwithstanding the provision in section 522, it is open to the party aggrieved by the action of the court to maintain an appeal.

I. L. R. 18 All, 422 followed.

Tharaman Paude vs. The Maharaja of Vizianagram.  
29 All. 593.

Adverse possession—lease—possession derived from a lessee.

Possession during the term of a lease, when all that the owner is entitled to is the yearly payment of the consideration reserved by the lease, is not adverse to the true owner.

I. L. R., 27 All 395 followed.

I. L. R., 26 Cal. 460 not followed.

Abdul Majid vs. Amolak.

I. L. R. 29 All. 618.

Presumption—burden of proof.

In a suit for pre-emption, the plaintiff who alleges the price to be fictitious must give some *prima facie* evidence which would lead to the presumption that the price mentioned in the sale deed was not the real or true price. Having done that, it lies upon the vendor and the vendee, who set up the price as true and genuine, to rebut the presumption raised by the plaintiff's evidence.

I. L. R. 28 Cal., 617., not followed.

Muthuswami Mudali vs. Veeni Chetti.

I. L. R. 30 Mad. 382, Full Bench,

Criminal Procedure Code, section 195 (6) and (7) appeal to High Court.

The right of appeal conferred by section 195 (6) of the Code of Criminal Procedure is not restricted to a right of appeal to the appellate court to which the court of first instance is immediately subordinate. An appeal lies to the High Court not only in cases where the court of first instance refuses sanction and sanction is granted by the court to which that court is immediately subordinate, but also in cases where the court of first instance grants sanction and the sanction is revoked by the court to which that court is immediately subordinate.

I. L. R. 27 Mad. 223, approved.

Thaji Beebi vs. Tirumalaiappa Pillai.

I. L. R. 30 Mad. 386.

*Stamp Act I of 1879, section 35 secondary evidence.*

The mortgage relied on by the plaintiffs had been executed on one unstamped cadjan. The same not being forthcoming so as to admit of penalty being levied thereon, secondary evidence of its contents was not receivable.

*Held*, that it was not open to the plaintiff to rely on the oral evidence as to the alleged execution of the instrument and the alleged passing of possession of the property under that instrument, in order to show that that possession operated to create by prescription only the title of a mortgagee in the defendants.

An admission of the mortgage by the defendant's ancestor was also held not receivable on the same grounds.

Karuppa Goundan *alias* Thoppala Goundan  
*vs.*  
Periathambi Goundan.

I. L. R. 30 Mad. 397.

*Evidence Act I of 1872, sections 91, 95, 97,—false description extrinsic evidence.*

The general rule laid down in section 91 of the Evidence Act is subject to the exceptions laid down in sections 95 and 97 of the same Act.

Where a sale deed describes the land sold by wrong survey numbers, extrinsic evidence is admissible to show that the lands intended to be sold and actually sold and delivered were lands bearing different numbers.

Tirumalchariar vs. Andal Ammal  
30 Mad. 906.

*Variance between pleading and proof.*

A plaintiff who sues on and fails to prove an alleged gift, may rely on his title by inheritance.

Monica Kitheria Saldanha vs. Subbaya Hebbara  
I. L. R. 30 Mad. 410.

*Section 108 (J) Transfer of Property Act—liability of assignee of lease, for rent, to lessor from the date of assignments.*

Under section 108 (J) of the Transfer of Property Act, a lessee may transfer his privity of estate to an assignee, thus rendering the latter liable to the lessor on covenants running with the land, while he himself will continue liable to the lessor by reason of his privity of contract which does not pass by assignment. The liability of the assignee arises from the date of assignment and not from the date when he obtains possession.

The same rule applies to agricultural leases as well as to non-agricultural leases.

1 M. H. C. R. 24 3 Cal. L. R. 285, Dissented from

Krishna Boi vs. The Collector and Government  
Agent, Tanjore.

I. L. R. 30 Mad. 419.

*Civil Procedure Code section 27.*

Under section 27 of the Code of Civil Procedure, when a suit is instituted in the name of a wrong person as plaintiff by a *bona fide* mistake, the court has power to substitute the names of right persons as plaintiffs; and this power is not excluded in cases where the person originally suing has no right to institute the suit.







# THE BURMA LAW TIMES.

No. 9.

JANUARY 1908.

VOL. I.

*The Subscription for "The Burma Law Times" is Rs. 10 per annum, payable in advance.*

*Subscribers not receiving their numbers should communicate with the Editors as soon as possible,*

*All communications should be addressed to the Editors, No. 1, Barr Street, Rangoon, who should be informed without delay of all changes of Subscribers' addresses.*

*The Editors hope to issue a volume a year consisting of 12 numbers, one to be issued monthly.*

## Editorial Notes.

WE congratulate the Chief Judge on the sanction accorded by the Secretary of State to the proposal of the Government to raise his pay from Rs 3,750 to Rs. 4,000 per mensem. In our opinion even this increase is inadequate, because it brings the pay of the Chief Judge only to the level of that of a puisne judge in an Indian High Court. It ought at least to be midway between the pay of a puisne judge and a chief justice, namely, Rs. 4,500 (treating the Chief Justice of Bengal, whose pay is Rs. 6,000 per mensem, as an exception). Is this done, when there is need, there would be some inducement to a puisne judge of a High Court to come over to Burma, though we had much rather that our province had no occasion at all for importing men from India.

THE appointment of Mr. Justice Robinson is it seems to us a new departure: for we can recall no instance in which this province or in any presidency of India, (with the probable exception of the N. -W. P.) an advocate practising in the Chief Court of the Punjab was raised to the Bench of the Highest Court elsewhere. We trust that this experiment will prove successful and that, in any event, the Government of the Punjab will return the compliment by accepting a judge from the Rangoon bar should a vacancy arise.

WE regret to learn that the District Judge of Pegu has done nothing yet towards remedying, or even inquiring, into the evils referred to in the letter of the Honorary Secretary, Pegu Bar Association, dated the 21st August 1907, and reproduced in our October number. This apathy displayed by judges in matters affecting the Bar and their official fetish of regarding their subordinates as creatures altogether perfect, are absolutely baneful, and must result in degrading the administration of justice. It is not often that a mofussil Bar complains to the judge about his subordinates, and if the Pegu Bar has done so, the evils must be grave indeed. We are not concerned very much as to the nature or even the existence of these evils: but we protest most emphatically against this habit

of some of the judges absolutely ignoring representation's made by the Bar on any subject connected with Courts of Law and their working.

MANGAL SEN CAPUR, who was unanimously acquitted by the jury on the 16th of this month on the charge of attempted murder, was arrested immediately after under section 19 of the Arms Act for possessing arms and going out armed without a license, and sentenced to six months rigorous imprisonment by the Western Subdivisional Magistrate two days later. The arrest and the conviction alike show an amount of vindictiveness on the part of the police which is thoroughly scandalous. If the story that he told the court and the jury during his trial was true, the accused was guilty of a very venial offence and a nominal sentence would have met the requirements of the law.

In another column we reproduce an article which appeared in *Truth* on the 15th December on the identification of prisoners. There is no doubt that the precautions recommended in this article are ten times more necessary in this country where, along with great ignorance, we have to contend against corruption, often of the worst kind.

An application was filed the other day in the Court of Small Causes by a pleader, asking, that he may be allowed to withdraw from a case on the ground that he had been tricked by somebody into representing the defendant. The latter was subsequently represented by another pleader, and denied having ever seen or instructed the pleader making the application. It remains a perfect secret how this happened,

but there can be no doubt that the mysterious agency which accounts for so many local peculiarities in our profession was at work at some stage of the case.

WHATEVER may be the real reason, this instance shows what an amount of care is necessary in receiving instructions from clients in order to avoid possible pit-falls. In criminal cases little practical harm can follow but in civil cases very serious consequences may result owing to the power which the pleader has of making admissions and of confessing judgment on behalf of clients.

THAT the attention of the Legislature has been drawn to this evil is evident from the alterations made in the new Civil Procedure Code Bill in the section relating to pleaders and agents. In place of the old section, which practically imposed no restriction as to the mode in which a pleader was to be instructed, we have the following which requires the production of a power-of-attorney by an agent before he can sign a power for the pleader on behalf of his principal.

Order III, Rule 4 (1)\*—

"The appointment of a pleader to make or do any appearance application or act *for any person shall be in writing and shall be signed by such person or by his recognized agent or by some other person duly authorized by power-of-attorney to act in his behalf.*

In a country where so much business is done in the most informal way imaginable, it would be a matter of serious inconvenience if this section is passed into law, because, even if an

\* The italics represent the alteration made.

agent acts for his principal without a written power in matters involving thousands, he would have to obtain a regular power-of-attorney to instruct a pleader in the pettiest of cases in the Court of Small Causes. However, it is a move in the right direction because it would teach people to be more business like and ensure greater safety to pleaders themselves, and we hope that there will be no difficulty about passing this draft section into law.

#### DISTRICT JUDGE OF HANTHAWADDY.

MR. PRATT, District Judge of Hanthawaddy, has been transferred to the Tenasserim Division to officiate as Divisional Judge in place of Mr. Christie. Mr. Cope has been appointed to officiate as District Judge, Hanthawaddy, in place of Mr. Pratt.

This is one of those appointments which does not carry with it the conviction to the mind of the public that it is likely to promote the ends of justice, or that it is based on any higher principle than that of executive expediency. Mr. Cope has been for so short a time with us that it is not safe to risk any conjectures as to his ultimately proving a success or a failure as a judicial officer. We share, however, in common with the greater portion of mankind, the belief that experience is a qualification indispensable to the office of a judge, whatever else he may not possess, and we feel constrained to think that the Local Government has not acted with that amount of wisdom or conscientiousness with which it usually credits itself. We have no desire to make any reflexions on Mr. Cope personally, even if he had been longer with us, because he is not necessarily responsible for his appointment,

but we protest against this pernicious principle which subordinates the administration of justice to official considerations.

We publish the following history of Mr. Cope's service, taken from the last edition of the history of services, corrected up to 31st July 1907, in order to make over position clear.

Joined 28th November 1903.

Sagaing	... Assistant Commissioners and A. T. J. Subdivisional Officer	4th December 1903.
Myinmya	... do	21st June 1904.
Yenangyaung...	do	21st April 1905.
Salin	... do	26th August 1906.
Maubin and Magwe:	Forest Settlement	duty 23rd October 1906.
Maubin	... do	10th March 1907.
Privilege leave 3 months 15 days from		16th May 1907.

After August 1907 Mr. Cope has acted as Subdivisional Officer, Insein, and last of all, the was in the Secretariat on special duty, so far as we can ascertain.

From these facts we can see that Mr. Cope has been all together a little over four years in the service, and must be presumably under thirty years of age. He has spent practically the whole of his time in executive work as a subdivisional officer. All the judicial experience he has must have been acquired, if at all, during the short period between 1904 and the abolition, in 1905, of the anomalous old regime under which revenue, magisterial and judicial functions were ordinarily exercised by the same officer. Add to this the fact that the official bringing up of Mr. Cope has been more or less in the jungles where litigation is scanty and of the simplest kind and the stakes small enough to be determined by a rough and ready sense of justice, which may or may not be strictly according to law. To place such an officer at the head of the Hanthawaddy district, which is commonly regarded as

the most important in Lower Burma, is to treat the administration of justice with an amount of lightness with which most men out of this country must be entirely unfamiliar, and even we in this country who are not entirely devoid of humour and who ought to be used by now to every kind of judicial anomaly, and to the cheerful enjoyment of all the good things of life which emanate from the usual quarters, feel that we cannot survive this recent specimen of administrative work without considerably straining our nerves. The District Court of Hanthawaddy, with its headquarters in Rangoon, and practically unlimited jurisdiction, has to deal with cases of almost as much importance as the Chief Court, both as to value and complexity. Mortgage suits of the most complicated nature, suits asking for special remedies and insolvency proceedings involving intricate questions of law, are, among others, more common in this court than probably in any other district court in the province, and it seems to us that the judge of such a court ought to have a longer record of standing and experience than is shown in this instance if he is to inspire any public confidence in the efficacy of our judicial system.

#### LAW AND REVENUE.

THE order of Mr. Justice Moore, in the matter of the estate of Nicolson, reported at page 123 of the current number will probably lead to some complications. According to this ruling, the correctness of which seems beyond any reasonable doubt, the Financial Commissioner has all along been illegally exacting additional court-fees and imposing heavy fines for imaginary breaches of the Court Fees Act, in cases in which the value of the property, in respect of which letters of administration have been granted and the full court-fee on the value of the property at

the date of the application has been paid has increased between the date of such grant and the final administration of the estate. In view of this judgment the Secretary of State in Council, represented by the Financial Commissioner, is liable to make good to the parties concerned the amount of the additional court-fees and fines wrongfully levied, and action to recover them will undoubtedly lie in the ordinary civil courts if he refuses to refund them.

Moreover, if the Financial Commissioner questions this decision of Mr. Justice Moore, and, following his own interpretation of the law as laid down in the matter of E. T. B. White's estate—Civil Miscellaneous No. 11 of 1905 (referred to in the Assistant Registrar's note and presumably considered and dissented from by Mr. Justice Moore), claims additional court-fee and fines the petitioner, a very interesting question may arise as to whether the petitioner is bound to obey the Financial Commissioner's order in face of this ruling. It seems to us that the petitioner is bound, in the first instance to pay the court-fee and the fine because, if he does not, he is liable to distraint, but as we have said before, his proper remedy afterwards would be to sue the Secretary of State in Council for refund of the additional fee and the fine illegally levied. As all the courts in this province are bound by a ruling of the Chief Court, to which they are subordinate, they must restore the party aggrieved to his original position by ordering the Secretary of State in Council to refund the amount wrongfully taken from him.

The order of the Financial Commissioner in the matter of White's estate, to which reference has been made above, shows how the interests of Government in revenue matters are sometimes looked after and how both the letter and the spirit of the law often strained.

The order is so wrong on the face of it that we are unable to see how it came to be passed except, on the obviously untenable hypothesis, that collection of revenue is of such paramount importance as to override all other considerations. As evolving a proposition of law, it has no appreciable value, except to revenue authorities, and therefore, we shall not expatiate much upon its legal aspect. It is positively open to grave objection on ethical grounds. Though we are fully alive to the fact that ethics as a human science is probably over-rated, as our law books incline us to believe, and that it plays at the most a very humble part in regulating human affairs, the proposition that Government should claim a share in the profit if the property should increase in value and bear no loss if it should go down is wholly inconceivable morally. It may be that this is the principle ordinarily applied by all governments in dealing with revenue matters, but for that reason no one can seriously argue that it is a principle acceptable or justifiable in itself. There is no doubt that increase of Government revenue has a high place in any scheme of general administration, but, unless it is legitimately, or rather righteously effected, it becomes an evil which every right-minded man must dread and do his utmost to prevent from growing.

**Correspondence.**

**PRELIMINARY ENQUIRIES IN CONFESSIONS.**

TO THE EDITORS,  
*Burma Law Times.*

DEAR SIRS,  
THE Chief Court, by its circular\* dated 1903, 5th August, framed some much needed rules

**\*CRIMINAL CIRCULAR**

*Dated Rangoon, the 5th August 1903.*

Section 447.—The following instructions for the recording of confessions of accused persons, otherwise than in the

(I believe on the representation of Mr. E. A. Moore, then Sessions Judge, Irrawaddy Division) for safeguarding the interests of accused persons

course of an enquiry or trial, are issued for the guidance of magistrates:—

1. The provisions of section 164 and section 364 of the Code of Criminal Procedure should be carefully studied and observed in every particular.
2. Before recording a confession, the magistrate shall record a separate memorandum in the attached form, stating the date on which and the place at which the confession is recorded, the circumstances in which the accused was produced before the magistrate, the period during which and the place or places at which the accused has been in police custody, the questions asked under the provisions of section 164, sub-section (3) of the Code of Criminal Procedure, to ascertain that the confession is voluntarily made and the answers of the accused to those questions, the magistrate's reasons for believing the confession to be voluntarily made, and any remarks the magistrate may wish to add. Any written communication made to the magistrate by the police regarding the wish of the accused to make a confession shall be attached to the memorandum.
3. The questions put to the accused, for the purpose of satisfying the magistrate that the confession is voluntarily made, should not be of a perfunctory nature. The magistrate should endeavour to ascertain whether the confession is really made voluntarily, and, if possible, the reason why it is made.
4. When the confession of an accused person is being recorded, none of the police who have been concerned in his arrest, or in the investigation of the case, shall be allowed to be present or to be within sight or hearing of the accused. No police officers should be present such as may be necessary to secure the safe custody of the accused.
5. The certificate prescribed by section 164, sub-section (3) of the Code of Criminal Procedure, must be attached to the confession which should be separately recorded on Form Criminal No. 32, in accordance with the provisions of section 364 of the Code of Criminal Procedure.

Sections 17 and 18 of the Criminal Circulars are superseded.

**Criminal No. 69.**

*Memorandum to be annexed to confession recorded under section 164 of the Code of Criminal Procedure.*

The accused.....  
son of.....  
who is suspected of having committed the offence of.....  
..... was brought before me at.....  
m. on this..... day of..... 19.....  
in..... at..... by.....  
..... He was arrested on.....  
at..... and has been in  
the custody of the police at.....  
..... for..... days.  
The following questions are put to the accused in order to ascertain whether he wishes to confess of his own free-will. The answers to those questions are also recorded. \* \* \*  
For the following reasons I believe that the accused voluntarily wishes to make a confession. \* \* \* \* \*  
I record the following remarks:— \* \* \* \* \*  
The undermentioned persons are present when the confession is being recorded. None of them has been concerned in the arrest of the accused or in the investigation of the case. \* \* \* \* \*

when making a confession. It is clear that the preliminary enquiry that the magistrate is bound to make, and record, before he takes down the prisoner's confession, is with a view to having some light thrown on the motive of the prisoner in making a statement which is so obviously against his interests. It is, I am afraid, also clear that, if these rules were carried out by magistrates, in the spirit in which it was intended that they should be carried out, unscrupulous policemen would be deprived of a powerful engine of oppression.

It seems to me extremely doubtful whether the rules have operated to check the abuse that was aimed at, and it would be interesting to know from statistics whether the recording of confessions as a means of convicting an accused person has increased, or diminished since 1903, the date when the rules come into force.

So little have these rules been understood by the subordinate magistracy, that it has not been an uncommon experience to find that the memorandum which is supposed to be a record of a preliminary enquiry, has been actually filled in after the confession was recorded! The memo. is headed as follows: "Memorandum to be annexed to confession." The word "annex" seems to be responsible for this. It is a word which appears in dictionaries as meaning "To add on at the end;" "To unite a smaller thing to a greater," and although it may, and does mean more, it can hardly be denied that it has been unhappily used. It would be more appropriate in the two senses of the word above given, to speak of the confession as annexed to the memorandum, than of the memorandum as annexed to the confession. I offer the Registrar of the Chief Court, therefore, the suggestion that the unambiguous word "prefixed" be used in place of "annexed" in the printed forms.

The form of the memorandum is capable of improvement in another and more important direction. At the top of page three appears in print the following words: "For the following reasons I believe that the accused voluntarily wishes to make a confession." There can hardly be any question as to what is required of the magistrates, under this heading. He is invited, though not directly, to state as far as he can ascertain it, the motive of the accused in making the confession, and he may substantiate his opinion of the accused's motives by reasons.

Although a public prosecutor, I have seldom come across a memorandum where the magistrate's recorded reasons under this head have any real bearing on the motives of the accused. As I write, I have a memorandum before me which is filled up as follows: "For the following reasons I believe that the accused voluntarily wishes to make a confession. The above questions are set (*sic*) clearly and unhesitatingly (*sic*) and he made his answers clearly." The magistrate then proceeds to record the following remarks: "The confession given appears to be trustworthy, being orderly and complete."

I have taken this memorandum at random and I am sure that it is a very fair sample of many others. If every case in which the magistrate's remark on page 3 is irrelevant, is examined, you will find either ignorance of what is required, or affectation of ignorance; for, from the indirect wording of the form it is very easy for the intelligent magistrate to evade the point of the enquiry, out of a desire not to try too closely into the doubtful methods of policemen whose zeal is greater than their rectitude.

To make ignorance no excuse, and evasion impossible, I would suggest a direct appeal to the magistrate's conscience; thus "My opinion as

to the motive which has operated upon the accused to make this confession is as follows." Then, in place of "I record the following remarks," which occurs lower down in the form, I would suggest: "My reasons for the opinion are."

The truth is more likely to be elicited by direct language which leaves no room for misapprehension or evasion. It can be left to the trying magistrate to determine whether the opinion given by the magistrate who recorded the confession is one which is consistent or not with the free volition of an accused person. The trying magistrate will at all events be in a much better position to judge whether he should admit or reject a confession, than is the case at present.

Yours faithfully,

CYNICUS.

—  
"SCRUTATOR."

*Extract from "Truth," dated 15th December 1907.*

It is very easy to understand the extraordinary interest evoked by the trial of Robert Wood. I confess to having followed it keenly myself. The surroundings of the case may be squalid and revolting, but the scientific process of constructing a case on the one side and demolishing it on the other, the conflict of evidence, and the battle of wits at the trial, with a dark tragedy in the background and a man's life depending on the issue, afford a fascinating and thrilling study; and in this case all the elements of interest were so accentuated that it will be long remembered in the annals of crime. Among the many striking points in the evidence, there

is one of direct concern to the public. I refer to the erroneous identification of the prisoner by a number of witnesses. There can be little doubt that those who deposed to having seen Wood in the company of the murdered girl on various occasions prior to the date when he says he first made her acquaintance were at fault, and the witness McGowan, who gave the only evidence which could have availed to convict the man, was unquestionably wrong. Apart from the strong *alibi*, the defence was able to produce the man who, in all reasonable probability, was mistaken by McGowan for the prisoner. Yet McGowan goes to the police station, admits that he cannot identify the prisoner by his general appearance, and then unhesitatingly picks him out by his walk when seen from behind. At the same time he is an independent witness, who undoubtedly gave all his evidence in perfect good faith.

You cannot have more convincing proof than this of the untrustworthiness of the process of identification in criminal cases as at present carried out. It is not as if this were an isolated case. Everybody remembers the case of Mr. Beck, and there have been even equally clear cases of erroneous identification before and since. It has always seemed to me that the management of the business of identifying an accused person ought not to be left exclusively in the hands of the police. I think that a magistrate should always supervise it, and that the prisoner should be allowed to have his solicitor present to watch the proceedings. In saying this I do not question the general desire of the police to do the thing fairly—least of all in Wood's case, where the prosecution seems to have been conducted throughout with scrupulous fairness. What I mean is, that the mere desire to be fair is not a sufficient protection to the prisoner. There is

always a possibility that when half-a-dozen prisoners are paraded for inspection by a witness, the man who is there to be identified will have something to distinguish him from the rest. In the case of a crime of abnormal character, the man accused is rather likely to be of a different class and type from the everyday denizens or police or prison cells. This may influence the mind of a half-educated person who has come for the purpose of picking one man out of the group. What is not less important is that a suggestion may be easily, though quite involuntarily, conveyed to a person who is in doubt and endeavouring to make up his mind by another person who wishes or expects that the decision should be in one particular direction. Nearly everybody is familiar with this in exhibitions of "thought-reading" and such like performances. A glance of the eye, an insignificant movement, will be quite sufficient to convey a hint which is looked for, whether consciously or unconsciously.

In the case of McGowan it is quite clear that he thought he identified Wood by his walk. He had certainly seen a man on the night of the murder, and thought he noticed something peculiar about his walk. On the other hand, several witnesses who knew Wood well deny that he had any peculiarity of gait, and though there was a witness to the contrary effect her evidence was not quite satisfactory, and it did not appear that there was any similarity between the walk of the man whom McGowan had probably seen and the peculiar walk attributed to Wood. In this state of the evidence, one would like to have been present at the time of McGowan's identification and to have noted the behaviour and faces of the policemen present, and to have seen whether the witness looked to their faces or anywhere else before he made up his mind. Every detail of such an experiment requires to be most care-

fully watched and guarded against the possibility of the conveyance, consciously or unconsciously, of any suggestion to the mind of the witness; and it is no reproach to the police to say that they cannot be relied on to take all the necessary precautions. If that is true in London, under the immediate eye of the Criminal Investigation Department, how much more must it be in country places, where police intelligence is often at a minimum, and even the desire to be strictly fair not always certain? It is well to remember here the case of Mr. Edalji, in which a committee, appointed by the Home Office, has expressly found that the police were unduly anxious to make out a case against the prisoner, with the evident result that they gave evidence which could not be relied upon. Only the other day another man was arrested and kept in confinement for a week on a similar charge to that against Mr. Edalji, without a particle of evidence against him worthy of the name, and here it has been alleged, and not denied that, in tendering the one serious-looking piece of evidence against the prisoner the police suppressed a fact which made this evidence absolutely insignificant. With police in this frame of mind—and it is a common frame of mind in the country, if not in London—what security is there that the precautions which are indispensable, if the identification of a prisoner by a witness is to be of any value in a doubtful case are scrupulously observed? The most strict rules of procedure ought to be laid down for the guidance of the police in this delicate business. But I repeat that, to make the process sure it should be conducted by a magistrate in the presence of the prisoner's legal representatives, and I should say it would be safer that after the witness had been introduced on to the scene no police officers should be present, or, at any rate, visible.

Apart from the possibility of hanging the wrong man, and the certainty of exposing him to terrible anxiety and heavy pecuniary loss, it must also be remembered that while the police are hunting the wrong man the right one is escaping further and further beyond chance of capture. There is a double reason, therefore, for guarding against mistakes by witnesses which are calculated to throw the police on a false scent. The woman Dimmock was murdered on September 11. Over three months have elapsed before it has been satisfactorily established that the police had got hold of the wrong man. It is a fair presumption that during the greater part of that time they have given up the search for further clues to the murderer, and devoted their energies exclusively to looking for evidence against the man in custody. It is easy to be wise after the event. The police have shown great energy and skill as well as perfect fairness in getting up their case. Had I been in charge of the investigation, I have no doubt that I should have followed precisely the same course, for, until the trial was well advanced the case for the prosecution looked very strong. But the fact remains that the case would not hold water, and that all the time and labour expended upon it have been worse than wasted, for they have all tended to facilitate the escape of the murderer. We all hope, of course, that it may not be too late to catch him. The evidence at Wood's trial disclosed certain clues which possibly may be followed up with practical results. But the detectives are likely to be disheartened by what has occurred, likely also to cling to their original hypothesis, in spite of the verdict of the jury, and everybody can see that the chance of the guilty man being within reach at the present date is remote. The prospect, therefore, of a successful solution of the mystery does not look very bright. There is a long list of unpunished

crimes of this class within the last few years. If the Camden Town murder is to be added to them, it may at any rate help to show where the present method of investigation contains possibilities of error.

### THE HIGH COURTS.

Mowj Monji vs. Kuverji Nanji.

I. L. R. 31 Bom. 516.

*Civil Procedure Code, section 28—meaning of "In respect of the same matter—practice."*

The object of section 28 seems to be to avoid multiplicity of suits if it could be done without embarrassment to any of the defendants.

The general principle deduced from the result of the various cases on this point is summed up at page 146 of the Annual Practice, 1907, where it is said: "The general principle governing the joinder of defendants would seem to be that there must be a cause of action in which all the defendants are *more or less* interested, although the relief asked against them may vary, but that separate causes of action against separate defendants quite unconnected and not involving any common question of law or fact cannot safely be joined in one action."

I. L. R. 12 Cal. 555 (followed).

Bhaghat vs. Narayan.

I. L. R. 31 Bom. 552.

*Civil Procedure Code, section 257A—Indian Contract Act (IX of 1872), sections 2, clause (g), 23 and 24.*

Section 257A, Civil Procedure Code, does not make the agreement therein illegal, in the sense of prohibited by law. It only prevents such agreements being enforced in a Court of law. See I. L. R. 16 Bom. 618.

It is well settled that, if several distinct promises are made for one and the same lawful consideration, and one or more of them be such as the law will not enforce, that will not of itself prevent the rest from being enforceable.

Hakim Lal vs. Moosahar Sahu.

I. L. R. 34 Cal. 399.

*Transfer of Property Act, section 53—good faith—fraudulent preference—frame of suit—appeal.*

A suit under section 53 of the Transfer of Property Act to obtain a declaration that a conveyance is voidable at the instance of the creditors of the transferor, must be brought by or on behalf of all the creditors and the suit, unless so framed, would not be maintainable.

But a suit cannot be dismissed on this ground, if the objection is taken for the first time in appeal.

A conveyance or transfer, whether founded on a valuable or adequate consideration or not, if entered into by the parties thereto with intent to hinder, delay, or defraud creditors, is void as to them.

A mere fraudulent intent on the part of the grantor alone, will not invalidate the transfer if it is not for valuable consideration, and there is no want of good faith on the part of the grantee. Where, however, the transferee is himself a creditor, he occupies a more favored position.

In the absence of a law of bankruptcy, a preferential transfer of property to one creditor cannot be declared fraudulent as to other creditors, although the debtor, in making it, intended to defeat their claims, and the creditor had knowledge of such intention; if the only purpose of the creditor is to secure his debt, and the property is not worth materially more than the amount of the debt, the transaction is not fraudulent.

Proof of a valid indebtedness does not necessarily disprove the existence of a fraudulent intent.

Tribeni Sahu vs. Bhagwat Bux.

I. L. R., 34 Cal. 1037.

*Appeal—stay of execution—power of appellate Court to stay sale.*

Held by the Full Bench that, when an appeal has been filed against a decree for money, the appellate court has jurisdiction to stay the sale

of immoveable property of the judgment-debtor in execution of that decree, pending the disposal of the appeal.

Vasudeva Mudaliar vs. Srinivasa Pillay.

I. L. R. 30 Mad. 436 (P. C.)

*Limitation Act (XV of 1877), schedule II, articles 132 and 147—application.*

A suit on a simple mortgage bond to enforce payment of the amount due on the bond by sale of the mortgaged property is governed by article 132 of schedule II of the Limitation Act (XV of 1877) and not by article 147.

The latter article is limited in its application to one class of mortgages in which alone the suit can be, and always is, brought for foreclosure or sale, that is, to mortgages in the English form.

Subramanian Chetty vs. Alagappa Chetty.

I. L. R., 30 Mad. 441.

*Negotiable Instruments Act (XXVI of 1881), sections 8, 78—indorser, on regaining possession of bill, may strike out name of indorsee and himself sue on the bill.*

When a drawer or indorser takes up a bill by paying the holder, he is entitled to maintain a suit on the bill against the parties antecedent to himself and to strike out subsequent parties who, by reason of his payment, have ceased to have any rights or liabilities under the bill.

Where a bill is indorsed for collection and is returned by the indorsee to the indorser, the former ceases to be the holder within the meaning of section 8 of the Act, and the latter can maintain a suit on the bill by striking out the name of the indorsee.

Kamalamma vs. Komandur Narasimha Charlu.

I. L. R. 30 Mad. 464.

*Transfer of Property Act (IV of 1882), sections 88—90—personal liability for costs can be enforced only under section 90.*

It will be contrary to the scheme of the Transfer of Property Act, and to the practice of the English Courts of Equity, to make the mortgagor personally liable for costs in any

case before the sale proceeds have proved insufficient to satisfy the mortgage claim.

A decree under section 88 of the Transfer of Property Act must not order the defendants personally to pay the costs. It may contain a declaration of the personal liability of defendant for principal or costs, but such a declaration is not part of the usual form of decree under the Transfer of Property Act and is enforceable only under section 90. The words 'the amount due on the mortgage for the time being' in section 90 must be taken to include costs.

Emperor vs. Siranaeu and other.

I. L. R., 30 Mad. 469.

*Criminal Procedure Code, Act IV of 1888 section 307—Jury not to be questioned as to reason for verdict.*

When the jury return a verdict on the general issue of guilty or not guilty, and there is no ambiguity as to the precise offence of which the accused are convicted or acquitted, section 307 of the Criminal Procedure Code does not authorize the session judge to question the jury.

Joti Kuruvettapa vs. Izari Sirusappa.

I. L. R. 30 Mad. 478.

*Civil Procedure Code, Act XIV of 1882, section 375—compromise in a suit for money by which the agreed amount is charged on property is lawful and the relief by way of charge 'relates to the suit.'*

The language used in section 375 of the Code of Civil Procedure is wide and general, and there is nothing in principle or in the language of the section to restrict the relief to be granted in accordance with a compromise to what is prayed for in the plaint or less.

In a suit for money, where the plaintiff prays for a simple money decree, an agreement by which the parties agree that the amount decreed according to the compromise should be a charge on certain properties, is 'lawful' and 'relates to the suit' so as to be embodied in the decree.

Aitamma vs. Naraina Bhatta.

I. L. R. 30 Mad. 504.

*Limitation Act (XV of 1877), schedule II, article 179 clause 6—res judicata.*

A decree directing payment of future maintenance from the date of the plaint, till death of recipient at a certain rate, is a decree for payment on that date in every subsequent year and the period of limitation for the execution of such a decree is that prescribed by article 179 (l) of schedule II of the Limitation Act.

An erroneous decision on a question of law in a previous application for execution of such a decree does not operate as a bar in a subsequent application to recover arrears which occurred subsequently.

I. L. R. 14 Mad. 396, followed.

Manickka Odayan vs. Rajagopala Pillai,

I. L. R. 30 Mad. 507.

*Civil Procedure Code, Act XIV of 1882, sections 244 310A.*

The question of setting aside a sale in execution under section 310A of the Code of Civil Procedure is a question relating to the execution of decree within the meaning of section 424 of the Code of Civil Procedure, even when the proceeds of such sale are sufficient to satisfy the decree and the auction-purchaser is a person other than the decree-holder.

I. L. R. 21 Mad. 416, followed.

The auction-purchaser at a court sale, is the representative of the decree-holder for the purposes of section 244 of the Code of Civil Procedure.

I. L. R. 28 Mad. 87, followed; I. L. R. 19 All. 140, I. L. R. 20 Mad. 487, not followed.

The transferee acquiring an interest in the property of the judgment debtor after such property had been sold in execution, has a right to apply under section 310A of the Code of Civil Procedure.

I. Cal. W. N. 279, dissented from; I. L. R., 26 Mad. 365, followed.



# THE BURMA LAW TIMES.

No. 10.

FEBRUARY 1908.

VOL. I.

*The Subscription for "The Burma Law Times" is Rs. 10 per annum, payable in advance.*

*Subscribers not receiving their numbers should communicate with the Editors as soon as possible,*

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## Editorial Notes.

MR. JUSTICE Ormond, since his return from leave, sits on the Appellate side. Mr. Justice Moore continues sitting on the Original side.

THE Lower Burma Courts Amendment Act, by which cases over Rs. 1,000 in the Court of Small Causes, Rangoon, are made appealable, came into force on the first of this month. Mr. Bagley has fixed every Wednesday of the week for the trial of these cases.

IN another column we publish a copy of a letter addressed by the Bar Association to the local Government, on the proposal in embryo to establish a City Court in Rangoon. We are glad to be able to feel that the Bar Association is at last waking up and taking a little more

interest in public affairs. Its recent activity has been very great, on the whole, but we hope that a re-action will not again set in, as there are many public questions yet which require its immediate attention.

Among these we may mention the formation of an Incorporated Society on the lines discussed by us elsewhere in the current number—representation to the proper authorities (a) to establish an amalgamated High or Chief Court for the whole of Burma; (b) to make administrative arrangements by which special training may be given to judicial officers; (c) to give the Chief Court the initiative in making judicial appointments and effecting transfers; (d) to draw attention to corrupt practices in various departments of the subordinate service; (e) to amend the law with reference to touts and touting (f) to abolish the appointments of Special Power magistrates, *ex officio*, or other and to increase the number of sessions judges or to appoint assistant sessions judges in their place if necessary; (g) to obtain the right of second appeal on facts in all cases from the jungles; (h) to abolish the objectionable practice of appointing policemen without legal qualifications as public prosecutors.

THE other day the Cantonment Magistrate sentenced a man to twenty stripes, evidently for

a petty theft. The sentence was to be carried out the following morning, before the man had any chance of appealing. His advocates, Mr. Jordan and Mr. W. E. Bonnerjee were, however, very energetic, and an application to stay the order was made the same day to the Chief Court and granted.

THE barbarity of some portions of our penal law is nowhere so marked as in the Whipping Act. Whipping as a punishment is always revolting and, in our opinion, it degrades alike those who order its infliction and those who are objects of it. But if methods of legislation require that whipping must exist as a punishment in order that they may be considered thoroughly wise, we hope that the amendment of the Act, which we have been promised soon, would make it more humane, than it has hitherto been. Offences which involve no injury or outrage to the human body ought no longer to be made punishable with whipping, especially in the case of adults, and in no case ought it to be inflicted before reasonable time has been given to the convicted person to appeal.

IT may be remembered that some time ago Sir C. Rivaz seriously suggested that rioting ought to be brought within the Whipping Act. Whether this arose from sheer love of the naïve or natural relish for the gruesome, it is difficult to say. But the Government of India evidently did not accept the suggestion, for obvious reasons. If it had it would have left many respectable men, notably Bengal Zemindars, perfectly at the mercy of the magistracy which, until it is deprived of its executive powers, must necessarily at times be influenced by other than judicial considerations.

We trust that, whatever else happens, proposals such as these, will never be entertained with any amount of favour when the promised Amendment Act is brought before the Council

THERE have been cases in the Subordinate Courts recently in which Advocates, at the request of parties, have given evidence in order merely to contradict witnesses when their statements in court have differed from those previously made before themselves. It is no doubt incumbent on every one, whether he is an advocate or not, to help the court in elucidating the truth, but we think that it is a practice which is not likely to raise the tone and status of our profession. Moreover, in the long run, it will be productive of positive harm instead of good to the public. It is generally known that advocates are in the habit of taking a personal interest in cases and of contradicting witnesses, the latter will be chary of entering a lawyer's office and making any statements at all. Owing to this reason if an advocate refuses to give evidence we do not suppose any court will compel him to do so.

It may not be inappropriate to mention also in this connection the personal element which is brought into the conduct of cases even by advocates of long standing who ought to set a better example to junior members of the profession. It sometimes happens, we regret to have to state, that an advocate puts questions in cross-examining a witness, which have more the appearance of being inspired by personal spite than regard for his client's cause. This, however, is no excuse in our opinion, for his opponent to get up and suggest or state the real motive to the court. Witnesses as a rule know quite well how to protect themselves and

are not likely to lose any opportunity either of explaining themselves or informing the court of the real state of affairs—a method which probably tells more than any statement from the bar. Besides this, a method or procedure which creates a dread of personal imputation being made against advocates by their opponents is always to be condemned. It must necessarily prevent them from exercising the fullest privilege of action they are entitled to according to law and must damage, in consequence, their clients' cause, and possibly the reputation of their own profession for conscientious fearlessness.

#### ABOUT OURSELVES

THE most pleasing feature of the recent controversy between the Bar and Mr. Cope was the staunchness shown by the Burmese members of our profession, in abstaining from appearing in the Hanthawaddy District Court in consequence of our resolution of the 5th of February.\*

The sacrifice on their part in the common cause was as real as it was sincere. The grateful reference made to their conduct at the last meeting, was thoroughly deserved, and we hope that it has been recorded in the minutes of the proceedings by the Honorary Secretary.

Probably the only important result, so far as our profession is concerned, of this legal campaign, is that it has drawn our attention both to our strength and our limitations. On the one hand, it is clearly proved that members of our profession as a whole are capable of combining against and resisting any extraneous invasions that may be made upon their dignity and self-respect. On the other, we have seen that the Bar Library Association as an organization for

enforcing general discipline or making any prolonged passive resistance if and when required by circumstances is not a very effective body. A great deal must always in these cases, depend upon voluntary co-operation and individual ideals of professional conduct; but it is obvious that, some provision for punishing recalcitrant members who set on their own personal good a value higher than that of the rest of the profession must be made or a time must come when concentrated action must become extremely difficult, and even impossible, whether in matters of personal professional discipline or in cases of outside aggression.

For these reasons it may not be inappropriate to consider whether a society, corresponding to the Incorporated Law Society, or any such other body may not now be founded with advantage for the whole of Burma, or, at least, for Rangoon. No doubt the greatest difficulty in the way of inaugurating such a society as this will be in reconciling the different branches of the profession. But we do not think that it is so insuperable as to make any satisfactory results impossible of attainment.

In this province the need for such an organization is much greater than elsewhere; because, we have not only, to reckon with the lower branches of the judiciary in their state of infancy, but we have to militate against those old and deep-rooted internal evils which are sapping the vitality of the profession and are degarding it to an extent entirely incredible. As we have discussed these elsewhere, it is not necessary to repeat them now. To these local conditions may be added the absence or weakness of public opinion. In civilized portions of the world public opinion rightly expressed is the most potent factor in regulating legal and judicial life and counts among its most salutary influences. There

\* Reproduced in the foot-note to our next article.

is no better way of creating and cultivating it than by founding a responsible body who can collect facts accurately and give them publicity.

Until the Association considers the question, it is difficult to lay down the precise lines on which we should work. But if our proposal is seriously entertained, we venture to suggest, in the meanwhile, that bearing in mind the following points, we are not likely to go far wrong, namely:

- (1) To give each branch of the profession proper place in its constitution,
- (2) To make arrangements for collecting facts throughout the province and for publishing and communicating them officially to the proper officers,
- (3) To make arrangements for enforcing professional discipline and to provide for punishing cases of disobedience.

We are quite prepared to be told by some of our readers that all this savours too much of the utopian. But we never despair; some allowance has always to be made for wisdom and experience, and it is always worth making.

A MORAL.\*

Though we fully believe that Providence takes a more lively interest in all who are in any way connected with the administration of justice, including ourselves, we do not so implicitly believe in her morality as to suppose that everything happens in life with the express purpose of effecting our ethical improvement. We cannot, however, help reading many instructive lessons in the struggle against the Hanthawaddy District Court from which we have just

emerged. The most important of these is probably furnished from the part played by the local Government. Few would doubt that it is primarily responsible for all the unpleasantness which we have had to face in this affair. First it imposed upon the public by appointing an officer who, to its knowledge, was scarcely experienced enough to discharge the responsible duties entrusted to him and now it has insulted it by keeping him on after being fully convinced that it would be inadvisable to do so on more grounds than want of experience.

Mr. Cope first took over charge from Mr. Pratt on the 16th of January. On the 24th he announced to Mr. J. E. Das and Mr. Fuller that he would allow no witnesses to be examined through an interpreter. Upon this Messrs. Das and Fuller requested Mr. Cope to postpone passing orders prohibiting interpretation until they had an opportunity of consulting the Bar Association. Mr. Cope, in consequence, postponed passing orders until the 31st January.

On Saturday, the 25th January, a special general meeting of the Bar Association was called to consider what step should be taken in view of Mr. Cope's announcement, and a deputation, consisting of Messrs. Agabeg, Das, Ah Yain and McDonnell was elected by a unanimous resolution and waited immediately on the Chief Judge, who promised to look into the matter. On the 29th the following indiscreet letter appeared in the *Rangoon Gazette* :—

"I think the recent rules and the account of the deputation of four advocates to the Chief Judge are worthy of a longer comment than the few lines in your yesterday's issue. Before the Chief Judge, Mr. Agabeg stated that hitherto English-speaking barristers had been allowed to examine and cross-examine witnesses in the court through the medium of the clerks acting as interpreters. The present District Judge had directed that after the 31st January this would not be allowed, and that, as Burmese was the language of the court, the examination of witnesses and cross-examination must be in Burmese. Further, Burmese or Indian advocates were to divest themselves of boots and shoes before entering the court. This was a direct infringement of the rules laid down by the Government of India and also by the Chief Court as regards such advocates. Mr. Ah Yain was requested to take off his shoes in the Hathawaddy court only last week, but he had taken no notice of the request, and on his saying he appeared for a plaintiff in a case, he was allowed to address the court in the same costume in which he appeared constantly in the Chief Court. As regards pleadings, it had hitherto been the practice to file them in English, and in the event of the other side not engaging an English-speaking advocate, to make a translation in Burmese on request. The present Judge wanted the original plaint or written statement to be in Burmese. The Chief Judge enquired how Burmese barristers liked the new rules. Mr. Das stated, those that he had spoken to on the subject had informed him they preferred the old rules. Mr. Agabeg said that under all Mr. Cope's predecessors the old rules had worked well and without any friction, and it would be impossible for English-speaking barristers or advocates to appear in the court if the present rules were allowed to continue. The Chief Judge thanked the deputation for their representation and promised to pass orders in the matter at an early date.

\* As most of our readers must be familiar with the facts of the dispute between the Bar and Mr. Cope, District Judge Hanthawaddy, we have relegated them to the following footnote. Mr. Cope's history and qualifications have already appeared in our last number page lxxix.

The unseemly desire to preserve its prestige is the only explanation of the violence which is thus offered to public feeling and our ideas of self-respect. That such a paltry motive as this should so far prevail as to make it forget all other considerations discloses a state of affairs which is calculated to give rise to serious reflexions in other parts of the world. Moreover, until it is shown that the prestige of a government is increased or vindicated by persisting in error, even at the risk of trifling with the administration of justice, we fail to see how the local Government has accomplished even this moderate feat which we say is at the bottom of the whole scandal

"The Hanthawaddy District Court is perhaps the most important one of its grade in the province, this being one of the wealthiest districts. It seems extraordinary that a court recently presided over by such experienced judges as Captain Nethersole and Mr. Pratt should be now relegated to a gentleman of some three years' service, nearly all of it in Forest Settlement work. Mr. Cope has had no experience in Civil work. He recently dismissed an application for attachment of paddy crops before judgement and, I dare say, rightly enough. The next day the barrister for the applicant showed him a telegram received from the applicant stating that defendant was selling his crop and "You dismissed my application for attachment yesterday." The judge then wired to defendant "Dont sell your crop," a novel mode of procedure, unknown to the Code and likely to be laughed at by the defendant.

27th January 1908.

Yours faithfully  
"ADVOCATE."

The following was, then, by way of protest, published by the deputation, in the *Rangoon Gazette* in its issue of the following morning:—

"We notice in your issue of this day's date a letter signed 'Advocate' detailing certain objections which the members of the Rangoon Bar hold to the procedure adopted by a certain district judge. We also observe that what purports to be an account of an interview granted by the Chief Judge to certain representatives of the Bar is set out in 'Advocate's' letter. As we were elected representatives of the Bar to see the Chief Judge, we desire to protest against 'Advocate's' conduct in thus taking the public prematurely into his confidence. The circumstances of our conversation with the Chief Judge should have been treated as entirely private, at any rate, so long as the matter was *sub judice*. We, in common with other members of the Bar, consider that 'Advocate,' by rushing into print in this way, although acting from the best of motives, has been guilty of a breach of good taste which we deplore. The result of his conduct will be, we fear, that judges will be very chary in future in meeting members of the Bar to discuss informally difficulties that may arise in the conduct of the court.

"We have, etc.,  
"A. AGABEG,  
"L. A. YAIN,  
"J. R. DAS,  
"T. F. R. McDONNELL."

"29th January 1908.

witnessed by the public for the last few days. We are prepared to grant, that it was absurd of the Bar Association to have asked for an apology from a person who, we now see, is not amenable to the ordinary code of good breeding, which applies in such cases as between one gentleman and another; but we are unable to understand why, for that reason, the public at large should be made to suffer by having a judge inflicted on it who cannot perform with much credit, either to himself or to those who have appointed him the ordinary duties attached to his office.

On the 3rd of February Mr. Cope passed orders prohibiting the use of interpreters, and requiring plaints and petitions in Burmese, unless the court granted permission to have them otherwise, in these terms:—

"Certain questions concerning interpretation and the language of plaints have come up for consideration in this court. When these points were first raised, at the request of the pleaders present in court, I deferred passing orders on them and fixed a day on which I would hear any further arguments which they wished to put forward. I imagined this application to be *bona fide*, but the sequel shows that the object of it was merely to make incorrect representations to the Chief Judge and to publish a scurrilous libel containing six deliberate lies about me in the *Rangoon Gazette*. On the day fixed for hearing argument on the subject no one appeared in the matter, although I learn from those present that the fact that this day (January 31st) had been so fixed was brought to the notice of a special meeting of the Bar Association convened to discuss the matter. The contemptible slanders above-mentioned twitted me on my inexperience in the letter above referred to. There are certain states of inexperience of which one need not be ashamed, and of these not least is the inexperience of the methods of the pleaders practising in this court. This incident has afforded me an insight into the ways of conducting a discussion which is little short of a revelation. As the members of the Bar have not deigned to present their case directly to me, I am compelled to consider it as it has been indirectly expressed. The first point to consider is the language to be employed in plaints, applications, etc. It is laid down in the Lower Burma Courts Manual, 470, that in criminal cases the language of the court is Burmese or, with the permission of the presiding officer, English. In Civil Circular 628 the language of the court has been declared to be Burmese. It is further laid down that cause lists should be written in Burmese. The fact that they were here written solely in English until I came shows that the established practice of this court is by no means a guarantee of correct procedure. Section 49, Civil Procedure Code, lays down that the plaint must be distinctly written in the language of the court, provided that, if such language is not English, the plaint may, with the permission of the court, be written in English. I would draw the attention of the pleaders who frequent this court to the fact that the permission of the court is an essential preliminary to the filing of a plaint in English. The mendacious individual, whose letter I have referred to above, remarks triumphantly that he has interviewed the Burmese members of the Bar on the question of language, but the people of Hanthawaddy district, of whom the best majority are Burmans, may well cry out with Xanthios *peri emosa d' cudeis logos*. To take a case in point—one, moreover, of exceedingly frequent

If the local Government puts so much value on its own prestige we may be forgiven for saying in reply that a large section of the body of lawyers whose feelings have thus been allowed to be flouted, apparently with impunity, belong to a learned profession whose name, in the estimation of by far the greater portion of the civilized world, counts for as much at least as the service to which Mr. Cope belongs, if not more; and that their traditions can boast of a past many times older than any local Government can ever point to. Even apart from this, in all places

where civilized methods of government obtain, members of the bar as a body are regarded as officers of the court in which they practise, and the respect and consideration paid to them from the bench are no smaller than what is due from them to the latter; and when they are not voluntarily accorded, it is acknowledged to be the duty of those who are responsible for preserving discipline to enforce them. In England, action by higher authorities has seldom or never been needed, because of the friendly relations which have always existed between the two branches of the court. In India, such instances have happened, and the local Governments have intervened and given members of the bar that protection to which they are entitled.†

occurrence. Some Burman cultivators are joined as defendants in a suit brought by a Chetty on a mortgage bond, and by reason of their being in possession they receive a copy of the plaint in English. They have not the faintest idea what it is all about; *ouch horones oudei ei me tes dikes ten elogen* (the truth was the same in Aristophanes' day). They are compelled to go off and engage a pleader to explain the matter, whereas, if a copy of the plaint was received in Burmese, they might very well not have to go to the expense at all. That the Burmese pleaders above consulted preferred the old system I can well believe, but such preference is not conclusive. It is, therefore, ruled that, in future, all copies of plaints or applications and all notices and other papers which are to be served on Burmans shall be presented to the court in Burmese. As regards plaints and other papers to be filed in the proceedings, as above shown, it is essential to obtain the permission of the court before filing them in English. The permission will be given provided that the Government system of transliteration is adopted in all names; at present the system or want of system employed is so barbarous that it is frequently impossible to recognise the names which it is attempted to transliterate, and, in consequence, it is not possible to serve summonses correctly. To take a few examples which have occurred in this court. Maung Kwyet has appeared in the guise of Maung Chu Wa (Mr. Cope here gave eight other similar instances, Maung Pe became Maung Pi, Maung Hman became Maung Hmon, and so on). Unless, therefore, the provision above referred to is complied with, permission will not be given to file any plaints, applications or other papers (other than documentary evidence) in English. There remains the question of interpretation which is the outcome of the pleader's ignorance. I have verified the fact that the number of Burman parties to cases and suits, as well as witnesses, outnumbered those of other races by more than three to one. So that the vast majority of examinations take place in Burmese. Now, that a pleader has any right to an interpreter I am unable to see. The objection is that, enormous amount of time is thereby wasted, and this court is not one which can afford to waste time. In the first place by the vain repetitions involved; in the second by the fact that the interpreters at present employed nearly always ask questions in forms not permissible, or else do not accurately translate the question. The obvious way to avoid the difficulty is for the pleader to ask these questions himself. Nor can this be said to press hardly upon the parties to a case or suit. That such a party ignorant of the language of the court is entitled to an interpreter is only fair, because he is bound by considerations of jurisdiction to appear in a particular court, but it is an entirely false analogy to argue from this that he is entitled to be represented by a pleader who needs an interpreter because ignorant of the language of the court. He is no more entitled to be represented by a pleader

† One of these is the following:—

In 1901, Mr. R. D. N. Wadia, Barrister-at-law of Bombay was briefed in a case before Mr. Wood J.C.S., First Class Magistrate, Dhulia. As he was engaged in Bombay in other cases, on the day of hearing he wired to Mr. Wood for a postponement. In reply the following telegram was received:—  
 "What the devil I care for your personal convenience case proceeds." Mr. Wadia reported the matter to the High Court, who made representations to the Local Government. An unqualified apology in writing was subsequently ordered to be, and was, tendered to Mr. Wadia by Mr. Wood. He then from by then took three months leave and on return was posted elsewhere.

thus unqualified than he is to be represented by a pleader who, for lack of other necessary qualifications, is not licensed to plead at all. If any one should wish to engage such a person on the chance of his being allowed to address the court in English, he should engage a Burmese-speaking pleader to conduct the examinations. I rule, therefore, that in future no pleader shall employ an interpreter in order to examine a Burmese-speaking party or witness in a suit in this court or be entitled to have the replies of any such party or witness interpreted to him."

In consequence of these orders a meeting of advocates of all grades was convened by the Bar Association in its own rooms, on the 5th February and the following resolutions were unanimously carried:—

"(1) That this meeting protests against the order passed by Mr. Cope, District Judge, Hanthawaddy, in respect of the employment of interpreters and the language of pleadings, etc., in the District Court of Hanthawaddy contrary to the practice obtaining hitherto.

"(2) That this meeting most emphatically protests against the unbecoming language used, and the imputations made, in the order of Mr. Cope, District Judge of Hanthawaddy, of the 3rd February 1908, and published in the *Rangoon Gazette* of the 5th February, and, in particular, condemns the use by Mr. Cope of the following words:—"I imagined this application (relating to the postponing of the enforcement of the order) to be *bona fide*, but the sequel shows that the object of it was merely to make incorrect representations to the Chief Judge and to publish a scurrilous libel containing six deliberate lies about me in the *Rangoon Gazette*."

The moral of all this clearly is, that the sooner the executive is deprived of the power of meddling with judicial affairs and making judicial appointments at its own sweet will, the better it will be for the country. It is monstrous that the highest court in the province should have little or no voice in the selection of its subordinate judicial officers, and should not be able to punish them directly, as it considers proper, without reference to the local Government.

We have no doubt that, in this instance, if the hon'ble judges had the power possessed by the executive, they would have exercised it without hesitation. Whether they would have made Mr. Cope apologise must be a matter of conjecture; but they themselves are always so courteous and considerate to members of the bar that it is impossible for us to believe that they would not have insisted upon an apology. This, however, is a small matter. The interest of the public is of far greater importance and cannot be sacrificed to sentiment alone, especially of such a shadowy nature as prestige. We are quite certain that the hon'ble judges in place of the executive would have recognized this at once,—if by any mischance they had been capable of making the initial mistake of appointing him to such a responsible post. They would have sent away Mr. Cope long ago to some place where he could have studied, in peace and quite, Burmese and even Greek, instead of allowing him to play until he is ripe enough for the Secretariat, at law and justice as if they were marbles or soap-bubbles in which no public stakes were involved.

There are certain states of inexperience of which one need not be ashamed, and of these not least is the inexperience of the pleaders practising in this court. This incident has afforded me an insight into the ways of conducting a discussion which is little short of a revelation. And this meeting is of opinion that all possible measures should be adopted to get these words deleted from the record, and to obtain satisfactory expression of regret in open court from the judge concerned in respect thereof, and that, unless an apology be given by Monday, the 10th instant, the members of the Bar do refuse to appear in his court.

“(3) That copies of these resolutions be sent to the local Government, the Chief Judge, Mr. Cope, and the Press.”

No advocates, whether Burman or other, appeared before Mr. Cope between the 10th and the 18th of February. The Hon'ble Judges passed orders in the matter and communicated them to the Divisional Judge who was to pass them on the District Judge. What these orders are still remains a secret

#### THE CIVIL PROCEDURE CODE BILL.

The following letter has been addressed to the secretary in the Legislative Department, Government of India:

*Rangoon, 13th February 1908.*

SIR,

I have the honour to address you as follows with reference to the Bill for the Amendment of the Civil Procedure Code, which is likely to be passed into law by the Government of India, in the course of a few days.

Before venturing, however, to take upon myself the sole responsibility of addressing so late the Government of India on a subject of such great complexity and public importance, I think it incumbent on me to point out the circumstances which have compelled me to do so.

but the following letter was received by the Bar Association on the 17th:—

“The Hon'ble Judges are of opinion that the orders passed by the District Judge of Hanthawaddy on the subjects of the examination of Burmese witnesses, and the filing of Burmese translations of English pleadings in cases where the parties are Burmans contained passages which were expressed in intemperate and unseemly terms, and they have directed that they shall be expunged from any record of the court in which they may have been entered. The Hon'ble Judges recognize that, it is open to the judge to insist on the use of the language of the court, or a language made permissible by rule of the local Government. They have, however, directed the Divisional Judge to enquire in consultation with Mr. Cope and his predecessor, Mr. Pratt, whether the practice of the court before Mr. Cope's appointment caused hardship or inconvenience to any one or militated to any practical extent against the efficient conduct of business by the judge; and to report in due course whether any modification of the former practice is necessary or desirable.”

On the 18th another meeting similar to the one on the 5th was called to consider what further steps should be taken in view of this communication received from the hon'ble judges. Whilst the meeting was going on, the following letter was received from the Registrar:—

“I am desired to say that, in the abstract of the orders issued to the Divisional Judge, which was sent you in my letter No. 187—13-15, dated 17th February 1908, the words ‘they shall be expunged’ should be read as referring not to the word ‘passages’ but to the word ‘orders.’ The letter actually issued to the Divisional Judge made it quite clear that the whole of Mr. Cope's order was to be expunged.”

This put an end to further discussion and the meeting unanimously resolved:—

“Members of the legal profession were at liberty to resume practice in the District Court of Hanthawaddy,” in view of the letter received from the Registrar.

It appears that all the local Governments or High Courts in India, have either directly referred the draft Bill to local Members of the Bar, for opinion and criticism, or have otherwise tried to obtain both, and I expected that the local Government of this province or the Chief Court will also follow their example and consult us through the Bar Association.

As they have omitted to do so, I have felt it my duty to avail myself of Notification No 147, Government of India, Home Department,\* and to address you directly upon the subject through the Local Government.

I may be permitted to say in passing that this omission, whether intentional or accidental, on the part of the local authorities to refer the Bill to Members of the Bar, is an unnecessary slight to our profession as a whole. The only justification for it is that it is not exceptional, but part of the objectionable practice which has been current in this province of effecting legislation and passing rules without reference to Members of the Bar whenever possible I trust that the Government of India will, in order to prevent a recurrence of such omission in future, either in this province or elsewhere, send its draft bills or proposals to the local Bars direct or through the local Government, for suggestion and criticism.

The chief point in which the draft Bill differs from the present Code is the re-arrangement of the sections. It is said by the Select Committee that those provisions only are retained in the body of the Code, in which some degree of permanence is desirable, and that "matters of mere machinery" are relegated to rules capable of alteration by each High Court.

The latter are published in a schedule and are to have effect as if enacted in the body of the Code, until annulled or altered by the High Courts or Chief Courts, subject to certain restrictions. It is claimed by the Select Committee, that the facilities provided by this enactment for alterations of rules in the schedule, will make the law more elastic, and bring it more into conformity with local needs. It is doubtful whether elasticity is in itself more desirable than certainty of the law. Apart from that, with great respect for the able authors of the draft Bill, I venture to doubt whether any such result

will be obtained, at least in Burma. Those very local conditions which make the Hon'ble Members on the Committee desirous of elasticity make it impossible to attain it in this province. Burma, which has almost always enjoyed the singular distinction of being unrepresented on Select Committees of the Government of India, has on this occasion suffered more than usual, because not a single Hon'ble Member on this Select Committee has had the opportunity of studying local conditions before recommending a measure which is likely to have such far-reaching results if it is worked out to its fullest extent. The anticipations of the Select Committee are based on two assumptions amongst others. First, that the Chief Court will always be ready and willing to exercise the power to amend the rules, secondly, that the Chief Court is as well fitted as any High Court to exercise this power.

With regard to the first point, the number of Judges at present is so small, and the Chief Judge has to do so much multifarious work, that, even if the judges had the desire, they will not have the time to avail themselves of the power of making rules. The recent appointment of an additional judge for six months and the proposal in embryo to establish a City Court in order to relieve the Chief Court of a portion of its original work are strong evidence in favour of my contention.

The second point is of greater importance. I have no desire to make any reflexions either on the present constitution of the Chief Court or upon the hon'ble judges who are at present on the bench, but few men who have any experience at all of this province will doubt that, unless most sweeping changes are introduced in the local judicial administration and the method of appointing judges, the Chief Court will never be as nearly fitted as it ought to be for undertaking work which is just short of direct legislation. I wish to draw the attention of His Excellency in Council to the following defects in the local judiciary, which seems to support my argument:

(1) There is in this province no such organization as a judicial service, in the sense that you have it in India. The larger body of men who are in it, and from whom for years to come the judges of the Chief Court are likely to

\* Dated 19th January 1905.

be recruited, have never, for that reason, been specially trained as judicial officers and have had very little of exclusively judicial experience. Until 1905 they all exercised revenue, magisterial and judicial powers simultaneously, and it is a notorious fact, that their judicial work had always to be subordinated to their revenue duties. Since 1905 it is true that in Lower Burma a judicial officer does not do any revenue work ordinarily, but he is liable to be, and is, transferred into the revenue department or the secretariat whenever his executive superiors think it necessary, apparently without considering whether the judicial administration was likely to suffer in consequence of such transfers. So that, even now, when one would expect otherwise, the chances of an officer acquiring uninterrupted judicial experience are few and far between. Moreover, it is no exaggeration to say that there is little or no attempt made to select the men best fitted to do judicial work with a view to improve the quality, in the long run, of the judicial service from which the judges of the Chief Court will ultimately be chosen. I can point to no instance more typically illustrative of this than that of Mr. Cope, who has been recently appointed District Judge of Hantawaddy a district which for wealth, importance, and complexity of litigation is probably only second to Rangoon, in the whole of Burma. When I say that the total length of his service is a little over four years, of which he has spent the greater portion in non-judicial work, I think it is unnecessary to discuss further the principle of his appointment. I will only add in this connection, that, within the last year or two, there have been other appointments of a similar nature, in which judicial administration has apparently been sacrificed to executive expediency.

That permanence of appointments is not looked upon as an essential element of judicial efficacy is still better illustrated from the way in which the highest judicial post in the province, namely, that of the Chief Judge, has changed hands since the creation of the Chief Court. In less than seven years we have had four judges, a fact which probably stands unprecedented in the annals of High Courts. Even His Excellency in Council and His Majesty's Secretary of State have yielded to the official traditions of this province in effecting or sanctioning

these changes, and have lent authority to the principle of non-permanence by their tacit acceptance of it in these cases.

It is not necessary for me to discuss how far these arguments apply to that branch of the service which consists of barrister judges. I will only state that if the rules contemplated by the Select Committee have to be framed by them with reference to local conditions, the very principle, so far as it is visible, of their appointment is opposed to the realization of any such result. For it seems to me, that, whilst it is constantly urged in favour of appointing civilian chief and puisne judges, that knowledge of local law, customs and conditions, among other things, is essential to the proper administration of justice, in appointing barrister judges that very knowledge is presumably considered a drawback, and local barristers are not appointed, if possible, to places on the Chief Court bench.

(2) The Charter of 1861 (24 and 25 Vict., Ch. 104), enacts with regard to civilian judges, that they must be of at least ten years' standing, and shall have served as zillah judges, or shall have exercised the like powers as those of a zillah judge for at least three years of that period. The Lower Burma Courts Act imposes no such restriction, and consequently, there is no guarantee that judges of the Chief Court will necessarily be as experienced as High Court judges, at least at the time of their appointment.

For these reasons I respectfully urge that the sections empowering the local authorities to make rules, altering or amending the schedule attached to the proposed Bill be re-considered with special reference to Burma.

I have the honour to be,

SIR,

Your most obedient servant.

P. P. G.

### Correspondence.

The following letter, dated 20th February 1908, has been addressed to the Secretary to the Government of Burma, by the Honorary Secretary, Bar Library Association, Rangoon.

1. On behalf of and under directions from the Rangoon Bar Library Association, I have the honour to request that this letter may be laid before His Honour the Lieutenant-Governor.

2. It appears from page 28 of the Report on the Administration of Civil Justice for the year 1906, and from the Resolution on the Report, dated the 23rd of November, that a suggestion has been made by the Hon'ble Judges of the Chief Court for the constitution of a City Court in Rangoon, and the Association gathers from the wording of the Report and Resolution that this suggestion has been accepted in principle by the local Government and referred back to the Hon'ble Judges for the preparation of detailed proposals.

3. The members of the Bar feel that, before so far-reaching a proposal was made to and accepted by the local Government, it would have been advisable that they should have been consulted. They must necessarily have, collectively, considerable knowledge both of the necessity for and of the probable effect of such a measure and they believe that a scheme, such as is foreshadowed in the said Report, if carried through, would be inadvisable and wholly undesirable on grounds of general principle and expediency.

4. The Association labours under some disadvantage in addressing His Honour from the fact that it is entirely in the dark as to the reasons put forward by the Hon'ble Judges as necessitating and justifying the proposal to constitute a City Court, as the only effectual means of dealing with the congestion of work in the Original Side of the Chief Court. That the work is at present somewhat in arrears is undoubted, but the Association does not believe that the proposed remedy is the only or the most suitable one. The congestion of work on the Appellate Side of the Court is equally serious.

5. The Association believes that a more business-like arrangement of work in the Chief Court would very much reduce the present congestion. It is not necessary to go in detail into

this matter now for the reason that, in so rapidly growing a province as Burma, and more especially in Rangoon where population and wealth are increasing by leaps and bounds, it would only be a matter of a very short time for the work to become too heavy for the existing strength of the Chief Court. The present question would therefore to a certainty arise again very soon, and the Association thinks it desirable that its protest against the proposal to establish a City Court should now be stated as emphatically as is possible.

6. If and when it becomes necessary to increase the judicial staff for dealing with the original civil work in Rangoon, the Association is most strongly of opinion that such increase should take the form of creating a High Court for Upper and Lower Burma, or of adding another judge to the Chief Court, and not of handing over any part of the work to a court of inferior jurisdiction. At the time when the Chief Court bill was on the anvil the Association has reason to believe that a scheme very similar to the present was submitted to and rejected by the Government of India. Nothing has happened to make such a scheme any more acceptable now than it was then. A similar scheme was proposed for Calcutta and was abandoned on account of the strenuous opposition with which it met at the hands of the mercantile community and the public generally. It is to be remembered that the civil original business in Rangoon forms a large proportion in value of all the civil litigation in Lower Burma, and that the suits filed in Rangoon differ widely in nature from those filed in the districts. That litigants do appreciate the advantages to be got from having their cases tried by a court of higher status and of superior quality is clear from the fact that plaintiffs will always, if possible, bring their suits in Rangoon even if they have the choice of another jurisdiction, and this, notwithstanding the delay in deciding cases in the Chief Court.

7. The Association has no information as to the jurisdiction with which it is proposed to invest the City Court, but if, as is understood, it is likely to extend to all cases not exceeding five thousand rupees in value, it will virtually abolish the original side of the Chief Court, because, as the average for the six years from 1900 shows, the number of such suits (excluding miscellaneous

matters) amount to 62 per cent. of the total number of suits filed during those years. In the opinion of the Association any measure which abolishes, emasculates or otherwise impairs the original side of any high court is distinctly retrograde and one to be deprecated both as depriving the public of a court in which it has confidence, and because it must eventually lessen the dignity and prestige of that Court.

8. There is no indication whether the proposed court, if constituted, will be presided over by a civilian or a barrister judge; but if, as there are reasons to anticipate, by the former, such a course would, in the opinion of the Association, be contrary alike to the wishes of the public, and to the policy of the British Government in other parts of the Empire. The arguments urged by the Association on former occasions in support of the appointment of a barrister judge as Chief Judge of the Chief Court apply with far greater force to the appointment of a barrister judge to preside over the court exercising original civil jurisdiction, and those arguments have never been answered.

9. It is unnecessary to go over those grounds again in detail; it is sufficient to say that the Association still adheres to the formerly expressed views upon that subject and protests as strongly as possible against any scheme which will reduce Rangoon to the level of Tharrawaddy and Prome, and which will tend inevitably to place the original work in Rangoon entirely in the hands of civilian judges. The most important town in Burma, and the third most important town in India is entitled to the very best court that can be given to it. It would no doubt be advisable that every district should have District Judge of the highest possible legal attainments; questions of expense unfortunately prohibit this, but that is no reason why the Government, instead of aiming at levelling up the district courts, should do its best to level down the court in Rangoon to the district standard. The amount, nature and value of the suits filed in Rangoon render it essential that the original side should be as strong as it can possibly be made, and no one can suggest that the proposed change will strengthen either the personnel or the prestige of the court exercising the principal original civil jurisdiction in Rangoon. From the earliest times it has been recognised in India

that the large commercial towns require, and are entitled to, special courts for their special needs, and it is impossible for an ordinary man to see any reason for a change in a backward direction now in Rangoon. If and when a City Court is imposed on Calcutta and Bombay, its *prima facie* necessity and advisability in Rangoon may be recognised, but not before.

10. The only ground on which the proposal under criticism could be supported would be that of economy. The argument would be that though there must be another judge, the Local Government cannot afford another Chief Court judge, and that, therefore, it must have a judge of inferior grade. It is extremely doubtful whether the saving in expense will be as great as is thought, but however great it may be, that can be no justification for deliberately lowering the status of the principal court of original jurisdiction in the province. It appears to the Association beyond the sphere of argument that the new court ought to be at least equal in quality to the court which it is to supersede. If the pay of the presiding judge is to be not appreciably less than that of a Chief Court judge, there will obviously be no saving but the reverse, as the City Court would require probably a building to itself, and certainly an entirely separate staff, which would far exceed the additional staff necessitated by the appointment of an extra judge to the Chief Court. It may be proposed that the pay of the presiding judge of the new court shall be that of a district judge or, possibly, a divisional judge. Even in that case it is not probable that there will be any appreciable saving. Considerations of petty economy should; in the opinion of the Association be the last to determine the constitution of the courts of justice in Rangoon. What is wanted in the first instance is an efficient court, and Rangoon can well afford to pay for it.

11. A matter of prime importance in this connection is the permanence of tenure of their offices by judges in so important a place as Rangoon. It is hard enough to get competent barristers to take up judgeships on a Chief Court judge's pay. It will be impossible to get a competent barrister to take a judgeship upon the pay of a district judge. The proposed judgeship will then become an ordinary official appointment, the occupant of which will be constantly

changed as the exigencies of leave or promotion require. In an important district like Pegu there have been five changes in the district court in the last year, and there is no reason why Rangoon should receive any different treatment in this respect.

12. It is further to be remembered that the judge of a City Court would not be available to assist the Chief Court. An additional judge on the Chief Court Bench would be available at any time, not only to assist on the original side, but to assist in disposing of the formidable arrears on the appellate side.

13. Lastly, there is an aspect of the case which more directly affects the Bar as a profession. In a court, such as is proposed, it would be impossible to confine the practice to advocates of the highest grade. The bar of the court would be the ordinary bar of a district court, and a great deal of work which now goes to advocates of the first grade would be diverted to second grade advocates who would flock to Rangoon from the districts and from India. Protests by the Bar against changes likely to have a prejudicial effect upon it as a body are naturally open to the criticism that they are purely selfish. It is well, therefore, to set out the views of the Association upon this point in greater detail than would otherwise be necessary. The Association believes that the interests of the bar and of the public are the same; that a system which produces a strong and satisfied bar, will also be to the advantage of litigants, and, therefore, of the public, and that a system which has the opposite effect will not advantage or please the general public. In this country there is need for a strong centralised bar at headquarters, and also for bars as strong as possible at each district court, and anything which tends to weaken the bar either in Rangoon or in the district courts is ill-advised. Paradoxical as it may seem, the proposed change would weaken the bar both in Rangoon and in the districts. The opening to second grade pleaders of the practice in the City Court would obviously tend to attract a large number of such practitioners from the district to Rangoon. But their advent, while weakening the district bars, would not in any way strengthen the central bar in Rangoon. It would tend directly to weaken it both in numbers and quality. A sphere of practice shorn of half its emoluments

will attract fewer and inferior advocates of the first grade, and it is they who must be looked to for the preservation of a high standard of professional practice and integrity. A weak and dwindling bar is good neither for the Bench nor for the public.

14. In the view, therefore, of the Association there is nothing to be said in favour of the proposed scheme except that it may result in a saving of money if the new court is sufficiently starved; while on the contrary, it will lower the prestige of the Chief Court, give the public of Rangoon an inferior grade of court to that to which it has been hitherto considered entitled, a judge of inferior calibre, probably one without experience of mercantile matters and liable to be constantly changed, and will prejudicially differentiate Rangoon from Calcutta and Bombay and weaken the Bar.

15. In the opinion of the Association, the only appropriate remedy for the congestion of work, complained of by the hon'ble judges, lies in the creation of an amalgamated High Court for the whole of Burma with a large number of judges. The time has now arrived when the anomalous position of the two provinces in judicial matters may, with advantage, be cured by the fusion of the two demi-provincial judiciaries into one consolidated High Court. If such a course is at present impracticable the only alternative is the appointment to the Chief Court Bench of one or more judges competent to sit upon the original side of that court.

## THE HIGH COURTS.

Anjora Kunwar vs. Babu.

I. L. R., 29 All. 638.

*Indian Limitation Act (XV of 1877) sections 5 and 14—delay in filing appeal due to appellant bonafide accepting erroneous legal advice.*

Where a client *bona fide* accepts the advice of counsel as to the proper procedure to adopt in the course of litigation, and, misled by that advice fails to file an appeal within time, he is entitled, to the benefit of section 5 of the Indian Limitation Act, 1877.

I. L. R., 28 All. 414 followed.

Muzaffar Ali Khan vs Parbati,

I. L. R., 29 All. 640.

*Muhammadan law—shiahs—succession—rights of widow in possession in lieu of dower—mortgage—adverse possession.*

Under the Imamia law a widow, if she has no issue alive at her husband's death, does not inherit any of her husband's immovable property.

A Muhammadan widow in possession of immovable property of her deceased husband in lieu of her dower has only a lien on the property to secure payment of the dower debt. She has no transferable interest in the property.

A mortgagee cannot, during the continuance of the mortgage, by an act of his render his possession adverse to the mortgagor.

The power to appoint a guardian, *ad litem* is inherent in every court of civil jurisdiction.

Chhannu Lal vs. Asharafi Lal and another.

I. L. R., 29 All. 649.

*Act No. XVIII of 1878 (Legal Practitioners' Act) section 28—agreement to allow legal fees to be set off against money advanced to a pleader by a client.*

A client advanced certain money to a pleader who subsequently appeared for the lender in various cases. On suit by the lender to recover his loan, the pleader set up an agreement entitling him to set off against the money borrowed his fees for professional services. *Held*, that the pleader was entitled to a set off in the shape of reasonable remuneration for services actually rendered although there was no such agreement as required by the Legal Practitioners' Act, section 28.

Ali Sher Khan vs. Ahmedullah Khan.

I. L. R., 29 All. 660.

*Civil Procedure Code, section 566—return to remand to be made by the court originally seized of the case.*

*Held* that when issues are remitted for trial under section 566 of the Code of Civil Procedure, such issues are triable only by the court which was originally seized of the case.

Ramchandradas vs. Jotiprasad.

I. L. R., 29 All. 675.

*Civil Procedure Code, section 444—duty of court as regards appointment of guardian, ad litem.*

Where the defendant or respondent to a suit or appeal is a minor it is the duty of the court not only to appoint a guardian, but to satisfy itself that the proposed guardian is a fit and proper person to represent the minor, to put in a proper defence and generally to act in the interests of the minor. The duty of the court is not a mere matter of form.

Emperor vs. Gunga Prasad.

I. L. R., 29 All. 685.

*Act No. XLV of 1860 (Indian Penal Code), section 499—Act No. 1 of 1872 (Indian Evidence Act), sections 105 and 132—how far witness protected when giving evidence.*

*Held* by Knox, Acting C. J. and Aikman, J., Richards, J., dissentiente.—If a witness whilst giving evidence makes a statement concerning any person which amounts to defamation, he may be prosecuted under section 499 of the Indian Penal Code in respect of such statement, and it lies upon him to show that the statement which he has made falls within one or other of the exceptions to section 499 of the Code, or that he is protected from prosecution by the proviso to section 132 of the Indian Evidence Act, 1872.

11 B. L. R., 321 distinguished.

*Per* Richards, J.—A prosecution for defamation under section 499 of the Indian Penal Code will not lie against a witness in respect of any statement made by him in the course of giving evidence, even if such statement may be not relevant to the matter under inquiry.

11 B. L. R., 321 followed.

Man Gobinda Chowdhuri,

vs.

Sashindra Chandra Chowdhuri.

I. L. R., 35 Cal. 28.

*Commission—sections 389 and 390 of the Code of Civil Procedure—practice.*

Regard being had to the provisions of sections 389 and 390 of the Code of Civil Procedure (Act XIV of 1882), as also to the practice of the mofussil courts, the deposition of a *purdanashin* lady taken on commission, although not tendered by the party on whose behalf it was taken, is yet admissible in evidence and can be referred to by the other side as a part of the record of the case.

Ashutosh Sikdar vs. Behari Lal Kirtania.

I. L. R., 35 Col. 61.

*Sale in execution of decrees in contravention of section 99 of the Transfer of Property Act—setting aside such a sale—section 244, Civil Procedure Code—fraud.*

A sale held in contravention of the terms of section 99, of the Transfer of Property Act is not a nullity, but an irregular sale liable to be avoided merely on proof that the terms of that section have been contravened.

The application to set aside such a sale must be made under section 244 of the Code of Civil Procedure, and must be made before confirmation of the sale, unless the applicant proves that owing to fraud or other reasons he was kept in ignorance of the sale-proceedings preliminary to sale.

Chhabildas Lalubhai vs. Dayal Mowji.

I. L. R., 31 Bom. 566. (P. C.)

*Vendor and purchaser—auction-sale under a power of sale in a mortgage—constructive notice—knowledge of purchaser.*

It was found by the first court on facts, that at an auction-sale under a power in a mortgage, the mortgagees by themselves or their agents so conducted themselves with reference to the sale that the bidders were induced to leave, and that the purchaser was present and had notice of these circumstances.

*Held*, that the purchaser was affected with notice of the impropriety of the sale, and bought at his own risk, notwithstanding the proviso in the mortgage and the provisions of section 69 of the Transfer of Property Act (IV of 1882), and that these circumstances invalidated the sale.

The doctrine of constructive notice will not allow a court to impute to a principal the

knowledge of an agent, not acquired in the matter for which he was agent, and to use it to upset a transaction of a date before the agency commenced.

Trikundas Damodhar vs. Haridas Morarji.

I. L. R., 31 Bom. 583.

*Construction of will—uncertainty—bequest for purposes of popular usefulness or for purposes of charity.*

By her will, *N.*, after making various requests bequeathed the residue of her estate as follows:  
\* \* \* my abovementioned six executors are to make use of the same in such manner as they may unanimously think proper for purposes of popular usefulness or for purposes of "charity." And I give to them, *i.e.*, my abovementioned trustees full authority to use the same in that manner.

*Held*, that the gift of the residue was bad for uncertainty.

Nagardas vs. Anandrao.

I. L. R., 31 Bom. 590.

*Guardian and Wards Act (VIII of 1890) Sections 47, 48—Indian Majority Act (IX of 1875) section 3.*

Section 48 of the Guardian and Wards Act is intended to give finality to contested orders and to enact, that when an order is made, except as provided in section 47 and saving the provisions of section 622 of the Civil Procedure Code, the order shall be final and shall not be contested by a substantive suit or any other form of litigation.

A chamber judge has power to alter, vary, modify or set aside an order made by his predecessor in chamber under the Act, when he finds that the order is one which ought not to have been made and that the order is one that requires in the interests of justice to be dealt with in that way.

If an order is made under the Guardian and Wards Act and such order is subsequently set aside the period of minority is not extended to 21 years under section 3 of the Indian Majority Act.





# THE BURMA LAW TIMES.

NO. II.

MARCH 1908.

VOL. I.

*The Subscription for "The Burma Law Times" is Rs. 10 per annum, payable in advance.*

*Subscribers not receiving their numbers should communicate with the Editors as soon as possible,*

*All communications should be addressed to the Editors, No. 1, Barr Street, Rangoon, who should be informed without delay of all changes of Subscribers' addresses.*

*The Editors hope to issue a volume a year consisting of 12 numbers, one to be issued monthly.*

## Editorial Notes.

WE have decided to start the benevolent fund which, sometime ago we discussed was needed, for destitute members of our profession from the first of May. We suggest that those who wish to co-operate will promise and contribute a small sum every month so long as it is convenient to them. The contributions will be collected by the Editors of this Journal but no distributions will be made except with the previous sanction of the Bar Library Committee. Subscriptions received and disbursements made will be regularly published in our columns. Those gentlemen who do not wish their names published are requested to give their *noms-de-plume*.

ORDERS passed by the Chief Court with reference to the language of the district court of

Hanthawaddy settle all the points raised by Mr Cope. We hope that the Local Governmen will accept the proposal of the hon'ble judge for the appointment of a Burmese interpreter for the Hanthawaddy district court.

IN the meanwhile, Mr. Cope has remained on the bench. If the interest of the public has suffered the powers-that be have proved themselves invincible. It is often said that statesmanship consists either in not making blunders or in correcting them gracefully. That this is a fallacy is now quite clear.

THE Law Member of the Viceroy's Legislative Council has sent, direct, to the Honorary Secretary of the Bar Library Association, several copies of the draft Presidency Towns Insolvency Bill, now before the Council, for circulation. It is to be hoped that the Bar Association will avail itself of the opportunity which the Government of India has afforded of making itself useful to the public, and offer some suggestions. The action of the Law Member ought to be very welcome to members of the Bar, because it recognizes the principle, not invariably recognized in this province, that those who by training and profession are qualified to advise ought to be consulted by Government in questions of legis-

lation.

At the annual general meeting of the Bar Association, on the 28th of March, it was unanimously resolved that a committee be appointed to draw up a representation to the local Government, and, if necessary, to the Government of India, protesting against the appointment of inexperienced officers to high judicial posts. Mr. Hamlyn, Mr. McDonnell, Mr. Vertannes and Mr. Ginwala were elected to form the committee.

In an appeal to the Divisional court of Hanthawaddy not long ago, from the judgment in C. R. 159 of 1907, of the Subdivisional Court of Pegu one of the grounds was that the lower court was debarred from trying the case because one of the defendants was the wife of the judge. Grounds of appeal are not necessarily based on exact facts in all cases. This case, however, seems to have been compromised in appeal, a fact which lends colour to the probability of this irregularity having taken place.

THE appointment of Sir Lawrence Jenkins to the India Council is to be regretted from more than one point of view. It deprives the High Court of Bombay of one of the best judges who ever came out to this country. His learning though very great, is, from our point of view the least of all his qualities. Conscientiousness in the discharge of duties, small and great, and absolute independence both of judgment and action in all judicial matters, are the two distinguishing features of his character. He was never known to have shirked a question, merely because its decision might bring him into conflict with the executive. The dignity and independence of the High Court over which he presided were of the most paramount importance, and anything which in his

opinion was likely to lessen them was met with the most fierce opposition; and there was hardly an occasion on which it was not successful.

His courtesy to members of the Bar and his jealous care to preserve the status and dignity of the profession are too well known to need much discussion.

WE cannot, however, help deprecating the fact, as a matter of principle, of his appointment, even after retirement, to a post which is in the gift of the executive. Though no one can be so foolish as to imagine that it can make any difference to a man like Sir Lawrence Jenkins it can not be denied that if the judiciary is to be as thoroughly independent in fact as it ought to be in principle, the prospect of having a prize at the hand of the executive, after retirement, is always not likely to be conducive to the realization of any such ideal. Public interest must at times make it inevitable that the head of the judiciary should have differences of opinion with the executive. The chances are taking humanity at its average, that the possibility on such occasions of the final prize being sacrificed may not help him to arrive at the decision which the public will be entitled to expect from him. Considering that in every part of the world the tendency is to make the judiciary as independent of the executive as possible, it is inconceivable on what principle these appointments are based where India is concerned.

THE handcuffing of prisoners in court has attracted a great deal of attention of late, and pronouncements have been made in Parliament from which it would appear that arrangements were effected to discontinue the practice everywhere. This it seems, is not so. We hope that circulars will be issued to all the courts

making their removal obligatory, unless exceptional circumstances such as unruliness or rowdyism made them necessary.

THE Amended Whipping Act has at last been passed into law (II of 1908). The chief alterations made are that it abolishes whipping as an additional punishment in second and subsequent convictions for certain offences, and makes whipping permissible for offences committed with violence or brutality. It is a pity that whipping is still retained for theft. We hope that when the Criminal Procedure Code is next before the Legislative Council it will be so amended that the sentence shall not be carried out until the person convicted has had time to appeal.

PERHAPS it is not generally known that the Chief Court has a decided belief in the efficacy of whipping. There are several rules as to how when and where it should be inflicted. The most interesting of these is contained in paragraph 377 of the Lower Burma Courts Manual. It says "Sentences of whipping should be efficacious. A few strokes of the rod can have little effect except upon young boys."

#### MR. BANURJI'S PROSECUTION.

FOOLISHNESS as an essential ingredient of humanity is not necessarily confined to individuals. Public bodies distinguish themselves by showing it in a high degree and if they do not make themselves as ridiculous as individuals, the fault is not entirely their own. Any one who has read with attention the account of Mr. K. B. Banurji's prosecution will scarcely doubt the truth of this statement. The only interesting part of the affair was its dramatic finish,

when Mr. Giles informed the court that he could not carry the case further, because the witnesses already examined had not given the evidence which he had expected and that the evidence that remained was merely corroborative of the statements they had made. The public, however, had lost a great deal. If death had not come with timely care to this prosecution, in its infancy a number of interesting facts would undoubtedly have been brought out. Even if they had not furthered the cause of that abstract justice which seems to have overpowered a number of otherwise very sensible men, they would have thrown unmistakable light on the methods of a prosecution by a public body, upon the petty meanness which sometimes characterizes it, and last, but not least, upon the uselessness of expensive legal advice as a means of saving appearances and of giving what is probably intentional the air of being accidental.

We do not treat Mr. Banurji as a martyr even if by some untoward chance a lawyer had in him the making of one. We do not regard him even as a hero because he has been extremely indiscreet. We think however that he has been treated with such gross unfairness and the law allows him so little redress, that it is fit that we should understand some of the more salient features of this prosecution in which a large amount of public funds has been wasted without adequate reason.

First of all a clumsy attempt is made to create an impression on the public mind that it was the police who was responsible for initiating this prosecution, and that the Port and its legal advisers were only the necessary and innocent instruments of bringing a miscreant to justice. The real fact is just the other way about. Mr. Buchanan has too much of his national instinct to be otherwise than extremely canny, and

it appears, took what he considered the safest course in order to minimize the legal consequences attached to the failure of a private prosecution. It is obvious that he felt so little convinced by what his legal advisers had told him, or by the statements taken down either by them or his lieutenants, that he had not the courage to accept them and commence a prosecution by information to a magistrate as any other man who believed in his own case would have done. The complaint is dated the 20th of February and signed by Mr. Cowling. However, long before this, the police, who had become cognisant of the offence, evidently through some invisible fairy agency had taken down the statements of nearly all the witnesses and the case was ready for commitment actually before the complaint (at least the one on the record), was filed or received by the Commissioner of Police! Mr. Banurji and Abdulla were arrested on the 25th of February and immediately released on bail by Mr. Henderson. Now, we ask our readers, how any public object was served by Mr. Buchanan making a complaint to the police, or by asking for Mr. Banurji's arrest, instead of going to a magistrate and applying for a summons, as is done even when a warrant is available in dealing with a respectable person?

The next point is the significant omission, though the fact was unfortunately not brought out in evidence, both by Mr. Stevens and Mr. Young who had examined witnesses behind Mr. Banurji's back, to ask him for any explanation of the statements made against him before launching into this prosecution. Mr. Stevens need not be taken seriously because, as a ministerial officer, he was not entirely his own master, but the conduct of Mr. Young is wholly inexplicable. It is impossible to understand how, as a

brother advocate, he absolutely forgot that he owed some duty to Mr. Banurji and his profession, and that this duty required him to ask for an explanation before advising his clients to rush into court. If Mr. Young had made an attempt to know from Mr. Banurji what he had to say, this unseemly case would in all likelihood never have come to light or created such a public scandal. Perhaps, Mr. Young refrained from doing so because he felt that it would not be wholly acceptable to his clients. Whatever the real reason may be, it is a pity that official life should so entirely weaken all professional feeling that men even in the highest positions cannot set a better example of professional conduct.

Next we would draw attention to the attempt made by the prosecution to shut out the best evidence in favour of Mr. Banurji by making Abdulla co-accused in the case. As Mr. Giles at once abandoned the point, it is certain it was not his doing. A more unworthy attempt to keep the real truth out of court cannot be imagined than this common trick of making an important witness a co-accused and the sooner all those whose duty it is to prosecute are taught the evils of it, the better it would be for the public.

Lastly, the omission on the part of the District magistrate to write some sort of a judgment on the evidence already recorded and to clear Mr. Banurji's character is very regrettable. It would not only have been graceful but it would have been in conformity with the practice of all Courts in dealing with men among whom a great deal depends upon reputation. We cannot point to a better instance than that of the Privy Council not very long ago.

## CRIME AND CORROSIVE ACIDS.

TWO cases were reported last month from Calcutta in which nitric acid was used by some men as a means of satisfying their revenge. One of the victims on whom it was thrown succumbed to the injuries after having gone through the most agonizing suffering.

The use of nitric acid as a weapon of offence marks a new era in the history of crime in this country, and unless strong measures are at once adopted to nip it in the bud, grave consequences may follow. It is so easy to use and so difficult to detect that it is likely to appeal peculiarly to those desperate characters whom recent events in different parts of India have made only too common.

It is not known that these two particular cases under discussion were the outcome of any foolish political intrigue, but it is extremely improbable that, unless active steps are taken by Government in future, nitric and sulphuric acids, with their terrible corrosive properties, will not take the place of the bomb of the anarchist or the bludgeon of the political assassin of Europe. We must remember that in this country, where firearms are not easily accessible to the ordinary man, political desperadoes may be easily susceptible to the insidious charms of a means of destruction which can be obtained without difficulty and used generally with impunity, causing certain death, or at least such injuries as are likely to incapacitate the victim for the rest of his life.

France, which has the reputation of supplying the civilized world with the best known poisons or other means for the destruction of human life, furnishes us with some valuable statistics in connection with the use of vitriol or sulphuric acid by criminals. Between the years 1880 and 1900 there were 83 cases in which vitriol was successfully used, in a large number of them with fatal results. The largest figure obtained was 32 in 1900, the year of the great Paris exhibition. Among the criminals, there were five times as many women as men: old, young and indifferent; and if, in this record of crime, the servant girl and the *demi-mondeuse* cut a very creditable figure, countesses and ladies of fashion have also their legitimate place. The most significant facts about these crimes are that they were actuated almost without exception by disappointed love or intense hatred, and that the perpetrators

escaped with very light punishments in cases tried by juries, because of the singular doctrine of the *circonstances extenuantes* which is so dear to the average French mind. One other noticeable feature may be mentioned. Several of these criminals were questioned as to why this particular means of revenge was chosen by them of all others, and they are reported to have said that they had read of it in the newspapers and had been tempted by the reports of the results produced and of the lightness of the punishments inflicted. It is strange that, in spite of this fact, and the confessions by the criminals themselves, no effective measures seem to have been adopted by the French Government to check the use of vitriol for criminal purposes, and though no figures are obtainable since 1900, there is no reason to suppose that crime from this cause has been on the wane during the past seven years.

There is little or nothing that France can learn now of the mere theory of government from other countries, but she has taught a great deal to the civilized world by the very failures and shortcomings of her methods. We think that from the figures and facts given above we ought to take an object lesson and stop at the commencement this particular species of crime which slackness and sentimentality have tended to encourage in France. In this country such precautionary measures are doubly needed because of the reasons discussed at the beginning of this article.

It is impossible to suggest any means which would effectually put a complete stop to the use of corrosive acids for the perpetration of crime. For that all our hopes must be centered in the spread of general education and the instinctive disgust it produces for crime, especially of that kind of it which is committed in a sneakish or cowardly fashion. In the meanwhile it may not be entirely inappropriate to discuss some means by which their use may be checked.

First, the retail sale of corrosive acids ought to be regulated as carefully as that of poisonous drugs and exciseable articles. If their sale is allowed, they must in any event be so diluted that their corrosive properties are considerably reduced. In this form they are still serviceable for all industrial purposes, and if used by criminals they are not likely to produce very dangerous effects on the human body.

Secondly, special punishment must be provided for offences committed by means of these acids, as in the case of injuries inflicted with dangerous weapons.

### JUDGE AND COUNSEL.

#### THEIR RESPECTIVE DUTIES.

The following extract from the judgment of Lord Crampton on the motion for a new trial in *Queen vs. O'Connell and others*\* may be of some interest to our readers. That we sometimes unfortunately do need such reminders as are conveyed in these passages is obvious from the circumstances which led to the passing of the order reported at page 137 of the last number.

Except upon the ground that, technically, they were legitimate, no one can seriously defend forensic tactics to secure double cross-examination. Nevertheless, it is a pity that an impression was created on the minds of younger men in the profession that even those to whom they are accustomed to look up to for guidance in matters relating to professional duties, cannot at all times decide questions relating to themselves without the intervention of the bench;

We were taught, in emphatic language, by one of the learned counsel for the defendants, what were the duties of a judge presiding at a criminal trial, and the duties of counsel were also dwelt upon; and then we were admonished that, by the law and constitution of this realm, the judge was counsel for the prisoner, and it would follow, therefore, bound not to express an opinion unfavourable to the prisoner. Now, I think there has been some confusion as to the judge's position in this respect. The subject is an important one, and I will shortly state my view of it. It is true that the judge is the prisoner's counsel and I add, he is also the counsel for the Crown; but both these offices are subordinate to his higher functions as a dispenser of justice and an expounder of the law; and he is bound to administer that law equally and impartially to both sides. On this subject I adopt the language of Lord Kenyon, in summing up to the jury, in the case of *Rex vs. Wakefield* (a). Mr. Wakefield had, in his defence, told the jury that "he had slender expectations of indulgent interference from the judge, though the law regarded him as the prisoner's counsel, but that all his hopes were concentrated in the jury." "I have been reminded," says Lord Kenyon, "that I sit here as counsel for the defendant. I certainly do so, so far as to interpose between him and the counsel for the prosecution, and to see that no improper use of the law is made against him, and that no improper evidence is given to the jury. But, gentlemen, the judge has another task to perform, which is that of assisting the jury in the administration of justice. Whether I have in this case betrayed my trust, I leave to you."

\* State trials: Vol. V., pp. 702-4.

Now, as the learned counsel has been so good as to remind the judges of their duties, I am sure he will not take it ill of me if I remind him that he has taken rather a narrow view of the duties of counsel upon a criminal trial. Then learned counsel said, the advocate's first duty was to his client, the second to himself, and the third to the public. His client was entitled to all that the counsel's zeal and ability could effect. He was bound to maintain his own independence with all due respect to the bench, and he was bound to assert the rights and liberties of the public: and all these duties the counsel in this case has, no doubt, ably discharged. Now, I do not quarrel with the learned counsel that he casts all these duties upon the counsel; but I do say that the British advocate has still higher duties to regard; his duties as a man and as a Christian are paramount to all other considerations.

This court in which we sit is a temple of justice; and the advocate at the bar, as well as the judge upon the bench, are equally ministers in that temple. The object of all equally should be the attainment of justice; now justice is only to be reached through the ascertainment of the truth, and the instrument which our law presents to us for the ascertainment of truth or falsehood of a criminal charge is the trial by jury; the trial is the process by which we endeavour to find out the truth. Slow and laborious, and perplexed and doubtful in its issue that pursuit often proves; but we are all—judges, jurors, advocates, and attorneys—together concerned in this search for truth: the pursuit is a noble one, and those are honoured who are the instruments engaged in it. The infirmity of human nature, and the strength of human passion, may lead us to take false views, and sometimes to embarrass and retard rather than to assist in attaining the great object; the temperament, imagination and the feelings may all mislead us in the chase,—but let us never forget our high vocation as ministers of justice and interpreters of the law; let us never forget that the advancement of justice and the ascertainment of truth are higher objects and nobler results than any which in this place we can propose to ourselves. Let us never forget the Christian maxim, "That we should not do evil that good may come of it." I would say to the advocate upon this subject,—let your zeal be as warm as your heart's blood, but let it be tempered with discretion and with self-respect; let your independence be firm, uncompromising, but let it be chastened by personal humility; let your love of liberty amount to a passion, but let it not appear to be a cloak for maliciousness.

Another doctrine broached by another eminent counsel I cannot pass by without a comment. That learned counsel described the advocate as the mere mouth-piece of his client; he told us that the speech of the counsel was to be taken as that of the client; and then seemed to conclude that the client only was answerable for its language and sentiments.

"Such, I do conceive, is not the office of an advocate. His office is a higher one. To consider him in that light is to degrade him. I would say of him as I would say of a member of the House of Commons—he is a representative, but not a delegate. He gives to his client the benefit of his learning, his talents and his judgment: but all through he never forgets what he owes to himself and to others. He will not knowingly mis-state the law—he will not wilfully mis-state the facts, though it be to gain the cause for his client. He will ever bear in mind that if he be the advocate of an individual, and retained and remunerated (often inadequately) for his valuable services, yet he has a prior and perpetual retainer on behalf of truth and justice; and there is no Crown or other license which in any case, or for any party or purpose, can discharge him from that primary and paramount retainer."

## CORRESPONDENCE.

## THE HIGH COURTS.

Kundan Lal vs. Gajadhar Lal.

I. L. R. 29 All. 728.

*Civil Procedure Code, section 457—appointment of married woman whose husband is alive.*

In no case can a married woman whose husband is living be appointed a guardian *ad litem* and if such an appointment is made, *de facto* such apparent appointment is not a mere irregularity.

I. L. R. 23 All. 459 (followed).

I. L. R. 29 Mad. 58 (dissented from.)

Hari Ram vs. Akbar Husain.

I. L. R. 29 All. 749.

*Act No. VII of 1870 (Court Fees Act) sections 9, 10, 11 and 28—limitation—Act No. XV of 1877, section 4.*

*Held.*—Sections 9 and 10 of Act No VII of 1870 govern all cases in which a Court may think it necessary to hold an inquiry into the market value of or the annual nett profits arising out of the property, the subject matter of the claim, and whether that inquiry be by evidence taken on a issue raised by the defendant or by a local investigation held in person or by commission or otherwise.

*Held, also.*—When a plaint has been registered and a court, subsequently on an inquiry under these sections, finds that a sufficient court-fee has not been paid, it is bound to stay the suit and to fix a time within which the additional fee can be paid, without any regard to the fact whether that be a times within or beyond the period of limitation prescribed for the suit. If the fee is paid within the time so fixed, the plaint is as valid as if it had been properly stamped in the first instance on the day when the suit was instituted.

Dharam Das vs. Ganga Devi.

I. L. R. 29 All. 773.

*Act No. XV of 1877 (Indian Limitation Act), sections 19 and 20, schedule II, articles 54 and 60—money deposited on current account—acknowledgement.*

*Held,* that a suit to recover money deposited with a banker on a current account is govern-

ed as to limitation by article 59, and not by article 60, of the second schedule to the Indian Limitation Act, 1877.

A part-payment of the principale of a debt must appear in the hand-writing of the person making the part-payment and not in that of any other person, however authorized.

*Held also,* that the mere crediting of interest in a banker's books cannot be regarded, for the purpose of saving limitation, as equivalent to payment of interest.

Jairam Mahton vs. Emperor.

I. L. R. 35 Cal. 103.

*Rioting—entry on land in possession of another—right of defence of property is a restricted one—Penal Code (Act XLV of 1860) sections 99, 101, 104, 147.*

The complainant was found to have had the right to actual possession. The petitioners anticipated the complainant in taking tangible possession and began to plough up the land and uproot some castor plants and throw them away. The complainant's men came to the land and protested and some of them tried to unyoke the cattle whereupon a riot took place on the spot and the complainant and his party were beaten.

*Held* that the petitioners were members of an unlawful assembly, the common object of which was to enforce a right or supposed right for the exercise of which they were prepared to use force, and that their action in beating the complainant's party was not justified by the fact of their having obtained temporary occupation

The right of self help, when it causes or is likely to cause damage to the person or property of another person, must be restricted, and recourse to public authorities must be insisted on.

Mulchand Lala vs. Kushibukan Biswas.

I. L. R. 35 Cal. III.

*Stamp duty—agreement—acknowledgment of debt—Stamp Act (II of 1899), schedule I, article 5, clause (b).*

An account written on a sheet of paper, signed by the debtor and addressed to the creditor, and also containing a stipulation to pay interest, is

not a mere acknowledgment of a debt, but an agreement, or memorandum of an agreement, which requires a stamp of 8 annas, under clause (b) of article 5, schedule I, of the Indian Stamp Act.

I. L. R. 25 Bom. 373. (followed).

Kartik Ram Bhakat vs. Emperor.

I. L. R. 35 Cal. 114.

*Code of Criminal Procedure section 476—enquiry ordered by one officer and continued by his successor.*

An order for prosecution under section 476 of the Code of Criminal Procedure can only be passed by the officer before whom the false statement was made and not by his successor.

I. L. R. 34 Cal. 551 (followed).

I. L. R. 29 Mad. 331 (not followed).

Ram Das vs. Gotardhandas.

I. L. R. 35 Cal. 133.

*Code of Criminal Procedure, section 476—judicial proceedings.*

Execution proceedings subsequent to the trial of a suit are not judicial proceedings.

I. L. R. 32 Cal. 367 (followed).

Jamait Mulluck vs. Emperor.

I. L. R. 35 Cal. 138.

Judgment of Appellant Court must be quite independent of the judgment of the Court of first instance—Criminal Procedure Code (Act V of 1898) sections 367, 424.

The judgment of an appellate court must show on the fact of it that the case of each accused has been taken into consideration, and reasons should be given, as far as may be necessary, to indicate that the court has directed judicial attention to the case of each accused.

The appellate court's judgment cannot be read in connection with, and as supplementary to, the judgment of the court of first instance, but must be quite independent and stand by itself.

In the goods Manick Lal Seal.

I. L. R. 35 Cal 156.

*Probate, application for—renunciation by executor—Probate and Administration Act (V of 1881) section 17.*

Where the official trustee expressed his intention of renouncing probate but subsequently retracted:—

*Held*, that no formal renunciation having been made, he was not precluded from applying for probate.

*Held also*, that there was nothing under the Official Trustees Act which precluded the official trustee from being appointed an executor and acting as such.

Laxmana vs. Ramappa.

I. L. R. 32 Bom 7.

*Limitation Act (XV of 1877), schedule II, article, 119—adoption.*

Suits in which either the factum or validity of an adoption is denied are governed by the provisions of article 119 of schedule II of the Limitation Act (XV of 1877).

I. L. R. 24 Bom. 260. (followed.)

Chunilal Jethabhai vs. Dayabhai Amulakh.

I. L. R. 32 Bom. 14.

*Limitation Act (XV of 1877) section 12—Civil Procedure Code, section 652—presentation of appeal.*

An appeal, etc., if presented in time, is validly presented for the purposes of the Limitation Act (XV of 1877) if it is accompanied by the copies required by the Civil Procedure Code. A high court has no power to frame a rule modifying any rule or mode as to computation of limitation prescribed, expressly or by necessary implication, in the Limitation Act (XV of 1877).

Ganesh vs. Vishnu.

I. L. R. 32 Bom. 37.

*Indian Contract Act (IX of 1872), section 16—urgent need of money—unfair and unconscionable bargains—fraud coercion—equity—promise to pay a time-barred debt.*

There are well known relations such as guardian and ward, father and son, patient and medical adviser, solicitor and client, trustee and cestui que trust and the like which plainly fall within clauses, of section 16 of the Indian Contract Act (IX of 1872). Where no specific relations exist, and the parties are at arm's length, being strangers, undue influence may be exerted, but its existence must be proved by evidence. The test is, confidence reposed by one party and betrayed by the other, which means that there must be an element of fraud or coercion.

The expression "unfair advantage" means an advantage obtained by unrighteous means. A promise to pay with interest a debt barred under the statute of Limitation is valid.

Moyan vs. Pattukutu.

I. L. R. 31 Mad. 1.

*Oaths Act (X of 1873)—section, 12.*

The plaintiff agreed to take oath on a particular date, and also that if he failed to do so the suit should be dismissed. He subsequently applied to withdraw from the agreement, but the court refused the application and dismissed the suit.

*Held*, that the court ought not to have dismissed the suit, but should have recorded the refusal and the reasons therefor under section 12 of the oaths Act and proceeded with the trial.

I. L. R. 2 Mad. 356 (followed).

Sarala Subba Rau vs. Kamsala Timmayya.

I. L. R. 31 Mad. 5.

*Civil Procedure Code, Act XIV of 1882, sections, 278—283.—Limitation Act (XV of 1877), Schedule II, article 11.*

Article 11, schedule II of the Limitation Act does not apply to an order dismissing a claim under section 278 of the Code of Civil Procedure for default. The party against whom such an order is made can maintain a suit to establish his right within the ordinary period of limitation applicable to such suit, although he has not had the order set aside within one year.

Rangasami Naiker vs. Annamalai Mudali.

I. L. R. 31 Mad. 7.

*Transfer of Property Act (IV, of 1882, section 78—registration—gross negligence.*

What amounts to gross negligence must be determined according to the circumstances of each case, and one of the circumstances to be taken into consideration in this country is that a universal system of registration is established by law. As registration puts subsequent encumbrancers in a position, with the exercise of reasonable care, to find out prior encumbrances, failure on the part of prior mortgagee to get possession of the title deeds must not be imputed to him as gross negligence. Possession of title deeds in the presidency towns, where mortgages may be created by depositing them, is of greater importance than in the mofussil.

2 C. W. N. 750 (followed).

Jivrathnam Mudaliar vs. Srinivasa Mudaliar.

I. L. R. 31 Mad. 33.

*Civil Procedure Code, section 232—253—Transfer of Property Act (IV of 1882), section 99.*

A transferee of a decree holder cannot in execution, bring to sale property which the original decree-holder is prohibited from bringing to sale by section 99 of the Transfer of Property Act.

9 Bom. L. Rep. 723. (followed).

I. L. R. 27. All. 450 (dissenting from).

Bhaishankar Nanabhai

vs.

The Municipal Corporation of Bombay and others.

I. L. R., 31 Bom. 604.

*Jurisdiction—special tribunal appointed by an Act.*

Where a special tribunal, out of the ordinary course, is appointed by an Act to determine questions as to rights which are the creation of that Act, then, except so far as otherwise expressly provided or necessarily implied, that tribunal's jurisdiction to determine those questions is exclusive.

It is an essential condition of those rights that they should be determined in the manner prescribed by the Act, to which they owe their existence. In such a case there is no ouster of the jurisdiction of the ordinary courts, for they never had any.

The jurisdiction of the courts can be excluded not only by express words but also by implication.

Vahazuffah Sahib vs. Boyapati Nagayya.

I. L. R., 30 Mad. 519.

*Muhammadian law—gift—delivery of possession.*

The Muhammadan law is applicable to gifts between Muhammadans, even when effected by registered instrument, and such a gift will be invalid unless the requirements of Muhammadan law as to possession are complied with.

L. R., 33 I. A. 68, followed.

I. L. R., 24 Mad. 513, not followed.

Halima Bee vs. Roshan Bee.

I. L. R., 30 Mad. 526.

*Contribution—co-heir—expenses incurred in litigation in respect of common property.*

A co-heir is not liable, either under an implied contract or on grounds of equity to contribute towards the expenses of litigation *bona fide* carried on by other heirs in respect of the common property.

Sesha Iyyar

vs.

The Tinnevelly Sarangapani Sugar Mill Co., Ltd.

I. L. R., 30 Mad. 583.

*Indian Companies Act, VI of 1882, section 136.*

It will not be equitable for courts to prevent judgment-creditors, under section 136 of the Companies Act, from executing decrees against a company in liquidation without seeing that such judgment creditor's rights are respected in liquidation.

A judgment-creditor attaching a decree against a company must be allowed to prove for the decree debt in the name of the decree-holder in liquidation.

Mohmed Sultan Sahib vs. Horace Robinson.

I. L. R., 30 Mad. 545.

*Husband and wife—implied authority of wife to pledge husband's credit when rebutted.*

The presumption of implied authority on the part of the wife to pledge her husband's credit for necessities may be rebutted by proof of circumstances inconsistent with the existence of such authority.

Such authority cannot be presumed where the husband has expressly forbidden his wife to pledge his credit.

In the matter of Medai Kaliani Anni.

I. L. R., 30 Mad. 545.

*Civil Procedure Code, section 258—right of suit—duty of decree-holder.*

The law casts on a decree-holder receiving payment out of court the duty of certifying such payment in satisfaction of the decree under section 258 of the Code of Civil Procedure. The judgment-debtor has a cause of action against the decree-holder, when the latter, having received the decree amount not only does not certify, but actually takes out execution. It is not necessary that money should have been actually recovered in execution.

Emperor vs. Lazar.

I. L. B., 30 Mad. 550.

*Penal Code, section 494—Native Christian having Christian wife living and marrying Hindu woman.*

A native christian, who, having a christian wife living, married a Hindu woman according to Hindu rites without renouncing his religion, is guilty of an offence under section 494, Indian Penal Code.

### PERJURY AND PUBLIC PROSECUTIONS.

[An extract from *Truth*.]

Most people will, I think, agree with Sir Harry Poland's opinion on the prosecution of Mr. Herbert Druce, notwithstanding what Mr. Edmund Kimber has said in reply. Taking into consideration all the circumstances of the case, it is certainly a scandal that a criminal charge should be preferred, as this was, in furtherance of the purpose of a pending civil action; and the company-mongering proceedings in the background lend additional ugliness to the whole business. In his first letter to the *Times* Sir Harry Poland seemed to have no definite suggestion to offer, except that the matter called for the attention of the Public Prosecutor and the Home Secretary. The charges now pending against two of the witnesses show that the case had received some such attention. But the real moral of the whole business seems to be that drawn by a Scotch lawyer, Mr. Wallace, in *Saturday's Times*, namely, that all criminal prosecutions should be undertaken by the Crown, and not by private individuals.

The argument for this reform does not rest on a single instance of abuse, like the Druce case, which is, after all, of a very exceptional character. The real scandal is, not that here and there an individual is wrongfully prosecuted from private motives, but that every day notorious offenders escape because no private individual will be at the trouble and expense of prosecuting them. I speak on this subject from special personal knowledge. Week by week systematic frauds, perpetrated by pretext or another, are exposed in the columns of *Truth*, and again and again on inquiry into the facts I learn that the

police know the rascals well, and have plenty of evidence against them, but are unable to move because no victim will make a charge, and the transactions are not considered by the authorities of sufficient importance to justify a prosecution at the public expense. It is not to be expected that a private citizen of limited means—possibly even a woman or a child, for many of the organised frauds now prevalent are chiefly practised on women and children—after having been robbed of a small sum of money, will spend perhaps ten or twenty times the amount lost, and go through the ordeal of appearing several times in the witness-box, merely to save other people from a similar loss. Moreover, as if the possible loss of time and money were not a sufficient deterrent to the private prosecutor, we further saddle him with liability to an action for malicious prosecution in the event of the failure of his proceedings. A man must be either very vindictive or inspired by a burning sense of public duty who will take up the office of a prosecutor under these conditions. The result is, that a large class of habitual criminals have practically a free hand, and it is quite possible for a clever man, who understands exactly how to go to work, to live in twentieth-century England, without concealment and without interference by means morally indistinguishable from those of the British highwaymen or the Italian brigands of former days. I could do it myself if I chose, on the strength of the experience gained at *Truth* office, or show anybody else exactly how it can be done. Such are the results of leaving it to the victim to decide whether this class of criminals shall or shall not be prosecuted.

Again, in regard to the crime of perjury, the matter particularly under notice at the moment, a very similar state of things prevails. A person who brings an action at law and is defeated by perjured evidence, is not merely robbed of the justice he seeks, but incurs at the same time a heavy pecuniary fine in the shape of costs. How can he be expected, unless from pure thirst for vengeance, to put his hand in his pocket again in order to punish the perjurer—especially with the possibility of an action for malicious prosecution before him? Moreover, by reason of the technicalities of English law, it is more difficult to obtain a conviction for perjury than for any other crime. Some years ago I was defendant in an action for libel—I have been in that position

before and since, but I am alluding to one particular case. This action involved a twenty-one days' trial, and the verdict was in my favour. The taxed costs due to me amounted to £8,000 or £10,000—I forget the exact figure—and there was no chance of recovering a penny from the plaintiffs. The latter were a pair of swindling adventurers, and it was obvious that much of the evidence they had given in support of their claim for damages against me was false. I thought it might be desirable, in my own interest as well as that of the public, to make an example of them, and I was advised that a conviction for perjury was certain. I prosecuted them accordingly. They got off; and the only result was that I added a few hundred pounds more to the thousands I had lost over the case, and appeared before the world in the light of a vindictive monster prosecuting a poor old man and woman on frivolous grounds. The truth is, that, as the law stands, a prosecution for perjury is the most speculative of legal proceedings, and few lawyers who value the good opinion of their clients will ever advise them to risk their money in this form of sport. Here again, therefore, virtual immunity is granted to the offender by our present system of legal procedure, with the result that false evidence is generally given at the vast majority of trials, civil and criminal, and the difficulty and uncertainty of administering strict justice by legal machinery are increased immeasurably. Occasionally, in some case where the perjury is proved up to the hilt in the course of a trial, a judge will order documents to be impounded and call the attention of the public Prosecutor to the facts: but even where this strong course is taken, it is quite the exception to see afterwards that the judge's action has borne fruit in the shape of a public prosecution.

While, therefore, I agree with Sir Harry Poland in this opinion on the particular case of Mr. Herbert Druce, I think he has called attention to only one side, and much the smaller side, of a cardinal defect in our system of criminal procedure. The practice of leaving it to the private citizen to initiate and bear the cost of bringing a criminal to justice is radically wrong. Its inevitable result is, that the majority of the scime to which this procedure is applied will pass unnoticed, and it implies that where a prosecution is undertaken it will often be from purely vindictive motives, or, as in the case of Mr. Druce, to

gain some collateral end. The practice is, I believe, unknown in any European county outside the United Kingdom; it is unknown in Scotland; and even in England it does not apply to all crimes. I think there can hardly be two opinions as to the desirability of abolishing it in the case of perjury, and conducting all prosecutions for this offence by the representatives of the Crown at the public expense. Perjury is essentially an offence against the majesty of the law. Its effect is to pollute the fountain of justice at its source. The technicalities which at present circumscribe the offence should be pruned down, and whenever a judge or magistrate is of opinion that deliberate perjury has been committed in his court, it should be his duty to call the attention of the prosecuting officer, whoever he may be, to the case. This would get rid of the particular abuses which Sir Harry Poland points out in the Druce case. But there is an unanswerable reason for abolishing private prosecutions in all cases. The only objection to the adoption of the Scotch practice of entrusting criminal prosecutions to a procurator-fiscal in every district is that of expense. But the expense would not be formidable, and it is absurd to suggest that this country cannot afford to enforce its criminal law by the methods which are in use in Scotland and nearly every foreign country. If it is to be said that crimes must go unchecked and unpunished because it is too expensive a business to prosecute offenders, we might as well get rid of the police for the same reason. The class of offences which now flourish for want of a general system of public prosecutions are chiefly offences against the pocket. They are therefore themselves a heavy cost to the public, and the expenditure on repressing them, would actually save money—probably more of it than the prosecutions would over cost.

# THE BURMA LAW TIMES.

NO. 12.

APRIL 1908.

VOL. I.

*The Subscription for "The Burma Law Times" is Rs. 10 per annum, payable in advance.*

*Subscribers not receiving their numbers should communicate with the Editors as soon as possible,*

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## Editorial Notes.

THE sudden disappearance of Mr. Spittler must be deeply regretted by all members of the profession. It is impossible to ascertain what has happened to him, though it is generally believed that he drowned himself.

It is a disgraceful state of affairs that no active steps should be taken by the police to trace Mr. Spittler's disappearance. If a man of Mr. Spittler's position is lost, and the police do not seem to be particular, it is inconceivable what slackness they may not show if the life of a common individual was concerned. There is nothing to prove that he was not murdered, and until some satisfactory evidence is obtained to explain the whole affair we cannot help feeling that the police is guilty of gross neglect of duty.

ON several occasions we have drawn the attention of the authorities to the barbarous practice of trying a man accused of murder without giving him the assistance of an advocate. Evidently questions of life and death are of so little consequence as to necessitate no particular action, and nothing has so far been done. Nearly all the high courts have recognized the justice of this claim, and enacted rules to provide facilities for furnishing an undefended person with every possible assistance. If you must hang a man you must at least let him feel that he has had a fair trial. Until he has had the fullest legal assistance, we repeat what we have said before, that he has not had such a trial. In England it was always the recognized practice in all murder cases. In other cases also, it was not uncommon to give a solicitor and counsel free of charge. As some judges, however, followed this practice and others did not, 3 Ed. VII chapter 38 (1903) was passed. It is as follows:—

*"An Act to make provision for the Defence of Poor Prisoners. (14th August 1903.)"*

"Be it enacted by the King's most Excellent Majesty, etc., as follows:

"1. (1) When it appears, having regard to the nature of the defence set up by any poor prisoner, as disclosed in the evidence given or statement made by him before the committing justices, that it is desirable, in the interests of justice, that he should have legal aid in the preparation and conduct of his defence and that his

means are insufficient to enable him to obtain such aid—

“(a) the committing justices, upon the committal of the prisoner for trial; or

“(b) the judge of a court of assize or chairman of a court of quarter sessions, at any time after reading the depositions, may certify that the prisoner ought to have such legal aid, and then thereupon the prisoner shall be entitled to have solicitor and counsel assigned to him, subject to the provisions of this Act.

“(2) The expenses of the defence, including the cost of a copy of the depositions, the fees of solicitor and counsel, and the expenses of any witnesses shall be allowed and paid in the same manner as the expenses of a prosecution in cases of indictment for felony, subject, nevertheless, to any rules under this Act and to any regulations as to rates or scale of payment which may be made by one of His Majesty's Principal Secretaries of State.

“2. Rules of carrying this Act into effect may be made in the same manner and subject to the same conditions as rules under the Prosecution of Offences Act, 1879.

“3. In this Act—

“Prisoner includes a person committed for trial on bail.”

THE General Council of the Bar has recommended in its last annual statement that, before being called to the Bar, every man must go through a course of compulsory work in chambers with a practising barrister. If the Council of Legal Education adopts this suggestion it will undoubtedly be conducive of good results, especially in countries like Burma where the conditions of practice necessitate a large amount of chamber work.

Though this work here is different from what is known as chamber work in England, the methods of study will be the same to a large extent, and the habit of doing desk work of the driest and the most monotonous kind will be of no little assistance afterward in practice and the quality of pleadings will be considerably improved.

THE Local Government has sent a copy of the draft Bill to amend the Insolvency Law applicable to the presidency towns, to the Bar Library Association for suggestions and criticism. The amendments proposed are very wide and if bodily adopted likely to create hardships. We hope that the Association will soon appoint a committee consisting of men willing to work in order carefully to study and report on the Bill.

THE following letter dated the 1st August 1908 has been received by the Honorary Secretary, Bar Library Association, Rangoon from the Secretary to the Government of Burma on the subject of the establishment of a City Court in Rangoon in respect of which a memorial was recently dispatched to the Local Government as was stated in our issue of February last.

“I am directed to acknowledge the receipt of your letter dated the 20th February 1908, concerning the suggested constitution of a City Court in Rangoon.

“2. The Bar Library Association is under a misapprehension in supposing that the proposal for the constitution of a City Court has been accepted by the Local Government. Before accepting any proposal to that end, the Lieutenant-Governor will be glad to avail himself, as it has been the practice to do on similar occasions, of the advice of the members of the Rangoon Bar. If

there is a probability that the suggestion will be pursued, the details and reasons of the proposals will be fully explained."

OWING to an oversight in reading the *Gazette of India*, we happened to state in our last issue that the Whipping Act had been passed into law as Act II of 1908. It was introduced only as Bill II of 1908, and we now find that it is being circulated among local Governments for criticism and suggestion. We have no doubt that it will be referred to the Bar Library Association in due course. The following Extracts from the *Law Times* are of great interest. They showing that whipping as a deterrent punishment has been a failure in crimes committed with violence, though the popular belief is to the contrary:

4th April 1908:—

"WE notice that during the assizes at Cardiff this week two sentences of flogging (in addition to imprisonment) were passed by Mr. Justice A. T. Lawrence upon men found guilty of robbery with violence. The judge is reported to have said that "he knew there were some humanitarian people who objected to the use of the lash," adding: "If those persons who have such highly sentimental views happen to be the persons attacked then I will listen to them." This is a curious piece of bench logic. What has the situation of the objector (*i.e.*, whether he has or has not been attacked) to do with the justice of the case? Moreover, objections to the lash are not governed by "sentimental" or "humanitarian" views: they rest upon the proved inefficacy of a gross and disgusting form of punishment. It seems to us that judges who persist in dealing out the "cat"—if they would but realise it—are in a rather awkward position. They have not acquainted themselves with the

history of flogging, or, if they have done so, they decline to be guided by patent and established facts. It has been shown to weariness that robbery with violence was never suppressed by flogging."

11th April 1908:—

"MR. GLADSTONE, as Home Secretary, declined, in reply to a question addressed to him on private notice, to consider, with a view to their remission or reduction the sentences of flogging to which, in addition to lengthened terms of imprisonment, no fewer than eleven men on conviction of robbery with violence were condemned by Mr. Justice A. T. Lawrence at the Cardiff Assizes, although the penalty of flogging is not fixed by law, but is inflicted at the discretion of a single judge, has never been awarded by the majority of the members of the judiciary, and will be subject to appeal on and after the 18th instant, when the Criminal Appeal Act comes into operation. In view of the attitude of the Home Secretary it is of interest to record that on the 31st July 1885 the House of Commons declined to sanction this form of punishment even in reference to offences against women and children which in the debate on that occasion was condemned by Sir Henry (Lord) James, Sir Edward Clarke, Sir Farrer (Lord Chancellor) Herschell, Sir Horace (Lord) Davey, and Sir Thomas Chambers, the Recorder of London, while on the 28th March 1900 the House of Commons rejected on a motion for its second reading by a majority of 123 Mr. Wharton's Corporal Punishment Bill. Mr. Asquith, in speaking in opposition to that Bill, said, "I believe the majority of the English bench, at present comprising some of the ablest and most experienced of our judges, have never in their lives awarded the sentence of the lash. As to reformation, has any one ever yet been reformed by the punishment of the lash? I

have never yet been able to discover any such evidence. Is it the wisest course for weaning men from brutality to commence the course of punishment by treatment which involves moral humiliation and physical torture? You may depend upon it, with most of them there are latent but still present sparks of self-respect and an element of human dignity which, if carefully watched and tended, might in the course of time burn into a purifying glow, which would be in great danger of extinction by such measures as this Bill proposes. As to the deterrent effect of flogging, it is impossible to look upon a punishment as really deterrent if the question whether it will be inflicted in any particular case is no more a certainty than a chance in a lottery. The majority of the judges never award this punishment at all."

"It is regrettable, and in the long run it certainly makes against the power of the press, writes Mr. Tighe Hopkins, that the facts and figures about flogging, which are easily accessible, are more or less deliberately ignored. They cannot but be ignored, for they are open to all of us. The *Daily Express* wrote of Mr. Justice Lawrence on Monday last that his 'Lordship is clearly determined to repeat the experiment which was tried with such success by Mr. Justice Day at Liverpool.' What was the "success" of Mr. Justice Day at Liverpool? Off and on, during a campaign of eleven years, he flogged pretty freely, inflicting in all something over 1,900 lashes. When he began in 1882, there were fifty-six cases of robbery with violence. When he left off, at Liverpool, in 1893, there were seventy-nine. From the unfortunate example of Mr. Justice Day, the *Daily Express* passes to generalities. 'The deterrent effect of this particular form of punishment has always been most marked.' Let us go to back some few years. The first flog-

ging judge under the 1863 Act was Mr. Justice Lush. At the Leeds Autumn Assizes, in 1863, he flogged every case that came within the statute. Mr. Justice Keating, who followed him on circuit, was asked by Mr. Justice Lush how far his system of flogging had been salutary. Mr. Justice Keating's reply was that 'the number of such cases happened to be considerably larger, so much so that I was forced to pass very severe sentences of imprisonment. I have been also told by another of my brethren that at the same town of Leeds he had prisoners before him, again charged, having already been flogged.' All these facts are known to every-one who has examined the history of flogging on its modern side. Mr. Justice Lawrence has effected nothing. At Liverpool, at Manchester, and elsewhere, the experiment of the 'cat' has failed, and the figures in proof of the assertion are at anyone's disposal."

"It is not, perhaps, generally known that the barbarous and degrading punishment of the lash is wholly abolished in Scotland. Mr. H. D. Greene, K.C., speaking in the House of Commons on the 28th March 1900, thus accounted for its abolition in Scotland. We quote from *Hansard*: "The unfortunate Paddy in Dublin and the unfortunate wretch in White-chapel may be whipped, but the man in Scotland is to go free. What is the reason? Because the Scotch will not tolerate a law of this kind. In an Act passed in 1862, to amend the law with regard to the whipping of juvenile offenders, a clause was introduced that no one should be whipped in Scotland for offences against person or property, and the Scotch have enjoyed a complete immunity against whipping ever since. Can any one contend that there has been an increase of crime in Scotland because of that provision."

"ONE of the ablest arguments ever advanced against the punishment of the lash was urged by the late Lord Chancellor Herschell in the House of Commons on the 31st July 1885. "He strongly objected to the punishment of flogging for two reasons. The first was that it was perhaps above all other punishments an unequal punishment. They inflicted the same number of strokes upon two men, and the chances were that the man who deserved to feel the punishment most felt it by far the least. It was an extremely unequal punishment. And, in the next place it was of all punishments the most uncertain. They had to leave the punishment, as they must leave it, to the discretion of the judge. There were some judges who would always flog, there were some judges who would never flog. Whether the punishment was inflicted or not depended, not on the gravity of the offence, but upon the particular circuit. He knew it was the prevailing opinion that the punishment acted as a great deterrent in cases of crimes of violence—that it put down garrotting. He invited anyone who entertained that belief to be good enough to peruse a return which was laid on the table of the House at his instance, because by that return it was shown very clearly that garrotting had been put down before the Flogging Act was passed. He obtained a return of the number of crimes of violence at the Central Criminal Courts and at every assize for two years before the flogging was introduced and for every year subsequently, and if anything was proved by that return it was proved to conclusion that the offence of garrotting had been substantially put down before the Act imposing flogging was passed. And how was it put down? He believed the suppression of garrotting was due very much to the action of one judge (Mr. Baron Bramwell) who sat at the Central Criminal Court. A number of these

cases came before him and he dealt with them with great severity. From that time the case in which this cruelty to persons was inflicted ceased. If hon'ble members would read the return to which he alluded they would find that, if a judge went assize and flogged a number of men for a particular offence the number of such offences at the next assize did not diminish. If they could prove anything from it would be this—that flogging judge was followed by a number of garrotting cases and a non-flogging judge by a great diminution of that crime. He did not say that was the result but he did maintain that if anything was conclusively proved it was that flogging had not the deterrent effect it was commonly believed to have. There must be uncertainty in the punishment. They could not say that every man who committed a particular offence should be flogged, and unless they did that they left the punishment uncertain. He had these strong objections to the punishment, and therefore he was opposed to any attempt to extend it."

#### THE SECRETARY TO THE LEGISLATIVE COUNCIL.

THE appointment of Mr. John Guy Rutledge in succession to Mr. Lentaigne as Secretary to the Legislative Council was one of those surprises which often vary the dull monotony of life in this province. The first announcement of any kind that Mr. Rutledge had been appointed reached us through the *Law Times* of the 21st March which was received in Rangoon on the 7th of April.

We know nothing authentic about Mr. Rutledge, except this that he is of Liverpool and that he was called to the Bar in 1897. It is impossible to say who is responsible for this appointment but there is no doubt that this is one of a

series of acts with which we have been familiar of late and from which it is amply evident that there is no desire on the part of the Government, local or other, either to do anything which would foster, or refrain from doing anything which would annoy, the local bar. If we were as complacent as the requirements of life in this province necessitate, we would probably consider it a compliment that even an invincible body should wish to weaken our position, or we should at least find some consolation in trying to believe, as some others do, that the Secretary of State had sent out a barrister because the appointment of a civilian had been suggested and considered highly desirable by the Local Government. Whatever view we adopt of this matter it is time to protest against the recurrence of such unfair treatment before it becomes a fixed and recognized principle. It is true that we cannot always have a voice in administrative matters, but it is equally true also that we have a right to resent being slapped on the face on every unnecessary occasion. The instances in which this has happened have been so many that it is in our opinion unsafe to look with equanimity upon these appointments if we have at heart our own future good. Public interest also requires that this tendency should be checked for the obvious reason that, if it is not, the bar would ultimately be so weakened that it would no longer be the wholesome check that is ought always to be on what is arbitrary or otherwise repugnant to our ideas of law and government. When members of the local bar have no prizes to look forward to, either at the beginning or towards the end of their active career, it is improbable that decent men would be attracted to practice, and the ultimate result must be an extreme attenuation if not the total exhaustion of the bar. The evil, however, will not stop there. A weakening of the bar must, in the long run,

lead to the demoralization of the bench, notwithstanding anything irresponsible optimists may say to the contrary. This is a consequence which no degree of sophistry or administrative expediency will prevail upon us to look forward to without a great deal of misgiving, and is in itself enough to induce any man who has any sense of duty to try and prevent with all his might and strength.

Of all cases we have had to deal with, this is the most egregious because it has not even the plausible justification of former appointments that it was inexpedient to appoint local barristers because they came into direct contract with their clients. Such an argument cannot apply to this appointment because the duties attached to this office\* involve nothing that need prevent the holder from coming into contact with any mortal whatever. Moreover, these duties are neither so intricate nor so difficult that any junior member of the bar accustomed to desk work of the most ordinary kind could not have performed them satisfactorily.

\* The Burma Rules Manual, Volume II, page 6, gives these as follows :

#### *Duty of Secretary.*

40. At least two days before each meeting of the Council the Secretary shall send to each Member a list of the business to be brought forward at such meeting.

41. The Secretary shall keep a journal, in which all the proceedings of the Council shall be fairly entered.

The journal shall be submitted after each meeting to the President for his confirmation and signature, and, when so signed, shall be the record of the proceedings of the Council.

42. The Secretary shall also prepare a report of the proceedings of the Council at each of its meetings, including an abstract of the observations of the Members, and publish it in the local Gazette as soon as possible after the meeting. He shall send a copy of such report to each Member, and also to the Secretary to the Government of India in the Legislative Department.

## LAW AND KNIGHT-ERRANTRY.

AMONG the delightful achievements of Don Quixote, that of having served on a special jury, so far as we recollect, has not been recorded. If it had, we have not the slightest hesitation in believing that it would have been very much like the inimitable escapade\* of the nine gentlemen who distinguished themselves before Mr. Justice Ormond in trying the lad Johnstone on

43. It shall be the duty of the Secretary---

- (1) to perform all acts required of him by the preceding rules ;
- (2) to draft all Bills originated by the Local Government, the Statements of Objects and Reasons, and the reports of the Select Committees to which such Bills are referred ,

Part I, local rules and orders made under

- (3) to take charge of the copies of the Bills to which the Lieutenant-Governor has declared his assent ;
- (4) to keep the records of the Council ;
- (5) to keep a list of business for the time being before the Council ;
- (6) to superintend the printing of all papers printed in pursuance of these rules ;
- (7) to assist the Council and all Committees in such manner as they may direct ;
- (8) to examine all Bills and to report to the President those which contain clauses trenching on subjects coming within section 43 of the Indian Council Act, 1861 ;
- (9) to write all letters which the Council or the President, or any Select Committee, directs to be written.

44. All acts which the Secretary is required to do may be done by any Secretary, or Under Secretary, or Assistant Secretary of the Government.

\*The following account which appeared in the *Rangoon Gazette* of the 1st of May is substantially correct :

Williams Johnstone was arraigned on a charge of having on the 21st February last in Lewis Street committed murder by causing the death of Jerome Jacobs.

The accused who was defended by Mr. deGlanville, pleaded not guilty.

The following jury was empanelled: Messrs. J. Maclean, foreman, T. W. Wilson, G. Y. Munro, R. M. Scanlon, H. McCann, C. H. Taylor, E. C. Coppin, B. E. Peters, and E. Bagchi.

Mr. McDonnell opened the case for the prosecution and detailed facts of the case with which our readers are well acquainted.

charges of murder and culpable homicide not amounting to murder on the 30th of April last. Sworn justly and truly to try and determine the questions submitted to them and to give a true verdict according to the evidence, they were so overcome with a feeling of chivalry and love of heroism that they utterly forgot the sanctity of their oaths or the necessity of conscientiously performing the most solemn of duties which can fall to the lot of man—that of deciding a question of life and death—and wished to acquit the prisoner as soon as his confession had been proved.

The circumstances are shortly described in Johnstone's recorded confession. Johnstone's confession stated that Jacobs had been living with Johnstone's mother for a long time and that she could not get rid of him as he seemed to have some hold over her. He had thrashed him once so that he was compelled to go to hospital. He corroborated his mother's statement about the abuse and beatings she had received from Jacobs not only when he was drunk but when he was sober. The statement told of his obtaining work with his cousin at Hsipaw and of his return on Wednesday 19th February. Jacobs left the house at about a quarter past six on the Friday night returning about nine very drunk and abusive and finding the door fastened from the inside he began to use offensive and obscene language and to try to kick the door in. This action so excited Johnstone that he lost his temper and secured a large clasp-knife, which he had recently purchased and opened the door. As Jacobs entered, the confession stated, Johnstone stabbed him once in the chest and on his turning to go stabbed him twice in the back. Jacobs ran up Lewis Street towards Fraser Street calling for the police. Johnstone then took the knife and washed it and put it in a canvas bag hanging on the wall of the inside room and went and told his mother what he had done. On the return of his cousin about half an hour later he told him also.

At this stage, at the instance of the Court, an alternative charge of culpable homicide not amounting to murder was added.

Mr. H. Leveson, District Magistrate, Rangoon, was called to prove confession of accused recorded by him which accused admitted had been voluntarily made.

Before the examination of the next witness, Mrs. Johnstone, was begun, the foreman in addressing the Court said that the jury were aware of the circumstances of the case. They were agreed that the accused should be acquitted. They knew what the case was.

His Honour:—You cannot return a verdict against accused until you have heard the witnesses.

The Foreman:—We want to acquit him, now, right away. What he has done he has done under grave circumstances, and I think he has done very well.

His Honour:—That is not the law, I am afraid.

The Foreman:—If you desire it, the jury will retire and give a verdict straight away.

His Honour:—You must consider the other point of culpable homicide not amounting to murder.

The Foreman:—I think the jury would desire an acquittal. Admit that it was culpable homicide not amounting to murder.

One of the jury:—It is justifiable homicide.

His Honour said he was afraid that it was not justifiable homicide.

This is conclusive proof that the age of chivalry is, after all, not dead, and that a bad man may be murdered with impunity provided that the act appears one of piety or otherwise has around it a certain halo of romance, sufficiently fascinating for nine impulsive cross-grained individuals.

In our opinion the verdict is quite erroneous in point of law. Grave and sudden provocation, however violent, only mitigates but never entirely excuses an offence. The jury was therefore bound to find the prisoner guilty of culpable homicide not amounting to murder on grave and sudden provocation though for our own part we feel inclined to think that the provocation, even if grave, was not so *sudden* as the law contemplates. The plea of self-defence was a useful peg on which a perverse jury, such as this, might hang its verdict of acquittal.

Mr. deGlanville said that the jury seemed unanimous on the matter although His Honour might not agree with them.

Mr. McDonnell:—I submit they are bound to hear the evidence for the prosecution. They could not on the unsupported statement of the accused himself acquit him.

The Foreman:—We consider it justifiable murder, not amounting to the offence of murder.

Mr. McDonnell:—I submit that the jury are bound to hear the evidence and to carry out Your Honour's direction of law as to whether the offence was culpable homicide not amounting to murder. If I may say so the attitude of the jury is in these words. "He may or may not have been guilty of culpable homicide not amounting to murder, but we desire to acquit him." If they do that they are not carrying out the terms of their oaths. They had sworn to bring in a verdict according to law. What they had done was not in accordance with the law.

His Honour repeated to the jury that they must take the law from him.

The Foreman:—We are willing to submit to the ruling of the Court.

Mrs. M. Johnstone was next examined. After a part of her evidence had been taken the foreman interposing told the Court that it was of no use wasting their time in hearing that evidence, which he did not think would lead to anything. The witness did not seem to be responsible for her words and it was a great mistake to waste their time.

His Honour said if the jury thought that the witness was irresponsible, he would not take her evidence.

Mr. McDonnell then proposed to read the witness's evidence tendered in the Lower Court. That was done as the defending Counsel had no objection.

But the confession of the prisoner did not reveal the immediate necessity of plunging his knife into the chest of the deceased, and as the burden of proof lay on him to establish his plea, no self-defence was proved which entitled him to an acquittal. It is rather a pity that Mr. Justice Ormond, in his charge to the jury, did not make sufficiently clear the distinction between grave and sudden provocation, which has the effect of mitigating, and self-defence which, *if proved*, has the effect of excusing an offence.

It is never safe to trust a jury painfully precocious and sentimental with a general verdict of "guilty" or "not guilty." The most appropriate course to adopt in such cases is to ask them for special verdicts, in the shape of answers to intelligible questions embracing all the facts which, if found, constitute the

After one other witness had been examined, the foreman again addressed the Court, remarking that the jury were unanimously of opinion that it was not necessary to hear any further evidence. What evidence had been adduced proved conclusively that there had been rows and continual quarrels and they did not think it necessary to prolong the case.

His Honour:—I must ask you again to allow me to point out that you must take the law from me.

The Foreman:—Yes, we accept the law as given to us. But the accused admits the case. It seems that everyone admits everything, and what is the use of going on with the case?

Mr. McDonnell, in reply to the Court, said that he proposed to tender a number of witnesses for cross-examination.

Mr. deGlanville said he did not propose to cross-examine any of them.

The Foreman:—I think it is very unfortunate that all this evidence should be called. As far as I can say we are all honest men.

Mr. McDonnell said that he did not question the jurymen's honesty. But he thought he must be allowed to conduct his case.

Counsel after examining some other witnesses briefly addressed the Court urging that there was a case for bringing in a verdict of guilty by the jury on the charge of culpable homicide not amounting to murder.

Mr. deGlanville in addressing the jury asked them to hold that his client's acts were justifiable and to find him not guilty on both charges.

After His Honour had summed up the jury after a few minutes' absence brought in a verdict of not guilty on both charges. The accused was acquitted.

offence and from which their true verdict may legitimately and without mistake be inferred. There is nothing unusual or illegal about this, and some of the worst juries in the world have been successfully dealt with in this way by many English judges. In cases of murder and man-slaughter in this country such precautions are doubly needed, even when the jury is composed of sensible men, because, in a code which is otherwise probably the most perfect penal enactment ever known, the definitions of these crimes are very defective and have been rendered still less intelligible by judicial decisions which more often try to get round than explain them.

Three further questions have still to be considered. First, is the jury in this country entitled to insist upon giving its verdict before it has been charged by the judge? We can find no reported case in which any such right has been recognized. The Criminal Procedure Code seems to point to the contrary rule. In chapter XXIII, which treats of trials before high courts and courts of session, the subdivision (f) which deals with the stage at which the verdict of the jury is to be given, is distinctly after the addresses of counsel and summing up of the evidence by the judge. The only obvious inference which can be drawn from this is, that the jury cannot volunteer its verdict at an earlier stage but has to wait until the judge has charged it. If it had been otherwise, the Legislature would undoubtedly have added some such word as "unless the jury is in a position to give its verdict without it" in the section which insists upon the judge summing up the evidence (Criminal Procedure Code, section 297). Secondly, is the judge bound by the verdict of the jury? If it is a unanimous verdict, there is no doubt that he is. It seems, however, that he is not bound to accept the first verdict, but he can ask it to reconsider it. In England the law appears to be the same, except that an English jury, if it insists upon a verdict being immediately recorded, cannot be asked to reconsider it. (Archbold's *Criminal Law*, page 188, 20th edition.)

Lastly, what is to be done with men like these who bring into disrepute the system of trial by jury, by behaving in this eccentric manner? If Mr. Justice Ormond had not returned for two days to the bench, in order to receive

the verdict of the jury after its withdrawal, to consider it and kept it waiting in court the whole time, we do not think that it would have been, under the circumstances, too vindictive a measure to have been adopted. If the men composing it had left the court without his orders, there was ample provision in the Code to meet them. As this was not done, the court should at least mark its disapproval of their conduct by placing them on the common instead of the special jury list, so that through perversity alone they may not get the exemption, which is often coveted by such men, from serving on the jury.

#### THE NEW CHIEF JUSTICE OF BOMBAY.

THE appointment of Mr. Basil Scott as Chief Justice in place of Sir Lawrence Jenkins has probably caused no surprise to any one familiar with the High Court of Bombay. No better man could have been chosen from the local Bar, and we hope that Mr. Scott's actual career on the bench will justify the choice made by His Majesty's advisers.

Except that Mr. Scott is essentially a man of few words, he is a typical lawyer from every point of view. His learning is very great and his knowledge of the law is an achievement not often surpassed in an Indian High Court. As an adversary at the Bar he was extremely courteous and fair, especially to the younger men. He is a stoic to the very marrow of his bones, and no one is reported to have caught him overtaken with grief or joy, or any other human feeling whilst conducting a case.

Though the High Court of Bombay could not have furnished a better man, it is no disparagement to Mr. Scott to say that the selection of a local barrister as the Chief Justice of a High Court cannot always be regarded necessarily as an advantage. In order to counteract the baneful process of "fossilization" (if we may be permitted to use a word which has not yet the distinction of being legalized) which affects lawyers and judges much more than any other class of individuals, the appointment of a Chief Justice directly from the Bar of England would have been a very desirable measure. There is little no doubt that at all times can effectually vitalize the parched up veins of an ordinary court of law.

Even a Chief Justice fresh from England, brimming with all his traditions of a thousand years and more, is subject to all the limitations imposed upon him by his, surrounding and the results, when finally summed up, may, for that reason, look astonishingly unconvincing. For all that, however, there is no gainsaying the fact that the Chief Justice of a High Court in India ought always to be a barrister who has been brought up among better environments than those over which he presides and who ought, above all, to be free from all those prejudices and likes and dislikes which often mar the work of the best intentioned and even the most conscientious of local selections. Finally, a great deal has to be shown in favour of a local man, by which we mean any barrister who has chiefly practised in India, for such a place as that of a Chief Justice, before the last, probably the only, link which for good may connect the Bar of India with that of England can, with safety, be allowed to be snapped.

#### A FAREWELL DINNER.

##### I.

THE seventh of April of this year marks a new era in the social history of the law courts in this province. All the judges of the Chief Court and all members of the bar who were in Rangoon, besides some pleaders, sat down to dinner at the Amphitryon Hotel to wish farewell to Mr. Eddis, preliminary to his permanent retirement and departure for England on the 9th April. There is no former instance on record of such a gathering but we hope that some arrangement would be made by which all of us may meet at least once a year and forget, just for the space of an evening, this valley of tears—of which probably we are the chief cause—in deep draughts of golden grape juice—drunk to the tune of a noise drowning string band.

It was a brilliant and, though a multi-coloured, by no means a gaudy crowd that assembled that evening. The hall was decorated in good taste, but with the artistic thrift which ordinarily characterizes a bachelor function. The table was divided into two parts, each roughly representing an inverted "T", with a flourish or two at the end. The seats were so arranged that the worst stick-

ler for precedence could not have objected—for the simple reason that he knew that it had been assigned to him by that higher power—Fate—who had called him to the bar at a particular time. The result was, that whilst the seniors had the distinction of being nearer the hon'ble judges and one another the juniors had the satisfaction of feeling as they have done by unchallenged right everywhere from time immemorial that all the future intellectual assets of the world and its higher hopes were concentrated at their end of the table.

As soon as that stage had been reached when every one is at the highest pitch of enjoyment at a public dinner, Mr. Agabeg, the patriarch of the bar, proposed the loyal toast. When that was duly finished he proposed the toast of the evening. In becoming terms he paid a tribute to the many qualities which had made Mr. Eddis a special favourite at the bar and his departure an irreparable loss. The toast was received with loud and repeated cheers and a wild chorus of "He is a jelly good fellow" was sung until the ceiling nearly came down. Mr. Eddis responded in one of his best speeches. He gave a humorous account of the merry days of old, winding it up with a couple of interesting stories.

Mr. McDonnell was then called upon to propose to the hon'ble judges. He said that it was very hard for a man to be suddenly asked to improvise a toast, but he rose to the occasion and discharged his duty with the requisite degree of sober solemnity.

A fresh rush was made for the golden juice and the toast was drunk as we lawyers only can drink it, ending as usual, with the eternal chorus.

Mr. Justice Robinson responded on behalf of himself and his colleagues.

After dinner all of us were immortalized by Mr. Wagstaff in a flash light photograph. Whilst it is pleasant to think that some of us were forcibly consigned to posterity, others of us would have done well to have reached her with different and less hilarious expressions. That is the worst of flash light.

This terminated the proceedings of the evening. Though Mr. Levison was specially invited by

the Bar to preserve order as District Magistrate and guardian of the peace, his assistance was not required. No previous records were beaten and no casualties have yet been reported.

## II.

MR. EDWARD UPTON EDDIS was born just about half a century ago. He was educated at Westminster school, where he was one of the Association eleven. He took his degree from Christ Church, Oxford. He was called to the Bar by the Inner Temple in 1884. Soon after his call he was enrolled in the Calcutta High Court. After a very short stay he was attracted to the land of pagodas and etherial dreams, and he survived both, as we know, for a period of over twenty years with heroic fortitude.

Mr. Eddis first came into prominence during the civil war between Mr. McEwan and Mr. Moylan by showing, with Mr. VanSomeren, that legal pugnacity which so characterized his later career. Mr. Moylan, soon after his return from Calcutta, where he had gone to get his appeal heard took Mr. Eddis into partnership. This lasted until Mr. Moylan's sudden death.

Mr. Connell joined the firm in 1895 and Mr. Lentaigne in 1900.

The severance of Mr. Eddis' connection with Burma must be much regretted by all who knew him in his professional or private capacity. He was a man of various attainments, and his knowledge of mercantile law and customs, in particular, was very great. His chief merit, however, was his love of fight. If it was against Government or any other public body he enjoyed it all the more. Though at times he was apt to be impulsive, his opponents even had to admit that he never made a statement in court in which he did not believe. There are many cases with which his name is associated. *Cowie vs. The Commissioners of the Port of Rangoon*, and *Hla Gyi's case* are two of them which must ever be remembered by those who had the opportunity of watching Mr. Eddis in them.

Junior members of the bar will especially miss him. He was always ready to help them with opinion or advice, either in court, the library or his chamber, and on many an occasion he has rushed into the library from court if

whilst waiting for his own case, he saw a junior arguing, hard pressed for an authority, and brought him one. This is not however what made him so popular with them. An authority is a useful thing in its own way but no one thinks it indispensable now-a-days, and if Mr. Eddis had confined himself merely to that, they would have forgotten him long ago. His urbanity and the impression that he gave that it was possible to get over seniority appealed to every one of them and his appearance in the Bar library was always welcome. Neither success nor even seniority has affected his sense of humour—the most vulnerable point in a successful lawyer—and he can always enjoy a good joke and, what is stranger still, relate one with great skill and gusto. An eternal appearance of being bored, stiffness and superlunar wisdom which disdains the vulgarity of being amused, form no part of Mr. Eddis' temperament. We hope that the mirth and sense of enjoyment which humanized learning and experience in Mr. Eddis will always be an example to be imitated to all those who know him and are not wholly past redemption.

## THE HIGH COURTS.

Nadiar Chand Shaha vs. Wood.

I. L. R., 35 Cal. 194.

*Indian Railways Act (IX of 1890), sections 77, 140—“may be directed.”*

A notice of claim for short delivery was served upon the Traffic Manager of a railway administered by a Railway Company, and not on the Agent.

*Held*, that such a notice was not a sufficient compliance with the provisions of sections 77 and 140 of the Indian Railways Act.

The word “may” in section 140 of the Act means that if a plaintiff is desirous of serving an effective notice of claim, the notice *must* be directed to the Manager or Agent as the case may be.

I. L. R., 28. All. 552 (followed).

I. L. R., 22 Mad. 137 (dissented from).

Ramjidas Poddar vs. Howse.

I. L. R., 35 Cal. 199.

*Arbitration Act (IX of 1889), section 19.*

Section 19 of the Arbitration Act only applies where there has been a submission to arbitration before the commencement of legal proceedings.

Phul Kumari vs. Ghanshyam Misra.

I. L. R., 35 Cal. 202 (P. C.)

*Valuation of suit, section 283 of the Code of Civil Procedure—Court-fees Act (VII of 1870), schedule II, article 17, sub-section (1).*

*Held*, that the suit was under section 283 of the Civil Procedure Code for which the proper court-fee was that prescribed by sub-section (1) of article 17 of schedule II of the Court-fees Acts (VII of 1870), namely, Rs. 10 for a suit to alter or set aside a summary decision or order of a civil court not established by Letters Patent.

I. L. R., 3 DOM. 20 (followed).

Prabhat Chundra Chowdhry vs. Emperor.

I. L. R., 35 Cal. 219.

*Arms Act (XI of 1878), sections 14 and 19 (f).*

Section 19 (f) of the Arms Act does not make the mere possession of a gun punishable thereunder, but a possession contrary to section 14 of the Act.

The temporary possession of a gun by a man who has snatched it up to fire at a mad dog which had entered his premises, is not contemplated by section 14.

Chintamon Singh vs. Emperor.

I. L. R., 35 Cal. 243.

*Security for good behavior—sections 226 and 540 of the Code of Criminal Procedure—sufficient bases for an order under section 110 of the Code—evidence of general repute.*

Section 261 of the Code of Criminal Procedure does not apply to the enquiry under section 117.

The prosecutor and the accused are both equally entitled to a full cross-examination of witnesses called by the court under section 540 on matters relevant to the enquiry. The court cannot restrict the cross-examination of such witnesses by either party to the subjects on which it had examined them.

In dealing with cases under Chapter VIII of the Code, the magistrate ought, especially where no conviction is proved, to test the prosecution evidence with great care.

Evidence of association with bad characters, who were always suspected of being concerned in dacoities, and many of whom were during the period of association bound down under section 110 of the Code or convicted of dacoity and theft, at various times, and especially in most cases shortly before, and near the place of a dacoity, is a sufficient basis for an order under section 110.

Evidence of witnesses from villages where dacoities had occurred, but which were at some distance from the village where a person resided, as to his character in connection with the dacoities, is admissible as evidence of general repute under section 117 of the Code.

Maharj Singh vs. Chettar Mal.

I. L. R., 30 All. 22.

*Civil Procedure Code, sections 473 (c), 588 (23)—interpleader suit—appeal.*

*Held*, that an adjudication upon the claims of defendants in an interpleader suit is a decree and appealable as such under section 540 of the Code of Civil Procedure and not under section 588 of the Code.

Hansraj Pal vs. Mukhraj Kunwar.

I. L. R., 30 All. 28.

*Civil Procedure Code, section 232—sale of property decreed—right to execute decree.*

If a decree-holder, holding a decree for possession of immovable property, sells a portion of such property, the sale does not, without express provision to that effect, give the purchaser any right to execute the decree himself.

Abdul Hamid *vs.* Riazuddin.

I. L. R., 30 All. 32.

*Civil Procedure Code, section 501—reference made orally, but reduced to writing by court—irregularity.*

Where both parties to a pending suit consented to a reference to arbitration and an order of reference was then and there made by the court, in the presence of the parties, though not upon a written application, it was held that it was not open to the court, having regard to the provisions of section 510 of the Code of Civil Procedure, to supersede that reference, the arbitrator not having declined to act.

I. L. R., 27 Cal. 61 and I. L. R., 23, Cal 629, followed

Emperor *vs.* Mahendra Singh.

I. L. R., 30 All. 47

*Criminal Procedure Code, sections 110 and 526—transfer.*

Held, that proceedings under section 110 of the Code of Criminal Procedure cannot be transferred to any court outside the district within which such proceedings have been lawfully instituted.

I. L. R., 16 All. 9 and I. L. R., 19 All. 291, followed.

Lohre *vs.* Deo Hans.

I. L. R., 30 All. 48.

*Appeal—parties—estoppel—procedure.*

The plaintiff having obtained a decree against one of two defendants acquiesced in that decree, but the defendant judgment-debter appealed, making the other defendant also a party to the appeal, with the result that the plaintiff's suit was dismissed. Held, that it was not open to the plaintiff in second appeal to contend that the court below should have made a decree against that defendant with regard to whom he had acquiesced in the dismissal of his suit.

Rupchand *vs.* Dasodha and another.

I. L. R., 30 All. 55.

*Guardian at litem—appeal—limitation.*

Where a guardian *at litem* of a defendant-respondent was not made a party to an appeal filed by the plaintiff until after the period of

limitation for filing such appeal had expired, it was held that the appeal was not for this reason time-barred.

I. L. R., 4 All. 37, followed.

Sheo Narain *vs.* Nur Muhammad.

I. L. R., 30 All. 72.

*Civil Procedure, section 244—purchase at auction by decree-holder—suit to obtain possession of property so purchased.*

Where the decree-holder himself purchases property at auction-sale in execution of his own decree, but fails to obtain possession, his remedy is by application under section 244 of the Code of Civil Procedure; he cannot bring a separate suit for possession.

Ro Gulbai and Lilbai.

I. L. R., 32 Bom. 50.

*Guardian and Wards Act (VIII of 1890), section 17—considerations for the court in selecting the guardian for the person of a minor.*

The mere legal right to be appointed a guardian, the preference of the minors, and the existing or previous relations are very minor considerations as compared with the main question—What order would be for the welfare of the minor? Who amongst the relations or, for the matter of that, friends of the minors can you select who will supply as nearly as possible the place of their lost parent or parents?

Bai Hirakore *vs.* Trikamdas.

I. L. R., 32 Bom. 103.

*Partition Act (IV of 1893), section 2—application of the section.*

Section 2 of the Partition Act (IV of 1883), applies, not only where the court has to pass a decree in a suit for partition, but also where, after the court has passed such a decree directing the partition to be effected in a particular mode, it is found that the mode is impracticable or inexpedient, and one of the parties asks the court to modify the decree by passing an order under this section.

I. L. R., 24 Mad. 639 and I. L. R., 5 Cal. W. N. 113, followed.



IN THE CHIEF COURT OF LOWER  
BURMA.

CIVIL MISCELLANEOUS APPEAL No. 34  
OF 1906.

S. A. S P. Palaneappa Chetty ... *Appellant*,

*vs.*

Joseph Sandys ... *Respondent*.

BEFORE SIR CHARLES E. FOX, KT., C. J.,  
AND MR. JUSTICE HARTNOLL.

*Dated 23rd April 1907.*

*For Appellant.*—A. C. Dhar.

*For Respondent.*—Young.

*Insolvency—Debt incurred in connection with disreputable conduct disentitles insolvent to discharge.*

When an insolvent has left his wife and children in Calcutta, and incurs the principal liability in connection with disreputable conduct with a Burmese girl, in Rangoon, he is entitled to no relief under the Insolvent Debtors Act.

This was an appeal from an order of Mr. Justice Bigge, sitting on the Original Side of the Chief Court, in Insolvency Case No. 73 of 1905. The following is the judgment appealed against.

*Bigge, J.*—The Insolvent filed his petition on the 28th June 1905, shewing debts to the amount of Rs. 1,416-14. He was opposed by the first creditor, Palaneappa Chetty, on the following grounds: that he was in a position to pay the debts; that when he contracted them he had no reasonable expectation to pay these debts, and that he has not furnished a true account of his debts and properties. The petition was heard by me on the 7th August, and when the petitioner was examined and cross-examined he stated that the debt of the opposing creditor represented jewellery which had been taken by him from the Chetty for a young lady on the understanding that if she left him the property was to be handed over to him. He was then cross-examined as to whether he did not say he had furniture to the value of about Rs. 400 or Rs. 500 which he emphatically denied. Palaneappa Chetty was examined and swore that he told him that he had Rs. 10,000 in the Bank of Bengal, a matter which has judiciously not been raised today. In

his cross-examination he most equivocally said that he had never been to the house of the Insolvent. In my order of the 7th August I stated that the petitioner was a Tally Clerk whose pay was Rs. 120 a month, and examined shortly the two stories told by him and the Chetty, after which I found that I did not believe that he ever said that he had Rs. 10,000 in the Bank, a finding which I endorse with all force today. I said that it was not necessary to notice the extraordinary story he had told about the origin of the debt for Rs. 400 except to say that before I could believe it, I should require much stronger evidence in support of it than I then had before me. It is not necessary to come to a conclusion as to that story, but after hearing the evidence of the Insolvent, and Palaneappa Chetty today, I have not the slightest doubt that whatever the jewels were taken for Palaneappa Chetty did, as a matter of fact, give jewellery and not cash on a promissory note. I considered on the last occasion that I should order payment out of the Insolvent's salary into Court, which I then said would probably be futile, and I am now more inclined than I was then to make any such order, and I said that I would not deliver him to the mercies of his opposing creditor who had so recklessly lent him money, and ordered that the hearing of the case would be postponed for one year with protection. The case has now come up at the conclusion of that year, and, though under the ruling of the Court of appeal I am bound to hear an opposing creditor again, it is a perfect scandal and an abuse of the process of the Court, and a waste of judicial time that the time of the Court should be taken up, as mine has been done, with such a futile and ineffective attempt to stop the personal discharge of the Insolvent as has been made in this case. There is absolutely nothing before me today that was not before me on the last occasion, except a certain amount of additional prevarication and untruthfulness on behalf of the opposing creditor. The grounds on which he has endeavoured to oppose are exactly the same as before, and he has not added one jot to the most ineffective evidence that he put before me on the 7th August. He stated that he was able to shew that the Insolvent had given his wife jewels since the date of his insolvency, and to prove that he called this lying witness, Latif Mahomed, who, in addition to his performances here today, seems to have set law and order altogether at defiance, by attaching the pay of the insolvent

after he knew full well that he had obtained his protection in this Court. Such conduct as this is intolerable, and I am satisfied that if it had been brought to the notice of the Judge of the Small Cause Court when the application for removal of the attachment was made, he would have marked his disapprobation of it by allowing suitable costs. I have expressed my opinion as to the conduct of the opposing creditor and I must protect myself against such wanton abuse in future of the process of the Court, by allowing suitable costs against the opposing creditor, who has thus wantonly and vexatiously wasted my time in these proceedings, and therefore, in granting the personal discharge of the insolvent, I order the opposing creditor to pay five gold mohurs advocate's costs of this application.

The opposing creditor, Palaneappa Chetty, appealed from this order, and the following judgment was passed on the 23rd day of April 1907, by Fox, C. J., in which Hartnoll, J., concurred.

The insolvent is a Tally Clerk, and at the time of his petition, his pay was Rs. 120 a month. He came from Calcutta, leaving debts there, in about November 1904. He got temporary work in January 1905, and was taken on the permanent establishment in February 1905. Between December 1904 and June 1905 he borrowed or made himself liable for Rs. 943-14-0. Rs. 400 of this appears to have been for jewellery for a Burmese girl, he having left a wife and children in Calcutta. Decrees were apparently obtained against him, but it does not appear that he was arrested in execution. He filed his schedule on the 28th June 1905. His personal discharge was postponed for a year with protection, and after the expiration of the year it was granted, without any order being made as to the payment of any portion of his salary towards repayment of his debts. The opposing creditor was ordered to pay him five gold mohurs as costs.

The effect of the learned Judge's orders is that a man who says he cannot live on less than Rs. 120 a month, but who incurred in six months liabilities, in principal alone, for about what he would earn in eight months, the principal liability having been incurred in connection with disreputable conduct, is given practically a clearance of the debts so recklessly incurred.

For such a man to apply to the Court for the benefits of the Act for the relief of Insolvent debtors appears to me to be an abuse of the Court. That he should receive any sort of relief seems to me to be lending aid to and encouraging a reckless, dishonest, and disreputable person. The benefits of the Act could not have been intended for such people. In my opinion the learned Judge should have dismissed the Insolvent's petition, and I would allow this appeal, set aside the order for personal discharge and for payment of costs, and would dismiss the Insolvent's petition for the benefit of the Act.

IN THE CHIEF COURT OF LOWER  
BURMA.

CIVIL FIRST APPEAL No. 69 OF 1907.

Moung Ba Pe vs. Ma Ma.

BEFORE MR. JUSTICE IRWIN AND MR. JUSTICE  
HARTNOLL.

Judgment dated 20th February 1907.

For Appellant—J. R. Das.

For Respondent—F. N. Burn.

*Specific performance of contract to sell land—notice of mortgage immaterial—section 18 (c) of the Specific Relief Act and section 55 (1) (g) of the Transfer of Property Act.*

The purchaser is entitled to specific performance and to a conveyance of the land unencumbered, whether he had notice of the mortgage subsisting on it or not.

If the vendor does not redeem, the purchaser can pay off the mortgage and deduct the amount from the purchase money. Section 18 (c) of the Specific Relief Act and 55 (1) g of the Transfer of Property.

*Ayesha Bee v. Somasundram Iyer, 11 Bur. L. R. 256 is no authority on the point, because section 18 (c) of the Specific Relief Act was not considered there.*

*Irwin, J.*—In July 1904 defendant-respondent contracted to sell to the plaintiff a certain plot of land, part of a larger plot, for Rs. 3,000. Plaintiff paid Rs. 200 earnest and subsequently Rs. 600 more. Defendant neither executed a conveyance nor gave the plaintiff sufficient particulars to enable him to prepare a conveyance.

Plaintiff sued to compel defendant to execute a conveyance, or, in the alternative, for return of the Rs. 800 paid and for 2,000 as damages for breach of contract.

The learned Judge on the Original Side found all the facts in favour of plaintiff.

The land was mortgaged to one Maung Thein Maung for Rs. 500, and this fact was not disclosed when the oral contract for sale was made. The existence of this mortgage prevented the defendant from producing the title deeds. Plaintiff's advocate, however, obtained a perusal of the title deeds from the mortgagee, and he admits that he is satisfied with the title, but he never obtained a description of the boundaries sufficient to enable him to prepare a conveyance.

Plaintiff was willing to formally admit that he had bought with notice of the incumbrance, in order that he might clear off the mortgage in the manner prescribed in the Transfer of Property Act, section 57, but the learned Judge refused to allow him to alter the case he had set up. The position then being that defendant having contracted to sell as unincumbered a property which was in fact incumbered, the plaintiff's prayer for a decree for specific performance was refused, on the authority of *Ayesha Bee v. Somasundram Iyer*, 11 Bur. L. R. 357, in which Mr. Justice Fox said that in such a case the legal title was not in the vendor, and he was not in a position to transfer what he sold. It was not in the power of the vendor to carry out the contract he had made.

It has been urged before us that the ruling just mentioned is not correct, and that the case is provided for in section 55 (r) (g) of the Transfer of Property Act, and in section 18 (c) of the Specific Relief Act.

The case above cited is not on all four with the present one. It was a suit for return of the earnest money and for damages. In the present suit the plaintiff has got a decree for the earnest money, but he wants a decree for specific performance of the contract. Moreover, I am authorized by the learned Chief Judge to say that when he decided the case of *Ayesha Bee* his attention had not been drawn to section 18 (c) of the Specific Relief Act.

In my opinion that enactment decides the point at issue without any doubt. The plaintiff is entitled to a decree for specific performance of the contract for sale, and under section 55 (r) (g) of the Transfer of Property Act he is entitled to retain out of the purchase money the amount payable to the mortgagee if the defendant does not pay off the mortgage before executing the conveyance.

Respondent urged that the findings of fact by the learned Judge on the Original Side are not correct. There were three issues of fact. The first issue—"Did plaintiff buy with notice of Maung Thein Maung's mortgage?" is immaterial, if my view of the law is correct. Plaintiff is entitled to a conveyance of the land unincumbered, whether he had notice of the mortgage or not.

On the second issue—whether plaintiff agreed to complete within three months, the defendant's statement is unsupported, and it is clear that long after three months had elapsed defendant treated the contract as if there were no such time limit.

On the third issue—whether completion was delayed by defendant failing to give particulars of title, it is quite plain that defendant has never supplied plaintiff with any particulars at all except a plan which admittedly does not show the boundaries of that part of the land which defendant contracted to sell. It is therefore impossible for plaintiff to prepare the conveyance.

I would therefore set aside the decree and would direct that defendant do furnish plaintiff with sufficient particulars for the preparation of the conveyance, and do execute the conveyance of the land in suit on payment of Rs. 2,200, less such amount as may be due on the mortgage, to the mortgagee Maung Thein Maung on the day on which the conveyance is signed. Plaintiff's cost of the suit and appeal to be paid by defendant.

*Hartnoll, J.*—I concur.

IN THE CHIEF COURT OF LOWER  
BURMA.

SPECIAL CIVIL SECOND APPEAL No. 260  
OF 1906.

Mohamed Hoosein v. Abdul Rahim.

BEFORE SIR CHARLES E. FOX, KT., C. J., AND  
MR. JUSTICE MOORE.

*Judgment dated 18th April 1907.*

*For Appellant.*—N. M. Cowasjee.

*For Respondent.*—Israil Khan.

*Mortgagor and Mortgagees—Rights of former against latter—section 20 of the Limitation Act.*

When the rents of mortgaged property, consisting of houses, and not lands, began to be collected less than six months after the mortgage, which was dated 18th April 1895, by the mortgagee under an agreement with the mortgagor and the rents collected were put against the interest due and the mortgagee sued on 19th May 1905.

*Held*, following their Lordships of the Privy Council in *Ram Din v. Kalka Prasad* (1884) I. L. R. 7 All. 502, that the mortgagor's right to a personal remedy against the mortgagee was clearly barred unless the mortgagor is entitled to the benefit of section 10 of the Limitation Act.

*Held*, the last paragraph of section 20 of the Limitation Act did not apply to this case as there is no authority for holding that the expression "Produce of land" includes rents of houses.

*Vide also* *Kariyappa v. Rachaya* (1899) I. L. R. 24 Bom. 493.

*Fox, C. J.*—The plaintiff appeals against the disallowance by the Divisional Court of a personal decree against the defendant for any deficiency there might be on sale of the mortgaged premises.

The mortgage sued on was executed on the 18th April 1896. The property mortgaged consisted of houses. Less than six months after the mortgage the mortgagee began to collect the rent of the houses by agreement with the defendant, and the rents collected were put against the interest due. The mortgage money was repayable in two years. Apparently no interest was ever paid as such. The suit was instituted on the 19th May 1905.

Under the decision of their Lordships of the Privy Council in *Ram Din v. Kalka Prasad*

(1884) I. L. R. 7 All. 502, the mortgagor's right to a personal remedy against the mortgagee was clearly barred unless the mortgagor is entitled to the benefit of section 20 of the Limitation Act. The last paragraph of that section does not, in my opinion, apply to the case. The mortgaged property was not land, and the rents were not produce of land within the meaning of the words of the paragraph. The plaintiff's appeal fails and must be dismissed with costs.

The defendant field cross-objections. His advocate did not urge the objection as to allowance of interest for the last two years prior to suit. He wanted the case remanded for an enquiry as to waste committed by the mortgagee. He had an opportunity of putting in any defence he had before the Original Court, but he did not avail himself of it. He cannot be given another opportunity. I also see no good ground for interfering with the Divisional Court's order as to costs. I would dismiss the cross-objections.

*Moore, J.*—There is no doubt that in this case applicant's right to a personal remedy against the mortgagor was barred, unless he was entitled to the benefit of section 20 of the Limitation Act.

I do not think the last paragraph of that section can have any application. There is no authority for holding that the expression "Produce of land" includes rents of houses.

As regards payment of interest, appellant stated that, at the request of respondent, the mortgagor had collected the rents due upon the mortgaged premises and applied the rents so collected in payment of interest. Had plaintiff proved that on any definite dates before the expiry of the time of limitation he had applied money received as rent in settlement of interest, and had entered the interest as paid in his accounts, I should have been inclined to hold, following the ruling in *Kariyappa v. Rachaya* (I. L. R. XXIV Bom. p. 493), that this would amount to a payment of interest as such within the meaning of section 20. Plaintiff has not, however, proved any such credits.

I agree, therefore, that this appeal should be dismissed with costs and also agree in holding that the cross-objections should be dismissed.

IN THE CHIEF COURT OF LOWER  
BURMA.

CIVIL REVISION No. 2 of 1907.

Ismail Mulla v. Babu Menraj Murhidar

BEFORE SIR CHARLES E. FOX, KT., C.J.

Judgment dated 20th March 1907.

For applicant—Agabeg.

For respondent—Lentaigne.

Section 344 of the Civil Procedure Code—Surety giving bond for judgment-debtor.

Where a surety executed a bond that a judgment-debtor would apply under section 344 of the Civil Procedure Code within one month from that date to be declared an insolvent and the judgment-debtor failed to apply within the month and was two days late

Held, he was bound to discharge the obligation of the bond.

*Vide* Koylash Chunder Shaha v. C. Christophoridi (1887) I.L.R., 15 Cal. 171. Ramzan v. Gerard (1890) I.L.R. 13 All 100. Dwarkadas v. Isabbai (1894) I.L.R. 19. Bom 210. Alagappa Chetty v. Sarathambal (1894) I.L.R., 19 Bom 20.

This is an application by a surety who executed a bond for a judgment-debtor under section 336 of the Code of Civil Procedure, asking that an order directing him to pay the amount decreed against the judgment-debtor should be set aside. The judgment-debtor had been brought before the Court under arrest on the 15th November 1906. He expressed his intention to apply to be declared an insolvent, and on the applicant signing a bond he was released.

The bond is in the form prescribed by this Court; it is in the English form of an absolute acknowledgment of being bound to pay the amount decreed, subject, however, to the condition that if the judgment-debtor should appear before the Court whenever called upon by it to do so, and if he should, within one month from the date of the bond, apply under section 344 of the Code to be declared an insolvent then the obligation should be void and of no effect, otherwise it should remain in full force and effect.

The terms of the bond carry out the two things which the section says the judgment-

debtor must furnish security for, namely, firstly, that he will appear when called on and, secondly, that he will, within one month, apply under section 344 to be declared an insolvent. The judgment-debtor applied under section 344, but not until the 17th December 1906, namely, two days after the month from the date of his release. It is claimed by the surety that the obligation undertaken by him under the bond became void upon the judgment-debtor filing the petition. It was so held in Koylash Chamber Shada v. C. Christophoridi (1887) I. L. R. 15 Cal. 171, but in that case the bond did not make the surety liable if the judgment-debtor did not apply under section 344 within a month; the surety only undertook to produce him at any time whenever the Court directed him to do so, and that he would apply to be declared insolvent, no time being mentioned within which he would apply. This case was approved of in Ramzan v. Gerard (1890) I.L.R. 13 All. 100, but the terms of the bond given do not appear in the report, and the question in the case did not turn on whether the judgment-debtor had applied within the month.

In Dwarkadas v. Issabbai (1894) I L.R. 19 Bom 210, the judgment-debtor presented his application under section 344 five days after the month, the above decisions were followed, but again the terms of the bond given are not reported. In Alagappa Chetty v. Sarathambal (1894) I.L.R., 19 Bom. 20, the surety's liability was not in question. In the present case the bond taken was in exact accordance with what is contemplated in section 336 of the Code. It must be taken that the Legislature intended some effect to be given to the words "within one month." It is unnecessary to decide whether the Court could not have extended the time because no application for extension was made within the month. In the majority of cases a month is a very ample allowance for preparing a petition under section 344. The applicant undertook that the judgment-debtor would make such an application within a month. The judgment-debtor did not do so. I fail to see how the subsequent application relieved the surety from his obligations under the bond. I accordingly dismiss the application with costs.

IN THE CHIEF COURT OF LOWER  
BURMA.

CIVIL REVISION NO. 94 OF 1906.

Audnath Doobay ... Applicant (Plaintiff),  
vs.  
Juggoo Goosain ... Respondent (Defendant).

BEFORE SIR CHARLES E. FOX, KT., C. J.

Judgment dated 13th March 1907.

For applicant.—Agabeg.

Section 13 of the Civil Procedure Code—*res judicata*.

Suit for possession of land and declaration that a document on which defendant relied was false, void and ineffective, decreed in consequence of deed of conveyance for Rs. 220, not having been registered and being therefore inadmissible in evidence—No separate decision as to payment of Rs. 220—In a subsequent suit by defendant for the recovery of Rs. 220 and taxes paid to Government while in possession the Judge of the Small Cause Court dismissed the suit as barred by *res judicata*.

Held, such suit not barred, as plaintiff was not bound to have asked for the return of Rs. 220 though he might have done so.

In suit No. 91 of 1905 in the Court the respondent sued the applicant for possession of two pieces of land, alleging that the applicant had trespassed on them and had refused to leave them, and that he had falsely set up that the respondent, had sold the lands to him, and that he had made use of a false document.

The applicant defended the suit and set up that, in consideration of Rs. 220 paid by him to the respondent, the latter had transferred the lands to him by a document. This document was not registered and was therefore not admissible in evidence. Consequently, the applicant could not establish the sale to him, and the plaintiff obtained a decree for possession with a declaration that the plaintiff had not sold or transferred his interest in the lands to the respondent, and a further declaration that the

document on which the applicant relied was false, void and ineffective.

The applicant did not appeal against this decree. He, however, brought a suit in the Small Cause Court to recover the amount he says he paid as purchase-money for the land, and the amount of the land tax he said he had paid during his possession. The learned Judge held that the suit was barred as *res judicata* because the sale was in issue in the former suit, and it was open to the applicant to have in that suit claimed in the alternative for restitution of the price paid if the sale were held to be abortive. I cannot agree in this view. The applicant was not bound in the former suit to ask for return of the money paid in the event of the plaintiff being successful; and it cannot be said that he ought to have done so.

No decision had been given by this Court upon the question whether the applicant had paid the respondent Rs. 220 for the land. The basis of the decision of the suit in this Court was that, by reason of the document on which that applicant relied not being registered, the applicant could not even get it admitted in evidence. No doubt the decree went much further than probably the learned Judge intended, owing to his having used the words "a decree for the plaintiff in terms of the prayer of the plaint," but, nevertheless, there was no decision that the applicant had not paid the respondent Rs. 220.

It is possible that he did pay the amount, and that he used a false document. The decision in the former suit is *res judicata* on the question of the document but it is not so as regards payment of the Rs. 220. I set aside the decree of the Small Cause Court and direct that the suit be heard on its merits.

The respondent will pay the applicant's costs in this Court, two gold mohurs, being allowed for advocate's fee.

IN THE CHIEF COURT OF LOWER  
BURMA.

CIVIL REVISION No. 4 OF 1907.

M. P. Kader Moideen ... *Appellant (Plaintiff),*  
vs.  
Ko Maung Gyi ... *Respondent (Defendant).*

BEFORE SIR CHARLES E. FOX, KT., C.J.

*Judgment dated 13th March 1907.*

*Construction of contract—Meaning of the words “on and after 20th August 1906”—what is “reasonable time” is a question of fact.*

The words “on or after the 20th of August” meant that defendant was to deliver on or within a reasonable time after the 20th August. What was a “reasonable time” is a question of fact.

Defendant sold plaintiff 500 bags of rice, delivery to be taken Ex. Hopper in the month of August 1906, on or after the 20th of the said month. The defendant failed to deliver on the 20th August or in whole of August 1906. He pleaded he was not bound to deliver the rice in August 1906; and that the contract was void for uncertainty as to the time of delivery. The plaintiff claimed damages for breach of defendant.

The contract provided for delivery “on or after 20th August 1906, date at seller’s option.” Plaintiff then applied for leave to amend in order to show (if he could) that the words quoted had a special meaning in the trade. He also filed an amended plaint. The amended plaint contained not the faintest suggestion of a specialised meaning. The plaintiff pleaded that the words “in August” had been omitted by the writer of the document. Held by Judge of Small Cause Court that plaintiff could not explain or upset the contract concluded by the parties as contained in the written contract; that the proposed amendment was futile. Suit was dismissed with costs.

Held by Fox, C. J., on an application in revision.

The defendant’s contract was to deliver the rice “on or after the 20th August 1906”: that in my judgment meant that he was to deliver on or within a reasonable time after the 20th August. What was a reasonable time after the

20th August is a question of fact to be determined by the Small Cause Court.

The decree dismissing the suit will be set aside and the suit will be re-heard, the above construction being taken as the correct meaning of the contract.

Cost two gold mohurs.

IN THE CHIEF COURT OF LOWER  
BURMA.

CIVIL REFERENCE No. 1 OF 1907.

N. S. Md. Abubaker,—*Petitioner,*  
vs.  
S. S. Ali,—*Respondent.*

BEFORE SIR CHARLES E. FOX, KT., C.J., AND  
MR. JUSTICE MOORE.

*Dated 18th April 1907.*

*For Petitioner.—A. C. Dhar.*

*For Respondent.—Bagram and Anklesaria.*

*Provincial Small Cause Court Act, section 17—dismissal of one application to restore without a deposit no bar to another within time with a deposit—section 13, Civil Procedure Code—res judicata.*

When a Small Cause Court has rejected an application under section 108 of the Civil Procedure Code to set aside a decree *ex-parte*, because the deposit required by section 17 of the Provincial Small Cause Courts Act is not made, it does not bar admission of fresh application within the period of limitation to set aside the same decree, accompanied by a deposit of the amount of the decree.

Section 13 of the Civil Procedure Code does not apply, because the first application could not be held to have been heard and finally decided.

This was a reference by Mr. Justice Irwin in Civil Revision Case No. 44 of 1906, from the order of the Judge of the Court of Small Causes, Rangoon. The facts of the case are sufficiently stated in the following order of reference.

*Irwin, J.*—The first application for a new trial was rejected because the provisions of the second clause of section 17 of the Provincial

Small Cause Courts Act, 1887, were not complied with. The second application was dismissed as *res judicata*.

The present application for revision is opposed, not on the ground of *res judicata*, but on the ground that section 17 of the Small Cause Courts Act contemplates only one application for a new trial under section 108 of the Civil Procedure Code.

The High Court of Madras, in the case of *Ramaswami vs. Kurisu* (1) held that the second clause of section 17 of the Provincial Small Cause Courts Act, 1887, is not mandatory but merely directory, and that the application could be heard if the amount of the decree was deposited before the hearing. This was dissented from by the High Court of Calcutta in *Jogi Ahir v. Bishen Dyal Singh* (2) where the Munsif refused to allow the applicant to deposit the amount of the decree on the day of hearing, and his order was upheld.

This last decision was followed by the Recorder of Rangoon in *Abdul v. Syed Zamin* (3) which was similar to the present case. The first application was dismissed because the amount of the decree was not deposited before the date of hearing. A second application was dismissed as *res judicata*. The learned Recorder said "If a man cannot cure his original default at the hearing of the application, I do not see how he can cure it by making a subsequent application."

The point seems to me to be of some difficulty, for I am not at all disposed to hold that the question whether a second application under section 108, Civil Procedure Code, is admissible can be decided on any grounds to be found in section 17 of the Provincial Small Cause Courts Act. The application is not under section 17; that section merely prescribes a condition precedent to the admission of the application.

The rejection of the application for want of the deposit seems to me to be exactly analogous to rejection for want of a court fee stamp. Such rejection does not seem to come within the definition in section 13, Civil Procedure Code,

and I find it difficult to say that a subsequent application, accompanied by a deposit of the amount of the decree, can be barred by anything except the Limitation Act.

I therefore refer to a bench the question—

When a Small Cause Court has rejected an application to set aside a decree passed *ex-parte*, because the deposit required by section 17 of the Provincial Small Cause Courts Act is not made, does such rejection bar the admission of a subsequent application to set aside the same decree, accompanied by a deposit of the amount of the decree?

The following was the judgment of the bench consisting of Fox, C. J., and Moore, J.

*Fox, C. J.*—I would answer the question referred in the negative.

It appears to me that a subsequent application is admissible and entertainable, unless it is barred by some provision of law. If it is within the period allowed by the Limitation Act, there is, as far as I can discover, no provision of law barring such an application. Section 13 of the Civil Procedure Code would not apply, because the first application could not be held to have been heard and finally decided. The case is analogous to that of a suit being dismissed on account of the plaintiff's failure to give security for costs under section 381, see *Rungrao v. Sidhi Mahomed* (4), or for non-payment of Court fees under clause 11 of section 10 of the Court Fees Act, see *Mahomed Salim v. Nabian Bibi* (5), or on any technical defect, such as want of a Succession Certificate, see *Pathapermul v. Murugandi* (6).

*Moore, J.*—I concur.

(4) (1882) I.L.R. 6 Bom. 482.

(5) (1886) I.L.R., 8 All. 272.

(6) (1895) I.L.R., 18 Mad. 466.

(1) I.L.R. 13 Mad. 178.

(2) I.L.R. 18 Cal. 83.

(3) 1 Bur. L.R., 3rd quarter 18.

IN THE CHIEF COURT OF LOWER  
BURMA.

SPECIAL CIVIL SECOND APPEAL NO. 118 OF  
1906.

P. L. A. N. K. Allagappa Chetty ... *Appellant*,

vs.

Mg. Pwe Li ... .. *Respondent*.

BEFORE SIR CHARLES E. FOX, KT., C. J.

Dated 18th April 1907.

*For appellant*.—N. M. Cowasjee.

*For respondent*.—Burjorjee.

*Presumption from non-production of available evidence in Original Court.*

If a plaintiff fails to produce evidence which he might and should produce in support of his claim, it may be presumed that if that evidence had been produced it would not have been in his favour.

The offer to produce it in Appellate Court was too late.

Although the Divisional Judge's reasons for dismissing the suit as against the first and fourth defendants are not such as commend themselves to me, I think the conclusion he arrived at was correct. It lay upon the plaintiff to prove by satisfactory evidence that those defendants had signed the promissory note for Rs. 300. The evidence he produced was that of himself, his clerk and of a casual visitor to his shop. He kept books of account which, if regularly kept, would have been strong corroborative evidence of his having paid the Rs. 300 to all four defendants and indirectly of their having signed the promissory note, but he did not produce this in the lower Court.

The offer to produce them in the Appellate Court was too late. If a plaintiff fails to produce evidence which he might and should produce in support of his claim, it may be presumed that if that evidence had been produced it would not have been in his favour. The plaintiff has only himself to blame for not putting all the evidence he might have produced before the court and for thus not proving his case satisfactorily.

I dismiss the appeal with costs.

IN THE CHIEF COURT OF LOWER  
BURMA.

CIVIL REGULAR No. 137 OF 1906.

Mg. Tha Noo ... .. *Applicant*,

vs.

S. K. R. S. Lutchmanan Chetty ... *Respondent*.

BEFORE SIR CHARLES E. FOX, KT., C. J.

Dated 18th April 1907.

*For applicant*.—Hamlyn.

*For respondent*.—Agabeg.

*Proof of execution of promissory note by evidence on Commission.*

In the absence of description, there is no identification of party executing a pro-note when evidence of execution is taken on commission.

The applicant denied execution of the promissory note he was sued upon. It was incumbent on the plaintiff to prove that he had executed it. He could not himself speak to its execution, and relied entirely on the evidence of two chetties who were examined on commission.

They said that Maung Tha Noo executed the note, but they gave no description of the person who executed it as Maung Tha Noo identifying such person with the applicant.

I must hold that there was no evidence justifying a decree against the applicant.

Decree set aside and suit against applicant dismissed with costs.

IN THE CHIEF COURT OF LOWER  
BURMA.

CIVIL APPEAL NO. 38 OF 1905.

Unamutu,

vs.

A. V. A. O. Ollagappa Chetty.

BEFORE SIR CHARLES E. FOX, KT., C. J., AND  
MR. JUSTICE HARTNOLL.

Dated 23rd April 1907.

*For appellant*.—Lambert.

*For respondent*.—N. M. Cowasjee.

*Section 375 of the Civil Procedure Code—Its meaning and scope defined and explained.*

Where defendant denies execution of deed of compromise filed by the plaintiff, section 375 of the Civil Procedure Code does not authorise a Court to hold an enquiry to decide whether the defendant has or has not executed the document.

Brojodurlabh Sinha v. Ramanath Ghose, 1. L. R. 24 Cal. 908 dissented from.

Vide.—I. L. R. 23 Mad. 101.  
I. L. R. 16 Bom. 208.

*Fox, C. J.*—The plaintiff sued three defendants, one of them a minor, to recover the amount due upon an alleged mortgage. He asked that the property should be sold in default of payment. The first defendant who is the present appellant put in a written statement denying the claim, alleging that the other two parties had no interest in the land sought to be proceeded against, and submitting that he and his two brothers, Marianan and Arlapan, were the only persons interested in it. The plaintiff had put in a petition asking that Marianan should be appointed as guardian *ad litem* to the minor. Marianan put in a petition objecting to be appointed guardian, and asking that he himself should be made a defendant in the suit. It does not appear that either he or Arlapan was ever made a defendant. The bailiff of the Court was appointed guardian *ad litem* of the minor defendant.

On the 1st October 1904, the then Judge recorded that the plaintiff's advocate put in a petition with a deed of compromise for orders under section 375 of the Code of Civil Procedure, but the executant of the deed (the appellant) denied execution of it. The case was adjourned for argument and evidence on the point. On the 13th March 1905 the plaintiff's agent withdrew the suit as against the second defendant and as against the minor. Evidence was taken as to whether the first defendant had executed the so-called deed of compromise. This document is in reality an absolute deed of conveyance by the first defendant to the plaintiff in full satisfaction of all the monies sued for. It was evidently intended that Marianan should be a party to the document, but he did not sign.

The District Judge found that the first defendant had signed it, but as the document was not registered he said he could not pass the same order as it would be proper to pass if it had been registered. He, however, thought that the deed might be used as evidence that the first defendant had agreed to make over the land to the plaintiff in satisfaction of the claim in the suit.

The decree he passed was that the first defendant do execute a deed conveying to the plaintiff the plaintiff lands and do give plaintiff possession.

This was virtually a decree for specific performance of an alleged agreement made antecedent to the already executed deed of conveyance.

The first defendant appeals on the grounds that the Judge erred in law in not proceeding to hear and determine the case when he denied the claim and the compromise, that the Judge erred in passing a decree upon an alleged deed of compromise which purported to be a conveyance of the lands, that he erred in passing a decree directing the appellant to execute another deed of conveyance, and that he wrongly held that the appellant had executed the deed of conveyance.

It has been argued that the Judge had no authority to act under section 375 of the Code when the first defendant denied that he had executed the deed.

The meaning and scope of section 375 of the Code has been exhaustively dealt with in *Brojodurlabh Sinha v. Ramanath Ghose* (1) in which the three judges who formed the majority of the Full Bench decided that where the parties to a suit have by an agreement adjusted the subject matter of the suit, the court can, by an order made in the suit under this section, direct such agreement to be recorded, and make a decree in accordance therewith, even if one of the parties to the agreement objects.

The minority of two judges dissented from this ruling, holding that in such a case the section does not apply.

Upon consideration of the judgments, the reasons given for their view by the learned judges who formed the minority, strike me as being of greater force than the reasons given for the view of the majority.

The case before us affords a striking example of the results of the view of the majority. If that is correct, a plaintiff has by merely putting in a petition saying that the case has been compromised, and then by producing evidence which may be true or false, diverted the questions to be decided from the original ones into a mere question of whether the defendant signed the deed put forward.

(1) (1897) I. L. R. 24 Cal. 908.

I must say that if such a procedure is possible the dangers to which defendants will be exposed at the hands of fraudulent claimants seem to me very great.

The wording of the section itself appears to me to point to its being applicable only when the parties appear before the Court or put in a petition and so inform the Court that the suit has been compromised or satisfied. The agreement or compromise has then to be recorded, and the Court must pass a decree in accordance with it, and that decree is final and unappealable.

The section does not make any provision for holding an inquiry if, as in the present case, the defendant denies execution of the document of compromise, but if the Court has authority *aliunde* to go into such a question, and finds that the document was signed by the objecting party, then it must pass the decree which is final, and the objecting party has no appeal from the finding on the question whether he executed the document or not. It was no doubt held in *Sridharan v. Puramathen* (2) and in *Goculdas Bulabdas & Co. v. James Scott* (3) that there is an appeal from an order of a judge passed on a dispute as to whether a compromise had in fact been arrived at, but the section itself says nothing about a judge passing any order, and if it contemplates any order, such order is not made an appealable order by section 588 of the Code. It is only from orders mentioned in that section that an appeal from any order under the Code can be made.

For these reasons and those given by the minority of the judges of the Full Bench of the Calcutta High Court in the case I have referred to above, I think that the District Judge had no authority to enter into and decide the question whether the first defendant had executed the so-called deed of compromise, or whether he had in fact agreed to compromise the suit.

I would set aside the decree of the District Court and would remand the case to it to be tried on the merits.

I would order the plaintiff to pay the first defendant's costs of this appeal.

*Hartnoll, J.*—I concur.

(2) (1899) I.L.R. 23 Mad. 101.

(3) (1891) I.L.R. 16 Bom. 203.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL FIRST APPEAL NO. 23 OF 1906.

Ma Yin U *vs.* Ma Lun and two others.

BEFORE SIR CHARLES E. FOX, KT., C. J., AND MR. JUSTICE MOORE.

Dated 18th April 1907.

*For Appellant.*—N. M. Cowasjee.

*For Respondent.*—Higinbotham.

*Buddhist law re jewellery given prior to marriage.*

Jewellery made by Burmese Buddhist for his wife is not necessarily her sole property—such jewellery is always regarded by both husband and wife as their joint property. His intention to give her the jewels so that it should be her sole property, if alleged, must always be clearly proved.

*Fox, C. J.*—This appeal is only as to some of the articles which the plaintiff claimed in the suit. They are of small value compared with the total value of her original claim. The plaintiff alleged that when Maung Mo died she was in possession of seven pairs of gold bangles, two ruby rings and a pair of ruby earrings worth Rs. 1,740 amongst other jewellery and that the first defendant Ma Soon had obtained the key of the box in which she kept her jewellery practically on a false pretence, and that the second defendant Ba Thet had also obtained some of her jewellery from her under circumstances which made the non-delivery of it back to her a fraud. There is, I think, no good ground for believing that either Ma Loon or Ba Thet contemplated any fraud on the plaintiff, when they respectively received from her the keys or the jewels.

The plaintiff claimed the jewels, as to which she now appeals, as having been given to her by Maung Mo and the sole question to be decided is whether the evidence proves that these jewels had been given to her by Maung Mo. He was a Christian, but the plaintiff was and is a Burmese Buddhist.

He had a lawful wife but she had gone mad. He subsequently went through the form of marrying the plaintiff according to Burmese custom, and whether he knew or did not know that the plaintiff was not his lawful wife, he certainly intended that she should consider herself such and she did so. This has an important bearing

on her conduct subsequent to his death, and on her evidence with regard to the property she claimed.

It appears to me that her confidence at first in her right to share in the property left by him explains to a great extent the readiness with which she gave up control over the property in the house to the daughter and son of Maung Mo by a former concubine pending the arrival of Maung Mo's sister.

The evidence shows that respectable people took part in the negotiations for the union of Maung Mo and the plaintiff, and that arrangements such as are customary when a Burmese Buddhist man marries a Burmese Buddhist woman were made previous to the union.

The plaintiff's friends did not know that she would not be a lawful wife unless she was married before a priest or a Registrar. Enquiry was made as to Maung Mo's means, and what jewellery he intended to provide for the plaintiff. There can, I think, be no doubt that Maung Mo said he would provide her with bangles made out of forty sovereigns and with diamond nagats. He did have a pair of gold bangles made soon after the union, and subsequently he bought six more pairs of bangles, and a pair of diamond nagats. The original gold bangles were altered: they and the six pairs ready made are the seven pairs claimed by the plaintiff. One of the ruby rings claimed by her she acknowledges that Maung Mo had before their union; the other ruby ring she says was made from stone he had. The ruby earrings she says he had before the union, but she says he gave them to her on their union. If the parties had been Europeans, one would have little difficulty in believing a wife's statement that articles of jewellery worn by females alone which were in the house at the time of the husband's death had been given to her by him. Although Maung Mo was a Christian, he appears to have followed in all respects the customs of his fellow-Burmese Buddhist natives of the province in connection with his union with the plaintiff. This leads to doubt as to his having given the plaintiff the property she alleges he gave her. So far as appears from the evidence in this case, jewellery, even female jewellery, purchased after a marriage by a husband for the use of his wife does not necessarily become among the Burmese Buddhists the sole property of the wife.

Ko Maung Gyi, an Honorary Magistrate, said that even property given to a bride at the time of entering the room becomes joint property of husband and wife.

U Po O, who apparently acted on the plaintiff's behalf before the union, said that when he asked Maung Mo how much he was going to give as dowry, Maung Mo said that the house he lived in should be regarded as such, and that he would buy diamond nagats for her, and would have bangles made for her out of forty sovereigns. The offer was accepted by the plaintiff and her family.

U Paw's recollection of what occurred was that Maung Gyi asked Maung Mo what property he had, and the latter said he owned a house which he and the plaintiff would enjoy, and then U Po O asked for forty sovereigns for bangles for the plaintiff but Maung Mo said he had bangles ready made. The plaintiff's evidence as to the various articles she claimed having been given to her is very hazy. The conduct of both Maung Mo and herself in connection with the jewellery seems to me to be more consistent with the view that both looked upon it as their joint property, in the same way that Burmese Buddhist husbands and wives usually regard jewellery acquired as their joint property. I do not think that the evidence establishes that he actually gave her any of the jewellery with the intention that it should be her sole property. She, unfortunately for her, derived no right to it through her union with him, and under the circumstances her appeal must, I think, be dismissed. The parties to bear their own costs.

*Moore, J.*—I concur.

IN THE CHIEF COURT OF LOWER  
BURMA.

CIVIL FIRST APPEAL No. 37 OF 1905.

Padashin and one—*Appellants*.

vs.

Maung Lun and one—*Respondents*.

BEFORE SIR CHARLES E. FOX, Kt. C. J., AND  
MR. JUSTICE HARTNOLL.

*Dated 23rd April 1907.*

*For Appellants*—Palit.

*For Respondents*.—Dantra.

*Damages for malicious prosecution what plaintiff should establish in order to succeed—Meaning of "malicious spirit."*

Plaintiff must prove—

- (1) that they were innocent of the crime alleged against them ;
- (2) that their innocence had been pronounced by a competent tribunal ;
- (3) that there was a want of a reasonable and probable cause for the prosecution, or that, in the eye of the Court, the circumstances were inconsistent with such cause ;
- (4) that the proceedings had been initiated in a malicious spirit, that is, from an indirect motive and not in furtherance of justice.

*Abrath v. The North Eastern Railway Company*, (1886) L.R. 11, App. Ca 247.

*Soobramoney Pillay Chetty v. Maung Po Lu* 2 L. B. R. III (1903).

Pollock, Section 42 of Draft of Civil Wrongs Bill.

*Fox. C. J.*—The plaintiffs had been convicted by the first Class Magistrate of Kungyangon of obtaining the defendant's property by cheating. Upon appeal to the Sessions Courts they were acquitted. They then brought the suit out of which this appeal arises for damages for malicious prosecution. They had to prove first that they were innocent of the crime alleged against them; secondly, that their innocence had been pronounced by a competent tribunal; thirdly, that there was a want of reasonable and probable cause for the prosecution, or that the circumstances of the case were such as to be in the eyes of the Court inconsistent with the existence of reasonable and probable cause; and, fourthly, that the proceedings against them had been instituted in a malicious spirit, that is, from an indirect motive, and not in furtherance of justice. If they failed to prove any one of these matters, their case failed (*see Abrath v. The North Eastern Railway Company*)\*. The plaintiffs proved, to my mind, only the second of these matters, conclusively. Possibly it may also be said that they also proved the first, for even if they had done all that the complainant said they had done, they were not liable to be convicted of cheating, and of obtaining property by cheating. They however, in my opinion, entirely failed to prove the other two requisites for succeeding in their suit. The whole matter turns upon whether the allegation which the first defendant had made against them, that he had paid them Rs. 4,800 as an advance in part payment of paddy which they had sold to him, was utterly without founda-

\* (1886) L. R. II. App. Ca. 247.

tion and false. The Magistrate believed that he had paid them the money, and convicted them. Upon the ruling in *Soobramoney Pillay Chetty v. Maung Po Lu*, † this conviction would be fatal to the plaintiff's case. Without going as far as adopting the ruling in that case, which I think goes too far, and adopting the rule as stated by Mr. Pollock in section 42 of his draft of a Civil Wrongs Bill, namely, "that an action will lie if the plaintiff was ultimately acquitted on appeal by reason of the original conviction having proceeded on evidence known by the complainant to be false, or on the wilful suppression by him of material information," the plaintiffs have, in my judgment, failed to establish that the first defendant's prosecution of them was without reasonable and probable cause, and that it was malicious.

The District Judge has dealt with the facts and evidence very fully and carefully. It is unnecessary to repeat them. There is first of all the great improbability of a man in the first defendant's position making the allegations he did without any foundation for them, and knowing he had not the strongest proof in the shape of a signed receipt that he had paid the Rs. 4,800.

The weakness of the evidence for the plaintiffs strengthens belief that the first defendant did pay them the money.

It is a case in which two judges who saw and heard the witnesses believed the first defendant and his witnesses. There is in my opinion no ground for holding that the District Judge's view was wrong. As against the second defendant there was no substantial case, and the judge was, I think, right in awarding separate costs.

I would dismiss the appeal with costs

*Hartnoll, J.*—I concur.

† (1903) 2 L. B. R. III.

IN THE CHIEF COURT OF LOWER  
BURMA.

CRIMINAL APPEAL No. 165 OF 1907.

*William D'Cruz v. King Emperor.*

BEFORE MR. JUSTICE MOORE.

Dated 16th April 1907.

*Misjoinder of charges—sections 467, 420 and 114, I.P.C. 233, Criminal Procedure Code,—new trial.*

Offences punishable under sections 467 and 420, I.P.C. and abetment of such offences, section 114, I.P.C., are distinct offences and cannot be tried together—(Criminal Procedure section 233. Such a misjoinder necessitates a new trial.

2 L. B. R. P. 10.

Appellant, William D'Cruz, has been convicted of four offences, namely, of two offences under section 467, I. P. C., and two offences under section 420, I. P. C., and the first question for consideration is whether the trial is bad for misjoinder. The four offences have been charged in two complicated and irregular charges. The first charge runs: "That on or about the 11th October a so-called Nga Pon forged a deed of sale of land and cheated Ma Ngwe Nu and thereby dishonestly induced her to deliver money to him, and that you, W. D'Cruz, did aid and abet the so-called Nga Pon to commit the said forgery and cheating and thereby committed 'an offence' punishable under sections 467 and 420 over 114, I. P. C."

This is a charge of two distinct offences, namely, of forging a valuable security, section 467, I. P. C., and of cheating and thereby dishonestly inducing delivery of money.

The second charge, which is in much the same terms, contains also charges of offences under sections 467 and 420, I. P. C. It appears to me that under no provision of law is it possible to justify the joinder in one trial of the charge of abetting Nga Pon on the 11th October to commit an offence under section 467, and of abetting Nga Toh on the 12th October to commit an offence under section 420. The case is similar to that reported in Lower Burma Rulings, Vol. 2, page 10. The fact that the Magistrate has in each of the two charges together jumbled together two separate charges of distinct offences punishable under different sections of the Penal Code, does not mitigate the misjoinder. Following the Full Bench Ruling quoted above, it seems to me that I have no option but to order a new trial. The convictions and sentences are set aside and a new trial ordered before the Special Power Magistrate, Hanthawaddy. Accused should be separately tried in respect of each transaction, and in framing the charges the Magistrate should be careful to comply with the provisions of section 233, Code of Criminal Procedure.

IN THE CHIEF COURT OF LOWER  
BURMA.

CIVIL REVISION No. 20 OF 1906.

Ma Sein ... .. Applicant,  
vs.

Hamed *alias* Ahmed Valley Mahomed—Respondent.

BEFORE SIR CHARLES E. FOX, KT., C. J.

Dated 13th March 1907.

For Applicant—Villa.

*Duty of Judge when he considers conduct of advocate improper.*

If the Judge thought that plaintiff's advocate had been guilty of improper conduct he should have noted what he considered improper with a view to reporting the advocate to the Chief Court. He should not have visited the sins of the advocate on the client.

The sole question in the case was whether the defendant had delivered the lungyees to the plaintiff. He alleged that he had delivered them to a man sent by her, and he produced a document which he said the man brought. This document purports to be an authority from the plaintiff to deliver the lungyees to the bearer and purports to be signed by the plaintiff. She denied the signature and denied that she had authorized any one to receive goods for her. The defendant produced no evidence that she had signed the document, or that she had sent the man for the goods. Under the circumstances the defendant failed to satisfy the burden of proof which lay on him, and the plaintiff was entitled to a decree.

The decree of the Small Cause Court is reversed, and there will be a decree for the plaintiff for Rs. 245 and the costs of the suit. The defendant will also pay the plaintiff's cost of this application. Two gold mohurs allowed as advocate's fee.

I may add that Mr. Villa strongly protested against the remarks in the judgment that he had made repeated efforts to assist his witness whenever his cross-examination was at all critical, and he vehemently repudiated having done such a thing. If the learned Judge thought that the plaintiff's advocate had been guilty of improper conduct, he should have noted what he considered to be improper, with a view to reporting the advocate to this Court. He should not have visited the sins of the advocate on the client.

IN THE CHIEF COURT OF LOWER  
BURMA.

CIVIL SECOND APPEAL NO. 258.

Ruthnam Chetty ... .. Appellant,

vs.

Thengathi Ammal and two others ... Respondents.

BEFORE SIR CHARLES E. FOX, KT., C. J., AND

MR. JUSTICE HARTNOLL.

Dated 16th May 1907.

*For Appellant.*—Patker.*For Respondent.*—Dantra.*Expert—Interpreter—Evidence Act, section 45—Mother as next friend—Letters of administration—Attorney representing next friend Sections, 36 and 37 (a), Civil Procedure Code.*

The evidence of interpreters examined as experts upon Tamil handwriting is not admissible, because they would not seem to be persons specially skilled in questions as to identity of handwriting within the meaning of section 45 of the Evidence Act.

Where a mother sues as next friend of her minor sons, the objection that her interest may be adverse is a technical one and ought not to have any weight.

A woman claiming maintenance only from the estate is not an heir and cannot sue in her own right without letters of administration.

The attorney of a next friend is a recognised agent within the terms of sections 36 and 37 (a) of the Code of Civil Procedure, and he can therefore sue on behalf of such next friend.

*Hartnoll, J.*—Thengathi Ammal, and her two minor sons, Dandapani Chattiar and Ramiah Chattiar, sue Ruthnam Chetty to recover possession of certain moveable and immoveable properties forming the estate of one Kasiappa Chetty and for an account. They obtained a decree from the District Judge, Hanthawaddy, and on Ruthnam Chetty appealing the appeal was dismissed. A further appeal has been laid to this Court.

The first ground is that the learned Divisional Judge erred in holding that the opinion of the two interpreters examined as experts upon

Tamil handwriting was admissible. The ground seems to be a good one, in that the interpreters would not seem to be persons specially skilled in questions as to identity of handwriting within the meaning of section 45 of the Evidence Act. Neither court, more especially that of the Divisional Judge, laid much stress on their evidence. I have perused the evidence, and, leaving out the depositions of the two men from consideration, it appears to me that there was sufficient evidence to justify the decision on the facts arrived at by the lower courts: I would, therefore, not interfere on this ground.

The second ground is, that it was an error to hold that Thengathi Ammal could sue as the next friend of her two minor sons, because the estate claimed was a small one. Her interest may possibly be adverse to that of her two sons, but she is their mother. The objection seems to be a technical one, I would not allow it to have any weight.

The third ground is, that Thengathi Ammal could not sue without letters of administration to the estate of her deceased husband, and that it was of no practical importance whether she was an heir or not. I am of opinion that she could certainly sue as the next friend of her minor sons who are heirs. She herself seems at present to only have a claim to maintenance, and for that reason I think that she could not sue in her own right, as she is not an heir. The next ground, and the last that need be considered, is, that Thengathi Ammal could not sue as a next friend through a constituted attorney. She herself is not living in the jurisdiction of the Court. Section 34 of the Civil Procedure Code lays down that any appearance, application or act in or to any court may, except when otherwise provided by any law for the time being in force, be made by a recognised agent, and section 37 lays down, who are such recognised agents. The agent in this case seems to come under clause (a) of that section, and it seems to me that Thengathi Ammal as next friend could sue by him.

In the result I would vary the decree of the District Court by ordering that the suit by Thengathi Ammal in her own right be dismissed, but that there be granted a decree to Dandapani Chettiar and Ramiah Chettiar, suing by their next friend Thengathi Ammal, for the immediate possession of the immoveable property

mentioned in the schedule and for an account of all the property immoveable and moveable which has come into appellant-defendant's hands, the property of the deceased, and the profits arising therefrom—the appellant defendant should file the account within one month from this date if he has not done so already.

I would not interfere with the order as to costs in the Lower Appellate Court, and as regards this appeal, would order Ruthnam Chetty, the appellant to pay the costs of the minors Dandapani Chettiar and Ramiah Chettiar.

*Fox, C. J.*—I concur.

IN THE CHIEF COURT OF LOWER  
BURMA.

CIVIL FIRST APPEAL NO. 51 OF 1906.

A. R. C. S. Soobramanian Chetty,

vs.

R. M. K. Curpen Chetty.

BEFORE SIR CHARLES E. FOX, KT., C. J., AND  
MR. JUSTICE HARTNOLL.

*Dated 2nd May 1907.*

*For appellant.*—Lentaigne.

*For respondent.*—Giles.

*Hundis payable to bearer on demand*—Section 25 of the *Indian Paper Currency Act (Act XX of 1882)*.

Plaintiff cannot recover on documents payable on demand, because, in drawing them, defendant contravened section 25 of the Indian Paper Currency Act (XX of 1882), unless there was evidence to show that they were within the proviso to that section.

*Jetha Parkha and others vs. Ramchandra Vithoba* (1892) I.L.R., 16 Bom. 689, considered.

*Beasley v Bignold* (1822) 5 Barn. and Ald. 335, and *Cope v Rowlands* (1836) 2. M. & V. 149, followed.

*Fox, C. J.*—The question for decision is whether the plaintiff can recover on the documents he sued on. These documents are hundi drafts by the defendant on his Rangoon agent, payable to bearer on demand.

There can be no question that, in drawing them, the defendant acted in contravention of section 25 of the Indian Paper Currency Act 1882, which is as follows:—

“No body corporate or person in British India shall draw, accept, make or issue any bill of exchange, hundi, promissory note or engagement for the payment of money payable to bearer on demand, or borrow, owe or take up any sum or sums of money on the bills, hundis or notes payable to bearer on demand of any such body corporate or of any such person. Provided that cheques or drafts payable to bearer on demand or otherwise may be drawn on bankers shroffs or agents by the customers or constituents in respect of deposits of money in the hands of such bankers, shroffs, or agents, and held by them at the credit and disposal of the persons drawing such cheques or drafts.”

But for the observations of Farran, J., in *Jetha Parkha vs. Ramchandra Vithoba* (1) to the effect, that he did not see why a holder of such a document should not recover on it, I should have little doubt that a holder cannot recover unless he can bring the document within the proviso to the section. The learned Judge's observations themselves show that he had not fully considered the matter.

Assuming that the plaintiff has not shown that the documents are lawful documents under the proviso, the rule of law applicable is that stated in *Beasley vs. Bignold* (2), namely, that a party cannot be permitted to sue on a contract made in direct violation of the provisions of an Act of the Legislature.

Again, in *Cope vs. Rowlands* (3), Baron Parke said: “It is perfectly settled that where the contract which the plaintiff seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common or statute law, no court will lend its assistance to give it effect.”

If we allowed the plaintiff to recover on the documents he sued upon, we should be giving effect to a form of contract expressly forbidden by law. It has been argued, however, that the documents come within the proviso to the

(1) (1892) I.L.R., 16. Bom. 689.

(2) (1822) 5 Barn. and Ald. 335 and 24 R. R. 401.

(3) (1836) 2. M. & V. 149 and 46. R. R. 532.

section. I can only say that there is no evidence that they do. There is nothing to show that the defendant was a customer or constituent of his agent in Rangoon, or that the documents were drawn against or in respect of "deposits of money" in the agent's hands, which were held by the agent at the credit and disposal of the defendants. The appeal must, in my judgment, be allowed, the decree of the Original Court set aside and the suit dismissed with costs. The plaintiff must also pay the defendant's costs of this appeal.

*Hartnoll, J.*—I concur.

IN THE CHIEF COURT OF LOWER  
BURMA.

CIVIL MISCELLANEOUS APPEAL NO. 31 OF 1907.

T. David, *v.* Shaik Ismail and nine others.

BEFORE SIR CHARLES E. FOX, KT., C. J., AND  
MR. JUSTICE HARTNOLL.

*Dated 2nd May 1907.*

*For appellant*—Agabeg.

*Insolvency—Protection order—Power of Appellate Court :*

When the judge in Insolvency has withdrawn the insolvent's protection order, the Appellate Court cannot pending the appeal suspend the order withdrawing the protection because there is nothing which can be suspended.

If the Appellate Court cannot directly grant a protection order pending an appeal, it has no power to grant it indirectly.

*Re Jacob Agabob, 12 B. L. R., 273.*

*Fox, C. J.*—The present application is for an order, that pending this appeal, the proceedings in the Original Court may be stayed, and that the order withdrawing the insolvent's protection be suspended so as to allow the insolvent to have the benefit of the first order granting him *interim* protection. There are no grounds for proceedings in the case generally, and as regards the order withdrawing the *interim* protection order, there is nothing which could be suspended even if we had power to make an order such as that asked for,

In the matter of Jacob Agabob (12 B. L. R. 273) the Court has held that the Appellate Bench has no power to grant an order for protection pending the hearing of an appeal.

The result which the petitioner wants is that his original *ad interim* protection order be revived. If this Bench cannot grant an *ad interim* protection order directly it cannot grant one indirectly. There is nothing to carry out under the order withdrawing protection. It ended with itself and, consequently, there is nothing to suspend action on or execution of. The insolvent is in the same position as he was in before he applied for the benefits of the Act, and he must so remain until the decision of his appeal.

I would reject the application.

*Hartnoll, J.*—I concur.

IN THE CHIEF COURT OF LOWER  
BURMA.

CIVIL MISCELLANEOUS APPEAL NO. 92 OF 1906.

J. Moment *v.* The Secretary of State.

BEFORE SIR CHARLES E. FOX, KT., C. J., AND  
MR. JUSTICE HARTNOLL.

*Dated 20th May 1907.*

*For Appellant.*—Pennell.

*For Respondent.*—The Government Advocate.

*Execution—Claim for restitution—Power of Original Court to grant—Appeal from order refusing—Sections 244 (c) and 583 of the Civil Procedure Code.*

*Jurisdiction—Lower Burma Town and Village Lands Act—(Burma Act IV of 1898).*

*Per Fox, C. J.*—If any damage is caused to a party in execution of a decree which is afterwards reversed in appeal, the ordinary law of restitution is applicable, and the party is entitled to ask the court to restore him to the possession of the land which has been taken from him by process of the court and to order the respondent to pay him at least mesne profits.

The wording of clause (c) of section 244 of the Code of Civil Procedure is wide enough to cover the order of an original court acting under section 583 of the Code granting restitution; and an appeal therefore lies from the order of an original court.

Under section 41 of the Lower Burma Town and Village Lands Act, the court is precluded from exercising any jurisdiction over a claim to a right to land as against the Government; and the court is, therefore, precluded from granting restitution in respect of injury which arose through invasion of the right which the party claimed to the land:

Lower Burma Town and Village Lands Act (IV of 1898).

*Rodger vs. The Comptoir d'Escompte de Paris*, 3 L. R. 465 and *Ayyar v. Subramania* (1899) I.L.R. 23 Mad. 206 considered.

*Per Hartnoll, J.*—The right to restitution seems to rest, not on erroneous procedure but on the actual merits of the case, and as this Court cannot enter into them, it cannot investigate the question of restitution.

*Fox, C. J.*—The respondent in this appeal brought a suit against the appellant for possession of a piece of land in the Cantonment of Rangoon, claiming that such land was State land. He obtained a decree in the Original Court, and, in execution of the decree, obtained possession of the land. The decree was set aside by the Appellate Bench on the ground that, as a claim to a right over land as against the Government was involved in the suit, the Civil Court had no jurisdiction to determine the claim in consequence of the provisions of section 41 of the Lower Burma Town and Village Lands Act 1898. Subsequently the Government gave up possession of the land to the appellant, but refused his claim for compensation. The appellant then instituted the proceeding out of which this appeal arises.

He asked for an enquiry as to the damage which he had suffered consequent on his eviction from the property, including the depreciation in the value of the buildings on the premises during the period of the Government's occupation, and that the Government might be ordered to pay him the amount of such damage.

The learned Judge held that the appellant had not proved any amount to which he was entitled in the proceeding. The learned Government Advocate took a preliminary objection that no appeal lies from the order. Notwithstanding the doubts expressed by learned Judges in the cases to which he referred us, it appears to me that the wording of clause (c) of section 244 of the Code of Civil Procedure is wide enough to cover the orders of an original court acting under section 583 of the Code granting restitution. I therefore think that this appeal lies.

The question arises whether in the present case, the court was bound to grant restitution. It has been argued on behalf of the appellant, on the strength of some observations of their Lordships of the Privy Council in *Rodger vs. The Comptoir d'Escompte de Paris* (1) that it was absolutely incumbent on the court to order restitution to the appellant in every respect.

Their Lordships were dealing with an ordinary case of a claim for money in which the original court had made a decree against the defendant, and the plaintiff had executed it before the decision on the appeal which the defendant brought. Their Lordships held that the original court had power to, and should have ordered repayment of not only the amount paid by the defendant, but also of interest on that amount.

No question, such as that which arises in the present case arose in that case: and, in fact, a precedent bearing on the question which arises in this case cannot be expected, for it is not often that the legislature absolutely removes the consideration and determination of any claims as against the Government from the jurisdiction of the civil courts as it has done by section 41 of the Lower Burma Towns and Village Lands Act.

In *Dorasami Ayyar, vs. Annasami Ayyar* (2), *Subramania Ayyar, J.*, expressed doubt as to whether a court was bound to order restitution when the appellate decision proceeds on technical

(1) 3 L. R., 465.

(2) (1899) I. L. R. 23. Mad. 306.

ground leaving the merits undetermined I concur in thinking that it is very doubtful whether an original court is bound to grant restitution in such case.

The present case, however, is much stronger than that of a case of an original decision being reversed on a mere technical ground. The Appellate Bench's decision was, that the civil court had no jurisdiction to deal with the dispute between the parties. The Lower Burma Town and Village Lands Act constituted another authority to deal with what was involved in the suit. But for the provisions of the Act, no doubt the ordinary law of restitution would have been applicable. Under that law the appellant would have been entitled to ask the Court to restore him to the possession of the land which had been taken from him by process of the Court, and to order the respondent to pay him at least *mesne profits*.

But if he had applied to the Original Court for restitution of the land, the court could not have given it to him without exercising jurisdiction over a claim to a right to land as against the Government, which jurisdiction it is expressly prohibited from exercising.

As regards his claim for damages, that claim must necessarily be based on the right which he claimed to the land as against Government for it could arise in no other way.

If, then, the Court was precluded from granting the appellant restitution of the land, it was equally precluded from granting him restitution in respect of injury which arose through invasion of the right which he claimed to the land.

For these reasons I hold that the Court had and has no jurisdiction to determine whether the appellant did or did not suffer injury for which he is entitled to be compensated in this proceeding for restitution.

I would dismiss the appeal with costs. Five gold mohurs advocate's fee to be allowed.

*Hartnoll, J.*—I concur with the learned Chief Judge in his view that an appeal does lie in this case.

I am also of opinion that no claim by way of restitution should be entertained on the following grounds :

The purpose of restitution is to restore property to its rightful owner and to give compensation for any wrong incurred. In this case the civil courts have no jurisdiction to go into the merits and decide who is the rightful possessor, and until appellant can show that he is such, I do not understand how he can claim restitution and compensation for loss of possession. The civil courts, if they had had jurisdiction, may have ultimately found him to be a trespasser, and, in that case, no such claim as the present would have arisen. The case of *Rodger vs. The Comptoir d'Escompte de Paris* (1) was strongly relied on by appellant's counsel in which their Lordships laid down the rule that it is one of the first and highest duties of all courts to take care that the act of the court does no injury to any of the suitors; but here it is not clear that the Civil Court did do any injury to appellant as the merits of the case were not gone into. The further question arises whether, since the Secretary of State brought the suit in a court that had no jurisdiction and obtained an erroneous decree under which appellant was put out of possession, that procedure in itself did not do a wrong to him for which he is now entitled to compensation. I am of opinion that this question should be answered in the negative. The right to restitution seems to me not to rest on erroneous procedure but on the actual merits of the case, and the real matter at issue in this case is, who is the owner of the land—which cannot be gone into. I would further note that, though the procedure was erroneous, the judgment in appeal points out that the appellant did not object to it but the learned Judges who decided the appeal raised the point. If appellant had objected from the beginning, the erroneous decree might not have been passed.

I concur in the order proposed by the learned Chief Judge.

(1) 3. L. R. 465.

IN THE CHIEF COURT OF LOWER  
BURMA.

CIVIL REVISION NO. 78 OF 1906.

K. V. P. L. Perianen Chetty, vs. Arumga Pather.

BEFORE SIR CHARLES E. FOX, KT., C.J.

Dated 13th March 1907.

For Applicant.—A. D. Nariman.

For Respondent—A. B. Banurjee.

*Civil Procedure Code (XIV of 1882), Section 32—Indian Contract Act (IX of 1872), Section 45—Succession Certificate Act (VII of 1889), Section 4.*

No one can be made a plaintiff without his own consent.

It is competent for the surviving partners to sue for a partnership debt without making the deceased partner's heirs co-plaintiffs.

The holding of letters of administration or a certificate of heirship by one of the plaintiffs who are the surviving partners is unnecessary.

*Vide Indian Contract Act by Pollock and Mulla, section 45, and notes thereunder.*

(1890) Ram Narain Nursing Doss v. Ram Chunder Jankee Lall, I. L. R. 18 Cal. 86.

(1893) Vaidyanatha Ayyar and others vs. Chinna-sami Naik, I. L. R. 17 Mad. 108.

(1897) Subramanian Chetty and others, vs. Rakku Servai and others, I. L. R. 20 Mad. 232.

(1894) Jagmohandas Kilabhai vs. Allu Maria Duskal, I. L. R. 19 Bom. 338.

The four plaintiffs, Chinaya Chetty, Ramen Chetty, Perianen Chetty and Lutchman Chetty, who described themselves as bankers and money lenders carrying on business together in co-partnership under the style and firm formerly of K. V. P. L. Pallaneappa Chetty and now under the style and firm of K. V. P. L. Perianen Chetty, sued the defendants to recover what was due on a promissory note executed in favour of K. V. P. L. Pallaneappa Chetty.

One of the defendants took the objection that Pallaneappa Chetty was dead, and that none of

the plaintiffs had obtained letters of administration to his estate or a certificate under the Succession Certificate Act.

Thereupon plaintiffs applied that the widow and daughter of Pallaneappa should be made plaintiffs, with them although they stated that his female relations took no share in his estate. Oblivious of the fact that no one can be made a plaintiff in a suit without his consent, the judge granted the application without even issuing notice to the widow and daughters. Up to the decision of the suit, however, the names of the widow and daughter had not been entered on the plaint as plaintiffs. The suit was heard as if they were plaintiffs, and on the objection that no one of the plaintiffs had either letters of administration or a Succession Certificate, it was held that the plaintiffs were not competent to sue and accordingly the plaint was rejected. The plaintiffs apply for revision and reversal of this order. In the first place the order making Pallaneappa's widow and daughter plaintiffs was illegal, and I set it aside.

The plaintiffs are as originally stated in the plaint. They admit that Pallaneappa was a partner with them at the time the money the subject matter of the suit was lent, and that it was partnership money.

The questions which arise are—

- (1) are the plaintiffs, as surviving partners, competent to sue for the money without Pallaneappa's heirs being co-plaintiffs?
- (2) can they sue without having obtained letters of administration or a certificate under the Succession Certificate Act?

There has been considerable diversity of decision on such points in the High Courts of India.

In Ram Narain Nursing Doss v. Ram Chunder Jankee Lall (1), the Calcutta High Court held that the effect of section 45 of the Contract Act was that a deceased partner's representatives must always be made parties to suits as plaintiffs with the surviving partner or partners. At the same time a hesitating opinion was expressed as to the applicability of this rule to the case of a family partnership under the Mitacshara-law.

(1) (1890) I.L.R., 18 Cal. 86.

Mr. Pollock, in his commentary on the Indian Contract Act, says in his notes on section 45: "It seems, therefore, to be the better opinion that the representatives of a deceased partner are not necessary parties to a suit for the recovery of a debt which accrues due to the partnership in the life time of the deceased. It has been so laid down by the High Courts of Allahabad, Bombay and Madras."

After examination of the decided cases he refers to I agree with him in the above opinion. Upon this view the holding of letters of administration or a certificate of heirship by one of the plaintiffs is unnecessary. In *Vaidyanatha vs. Chinnasami* (2) it was said that a suit by the surviving partner conjointly with the heir of the deceased would be maintainable, but in such case a certificate of heirship would be necessary, unless it appeared on the face of the document sued on that the debt was a coparcenary debt. This last view, however, was not adopted in *Subramanien Chetty and others vs. Rakku Servai and others* (3), and it was stated that the court recognized that other proof of the debt being joint beyond what appears on the face of the document could be given.

In *Jagmohandass Kilabhai vs. Allu Maria Duskal* (4) it was held that a plaintiff does not require a certificate where his claim is for family property by right of survivorship, and that where a plaintiff's family is admitted or proved to be a joint Hindu family, but there is no direct evidence as to the nature of the debt claimed by the plaintiff, the presumption is that it is a family debt.

In the present case, whether the plaintiffs claim as surviving partners or by right of survivorship under the Hindu law by which they are governed, it appears to me that the objections that *Pallaneappa's* estate was not represented by any plaintiff, and that none of them held letters of administration or a certificate under the Succession Certificate Act were not good objections to the suit.

I set aside the order of the Small Cause Court and direct that the suit be heard on the merits.

The respondent must pay the plaintiffs' costs in this court; two gold mohurs are allowed as advocate's fee.

(2) (1893) I.L.R., 17 Mad. 108.

(3) (1897) I.L.R., 20. Mad. 232.

(4) (1894) I.L.R., 19, Bom. 338.

IN THE CHIEF COURT OF LOWER  
BURMA.

CIVIL REVISION NO. 14 OF 1906.

Aung Kyaw Pru vs. Mi Kala.

BEFORE SIR CHARLES E. FOX, KT., C J.

Dated 8th May 1907.

For Applicant (Plaintiff).—Pennell.

Revision—section 622, Civil Procedure Code.

Failure to follow a decision of the High Court of Calcutta to which the Court's attention was not drawn at the hearing is no ground for revision, as this Court is not bound by it.

Such a failure does not fall within the test laid down in *Zeya v. Mi On Kra Zan and San U Khine*.

(1904) 2 L. B. R. 333.

This is an application for revision under section 622 of the Code of Civil Procedure. The District Judge dismissed the suit on the ground that the claim was barred by limitation. The ground relied on as a good ground for revision falling within the test stated in *Zeya vs. Mi On Kra Zan* (1) is that the judge failed to take into account a fact and a proposition of law which ought to have affected his decision. The fact was that the loan sued on was repayable after the date of the loan and at a time less than three years before the institution of the suit; the reason why it should have affected his decision is, because there is a ruling of the Calcutta High Court, *Rameshwar Mandal vs. Ram Chand Roy* (2), to the effect that a suit to recover money lent upon a verbal agreement that the loan should be repaid with interest on a date subsequent to the loan is governed by article 115 of schedule II of the Limitation Act, and not by article 57.

In my judgment there is no good ground for revision. Even if the decision of the Calcutta High Court had been brought to the judges notice, he was not bound to follow it. The suit was for money lent. The judge had to consider what provision of the Limitation Act applied to it.

(1) (1904) 2 L. B. R. 333.

(2) (1884) I. L. R. 10 Cal. 1033.

He must have applied the article most obviously applicable, namely, article 57 "for money payable for money lent—three years (from the time) when the loan is made." In so doing he may have been right or he may have been wrong. I do not say that he was wrong. The fact that his decision is in conflict with a ruling of a court by whose decision he is not bound, does not constitute a failure to take into account some proposition of law which ought to have affected the decision.

The application is dismissed.

IN THE CHIEF COURT OF LOWER  
BURMA,

CIVIL REVISION NO. 120 OF 1906.

Yeo Hooi Chow ... .. *Appellant,*  
vs.

Yeo Hooi Yang and nine others ... *Respondents.*

BEFORE SIR CHARLES E. FOX, KT., C. J.

*Dated 13th March 1907.*

*For Applicant.*—D. N. Palit.

*For Respondents.*—Villa.

*Arrest before judgment—Compensation—Irregularity.*

*Civil Procedure Code (XIV of 1882) Sections 478, 479, 491.*

Defendant must be given an opportunity of showing that the allegations by which plaintiff obtained his arrest before judgment were untrue, and failure to do so does not constitute an immaterial irregularity. A decree should not be passed against the defendant before the date fixed for return of summons, unless he clearly consents to it.

The plaint was presented on the 31st of August 1906 and the hearing was fixed for the 7th September following. On the day on which the plaint was presented the plaintiff applied for arrest of the defendant under section 478 of the Code of Civil Procedure. The defendant was arrested and taken to the Judge's house on the 1st September.

The affidavits as to what took place there do not agree, but, taking the facts to be as stated in the affidavit filed on behalf of the

plaintiffs, the interpreter, under the directions of the Judge, asked the defendant whether he had executed the promissory note sued on, and whether he admitted the amount sued for. The defendant answered both questions in the affirmative, and on this being communicated to the learned Judge he released the defendant from custody. The learned Judge recorded that the defendant confessed judgment, and gave the plaintiffs a decree.

The defendant says that the allegations on which the plaintiff procured his arrest were untrue, and that he had no opportunity of repelling them. He acknowledges that he admitted execution of the note sued on but denied that he confessed judgment.

He complains generally of the illegal procedure by which a decree carrying costs was given against him before it should have been. The procedure cannot be justified. The sole question which had to be dealt with when the defendant was brought before the Judge, under arrest, was whether he should not give security for his appearance. This question was not dealt with at all. If it had been dealt with at a proper time and place, it would have been open to the defendant to show that the judge had issued the warrant without having followed the necessary procedure of examining the applicant for it, and to have shown that the allegations in the affidavit in support of the application for a warrant were false. It would then have been open to him to have asked for compensation under section 491 of the Code.

Further, the Judge had no authority to determine the suit before the day fixed in the summons for the defendant to appear and answer, unless the defendant expressly consented to the suit being determined earlier.

It is argued that the irregularities are not material, because it is still open to the defendant to bring a suit for compensation for illegal arrest.

Section 491, however, was enacted to enable a person wrongly arrested to obtain a remedy by a less costly method than a suit, and, in any case, the defendant cannot get back the costs awarded against him by the decree if it is allowed to stand.

I set it aside and direct that the suit be re-heard according to law. The plaintiffs will pay the costs of this application.

Two gold mohurs are allowed as advocate's fee.

IN THE CHIEF COURT OF LOWER  
BURMA.

CIVIL REGULAR NO. 378 OF 1906.

Moonshee Morad Bux ... .. Plaintiff.

vs.

The Secretary of State ... .. Defendant.

BEFORE MR. JUSTICE ORMOND.

Dated 2nd May 1907.

*Jurisdiction—Lower Burma Town and Village Lands Act, section 41 (a).*

Under section 41 (a) of the Lower Burma Town and Village Lands Act (Act IV of 1898) the Court has no jurisdiction to entertain a suit in respect of any claim to any right over land as against Government.

The Court, therefore, has no jurisdiction to go into the question whether the Government have the right of filling up a creek, which is a right or a claim to a right over land.

The plaintiff is the owner of land adjoining a creek situated at Ahlone. He alleges that he has the right of floating his logs over the water in the creek and of storing his logs on the foreshore of the creek, it being a tidal creek. The Government wish to fill up the creek and the plaintiff seeks for an injunction restraining them from doing so. The question is, has this Court jurisdiction to entertain this suit under section 41 (b) of the Lower Burma Towns and Village Lands Act, which is follows: "No civil court shall have jurisdiction to determine any claim to any right over land as against the Government." Now this is a suit in respect of land which comes under the Act, the land being within Rangoon, and it is a suit to recover against Government. That, I think, is sufficient to shew that that section precludes this Court from entertaining this suit.

Mr. Eddis, for plaintiff, contends that the plaintiff is not preferring a claim over land as

against the Government but he claims the right of using the creek, which right is appurtenant to his own land. But in determining that question I must go into the question of whether the Government have the right of filling up the creek, which is a right or a claim to a right over land preferred by Government, and if I have no jurisdiction to determine that question, I have no jurisdiction to entertain this suit, which must be dismissed accordingly.

IN THE CHIEF COURT OF LOWER  
BURMA.

CRIMINAL APPEAL NO. 206 OF 1907.

Y. C. Arif and Musoor vs. ... King Emperor.

BEFORE SIR CHARLES E. FOX, KT., C. J.

Dated 22nd February 1907.

*For Appellants.—Grant.*

*For the Municipality.—Jordan.*

*Attachment—duty and liability of thugyi and bailiff—good faith—Obstruction—trivial harm—section 95 of the Indian Penal Code.*

When a warrant of attachment of property for default in payment of Municipal taxes is taken out, a thugyi is not at liberty to take a bailiff to any house where he may think a tax defaulter lives, and seize any property in the house, leaving the owner of it to go to the Revenue Officer to apply for removal of attachment.

Both thugyis and bailiffs incur serious liabilities if they do not act in good faith in the execution of their duties.

Nothing can be taken to have been done in good faith which is done without due care and attention.

A possibly strongly worded protest and order or request to leave the premises does not amount to obstruction.

Pushing of the officers out of the house is not justifiable, but the harm done to them is not of such importance or of such a nature that any person of ordinary sense and temper who is not over whelmed with the importance of his office will complain of. It is a case in which section 95 of the Indian Penal Code is applicable.

The Municipal taxes on two houses, one in 50th street and one in 52nd street, not having been duly paid, the Circle Thugyi applied for and obtained a warrant from the Akunwun for the attachment of the moveable property of Janab Bee, the registered owner of the properties. The warrant directed the bailiff to attach such property as was set forth in a list annexed or which should be pointed out to him by the thugyi. No list of property was annexed to the warrant.

Armed with it, the thugyi, bailiff and a peon went to a house in 27th street in which the first accused lives. The second accused is his servant.

The reason why the thugyi took the bailiff to that house was, because the taxes in respect of the houses in 50th and 52nd street had been previously paid there.

The thugyi did not know the defaulting lady, nor did he know where she lived or was living. He says he believed she lived in the house simply because the taxes had been previously paid in that house. Further, he admitted that he did not know what property in the house (if any) belonged to the lady. He says he thought he had to have attached any property he found in the house, and if any property seized did not belong to her, the owner had to come and apply for removal of attachment.

The bailiff's idea of his duty was that he must seize anything the thugyi told him to seize.

When they got to the first accused's house, they called out announcing their arrival. The second accused appeared, and they told him they had come to execute the warrant which the bailiff showed him. They announced their intention of seizing one of many ponies in stalls on the ground floor. The second accused fetched the first accused, and, when he arrived, he used strong language, and both accused pushed the party out of the house. The municipal party say they were so frightened at the conduct of the two accused that they took refuge from them in the house of a Burman on the opposite side of the street. This is manifestly as great an exaggeration as the exaggerated statements as to what took place on the second occasion when they went to the house.

The bailiff admits that when the first accused came on the scene he told them that the ponies

were not the property of Janab Beebee, that she did not live there, and that she had no property in the house. The thugyi does not admit that the first accused told him that Janab Beebee was in Calcutta, and that she had no property in the house, but he says the first accused spoke something in English which he did not understand.

The frightened and discomfited party went and reported to the Akunwun. Two days afterwards the thugyi, bailiff and two peons again set out to execute the warrant. On this occasion they sought the aid of the police, and two Punjabi policemen were put at their service.

The party went again to the first accused's house. The accounts of what then took place vary. The policeman who understood most of what was said, says that on the warrant being shown to the accused, he said his name was not on it, and that the person against whom it was, had no property in his house. The first accused told them not to come into his house or there would be disturbance. The policeman was asked to arrest the accused but he refused to do so.

The Municipal peons represent that the two accused dared them at the risk of their lives to enter the house. The bailiff says that they were merely told to leave the house. The thugyi adds that the second accused pulled one of the municipal peons by the hand and said "go up if you dare."

The accused were next prosecuted and were charged with having assaulted the bailiff on the occasion of his first visit with intent to prevent or deter him from discharging his duty as a public servant, and with having on the second occasion obstructed him in the execution of the warrant.

They were found guilty on both charges, and each one was fined Rs. 200 for the first offence and Rs. 50 for the second offence, and in default of payment of fine they were sentenced to rigorous imprisonment for three months and three weeks respectively.

What strikes me most prominently in the case is the fact that the execution of this warrant was left to persons so grossly ignorant of their duties, and also of their own liabilities if the property of one who is not a defaulter is seized in execution.

It is to be hoped that measures will be taken to disabuse the minds of this Revenue thugyi in particular and of every other municipal thugyi of the idea that he is at liberty to take a bailiff to any house where he may think a tax defaulter lives, and seize any property in the house, leaving the owner of it to go to the Revenue Officer to apply for removal of attachment. It should be impressed on both thugyis and bailiffs that they incur serious liabilities if they do not act in good faith in the execution of their duties, and that nothing can be taken to have been done in good faith which is done without due care and attention. There was no justification for the officers in this case going to the first accused's house, and threatening to seize one of his ponies. Neither of the officers had any knowledge or information that the person whose moveable property the warrant directed the bailiff to seize, had any property in the house. If they had seized any of the property in the house, under such circumstances, they could not be held to have acted in good faith. The second visit was more unjustifiable than the first for they, or one of them at least, had been told that the defaulter was not living in the house and that she had no property there, and the officers had no information to the contrary. On this second visit there was nothing which amounted to obstruction of the bailiff in the discharge of his functions. A possibly strongly worded protest and order or request to leave the premises is not an obstruction. Any officer possessing ordinary sense could not have believed that the accused would have assaulted or otherwise obstructed them in the presence of two stalwart policemen.

As to the pushing of the officers out of the house on the first visit, that was not justifiable, but I cannot believe that the harm done to them was of any importance, or of such a nature that any person of ordinary sense and temper who was not overwhelmed with the importance of his office would complain of. It appears to me to be a case in which section 95 of the Indian Penal Code is applicable.

I accordingly reverse the convictions and acquit the accused. The fines paid will be refunded.

IN THE CHIEF COURT OF LOWER  
BURMA.

CRIMINAL REVISION NO. 89B OF 1907.

King Emperor v. Nga Cheiu and 18 others.

BEFORE SIR CHARLES E. FOX, KT., C. J.

Dated 30th April 1907.

*Criminal trespass—Section 447, Indian Penal Code—Intention.*

From the mere fact that some persons drove their carts over a footpath belonging to the Forest Department, who had put up a notice prohibiting such driving, it cannot be presumed that they intended to intimidate, insult or annoy any one within the meaning of section 447 of the Indian Penal Code, and, therefore, a conviction under that section must be set aside.

This was a reference made by the District Magistrate of Tharrawaddy in Criminal Revision No. 144 of 1907 of his Court from the order of the 3rd class Additional Magistrate of Zigon, dated the 2nd February 1907, passed in Criminal Case No. 25 of 1907. The Chief Judge agreeing with the reasons given by the District Magistrate, set aside the convictions and sentences and acquitted the accused. The accused had been convicted under section 447 of the Indian Penal Code. The facts are sufficiently set out in the following reference of the District Magistrate.

Nineteen persons were prosecuted under section 447, Indian Penal Code, for driving their carts over a footpath erected by the Forest Department, and were convicted and sentenced to pay a fine of 8 annas each by the 3rd class Additional Magistrate of Zigon.

The fines have been paid.

It appears that a notice was put up prohibiting cartmen from driving on it, but the cartmen say that they had to cross it because there was no other way.

\* \* \* \*

It appears to me that the plea of the accused, that there was no other way to go is a good one, and that it cannot be presumed that by driving their carts across the road they intended to intimidate, insult or annoy any one. I do not therefore think that the convictions can be sustained, and the proceedings, together with the proceedings in case No. 32 of the same Court are submitted to the Chief Court with the recommendation that the convictions be set aside.

IN THE CHIEF COURT OF LOWER  
BURMA.

CRIMINAL REVISION NO. 79 B. OF 1907.

The King Emperor v. Mhwe Aung.

BEFORE SIR CHARLES E. FOX, KT., C. J.

Dated 30th April 1907.

*Excise Act (XII of 1890)—Presumption under section 30 (2) (a).*

When a person with a yearly income of Rs. 50 to 100 is found in possession of seven dozen pints of beer, the Magistrate may legitimately presume that the liquor was not in his possession for private use but for sale.

This was a reference to the Chief Court under section 438 of the Criminal Procedure Code by the District Magistrate of Akyab in Criminal Revision No. 52 of 1907.

The reference stated: The accused in this case was found in possession of seven dozen pint bottles of beer and was convicted by Maung Tha Ban, 1st class Subdivisional Magistrate, Akyab, under section 51, Excise Act, and sentenced to pay a fine of Rs. 25 or, in default, 22 days' rigorous imprisonment. The fine was realized. The Magistrate has presumed with reference to section 30 (2) (a), Excise Act, that the foreign fermented liquor was for sale and not for the private use of accused.

The presumption is drawn from the following facts: The accused is a betel garden planter with a probable yearly income of Rs. 50 to Rs. 100, and he could not afford so much foreign liquor for his own use.

As several cases have arisen in this district in which coolies have been found in possession of considerable quantities of foreign spirit and foreign fermented liquor, a ruling as to whether the presumption drawn in this case is a proper one is desirable. Some such cases have been prosecuted and in some no action has been taken. Some magistrates have convicted and some have not.

I feel no doubt myself as to the correct presumption to be drawn, when such a person is found in possession of a large quantity of foreign fermented liquor, and there is no proof

of intention to sell. The case is submitted to the Registrar, Chief Court.

*Order of Fox, C. J.*—I do not think any interference is called for. Where, as in the present case, the circumstances are such that it is highly improbable that the liquor could be in the accused's possession for his private use, magistrates may legitimately draw the conclusion that it was not for such use.

The record will be returned.

IN THE CHIEF COURT OF LOWER  
BURMA.

CRIMINAL REVISION NO. 19 OF 1907.

King Emperor vs. Nga Chow and ten others.

BEFORE SIR CHARLES E. FOX, KT., C. J., AND  
MR. JUSTICE MOORE.

Dated the 21st March 1907.

*Punishment—Section 121 A. Indian Penal Code—  
Enhancement of sentence.*

Punishment is given not only as a punishment upon the individual who has committed the crime, but also in order that it may have a deterrent effect amongst the population generally, and that it may tend to stop repetition of the crime.

When people take part, however little, in committing an offence under section 121 A. of the Indian Penal Code, the fact that they were foolish or ignorant does not mitigate the offence.

A punishment of not less than seven years ought to be given upon every conviction under that section, in order that, in course of time, it may have a deterrent effect.

Under these circumstances sentences may be enhanced on appeal by the Local Government.

*Fox, C. J.*—This is an application presented under the orders of the Local Government asking the Court to enhance the sentences on some of the accused convicted in what may be called the Toungoo rebellion case, on the ground that the sentences of three years rigorous imprisonment, and in one case of two years rigorous imprisonment, were inadequate for so serious an

offence. The learned Sessions Judge thought that an altogether different sentence should be passed on the leaders in the conspiracy from that on the rank and file. He sentenced the chief conspirator to transportation for life, another principal conspirator to ten years rigorous imprisonment and another minor leader to seven years transportation. All the other accused who were convicted, with the exception of one, he sentenced to three years rigorous imprisonment, and the one he sentenced to two years rigorous imprisonment.

He regarded these as the rank and file, although one Nga Nyein had supplied 50 dahs to the arch-conspirator. He said that the majority of the rank and file were extremely ignorant persons who were probably persuaded to launch into the scheme from love of novelty and adventure, and from respect for the pongyi, without any reflection as to the terrible result that their venture might have. A part of the scheme settled on was the burning of Toungoo and the cutting down of all who might oppose the *soi-disant* prince.

Whether the ignorant ones reflected or not, they each of them must have been aware that bloodshed and great destruction of property were contemplated by the leader as being part of his scheme which they agreed to join in and carry out.

It is no doubt pitiable that the evil doers, like the perhaps visionary pongyi leader who planned the scheme, should find such foolish dupes amongst the population, but it is the dupes who in the end make such evil schemes formidable, if they become so.

Punishment is given not only as a punishment upon the individual who has committed the crime, but also in order that it may have a deterrent effect amongst the population generally and that it may tend to stop repetition of the crime.

The lessons afforded by the results of similar hairbrained plots in the past have not as yet impressed on the dupe class the utter folly of joining in the plots to overthrow the power of their existing ruler.

I see but one way of bringing it home to the minds of the ignorant and foolish that they

cannot join in any scheme which involves rebellion, bloodshed and destruction of property without incurring risk of very serious consequence to themselves, and that way is by passing heavy sentences on these, be they tutored or untutored who joined in such schemes.

If a punishment of not less than for seven years is given upon every conviction of an offence punishable under section 121 A. of the Indian Penal Code, whatever the age of the convict may be and however little part he may have taken or have been capable of taking in carrying out the conspiracy, it may possibly in time penetrate to the most untutored stratum of the population that they ran risk of very serious punishment if they join in or aid in any way schemes of pongyis, *soi-disant* princes, or others, to overthrow their present King-Emperor's sovereignty over the province.

I would enhance the sentences on each of the respondents to one of transportation for seven years.

Moore, J.—I concur.

#### IN THE CHIEF COURT OF LOWER BURMA.

INSOLVENCY NO. 71.

Re Ahmed Ebrahim Adjim.

BEFORE MR JUSTICE OERMOND.

Dated 15th May 1907.

*Sanction to prosecute.*

An application for sanction, if made after a delay of four months, should be refused.

Mr. Hamlyn applies for sanction to prosecute insolvent for giving false evidence. The judgment was delivered on 13th December 1906 and the application is not made until more than four months afterwards, although the applicant knew at that time that the statements were false. I think an application of this sort should be made without delay. It is therefore refused.







IN THE CHIEF COURT OF LOWER  
BURMA.

CIVIL REGULAR NO. 144 OF 1906.

Tommaso Brizzio ... .. Plaintiff,  
vs.  
Antonio Chiesa ... .. Defendant.

BEFORE MR. JUSTICE BIGGE.

Dated 23rd July 1906.

For Plaintiff.—Vertannes,

For Defendant.—F. C. Brown.

Application for a commission to examine plaintiff—  
Section 386, Civil Procedure Code.

The fact that a plaintiff will be put to expense in having to attend at the hearing of his case is not a sufficient ground for the granting of a commission to examine him beyond the jurisdiction of the court, more especially if it would be oppressive and unfair to the defendant.

*Vertannes.*—The Civil Procedure Code gives the Court full discretion to grant a commission, and the words "any person" in section 386 of the Civil Procedure Code include a plaintiff. The argument, that the plaintiff having chosen his own forum ought to be present at the trial of his case, has no application in this case as the plaintiff had no choice. He cannot sue elsewhere, and if he sue at all he must sue here.

Another point the court has to consider is the amount in dispute which, in this case, is small; and it would be practically denying the plaintiff justice to refuse his application as, in proportion to the amount in dispute, the expense to which the plaintiff would be put in having to come from Poona to attend his trial would be very considerable. Besides this, plaintiff would lose his appointment at Poona if he were to come here for his case. The court should remember that when plaintiff filed his suit in the Small Cause Court his intention was apparently to finish his case before leaving Rangoon, as he was present in court on the day fixed by the Small Cause Court for the trial of his case.

Referred to *Coch v. Allcoch*, 21, Q. B. D., p. 178.

*Ross v. Woodford*, L. R. (1894) 1. Ch. D. 38.

*Keely v. Wakeley*, 9, T. R. 571.

*Brown.*—Before he filed his suit in this court, plaintiff knew he had accepted a situation at Poona and, as a matter of fact, he left two days after filing his plaint. Why did he not apply to be examined *de bene esse*? Although the court has full discretion, it must see that in exercising that discretion, justice is done to the defendant no less than to the plaintiff.

Referred to *Amrith Nath Jha vs. Dhunput Singh Bahadur*, 20 W. R. 253.

In *re Boyse, Crofton vs. Crofton*, L. R., 21 Ch. D., p. 760.

This suit, in which the plaintiff is suing the defendant for Rs. 585, being the amount of commission at 3 per cent. on his profits and one month's pay in lieu of notice, was originally filed in the Small Cause Court, and on the 22nd of May the learned Judge, for the reasons shown in his order of that date, ordered the plaint to be returned for presentation to the proper court, or, in the alternative, for amendment, saying, that part of the plaintiff's case was essentially a matter of account and one, therefore, outside his jurisdiction.

It was presented in this Court on the 24th May and admitted, and the defendant filed his written statement on the 12th June, and issues were settled on the 9th July. On the 2nd July 1905 the plaintiff's advocate, Mr. Vertannes, filed a petition in which he stated that the plaintiff is now at Poona in the service of one Signor Cornaglia, and praying that the plaintiff might be examined by commission. This petition is supported by an affidavit which is also made by Mr. Vertannes, in which he states that the services of the plaintiff had been engaged by this Signor Cornaglia and that he could not stay in Rangoon to prosecute his suit, as it would mean the loss of his appointment, and that he was at Poona at the time where he expected to be for about two or three months, after which he expected to be sent to Bombay.

The application is made under section 386 of the Code of Civil Procedure, under which it would seem that the powers of the Court are wide enough to issue a commission to examine any party, be he witness, defendant, or plaintiff. But I have to consider whether it is consistent with the due administration of justice to allow the plaintiff to give evidence on his own behalf at Poona on commission.

In *Coch vs. Alloch*, L. R. 21. Q. B. D., p. 178, Lord Esher, in considering on appeal whether the evidence of the witnesses of the plaintiff who were resident in Norway, in a suit in which only £24 was at stake, should be taken on commission, said, that "the granting of a commission must depend on the circumstances of the particular case and the court must take care, on the one hand, that it is not granted when it would be oppressive or unfair to the opposite party, and, on the other hand, that a party has reasonable facilities for making out his case, when, from the circumstances, there is a difficulty in the way of witnesses attending at the trial. All the circumstances of each particular case must be taken into consideration. With regard to the case of a plaintiff asking for a commission to examine himself, that also appears to me to be a matter of discretion; but the discretion will be exercised in a strict manner, and the court ought to require to be more clearly satisfied that the order for a commission ought to be made."

In *Ross vs. Woodford*, L. R. (1894) 1. Ch. D., p. 38, the head note is "In the exercise of its discretion to grant or refuse a commission to take evidence abroad, the court will not regard the case of a defendant with the same strictness as the case of a plaintiff who has chosen his own forum." And Chitty, J., in delivering judgment said, "There are many cases where the court has been very reluctant to accede to applications by a plaintiff to take evidence abroad, because the tribunal has been chosen by the plaintiff himself; so, too, with regard to the case of a plaintiff asking for a commission to examine himself, the court has full discretion, but it exercises that discretion strictly, and does not grant the application unless a very strong case is made out."

The case of *Keeley vs. Wakeley*, 9. T. R. 571, quoted by Mr. Vertannes, does not seem to carry his case any further.

In *re Boyse, Crafton vs. Crofton*, L. R. 21. Ch. D., p. 760, quoted by Mr. Brown, owing to its special circumstances, does not seem to touch this case, and the fact that it did not appear to the court that the witness who, it was of opinion, should be submitted to a drastic cross-examination, could be cross-examined satisfactorily before the French Courts.

The remarks of Mr. Justice Phear in *Amrith Nath Jha vs. Dhunput Singh Bahadur*, 20. W. R. 253, are worthy of serious attention.

It seems to me that to allow the plaintiff to be examined on commission at Poona would not only involve a serious expense, if his examination and cross-examination is to be in any way effectively conducted, but would put the defendant at a very serious disadvantage in combating the claim which is set up against him, and, further, as was said by Chitty J., in *Ross vs. Woodford*, "it is a matter of great importance to see the demeanour of witnesses in open court where there is likely to be a considerable conflict of testimony," and what this learned Judge said of witnesses applies in all its force to parties.

No doubt certain expense will be incurred by the plaintiff in coming over here to give his evidence, but I do not see on this ground alone that the indulgence asked for should be granted, more especially as it would certainly be oppressive and unfair to the defendant; and these considerations far outweigh the consideration of the plaintiff's convenience, which is substantially the only ground on which he relies.

This application is refused with costs two gold-mohurs.

IN THE CHIEF COURT OF LOWER  
BURMA.

CIVIL FIRST APPEAL\* NO. 71 OF 1905.

V. V. R. Lutchman Chetty,

vs.

Maung Shwe Hlwa and one.

BEFORE SIR CHARLES E. FOX, KT., C. J., AND

MR. JUSTICE IRWIN.

Dated 23rd August 1906.

For Appellant.—Pennell.

Respondent, did not appear.

*Rights of mortgagee to interest at mortgage rate from date of institution till realization—Transfer of Property Act, sections 86 and 88—Forms 109 and 128 to IVth Schedule to Civil Procedure Code—Form of decree.*

\* Appeal from judgment of Mr. H. S. Pratt, District Judge of Pyawon, in Civil Regular Suit No. 15 of 1905, dated the 18th July 1905.

A mortgagee who sues on his mortgage is entitled to interest at the mortgage rate from the date of institution of the suit till realization by sale of the mortgaged premises and, after the sale, to interest only at 6 per cent. per mensem on the balance remaining due.

Every mortgage-decree should direct that if the defendant should pay the plaintiff the amount due for principal, interest and costs on or before the date fixed for payment, the plaintiff should reconvey the mortgaged premises free and clear from all incumbrances done by him, and deliver to defendant all documents in his custody or power relating to such property.

*Vide Rameswar Koer vs. Mohamed Mehdi Hossein Khan (1898) I. L. R. 26 Cal. 39.*

*Sunder Kaer vs. Rai Shain Krishen, I. L. R. 34 Cal.*

*Fox C. J.*—The plaintiff sued to recover Rs. 7,953-6-6 upon a mortgage of lands and buildings and moveable property. The prayer of his plaint was framed according to form No. 109 in the 4th schedule to the Code of Civil Procedure, that is to say, he asked for further interest which might accrue on the mortgage between the filing of the plaint and the day of payment, and for the costs of the suit; and that in default of payment, the defendants' right to redeem might be foreclosed, or that the mortgaged property might be sold, and the proceeds of sale applied towards payment of the principal, interest and costs; and that, if such proceeds should not be sufficient for the payment in full of such amounts, the defendants should be ordered to pay the amount of the deficiency with interest. Instead of following the form and asking for interest on the deficiency at the rate of six per cent. per annum, he asked for interest at the mortgage rate.

The first defendant admitted the claim with the exception of Rs. 151-12-11. The plaintiff agreed to forego that amount, and accepted an allegation of the first defendant that the interest payable had been verbally reduced from Rs. 2 per cent. per mensem, the rate stated in the mortgage, to the rate of Rs. 1-12 per cent. per mensem.

The District Judge gave a decree for Rs. 780-9-7, with costs on that amount, and ordered that, if the amount payable were not paid into Court within six months from the

date of the decree, the mortgaged property should be sold and the proceeds applied toward satisfaction of the decree.

The plaintiff appeals on the ground that he has not been allowed what he asked for, and what he was entitled to get a decree for.

As to interest subsequent to plaint filed, Their Lordships of the Privy Council have, in *Rameswar Koer vs. Mohamed Mehdi Hossein Khan (1)*, recognised the right of a mortgagee to interest at the mortgage rate up to the date of realization. Form 109 in the 4th schedule is an indication of what the Legislature considered a mortgagee entitled to. Form 128 is the form to be followed in drawing up a decree when an account is ordered to be taken. Section 86 of the Transfer of Property Act provides for two forms of decree—one ordering an account to be taken of what will be due to the plaintiff for principal and interest on the mortgage, and for cost of suit (if any), on the future date fixed for payment of the mortgage—the other for a declaration of the amount due for principal, interest and costs at the date of the decree.

Their Lordships considered that sections 86 and 88 of the Act indicated clearly enough that the ordinary decree in a suit to recover the amount due on a mortgage should direct accounts, allowing the rate of interest provided by the mortgage up to date of realization. They also held that courts, in exercising their discretion as to allowing interest, given by section 209 of the Code of Civil Procedure, could not have a better guide to such discretion than the rule indicated by the Legislature in the above-mentioned sections of the Transfer of Property Act, and that this rule is applicable even where that Act is not in force, and, generally, whatever form the decree may be in.

This appeal should, in my own opinion, be allowed, and the decree of the District Court shall be altered to a decree ordering the defendants to pay into Court, on or before the 23rd February 1907, Rs. 6,900 principal and Rs. 901-9-7 interest, with further interest on Rs. 6,900 at the rate of Rs. 1-12 per cent. per mensem from the 28th June 1905 (the date of institution of the suit) until the date of payment, together with the plaintiff's cost of suit, computed on Rs. 7,801-9-7, and ordering

(1) (1898) I. L. R. 26 Cal. 39.

that, in default of the defendants paying the above amounts into Court on or before the above-mentioned date, the mortgaged properties (to be set out in a schedule to the decree) be sold and the proceeds of sale be applied towards payment in the first instance of the expenses of sale and then towards payment of the amount which shall be at the time due to the plaintiff for principal, interest and costs, computed as above, and, in addition, plaintiff's costs of this appeal; and that, if the proceeds shall not be sufficient for the payment of the above amounts in full, the defendants should pay the plaintiff the amount of the deficiency, with interest thereon at the rate of 6 per cent. per annum until realization. The decree should also direct that if the defendants pay the plaintiff the amounts due to him for principal, interest and costs on or before the date fixed for payment, the plaintiff should re-convey the mortgaged property to the defendants free and clear from all incumbrances done by him or any claiming by, from, or under him, and that he should deliver up to the defendants, or to such person as they appoint, all documents in his custody or power relating to such property. I have fixed the rate of interest subsequent to institution of suit at Rs. 1-12 and not at Rs. 2, the mortgage rate, in view of the plaintiff's agreement at the trial not to claim at the higher rate. Appellant's counsel admitted that he could not, on this appeal, claim at the higher rate.

*Irwin, J.*—I concur.

IN THE CHIEF COURT OF LOWER  
BURMA.

CIVIL FIRST APPEAL NO. 71 OF 1906.

Babu Sheodut Roy Soni Ram,

*vs.*

C. R. M. Ramasawmy Chetty.

BEFORE SIR CHARLES E. FOX, KT., C. J., AND

MR. JUSTICE HARTNOLL.

*Dated 29th April 1907.*

*For Appellant.*—N. N. Burjorjee.

*For Respondent.*—Law.

*Evidence Act, section 92.—Oral evidence inadmissible to vary the terms of a written document.*

Oral evidence to show that the consideration in a deed is in fact different to that stated in the deed is evidence to vary the terms of a written document and is inadmissible under section 92 of the evidence Act.

*Sah La Chund vs. Indrajit*, I. L. R. 22 All. 370, followed.

*Maung Bin vs. Ma Hlaing*, 3 L. B. R. p. 100, and *Balkishen Doss vs. Legge*, I. L. R. 22 All. 149, referred to.

This was an appeal from the judgment and decree of Mr. G. Scott, Judge of the District Court of Amherst in Civil Regular Suit No. 72 of 1906.

*Hartnoll, J.*—The plaintiff-appellant sues the defendant-respondent to recover the sum of Rs. 9,154, being principal and interest deposited with the latter, and his case is as follows: He states that, on the 4th April 1903, he, by an arrangement with Sathappa Chetty, the then managing agent of defendant's firm, sold his interest in certain decrees for Rs. 7,000 to that firm, and that the purchase-money was allowed to remain on deposit with the firm at interest at the rate of fourteen annas per cent. per mensem. He alleges that he has asked for the principal and interest due to him but has failed to obtain it, and so he sues for it, Rs. 7,000 principal and Rs. 2,154 interest. The defendant denies that he purchased the decrees from the plaintiff for Rs. 7,000 and that this sum was ever deposited with him at interest as alleged. He gives a history of the transactions relating to the decrees and ends by stating that the plaintiff assigned to him his interest in the decrees for Rs. 1,000 which was the actual balance of money due to him from the plaintiff.

The issues fixed were—

*First*—Did plaintiff sell to defendant, for Rs. 7,000, a half share in the two decrees?

*Second*—Did plaintiff agree that this sum of Rs. 7,000 should remain in deposit with defendant with interest at 14 annas per cent. per mensem?

*Third*—If so, what is the amount now due as principal and interest on that deposit?

*Fourth*—To what relief is plaintiff entitled?

The learned District Judge found on the first and second issues in the negative, and accordingly dismissed the suit. Towards the decision of

the first issue evidence was admitted for the purpose of varying the terms of the deed of assignment produced for the plaintiff.

The grounds of appeal are—

- (1) that, on the evidence (oral as well as documentary), the learned Judge erred in law and fact in holding that the respondent had not purchased the decrees for Rs. 7,000;
- (2) for that the learned Judge erred in law in discrediting the appellant's accounts;
- (3) for that the appellant's case was strongly corroborated by the documentary evidence on the record;
- (4) for that the learned Judge erred in law in admitting in evidence and relying on the books of account produced by the respondent;
- (5) for that the learned Judge erred in law and in fact in holding that the consideration for the sale of the two decrees was not Rs. 7,000;
- (6) for that the Judge erred in law in allowing oral evidence to contradict and vary the terms of the registered deed;
- (7) for that the Judge erred in law in admitting evidence as to custom as to deposits with chetties;
- (8) for that, in any case, the Judge failed to adjudge the issue between the parties as to the interest which the plaintiff was entitled to;
- (9) for that the judgment was otherwise erroneous in law and against the weight of evidence.

In appeal, great stress was laid on the argument, that evidence could not be given to vary the terms of the deed of assignment that was produced. The contention must, I think, prevail. The law on the subject was gone into at length in the case of *Maung Bin vs. Ma Hlaing* (1), and in that case were quoted the words of Their Lordships of the Privy Council in *Balkishen Dass vs. Legge* (2). In the deed under discussion

the purchase-money is stated to be Rs. 7,000 and the amount of the purchase-money is clearly one of its terms. Nothing was pleaded by the defendant to bring the document under the operation of proviso (1) to section 92 of the Evidence Act. In his written statement he simply states that the deed does not correctly represent the contract, and in his evidence he says that he can give no explanation as to why Rs. 7,000 was written in the deed and not Rs. 1,000. It was suggested by his counsel in the appeal that the Rs. 7,000 may have been entered with the object of getting money out of Chethambram Chetty, the original judgment-debtor in the decrees that were assigned, but he stated that this was only a surmise of his. The two cases quoted by the learned District Judge do not in my opinion show that evidence of any oral agreement can be admitted to vary the terms of the deed of assignment, as they deal with the question of admission of evidence with regard to the payment and nature of the consideration and not with the amount of the consideration itself. The amount of the consideration is clearly one of the terms of a document; but the question whether it has been paid or not is not. In this connection the case of *Sah Lal Chand vs. Indrajit* (3) would seem to be in point in which Their Lordships of the Privy Council held that it is settled law that, notwithstanding an admission in a sale deed that the consideration has been received, it is open to the vendor to prove that no consideration has been actually paid, and that the Evidence Act does not say that no statement of fact in a written instrument may be contradicted, but that the terms of the contract may not be varied. For these reasons it seems to me that evidence of any oral agreement to show that the consideration in the present instance was in reality different from that stated in the deed, is inadmissible for the purpose of varying its terms, and I would answer the first issue by deciding that the plaintiff sold his interest in the decrees to the defendant for Rs. 7,000.

It was further argued at the hearing of the appeal that the suit should fail, in that it was not brought for the balance of purchase-money due on the deed but for the recovery of an unproved deposit with interest due thereon. I am unable to concede to this view. The suit is certainly for the recovery of money placed on deposit, but it is equally for the recovery of the

(1) 3 L. B. R. 100. | (2) I. L. R. 22 All. 149.

(1) 3 L. B. R. 100. | (3) I. L. R. 22 All 370.

unpaid purchase-money, as it is alleged, that the deposit is the unpaid purchase-money. It seems to me that the suit may well be taken as one for the recovery of unpaid purchase-money *plus* interest due thereon. This being so, and it being allowed that the consideration of the deed was Rs. 7,000, the burden of proving the payment of this consideration seems to me to lie on the defendant, since he does not deny the interest in the decrees was assigned to him, but he disputes the amount of the purchase-money. From the very nature of his defence it is clear that he has not paid Rs. 6,000. Since he pleads that the total purchase-money was Rs. 1,000 only, the burden of proof lying on him, I am unable to hold that he has even proved the payment of this Rs. 1,000. His agent alone gives evidence producing certain accounts. There is in his disfavour the fact that he pleads there is something wrong about the document and does not explain it satisfactorily. The cheque drawn on the 27th April 1903 was for Rs. 820. The accounts show that Rs. 600 was on that day paid by cash and cheque, and they do not show that any of the interest was paid by cheque.

The facts, that the accounts show, apart from the Rs. 1,000 alleged purchase-money of the deed of assignment, Rs. 918 credited in the defendant's books on that day and that the cheque drawn was clearly one for Rs. 820, are not satisfactory. I would certainly hold that the defendant has not proved the payment of even Rs. 1,000 towards the price of the deed of assignment, and that he is certainly liable for Rs. 7,000.

Lastly, there is the question of interest, and on this point the burden of proof seems to me to clearly rest on the plaintiff. There is no admission on the part of the defendant to shift the burden of proof. I am of opinion that plaintiff has entirely failed to prove that the purchase-money, Rs. 7,000, was placed at interest of 14 annas per cent per mensem. The accounts that he produces are unsatisfactory, as noted by the District Judge, and the evidence of Ganga Sahai, a travelling pedlar, is not trustworthy. I would disallow the claim for interest.

I would therefore set aside the decree of the District Judge and give plaintiff-appellant a decree for Rs. 7,000 with proportionate costs; the defendant-respondent getting his cost on the sum disallowed.

Fox, C. J.—I concur.

IN THE CHIEF COURT OF LOWER  
BURMA.

CIVIL SECOND APPEAL NO. 133 OF 1907.

Maung Shwe Tha and one,

vs.

Maung Tha Dun Aung.

BEFORE SIR CHARLES E. FOX, KT., C. J.

Dated 22nd May 1907.

*Attachment removed at instance of decree-holder—No remedy under section 283 of the Civil Procedure Code.*

When an attachment is removed at the instance of, and at the request of the decree-holder and not in consequence of an order passed under section 280 of the Civil Procedure Code, he cannot avail himself of the provisions of section 283 of the Civil Procedure Code as no order can be said to have been made against him under section 280, 281 or 282 of the Civil Procedure Code.

This was an appeal from the judgment and decree of the District Court of Maubin, in Civil Appeal No. 23 of 1906 on an appeal to that court from the judgment and decree of the Township Court of Danabyu in Civil Regular No. 651 of 1905. The facts of the case are fully stated in the following judgment of the District Court:

"The respondent-plaintiff instituted a suit under section 283, Civil Procedure Code, to declare that two paddy holdings, Nos. 81 and 82, and three cocoanut trees in dispute are liable to be attached in execution of the decree against the estate of the late U Taing. The plaintiff stated, *inter alia*, that, in execution of the decree obtained against the estate of the late Maung Taing, he attached two pieces of land known as holding Nos. 81 and 83 and three cocoanut trees standing on a garden land, in Civil Execution Case No. 157 of 1905; that defendant-appellant, Maung Tha Dun Aung, applied for removal of attachment in Civil Miscellaneous Case No. 42 of 1905, and that the warrant of attachment and sale proclamation were withdrawn as he wanted to institute a regular suit to establish his right to the property in dispute. This statement of plaintiff-respondent had led me to call for Civil Execution Case No. 157 and

Miscellaneous Case No. 42 of 1905 of the Dana-byu Township Court. In the former case I observe that the judge noted in his diary under date 25th October 1905, thus: 'In Civil Miscellaneous Case No. 42 the pleader for respondent, Maung Shwe Tha and one, decree-holders, asks the Court to remove the warrant of attachment and withdraw the proclamation. Sale proclamation is withdrawn and cancelled. Inform Bailiff.' On examination of the latter case I observed the order under the same date to be 'Applicant and respondents Maung Shwe Tha and one, decree holders present.—Pleader Maung Ba Maung and Maung Po Tha present. The pleader for respondents Maung Shwe Tha and one, decree-holders, asks that the warrant of attachment may be removed and the sale proclamation may be withdrawn. Three witnesses for respondent present. The warrant of attachment removed and the sale proclamation cancelled. Inform Bailiff.' These notes and the orders were not made grounds of objection in the lower Court. From these it is clear that the attachment was removed and the execution case was closed at the instance of the decree-holder and not in consequence of an order passed under section 280, Civil Procedure Code, against him. It is therefore evident that there was no cause of action to the institution of the suit under section 283, Civil Procedure Code, by the decree-holder, plaintiff-respondent.

ORDER.

"Appeal allowed. The decree of the lower Court set aside. Respondent to bear cost of appellant in both courts."

The following was the judgment of the Chief Judge:

Upon the facts stated by the District Judge, it appears to me that his decision was quite right. The plaintiff decree-holder chose to himself have the attachment against the property removed: consequently no order can be said to have been made against him under section 280, 281 or 282, and he did not come within section 283 of the Code.

The appeal is dismissed with costs.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL SECOND APPEAL NO. 73 OF 1906.

Bashe Ahmed vs. S. M. R. M. Olagappa Chetty.

BEFORE MR. JUSTICE MOORE.

Dated 10th June 1907

For Appellant.—R. M. Das.

For Respondent.—N. C. Datta.

Suit of a Small Cause Court nature—no second appeal. Section 586, Civil Procedure Code.

A suit to recover from the decree-holder, as damage earnest-money forfeited to Government and which has been paid for the purchase of land sold in execution of a decree against a judgment-debtor who had no interest therein whatsoever, is a suit of a Small Cause Court nature, and if the amount is below Rs. 500, no second appeal will lie.

Prasanna Kumar Khan vs. Uma Chun Hazra, I. C. W. N. p. 140.

Makund Ram vs. Bolind Kishen, I. L. R. 20, All. p. 80

The case of Pachayappan vs. Narayana (I. L. R. Mad. 269) and Sutherland's Weekly Reporter, Vol. XI, p. 369, do not apply, as they are cases under the Repealed Act. (XI of 1865.) Section 586, Civil Procedure Code.

The plaintiff-appellant sued the defendant respondent in the Township Court of Payagala in Civil Regular No. 994 of 1905 to recover Rs. 215 under the following circumstances: The defendant, in Execution Case No. 57 of 1905, of the said Township Court, attached and sold a piece of paddy land. The plaintiff bought it at the court sale Rs. 215 being 25 per cent. of the amount for which he purchased the land and which he paid into Court. Before the expiry of the time for the payment of the balance of the purchase-money, he found that the land purchased had long ago been resumed by Government, and that the civil court had no jurisdiction to order the sale of the same. He therefore did not pay the balance of the purchase money in due course. The sum of Rs. 215 was forfeited and the present suit was instituted to recover the said sum. The Township Court dismissed the suit on the ground that it was the

duty of the plaintiff to ascertain the right, title and interest of the judgment-debtor in the said land before the purchase, and his neglect to do so could not afford any cause of action against the defendant. The plaintiff then appealed to the District Court of Pegu (Civil Appeal No. 122 of 1905) which dismissed the appeal on the ground that "if defendant committed a wrong the forfeiture of the purchase-money is not a natural and probable consequence of defendant's conduct." The plaintiff then appealed to the Chief Court, and at the hearing a preliminary objection was taken that, the case being one cognisable by a Court of Small Causes, no second appeal would lie.

*Moore, J.*—A preliminary objection has been taken in this case that no appeal lies under section 584, Code of Civil Procedure, because the suit, the value of which admittedly does not exceed Rs 500, is of a nature cognisable by a Court of Small Causes. The facts of the case are, briefly as follows: The defendant-respondent brought to sale a piece of land in execution. Plaintiff-appellant bought this land at the auction sale and paid a deposit of Rs. 215. After purchase plaintiff discovered that the judgment-debtor had no saleable interest in the land sold. Plaintiff then declined to pay in the balance of purchase-money which was forfeited to Government under section 308, Civil Procedure Code.

Plaintiff now sues to recover this sum of Rs. 215 from defendant by way of damages.

The question for decision is, whether this suit was a suit excepted from the cognizance of a Court of Small Causes by schedule II, Provincial Small Cause Courts. The case of Pachayappan *vs.* Narayana (1) has been quoted as authority for holding that a suit of this nature is not cognisable by a Court of Small Causes. But this case was decided under a different Small Cause Court Act (Act XI of 1865) and is no authority for interpreting Act IX of 1887.

The case quoted on behalf of respondent from Sutherland's Weekly Reporter, Vol. XI page 369, is also under the Repealed Act.

In the case of Prasanna Kumar Khan *vs.* Uma Churn Hazra (2), a Divisional Bench of the Calcutta High Court held that a suit by an

execution-purchaser of immoveable property to recover his purchase-money on the ground that the judgment-debtor had no saleable interest therein was a suit cognizable by a Court of Small Causes, and that Article 35, clause I, of the second schedule, Act IX of 1887, had no application to such a suit. This case was decided in 1896. This ruling does not appear to have been dissented from. In the case of Makund Ram *vs.* Bolind Kishen (3), Mr. Justice Banerji came to the same conclusion, namely, that a suit of this nature was cognizable by a Court of Small Causes.

It appears to me that this is clearly a suit for damages sustained by plaintiff by reason of defendant having brought to sale property in which the judgment-debtor had no saleable interest. It does not appear to me to fall within Article 35 (v), or under any other article of schedule II to Act IX of 1887.

I hold, therefore, that the suit was cognizable by a Court of Small Causes and that, therefore, by reason of section 586, Civil Procedure Code, no second appeal lies.

I therefore dismiss this appeal with costs.

IN THE CHIEF COURT OF LOWER  
BURMA.

SPECIAL CIVIL SECOND APPEAL NO. 162 OF  
1906.

Maung Po Thet and 1 *vs.* Mg. Shwe Lu and 1.

BEFORE SIR CHARLES E. FOX, K.T., C. J.

Dated 8th May 1907.

*For appellants.*—S. N. Sen.

*For respondents.*—Vakharia.

*Lower Burma Town and Village Lands Act (Burma Act IV of 1898)—State land—village land.*

Land once appropriated to dwelling places, *i.e.*, constituted village Lands under the Lower Burma Town and Village Act, does not cease to be village land and thus outside the jurisdiction of the civil courts by

(1) I. L. R. 11. Mad. page 269.

(2) I. Cal. W. N., page 140.

(3) I. L. R. 20 All., page 80.

possession thereof and payment of land revenue thereon for more than 12 years, even though it may have been originally included in the occupant's holding and he and his predecessors may have paid revenue in respect of the whole area originally included in the *kwin*.

The appellants, who were plaintiffs in the court of first instance, sued for the possession of a piece of land in the possession of the respondents. The respondents had built a dwelling house on the land, which they claimed formed part of the village land under the Lower Burma Town and Village Lands Act. The appellants claimed it as belonging to their paddy holding. They called evidence to show that they had paid taxes on the said land; and a revenue surveyor, called by the defendants, stated that, in accordance with a long standing rule, land measuring 120 feet from the river should be kept free from cultivation, and he proved that the land was a village land up to and in the year 1900-01.

The following was the judgment of the Chief Judge:

The plot of land claimed was one of a number of plots along the bank of a stream on which houses had been built. Neither party claimed to hold a revenue free grant of the land, consequently it is "State land," as defined in the Lower Burma Town and Village Lands Act, if it is in a village, and if it is not in a village it is land belonging to the State although a landholder's right of permanent occupancy may have been acquired over it.

"Village" in the Town and Village Lands Act means an area appropriated to dwelling places not included in the limits of a town. It is clear from the maps that the plots along the bank of the stream, one of which is occupied by the defendant, form an area appropriated to dwelling places. That area is consequently a village. Although the area may have been originally included in the plaintiff's holding, and although he and his predecessors may have paid revenue in respect of the whole area originally included in the *kwin*, the land became village land under the provisions of the Act.

The plaintiff claimed no title to the plot of land under that act, and he could not succeed.

The appeal is dismissed, with costs.

IN THE CHIEF COURT OF LOWER  
BURMA.

SPECIAL CIVIL SECOND APPEAL NO. 186 OF  
1906.

Maung Tun Lin and one vs. Maung Lon Gyi.

BEFORE MR. JUSTICE HARTNOLL.

Dated 16th May 1907.

*Boundaries—Oral evidence to construe document—Section 92, Indian Evidence Act—Removal of fence Section 55 Specific Relief Act.*

Oral evidence is admissible to show the correct boundaries, although the boundaries are clearly defined in the documents relied on, and admission of such evidence does not contravene the provisions of section 92 of the Indian Evidence Act.

The removal of a fence attached to the land does not seem to come under section 55 of the Specific Relief Act.

Maung Tun Lin and Ma Thu Za sue Maung Lon Gyi for an injunction directing him to remove a fence that he has erected on their land, and also to remove the eaves of his granary which overlap the eaves of their granary.

Maung Lon Gyi disputed the title of plaintiffs to the land that they allege is theirs, and further stated that the eaves of his granary have been erected in the manner that they have been with the consent of plaintiffs.

The Township Judge gave a decree as prayed for, holding that plaintiffs had proved their title to the land, and that the eaves projected over their land without their permission. The District Judge reversed the decree, holding that the plaintiffs had not proved their title to the land in dispute and that no agreement which is binding on the plaintiffs was made to allow the eaves to be put up as they are now.

Against this decision this appeal has been laid, and the points in dispute are practically the same as those in the lower courts.

It appears that the land on which the houses of both parties are built originally belonged to U Ku and Ma Chaw. U Lon Gyi's land seems to have a frontage of 26 feet and to be 27 feet six inches wide at the back. According to the demarcation officer's measurements the plaintiffs' land was found to be 52 feet six inches in front and 55 feet at the back. The plaintiffs base their claim to the land on a registered deed of sale in which the land is described as 200 feet by 50 feet. The defendant pleads that no oral evidence can be given to show that the land in dispute belongs to the plaintiff, for, to admit such would infringe the provisions of section 92 of the Evidence Act. I am unable to agree to this contention. The point in dispute is not the total area of land purchased by the plaintiffs from their vendors but the boundary between them and the defendant. The deed they produce described their southern boundary as being the land of Maung Po Ku, the predecessor in interest of Maung Lon Gyi. Even though the plaintiffs may be in possession of more land than is described in their title deeds, that would not show that the actual piece in dispute is not comprised in the land mentioned in their deeds as purchased by them. I am of opinion that oral evidence is admissible to show the boundary. Satisfactory evidence has been produced, to my mind, to show that the boundary should be the one as found by the demarcation officer. Ko Ah Sein Na describes how Ma Chaw disposed of her land measuring from south to north.

First Shwe Pyaung was given a strip measuring 50 by 200 feet. Then came the allotment in dispute. The northern portion of Shwe Pyaung's is now U Lon Gyi's. Looking at the map C. it would appear that Shwe Pyaung and U Lon Gyi possess between them more than 50 feet frontage. So, strictly, if the measurement given by Ma Chaw was insisted on, the plaintiff's land would begin one foot or so to the south of the demarcation line A. B. shown on the plan. Shwe Pyaung evidently got a little more than he bargained for. According to U Ah Sein no boundary posts were put up. When Maung Shwe O made his demarcation there seems to have been no dispute; I decide the limits of the plaintiffs' land to be as shown by the line A. B. in Exhibit C.

The second point remains for determination, and that is, whether there has been an agree-

ment binding on the plaintiffs that the eaves should be erected as they are. The defendant states that Po Su, brother-in-law of Maung Tun Lin, agreed to it in the presence of Maung Tun Lin, who said nothing. He allowed that the land belonged to Maung Tun Lin and Ma Thu Za only but said that Po Su and plaintiff are on the same means of income. Maung Tun Lin allowed that he and U Su are on the same means of income but he said, "Everything is to be done with the consent of my wife. U Su cannot [do] anything as he liked." There is not sufficient on the record to show that U Su could bind Maung Tun Lin and Ma Thu Za by any agreement that he may have entered into. It is not shown that he owned the land, or could bind all the owners. The evidence as to the alleged agreement does not seem to me to be satisfactory—the more especially as this dispute has arisen. It is not suggested that Maung Tun Lin said anything giving his consent; he is supposed to have stood by and acquiesced by his silence. The evidence is not weighty enough in my opinion to prove any binding agreement.

I accordingly set aside the decree of the District Judge.

I cannot, however, altogether restore that of the Township Judge. The removal of a fence attached to the land does not seem to come under section 55 of the Specific Relief Act.

I decree that U Lon Gyi do remove all the eaves of his granary that project over the land of Maung Tun Lin and Ma Thu Za, the boundary of which is to be according to the line A. B. in the plan Exhibit C. filed at page 25 of the proceedings of the Township Judge.

Maung Lon Gyi will pay the costs of Maung Tun Lin and Ma Thu Za in all courts.

IN THE CHIEF COURT OF LOWER  
BURMA.

SPECIAL CIVIL SECOND APPEAL NO. 93 OF 1906.

C. P. P. Anamalay Chetty,

vs.

Maung Shwe Thi and one.

BEFORE MR. JUSTICE MOORE.

Dated 13th June 1907.

For Appellant.—Vertannes.

For Respondents—Gaunt.

*Amendment of plaint in appeal—Section, 53 Civil Procedure Code.*

When the misdescription of a plaintiff is a mere mistake, it will not be allowed to prejudice the case on the merits, and leave to amend the plaint by substituting the name of the real plaintiff in place of the plaintiff in whose name the suit was originally filed, will be granted under section 53 of the Civil Procedure Code even in second appeal, and even if the plaintiff, in whose name the suit was originally filed, was dead when the suit was filed.

This was an appeal from the judgment and decree of Mr. David Wilson, Judge of the Divisional Court of Hanthawaddy, in Civil Appeal No. 113 of 1905. The respondents were sued in the Subdivisional Court of Insein on a promissory note, alleged to have been executed by them in favour of C. P. P. Anamalay Chetty. The plaint was signed and verified by one Peria Curpen Chetty who held a power of attorney from Anamalay Chetty. The only issue was, whether the note had been executed by the respondents. The Judge found against them and a decree was passed accordingly. In the evidence, however, of one of the witnesses for the plaintiff, it was stated that Anamalay Chetty had died previous to the institution of the suit.

The defendants on this appealed on the grounds stated in the judgment. It was admitted that Anamalay Chetty was dead. The Divisional Judge of Hanthawaddy reversed the decree of the lower Court on the ground that the plaintiff was dead when the suit was originally filed; though he agreed with the lower Court on the finding of fact. Thereupon an appeal was

filed in the Chief Court and an application was at the same time made for leave to amend the plaint by substituting the name of Pallaneappa Chetty in place of Anamalay Chetty, and, in an affidavit attached to the petition, Peria Curpen Chetty, agent of the firm of C. P. P., stated that the principal was Pallaneappa Chetty who had given a power of attorney with power of substitution to Anamalay Chetty, who had himself appointed him (Peria Curpen Chetty) the agent of the firm of C. P. P. under a power of attorney.

The following judgment was delivered by Mr. Justice Moore.

In Civil Regular Suit No. 98 of 1905 of the Subdivisional Court, Insein, the plaintiffs sued to recover from respondents Rs. 835 due upon a promissory note. The suit is filed in the name of C. P. P. Anamalay Chetty, by his agent Peria Curpen Chetty. Defendants denied execution, and the only issue raised was: Did defendants execute the promissory note. This the lower Court decided in favour of plaintiff and gave him a decree. Defendants appealed on the grounds—(i) that, as Anamalay Chetty died before the suit was instituted, it should have been dismissed, (ii) that execution and payment of interest were not proved.

The fact that Anamalay Chetty died before the suit was filed is admitted.

The learned Divisional Judge held that the note was payable to Anamalay, and that, Anamalay being dead, Peria Curpen could not sue upon it.

Appellant now asks for leave to amend his plaint by altering the words descriptive of plaintiff to the following: "Palaneappa Chetty etc., carrying on business formerly by his duly constituted agent Anamalay Chetty but now by his duly constituted attorney Peria Curpen Chetty under the firm (*sic*) and style of C. P. P.

The note sued upon is payable to C. P. P. Anamalay Chetty which mean nothing else than "Anamalay, agent (or representative) of the firm of C. P. P. Chetty." It is a note which could not have been sued upon by Anamalay personally, section 230 Contract Act, and payment to the firm of C. P. P. or their authorised agent, holding the note would be a proper payment

In my opinion, therefore, this suit could have been brought on this note had the plaintiff been described as he is described in the amendment to make which leave is now sought.

In my opinion leave to make the amendment should be granted. It is clear that the misdescription of plaintiff was a mere mistake which should not be allowed to prejudice the case on the merits. Section 53 permits such an amendment and I see no reason why leave to amend should not be granted. I grant leave to amend the plaint as prayed.

The case on the merits has been dealt with in the Court of First Instance and no remand to that court appears necessary. The judgment of the Divisional Court, however, is as regards the facts of the case no judgment at all.

I therefore allow the amendment and remand the appeal to the Divisional Court for determination on the merits.

Appellant to pay respondents' costs in this Court.

IN THE CHIEF COURT OF LOWER  
BURMA.

CIVIL REVISION NO. 48 OF 1906.

Arumugam Chetty and two others,

vs.

Arunachallam Chetty.

BEFORE MR. JUSTICE HARTNOLL.

Dated 23rd May 1907.

For Appellants.—Agabeg.

For Respondents.—N. M. Cowasjee.

*Mortgages without possession—Section 295, Civil Procedure Code not applicable.*

Where an application under section 295 of the Civil Procedure Code by a mortgagee of property not in his possession is dismissed and the sale proceeds have been paid away, the High Court will not interfere on revision as the mortgagee has a remedy by a regular suit.

When the mortgage is not admitted, action under section 295 of the Civil Procedure Code is not appropriate.

*U. Hla Baw vs. Muthia Chetty. XII, B. L. R., 325.*

This was an application to revise the orders passed by Mr. E. Ford, District Judge of Pegu, in Civil Miscellaneous Case No. 19 of 1906, of the District Court of Pegu. The applicants claimed to be mortgagees of two pieces of paddy land and certain paddy and cattle which the respondent had attached, and applied under section 295 of the Civil Procedure Code that the proceeds of sale be applied towards payment of their mortgage debt before satisfaction of the decree in respect of which execution had issued. The District Judge considered that, under certain orders issued by the Divisional Court of Pegu, he was debarred from recognizing claims of a mortgagee, who was not in possession, of moveable property, and refused the application in respect of the paddy and cattle but granted the application in respect of the paddy land. The applicant appealed.

The following judgment was delivered by Mr. Justice Hartnoll.

The applicants alleged that certain immoveable and moveable property was mortgaged to them, that it was attached by the respondent, and that a certain sum was due to them on the mortgage bond. They therefore asked that the attached property should be sold free from the mortgage and that they be given prior rights over the sale proceeds. The District Judge gave the order prayed for with respect to the paddy lands but refused it with regard to the cattle and grain. The present application is to set aside the latter portion of the order. It is allowed that the sale proceeds have been paid away. The counsel for the respondent has stated that he cannot support the view taken by the District Judge, but he argues that, as a regular suit lies, this is not a case for interference on revision.

I concur with him. I do not see how the order can prejudice the applicants as they have a regular suit as their remedy. According to the ruling in *Hla Baw vs. Muthia Chetty* (1), as the mortgage was not admitted, action under section 295 of the Civil Procedure Code was not appropriate.

I dismiss the application but, under the circumstances, there will be no order as to costs.

IN THE CHIEF COURT OF LOWER  
BURMA.

SPECIAL CIVIL SECOND APPEAL NO. 144  
OF 1906.

Usman Mahomed vs. Jusraj Vacharaj and one.

BEFORE SIR CHARLES E. FOX, KT., C.J.

Dated 6th June 1907.

For Appellant.—Eddis.

For Respondents.—N. M. Cowasjee.

*Want of consideration—Section 25—Indian Contract Act—Agreement in fraud of creditors void—Voluntary promise—Promise under pressure.*

A voluntary payment made by a compounding debtor after a composition is complete and pressure on him is removed, cannot be recovered back by him. A compounding debtor pleading want of consideration for a note must set up and show that the promise was not voluntary; or, that it was made under pressure, or, in pursuance of an agreement previous to the composition deed that would have been a fraud on the other creditors.

The suit was upon a promissory note. The defence set up was denial of execution of the note, and of receipt of consideration. The District Judge found that one of the defendants had executed the note and gave a decree on it. The defendants appealed impugning the finding that the note had been executed and that there was consideration for it.

At the hearing of the appeal an entirely new ground was taken up, and this was, that the defendants had compounded with their creditors for a payment of 6 annas in the rupee, and the note sued on was given to the promisees of it in pursuance of a separate and private agreement that one of the defendant's creditors should be paid in full.

On the authority of the decision in *Alice Mary Hill vs. William Clarke* (1), the defendants' advocate was allowed to argue that the note was given in pursuance of an illegal agreement, and that it was therefore void. The original promisee of the note said that the note

had been given because the defendants asked him to pay for them the amount of the note to one of their creditors and that he had agreed to do so and had in fact done so. He said he was not aware that the defendants had entered into a composition with their creditors, but his clerk said he did know of the composition. The composition deed had been entered into two days before the note was signed. The creditor, whose debt the promisee of the note agreed to pay, was a party to that deed; and he was present when the promissory note was signed. The learned Divisional Judge held that the agreement under which the defendants signed the note was void, and that the note could not be recovered on. He relied on the ruling of the Madras High Court in *Krishnappa Chetty vs. Adi Madali* (2). The facts in that case were not on all fours with the facts in the present case.

In that case the plaintiff, who was a creditor of an insolvent, refused to agree to an arrangement for a composition of an insolvent's debts, and threatened to oppose his discharge, but said he would sign the agreement if he were paid a larger amount than what would come to him under the proposed composition. The insolvent got the defendant to sign the promissory note sued on, and then the plaintiff signed the composition deed. The plaintiff was held not to be entitled to recover the amount of the note. The facts fell clearly within the principles of the cases in which the courts have refused to assist creditors who enter into a composition deed, but seem to obtain an advantage over their fellow-creditors.

In the present case, however, it is not the creditor, who obtained the advantage, who is suing. Moreover, the promissory note sued on was given after the composition agreement was entered into, and there is no evidence to contradict him. A voluntary payment made by a compounding debtor after a composition is complete and pressure on him is removed, cannot be recovered back by him—see *Wilson vs. Roy* (3). Similarly, if, under such circumstances, a compounding debtor gives to one creditor a promissory note for the balance of the debt due to him above the amount which the creditor is to get under the composition, he would be liable.

(1) (1904) I.L.R., 27. All. 266.

(2) (1896) I.L.R., 20. Mad. 84.

(3) (1839) 10. A. & E. 82.

The defendants did not set up and did not show that the promissory note was not given voluntarily; or that it was given under pressure, or in pursuance of an agreement previous to the composition deed that would have been a fraud on the other creditors.

Under the circumstances the plaintiff was, in my opinion, entitled to recover. I allow the appeal, set aside the decree of the Divisional Court, and restore the decree of the District Court.

The defendants must pay the plaintiff's costs in the Divisional Court and in this Court.

IN THE CHIEF COURT OF LOWER  
BURMA.

CIVIL REGULAR NO. 123 OF 1907.

Kruger & Co., Limited ... Plaintiff,

vs.

M. U. Shaib Abdul Kadir ... Defendant.

BEFORE MR. JUSTICE ORMOND.

Dated 11th May 1907.

For Plaintiffs—Pennell.

*Practice*—Plaint presented by manager of limited liability company—Application for leave to sign and verify not necessary—Section 435, Civil Procedure Code.

A manager of a limited liability company, registered under the English Companies Act, can file a plaint signed and verified by him without obtaining the permission of the Court to do so, as provided for by section 435, Civil Procedure Code.

Delhi and London Limited vs. Oldham and others, I.L.R., 21 Cal. p. 60, followed.

The plaintiffs are a company registered under the English Companies Act 1862 (25 and 26, Vict. c. 80) and carrying on business in England, Burma, and elsewhere. On the 3rd May 1907 a plaint was presented before the Assistant Registrar, Original Side, signed and verified by the plaintiff Company's Manager, one Carl Rosencrauz. No application for leave to sign and verify the plaint was filed.

The Assistant Registrar, Original Side, submitted the plaint for the orders of the Judge as to whether the application mentioned in rule 18 of the Rules of the Chief Court should be filed for leave to verify, supported by an affidavit showing that the person verifying is the manager, is empowered to institute suits and able to depose to the facts of the case, as provided for by section 435, Criminal Procedure Code. He also stated that hitherto it had been the practice for the manager or attorney of a company to file such an application for leave to sign and verify plaints and written statements.

Mr. Justice Ormond thought the practice referred to by the Assistant Registrar correct, and at Mr. Pennell's request the case was set down for admission on the 13th May 1907.

After hearing Mr. Pennell the learned Judge passed the following order:—

Mr. Pennell for plaintiffs cites I.L.R., 21. Cal. 60. Let the plaint be admitted subject to objections, if any, of defendant.

IN THE CHIEF COURT OF LOWER  
BURMA.

CIVIL REVISION NO. 65 OF 1906.

Tha Ban vs. Khaik Ya.

BEFORE MR. JUSTICE HARTNOLL.

Dated 23rd May 1907.

For Applicant (Defendant)—Palit.

For Respondent (Plaintiff).—No appearance.

Revision—Section 622, Civil Procedure Code.

Where in a suit the lower Appellate Court failed to consider what damages should be allowed and gave no good reasons for awarding a certain sum as damages, the Chief Court will exercise its revisional jurisdiction and interfere with such decision.

The case for the plaintiff is that, through Maung Hmon, he hired the defendant to convey certain timber to Kyetyo village for Rs. 15, and that he was given Rs. 5 as earnest-money; that the timber was entrusted to the defendant; that he did not land the timber at the landing place

but returned and placed the timbers near his house and would not give them up when asked by the plaintiff to do so; that, as the plaintiff could not get the wood, he built a bamboo house, and so does not want it now. He therefore sues for Rs. 65, the price of the timber, plus Rs. 65, earnest-money.

Defendant denies that he received Rs. 5 advance and states that the agreement was that the timber should be delivered at a place the boat could enter or, otherwise, at the place where it remained; that he went and waited at the place where a boat could lie, that though he called the plaintiff to take delivery he would not come and so he, defendant, returned; and that he then made over the timber to Maung Hmon.

The Township Judge found that the advance was paid; that defendant acted according to his agreement and conveyed the wood; that plaintiff was wrong in not going to the defendant when called, and that defendant was right in going back. He stated that defendant's witnesses have stated that defendant delivered the wood to Maung Hmon, though he recorded no finding on the point, and he dismissed the suit.

On appeal, the District Judge found that defendant broke his contract and gave the plaintiff a decree. Against this finding this application on revision has been made.

The finding that defendant broke his contract cannot now be questioned; but it seems to me that the District Judge omitted to consider what damages should be allowed, and gave no good reasons for awarding Rs. 65. He does not seem to have gone into the question.

The earnest-money certainly would be recoverable, and that is Rs. 5. The plaintiff's case is that he requires Rs. 60 in addition as he does not now want the timber which defendant refused to hand over to him, and as that is the price of the timber. The defendant replies that the timber has been delivered to Maung Hmon, the agent of the plaintiff, and so he should not be liable for the price of it.

I set aside the decree of the District Court and fix the following issue:—

“Having regard to section 73 of the Contract Act, to what sum of money is the plaintiff entitled as damages?”

The proceedings will be returned to the District Judge to try this issue, hearing what evidence the parties may wish to adduce, and to pass a revised decree in accordance with his decision thereon.

Costs will follow the final result.

IN THE CHIEF COURT OF LOWER  
BURMA.

CIVIL REVISION No. 53 OF 1907.

Haji Shah Mahomed Alli,

vs.

A Peria Sawmy Pillay.

BEFORE SIR CHARLES E. FOX, KT, C.J.

Dated 22nd May 1907.

For Applicant.—Pennel.

For Respondent.—Chari.

Revision—Section 622, Civil Procedure Code—Judge deciding case according to his notions of justice and not according to law.

A judge's decision should be according to the law applicable and not according to his own notions of what is right and proper.

Where the equities between the parties are evenly balanced the High Court will not interfere on revision even though the decision of the lower court be not according to law.

The applicant filed a suit against the respondent in the Court of Small Causes, Rangoon, to recover the sum of Rs. 108-8 on account of house rent for three months and three days, from the first day of June to the third day of September 1906, at Rs. 35 per mensem. The defendant admitted occupying the house till 15th June, and stated that he left the house on 15th June, and engaged another house in consequence of the receipt of a notice from the Rangoon Municipality to quit the house on the ground that it was unfit for human habitation. The Additional

Judge of the Court of Small Causes found that defendant was not in occupation of plaintiff's house in August, and observed "Justice would, I think, be done if defendant is ordered to pay for the whole of June." A decree was accordingly passed for Rs. 35 and costs on that amount. The plaintiff applied to the Chief Court to revise the judgment and decree of the Court of Small Causes.

The following judgment was delivered by the Chief Judge.

The Judge should certainly have decided the case according to the law applicable, and not according to his own notions of what is right and proper.

The tenancy continued until it was determined by some means expressed in the Transfer of Property Act, and the plaintiff was in the absence of anything to show that the lease had been determined, entitled to the rent he claimed. The Judge, however, believed that the defendant had left the house in consequence of a notice he received from the Municipal Committee requiring him to leave because the house was unfit for human habitation. In such case the lessor did not fulfil his contract that the lessee should hold the property without interruption, and, although the lessor might be in law entitled to the rent he claimed, the lessee was entitled to compensation for breach of contract by the lessor. The damages would be at least equal to the rent for the time subsequent to the lessee's leaving the house. The Judge did not believe that the defendant remained in the house until the 3rd September. He made him pay for longer than he admitted. It is not a case in which the interference of this Court is called for.

The application is dismissed with costs. One gold mohur allowed as advocate's fee.

IN THE CHIEF COURT OF LOWER  
BURMA.

CIVIL REFERENCE NO. 3 OF 1907.

Ma Leik and three others,  
vs.  
Maung Nwa and two others.

BEFORE MR. JUSTICE HARTNOLL AND

MR. JUSTICE MOORE.

Dated 12th June 1907.

For Appellants (Defendants).—Maung Kin.

There was no appearance for the respondents.

*Buddhist Law—Property inherited by father between two marriages how divided between offspring of first and second marriage.*

When property, moveable or immoveable, is inherited by a man after the death of his first wife, by whom he had a son, and before his marriage with his second wife, by whom he has children, the son by the first wife is entitled to a half share in such property.

Buddhist Law gives no preference to the issue of the first marriage over the issue of a second marriage and the division must be *per stirpes* and not *per capita*.

This was a reference by Mr. Justice Hartnoll in Civil Second Appeal No. 92 of 1907, under section 11, Lower Burma Courts Act. The Chief Judge ordered the question referred to be heard before a bench consisting of Mr. Justice Hartnoll and Mr. Justice Moore.

The following is the order of reference of Mr. Justice Hartnoll:

Maung Nwa, by his guardian, Maung Htaw, brings a suit for partition of his inheritance against Ma Leik, his step-mother and her minor children who are represented by her, under the following circumstances:—

He states that his own mother was Ma Sein Bwin, who died in 1259 B.E., and that his father, Maung Ge, married Ma Leik in 1261 B.E. He then gives a list of the property which, he asserts, is in possession of Ma Leik and himself. He also says that in 1260 B.E., after his mother's death and before his father married Ma Leik, there was a partition of the estate of his father's parents at which his father received as his share

18.30 acres of land and for which he had to pay Rs. 200 to the other co-heirs; this sum being part of the joint property of his father and mother.

He asked for a three-fourth share of the property, that he alleged Maung Ge brought to his marriage with Ma Sein Bwin, and one-eighth share in the property acquired during such marriage. He also asked for a three-fourth share in the rents of the paddy land inherited by Maung Ge, and mentioned that he had paid a debt of Rs. 312, due from his father to Maung Hman. He therefore asked that an enquiry be made and account taken of what share he was entitled to as heir and for payment to him of such share, and he further asked for a decree that the estate of Maung Ge and Ma Sein Bwin be administered by the court.

Ma Leik answered by admitting some of the facts alleged by Maung Nwa, but denying others. She also alleged that the estate was different in some respects to what Maung Nwa stated that it was. She further contested the fact that Maung Nwa had paid a debt of Rs. 312 that was owing by Maung Ge.

On the case being tried by the Subdivisional Judge, he found that the property brought by Maung Ge to the marriage with Ma Leik consisted of the inherited land, two-and-a-half ticals of gold, one large silver bowl, four small silver cups, three putsoes and one ruby ring and he gave Maung Nwa a five-eighth share in this property. He also gave Maung Nwa a five-eighth share in the rents of the land for 1265 B.E. and 1266 B.E., less revenue paid for those years, which was five-eighths of Rs. 449-2. As regards the house and ground, which was found to be the property that was acquired during Maung Ge's and Ma Sein Bwin's marriage, he gave Maung Nwa a one-fourth share.

He further found that it was not proved that Maung Nwa had paid a debt of Rs. 312, due by Maung Ge to the latter's creditor.

Against this decision an appeal was laid by Ma Leik. The Divisional Judge found that Maung Nwa had paid a debt of Rs. 312, due by Maung Ge to another, and directed that he should recover it out of the estate. He further found that the *attetpa* property of Maung Ge consisted of—

- (1) the share of Maung Ge in two durian gardens;
- (2) the paddy land measuring 18.30 acres;
- (3) one silver bowl;
- (4) four small silver bowls;
- (5) three putsoes;
- (6) two-and-a-half ticals of gold;
- (7) one ruby ring,
- (8) the rent of paddy land; which seems to have been Rs. 270 in 1265 and Rs. 300 in 1266,

and he gave Maung Nwa a three-fourth share in such property. He gave him in the property jointly acquired during the marriage of Maung Ge and Ma Sein Bwin, which he found to be a house and granary, an eighth share.

Against this decision Ma Leik lays a further appeal on the following grounds:

- (1) that the lower Courts erred in treating the paddy land as *payin* instead of *thinthi* or separate property of Maung Ge;
- (2) that they erred in treating the silver and gold articles, the putsoes, and the the ruby ring as *attetpa* property of Maung Ge;
- (3) that they failed to notice the difference between *payin attetpa* and "inherited" property, and should have considered the Buddhist law as to the distribution of shares to which the heirs are respectively entitled, with due regard to such difference;
- (4) that the Divisional Court should have held that, in the properties which were admittedly inherited by Maung Ge after the death of Ma Sein Bwin and before his marriage with Ma Leik, Maung Nwa was only entitled to one-sixth share;
- (5) that the Divisional Court was wrong in holding that a sum of Rs. 312 was due from Maung Ge's estate.

I will deal with the last ground first and, with respect to it, I see no reason to differ from the decision arrived at by the learned Divisional Judge. It seems to me proved, that, when Maung Ge died, a sum of Rs. 312 was owing for the house and ground where Ma Leik was living when the suit was brought. Maung Chiek deposes to making them over to Maung Hman in satisfaction of a debt. From the evidence of Maung Lon and Maung Dwe it seems clear that Maung Htaung paid the sum to Maung Hman on behalf of Maung Nwa. Ma Leik cannot prove that the house was ever paid for though she says that Maung Ge told her that it was. Since it appears that this debt was owing by Maung Ge, and that Maung Nwa, through Maung Htaung, has paid it, I am of opinion that Maung Nwa is now entitled to recover it from the estate. I must therefore hold that the fifth ground of the appeal must fail.

The other four grounds concern the Buddhist Law of inheritance. In appeal it was argued on behalf of the appellant that, as regards the *attetpa* property, if it be held to be the property acquired during the marriage of Maung Ge and Ma Sein Bwin, and the property inherited after Ma Sein Bwin's death, Maung Nwa should only get half share, the widow and children of the second marriage being entitled to a quarter share each, and the cases of *Ma Ba We vs. Sa U (1)* and *Chit Saya vs. Mein Gale (2)* were referred to in this connection; but it was further urged that the property inherited after Ma Sein Bwin's death stood on a different footing to the rest of the property brought by Maung Ge to his second marriage, and that Maung Nwa should only get one-sixth share in it, the remainder going to Ma Leik and her children. In support of this contention were quoted the cases of *Po Sein vs. Ma Pwa (3)* and *Shwe Ngone vs. Ma Min Dwe (4)*. The text of *Dāyajja* in section 229 of the Digest on Buddhist law was also referred to. With regard to the property, other than that inherited by Maung Ge, I see no reason to differ from the Divisional judge. The weight of authority, as shown by the texts in section 229 of the Digest, is in favour of the issue of the first marriage obtaining a three-fourth share where there have been two marriages.

(1) 2 L. B. R. 174.

(2) 2 Chan Toon's leading cases 97.

(3) 1 Chan Toon's leading cases 292.

(4) S. J. 110.

The cases of *Chit Saya vs. Mein Gale (2)* and *Ba We vs. Sa U (1)* deal with families, where there have been three marriages. In the case of *Mi Ka vs. Maung Thet (5)* it was held that a second wife's share in the property of the first marriage was one-fourth, as compared with three-fourths falling to the share of the first wife. The same division between the children of the first and second marriages was given in the case of *Myat Kaung vs. Ma Gyaing (6)*. I am not disposed to hold, that, because the widow and children of the second marriage are alive, the division should be different, unless good authority is shown me for so holding, and such authority has not been shown me.

But with regard to the inherited property, which consists of the paddy and the two and half ticals of gold, the matter seems to stand on a different footing. The reason for giving the wife and issue of a certain marriage a larger share in the property acquired during such marriage than other wives and children of other marriages, and which is the fact that the wife of such marriage helped to acquire and preserve it, does not exist where property devolves by right of inheritance. It is not jointly acquired by joint skill and labour. The subject is dealt with in the case of *Shwe Ngon vs. Ma Min Dwe (4)* and was again considered in the case of *Tun Hla v. Po Yauh (7)*. It was not considered in the cases of *Chit Saya v. Mein Gale (2)* and *Ba We vs. Sa U (1)*.

Reference to inherited property will be found at the following pages of the Digest: 237, 240, 288, 301, 307, 321 and 325.

Though I have been able to find little about the subject in the Dhammathats, it seems to me that the little I have found points to the fact that inherited property does not follow the same rules as property jointly acquired. Chapter 12, section 3, of the *Manugye* lays down the two different kinds of property, section 38 of Chapter 10 of the *Manu Kyi* favours an equal division of inherited property between different wives, for it says: "If the husband shall have inherited his parents' property after the marriage of these wives, let them divide it and share according to their class."

(5) S. J. 6. (6) P. J. 534. (7) S. J. 255.

In the present instance the wives are of the same class. Section 8 of the same Chapter gives the step-father and step-son equal share in property inherited by the wife or mother from her parents during the time of her coverture with her second husband. The Dayajja, at page 288 of the Digest, says: "The father's separate property acquired before he contracted his second marriage shall be partitioned between the children and their step-mother in the proportion of one to five respectively"; but no reason is given for such a distribution.

The Dhamma, at page 301 of the Digest, and the Cittara, at page 307, give different rules with regard to the division of hereditary estate. The Manugyi, at page 321 of the Digest, deals with hereditary property and favours the wife and children during whose time it devolved. It seems to me that no fixed rule can be derived from the Dhammathats.

In the present case the property was inherited between the two marriages, and it would seem equitable to allow an equal division; but the point is one not free from doubt and difficulty and I think that it would be well to have an authoritative decision on the point. I therefore refer to a Bench, full or otherwise as the learned Chief Judge may direct, the following question:

"Where property, moveable, and immoveable is interited by a man, after the death of his first wife, by whom he has a son, and before his marriage with his second wife, by whom he has children, to what share of such property is his son by his first marriage entitled after his death?"

The reference coming before Mr. Justice Hartnoll and Mr. Justice Moore, the following judgments were given:

*Moore J.*—The question referred for our decision is: "When property, moveable or immoveable, is inherited by a man, after the death of his first wife by whom he has a son, and before his marriage with his second wife, by whom he has children, to what share of such property is his son by his first marriage entitled after his death?"

The ruling in the different Dhammathats as to partition among children of a former marriage,

their step-mother and children of the second marriage, are collected together in section 229, Chapter X, Volume I, of the Digest of Burmese Buddhist Law.

*Vilasa.*—The Vilasa lays down that, of the property brought by the father to the second marriage, the children of the first marriage on his death shall get three shares and the step-mother or second wife one share.

The expression which is very freely translated as property brought by the father to the second marriage is, in the Burmese text, ဝိလာသ်ဥစ္စာ which seems to me to clearly indicate that the property referred to is the joint property of the father and his first wife.

*Kungya.*—The Kungya gives a different rule of division. It allows of the property taken by the father to the second marriage five-eighths to the children of the first marriage, two-eighths to the second wife and one-eighth to the children of the second marriage.

Here, again, the expression "property taken to the second marriage is a very free translation of the original, in which the words are simply ခုဝေဉ်ဥစ္စာ former property, or property of the former marriage."

*Yazathat.*—In the Yazathat the same expression is used as in the Kungya (ခုဝေဉ်ဥစ္စာ) but it is here translated, property belonging to the first marriage and taken to the second. The Yazathat gives half to the children of the first marriage, quarter to the second wife and quarter to her children.

*Dhammathat Kyaw.*—This gives the same shares as the Vilasa namely three-quarter to the children of the first marriage and quarter to their step-mother. The step-mother gets her quarter share because she prevents the property from being squandered. The children of the former marriage get three-quarter "because it was their parents property even before they were born."

*Vaunana.*—The rule here is the same as in the Vilasa. The property is tersely described as ဝေဉ်ဥစ္စာ "property coming with the father," i.e., to the second marriage.

*Manuyin.*—This Dhammathat also follows the Vilasa in awarding three-quarter to the children

of the first marriage and quarter to the widow, their step-mother. The property is here described as အထက်ဘေးဝါးပစ္စည်း which would appear to mean simply property taken to the second marriage with the children of the first marriage. The Maunyin goes on to debar the children of the second marriage from any share in the property of the first marriage.

The *Rasi* gives the same shares as the *Vilāsa* and speaks of the property as အထက်ပစ္စည်း which is translated—property brought by him the husband.

The *Vinicchaya* is the same as the *Kungya*, awarding the children of the first marriage five-eighths of the property “originally brought by their father” presumably to the second marriage.

The *Manuvanana* awards the children of the first marriage three-quarters of the property of their father and mother and quarter to the step-mother.

The *Vicchedani* rules that, if, when the father dies, there is any of the former property အထက်ပစ္စည်း remaining the former children အထက်ဘေးဝါး shall receive three shares and their step-mother one share. The expressions အထက်ဘေးဝါး and အထက်ပစ္စည်း must, I think, be taken to mean “property of the former marriage “and” children of the former marriage” respectively.

The *Rajabala* lays down that, if the house was the property of the former marriage, the children of that marriage may acquire it on paying quarter of its value.

The *Dāyajja* gives the children of the first marriage three-quarter of the property of their parents, *i.e.*, of the joint property of the first marriage. Then follows a difficult and obscure passage which has been translated “The father’s separate property acquired before he contracted his second marriage shall be partitioned between the children and their step-mother in the proportion of one to five.” I am not clear that this is a correct translation. It appears to me that the text may be also construed as referring only to the separate property of the father before his first marriage. The same *Dhammathat* goes on

to give a contradictory rule, assigning three-fifth shares to the children of the first marriage in the property taken to the second marriage.

The *Dhammasāra* and *Kyetyo* give the same rule as the *Vilāsa*.

There is thus a fairly general consensus of authority for the proposition that of the property taken by the father to the second marriage the children of the first marriage shall receive three-quarter and their step-mother quarter. But I think it is clear from the above quotations that the property referred to is the property of the first marriage, and that the children of the first marriage are awarded a larger share in this property because it was “their parents’ property at the commencement of their union.” If this view be accepted, the reason for fixing the share at three-quarter is apparent. The property being considered as belonging equally to the father and his first wife, the children of the first marriage take the whole of their mother’s share, namely, half, being her sole representatives and half of their father’s share, in which, they considered as having equal rights with the offspring of the second union as represented by their mother.

It is however clear that the children of the first marriage cannot have any superior claim through their mother to property inherited by their father after her death.

It has been suggested that the fact that this property was inherited should affect the method of partition in this case.

If it had been inherited by the father during the continuance of the first marriage, I think that this might be the case. There is authority for holding that the husband has a two-third, and the wife only a one-third, interest in property inherited by the husband during marriage.

And upon that basis the children of the first marriage would seem to be entitled to a two-third instead of a three-fourth share in the property inherited by their father during the first marriage.

But, as in the present case, the property was inherited by the father after his first wife's death, I do not think that there is any ground for treating it differently because it was inherited.

The Dhammathats, in the rules above quoted, agree in this respect that the division whether between children of the two marriages, or between children of the first marriage and their step-mother, is always *per stirpes* not *per capita*.

Following the principle which seems to me to underly the rules for division of property acquired during the first marriage, namely, that the children of that marriage take the whole of their mother's and one half of the father's share, I think the children of the first marriage are entitled to half of any property, inherited or otherwise acquired by their father between the death of his first wife and his second marriage.

I would therefore answer the reference as follows, namely, "Under the circumstances set out in the order of reference, the son by the first marriage is entitled to a one half share in the property inherited by his father after the death of the first wife but before his marriage with his second wife."

*Hartnoll, J.*—I concur in the answer to the reference proposed by my learned Colleague. At the arguing of the reference practically no more light was thrown on the rules governing the devolution of inherited property than appears in the order of reference.

The division should certainly be *per stirpes* and not *per capita*, and, in that the property was inherited between the two marriages, there seems to be no reason why one family should be favoured before another.

IN THE CHIEF COURT OF LOWER  
BURMA.

CIVIL APPEAL \*No. 85 OF 1906.

Ma Pyu U,

vs.

Maung Po Kyun and two others.

BEFORE SIR CHARLES B. FOX, KT., C.J., AND  
MR. JUSTICE MOORE.

Dated 2nd July 1907.

*For Appellant.*—Hamlyn.

*For Respondents.*—McDonnell.

*Burden of proof*—husband alienating wife's separate property—transferee must show husband's authority.

When a husband alienates his wife's separate property, there is no authority for holding that in such a case the husband must be presumed to have acted as the wife's authorized agent. The ordinary rule applies and, if a person takes a transfer of property from one who is not the owner of the property, it lies on the transferee to show that his transferor had the authority of the owner to make the transfer.

R. M. M. S. Soobramonien Chetty vs. Mah Huin Ye (1899), L. B. P. J. 568; and Maung Twe vs. Ramen Chetty (1900), 1. L. B. R. 11, referred to; Ma Shwe U vs. Ma Kyin (1904), 3 L.B.R. 66 distinguished.

The plaintiff-respondent sued for declaration and possession of a piece of land, on the ground that she had inherited it, and that the first defendant (respondent), who was her husband, had, without her knowledge and consent, transferred it to the other respondents, in collusion with them, and with a view to deprive her of it. The lower Court holding that, the burden of proving want of such knowledge or consent rested on her, and that she had not discharged it, dismissed her suit with cost.

*Per Fox, C. J.*—The case affords an example of the happy-go-lucky way in which Burmese effect transactions in land.

The land in dispute came to the plaintiff by inheritance. Money was borrowed on it from one

\* Appeal from the judgment and decree of B. H. Heald, Esq., District Judge of Hanthawaddy, dated the 18th day of June 1906.

Kya Win. The plaintiff's husband, Po Kyun, borrowed money from the defendant, Ko Maung, to pay Kya Win off. Ko Maung admits that for this money Po Kyun alone executed a mortgage of the land by registered deed. The deed has not been produced. It is not alleged that he signed it as the plaintiff's agent. It is purported to be his own deed and transfer, it conveyed no right to Ko Maung as Po Kyun had no right in the land. Subsequently Po Kyun reported to the Circle Thugyi that the land had been sold outright to Ko Maung and his wife. The way in which this came about is described by the defence witness, Kya Gaing. Ko Maung said that the principal and interest had mounted up and that Po Kyun must transfer the property to him—he would wait no longer. It is clear from this witness' evidence, and from that of the Circle Thugyi, Ko Saing, that the plaintiff was not present at the time. The Thugyi says that Ko Maung said he was quite satisfied with Po Kyun's signature, so he issued a *pyat-paing* which purported to be a record of a report of a sale made by the plaintiff as well as by Po Kyun.

The District Judge held that the plaintiff had to prove want of knowledge of, and consent to, her husband's doings. He does not say where he derived this proposition from. Personally he had in mind some remarks in the judgment in *R. M. M. S. Soobramanien Chetty vs. Mah Huin Ye (1)* which were considered in *Maung Twe vs. Ramen Chetty (2)*, to go too far.

These cases, as well as the case of *Ma Shwe U vs. Ma Kyin (3)*, dealt with the case of a husband alienating the joint property of himself and his wife. The present case is one of a husband alienating his wife's separate property. There is no authority for holding that in such a case the husband must be presumed to have acted as the wife's authorized agent. The ordinary rule applies, and if a person takes a transfer of property from one who is not the owner of the property, it lies on the transferee to show that his transferor had the authority of the owner to make the transfer.

It is clear in the present case that the husband, Po Kyun, had not the authority of the plaintiff to transfer the land.

(1) (1899) L.B.P.J. 568.

(2) (1900) 1 L.B.R. 11.

(3) (1904) 3 L.B.R. 66.

I would allow the appeal, reverse the decree of the District Court, and give the plaintiff a decree for possession of the land sued for, with costs. I would also order the defendants, Ko Maung and Ma Shin, to pay the plaintiff's costs on this appeal.

*Per Moore, J.*—It is not disputed that the land in suit was obtained by plaintiff, Ma Pya U, by inheritance. Though inherited after her marriage, it was not joint or *unapazon* property. It is in my opinion clear from the evidence that plaintiff was not present when her husband transferred this land to Ko Maung, and it is not proved that she authorized him to make the transfer. Plaintiff's title to the land was not, therefore, effected by the transfer. It has not been contended that the husband had in his own right any transferable interests in the land. I therefore concur in the judgment of the learned Chief Judge and in the order proposed.

IN THE CHIEF COURT OF LOWER  
BURMA.

CIVIL FIRST APPEAL\* NO. 41 OF 1906.

Maung Aung Min and three others,

vs.

Mutu Curpan Chetty and two others.

BEFORE SIR CHARLES E. FOX, KT., C. J., AND  
MR. JUSTICE MOORE.

Dated 8th July 1907.

*For Appellants.*—Palit.

*For Respondents.*—Lambert.

*Partners changing—promissory notes in favour of old firm cannot be sued on by new firm unless endorsed.*

When promissory notes are drawn in favour of one firm and when partners in that firm change and a new firm is formed, the latter cannot sue on them unless they are endorsed over to them by or on behalf of the former.

*Per Fox, C. J.*—The suit was that of three partners carrying on business under the style of

\*Appeal from judgment and decree of Capt. Nethersole, District Judge of Hanthawaddy, in Civil Regular Suit of 1905.

V. R. M. A. V. Letchamanan Chetty upon two promissory notes in favour of S. T. M. Letchamanan Chetty. The latter is said to have been a style of a partnership business also, the partners in which were: (1) Sumasundaram, (2) Krishna, (3) Mutu Carpan, and (4) Letchamanan.

Sumasundaram and Krishna withdrew from the partnership and Anamalay joined Mutu Curpan and Letchamanan and these three adopted the style of V. R. M. A. V. Letchamanan. The notes are not endorsed by or on behalf of the S. T. M. firm to the V. R. M. A. V. firm and, therefore, in my opinion, the members of the latter firm had no rights of suit on the notes.

I cannot accede to the argument that the V. R. M. A. V. was the same as S. T. M. firm. Even if the mercantile view of a firm could be adopted and applied, it appears to me that they would be regarded as separate firms. According to the law of partnership, expressed in the Contract Act, the partnerships were distinct. The property in and right of suit on the promissory notes had not been transferred by the partners in the S. T. M. firm, and they were the persons who alone could sue. I would allow the appeal and would reverse the decree of the District Court, and would dismiss the suit with costs, allowing the defendants their costs of the appeal.

*Moore, J.*—I concur.

IN THE CHIEF COURT OF LOWER  
BURMA.

CIVIL SECOND APPEAL NO. 25 OF 1907.

Apana Charan Chowdry,

*vs.*

Mah Shwe Nu.

BEFORE MR. JUSTICE HARTNOLL.

*Dated 4th July 1907.*

*For Appellant.*—Pennell.

*For Respondent.*—Lentaigne.

*Chinaman—inheritance—law applicable—Indian Succession Act—Burma Laws Act, Section 13.*

If a Chinaman is not a Buddhist, he is governed by the Indian Succession Act, section 5.

If he is a Buddhist, he is exempt from the application of section 33 of the Indian Succession Act, and subsection (1) of section 13 of the Burma Laws Act would be applicable to him, and he would be governed by Buddhist law—the Buddhist law not of Burma but of China.

*Fone Lan vs. Ma Gyee (1903), 2 L.B.R. 95 followed.*

Ma Shwe Nu sues Ma Shwe Hmu, Pha Thet Hnan and Apana Charan Chowdry for the enforcement of a right of pre-emption with respect to certain property. Her father was a Chinaman named Ahaing, and she alleges that during his lifetime he sold a piece of land to his daughter Ma Shwe Choo, now deceased; that the latter's daughter, Ma Shwe Mu, and her husband, Pha Thet Hnan, have sold that land to the third defendant without her knowledge and consent, and that she has asserted her right to pre-emption without success. She therefore prays for a decree declaring her right to purchase the land. The plaint, as at first drafted, did not show under what law the plaintiff claimed her right and she was allowed to amend by stating that she claimed under Chinese Customary Law. The Judge of the District Court held, that Chinese Customary Law on the subject of a right to pre-emption of land, if there is such a thing, could not apply, and so dismissed the suit. The Judge of the Divisional Court held otherwise and remanded the case back for trial. Against this decision this appeal has been filed.

If Ahaing was not a Buddhist the provisions of the Indian Succession Act apply to him, and section 5 of that Act is as follows: "Succession to the immoveable property in British India of a person deceased is regulated by the law of British India, wherever he may have had his domicile at the time of his death." Hence it is clear that, if he was not a Buddhist, the law of China would not apply to this land but the law of British India. I must therefore hold that the decision of the District Court was correct.

If Ahaing was a Buddhist, his estate would be exempted from the provisions of the Indian Succession Act by section 33 of that Act, and section 13 of the Burma Laws Act would be applicable to his estate. The right of pre-emption is

clearly one concerning inheritance, and so sub-section (1) of section 13 would be the sub-section applicable, which lays down that, in questions regarding succession and inheritance, the Buddhist law in cases when the parties are Buddhist shall form the rule of decision. In the present case the Buddhist law would not be the Buddhist law of Burma, but the Buddhist law of China, that is applied to the estate of Chinese Buddhists in China, as Ahaing would be a Chinese Buddhist and not a Burman Buddhist. This view of the law has been discussed in the case of Fone Lan *vs.* Ma Gyee (1). If Ahaing was a Chinese Buddhist it would be necessary for the plaintiff to show that there is a Chinese Buddhist law in China applicable to Chinese Buddhists only as apart from the Customary Law of the country applicable to all the inhabitants, whether Buddhists or not, and that by that law there is a right of pre-emption in respect of this land in dispute. She would also have to show exactly what the law was.

Plaintiff's counsel has asked me to allow the plaint to be amended, stating that Mah Shwe Nu claims under the Chinese Buddhist law applicable to Chinese Buddhists as such in China and not to dismiss the suit as he fears that limitation may bar his client from bringing another suit. It seems likely that another suit would be barred by limitation. Defendant's counsel has no objection to this course being followed. The law involved is somewhat intricate and I would allow the request.

The case will accordingly be remanded back to the District Court for re-trial on the merits, after the plaint has been amended as indicated above.

The costs of the two appeals—that is, that in the Divisional Court and this Court will be borne by plaintiff-respondent. The costs in the regular suit will follow the final result.

(1) (1903) 2 L. B. R. 95.

IN THE CHIEF COURT OF LOWER  
BURMA.

CIVIL SECOND APPEAL NO. 134 OF 1906.

Kulandavalan Chetty *vs.* Mah Hla Win.

BEFORE MR. JUSTICE MOORE.

*Held—*

(1) If the agent does not disclose the name of his principal he is, under section 230 of the Contract Act, liable to be sued personally.

(2) The mere fact that the party dealing with him might have known him to be an agent does not affect his liability. "It matters not that he might by enquiry have ascertained the name (of the principal), for he is not bound to do so."

(Thomson *vs.* Davenport, 2 Smith's L. C. 9th Edn. 395.)

IN THE CHIEF COURT OF LOWER  
BURMA.

SPECIAL CIVIL SECOND APPEAL NO. 129 OF  
1905.

Maung Mo Thi and one *vs.* Maung Tha Kwe.

BEFORE MR. JUSTICE HARTNOLL.

*Dated 4th July 1907.*

*For Appellant.—R. M. Das.*

*For Respondent.—Lentaigne.*

*Buddhist law—Pre-emption—co-heir—Sale to stranger.*

Under Buddhist law, a co-heir cannot sell his share of joint ancestral property without offering it first to other co-heirs.

A sale to a stranger without such an offer is invalid if the co-heirs promptly assert their rights.

*Nga Myaing vs. Mi Baw, S.J. 39, and Ma Ngwe vs. Lu Bu, S.J. 76, followed.*

*Ma On vs. Ko Shwe O, S.J. 378; Maung Tha Nu vs. Maung Kya Zan, 2 L.B.R. 176; Maung Hlaing vs. Maung Tha Ka Do, P.J. 65, considered and distinguished.*

Maung Tha Kwe sues Ma Yu, Maung Mo Thi and Ma Shwe Hmon to enforce his right of

pre-emption in respect of a certain piece of land. The Township Court gave him a decree in respect of half the land. On appeal, the District Judge gave him a decree to enforce his right with respect to the whole of the land. Against this decree the present appeal has been filed. It is not disputed by either side that the land is the ancestral property of the family of Maung Tha Kwe and Ma Yu. Ma Yu is Maung Tha Kwe's mother. Tha Kwe's case is, that the land was the joint property of his father, the late Ko Maung, and Ma Yu, who purchased it from Ma Yu's parents. Ma Yu's case is, that the land is her exclusive property as it was given her by her mother. The Township Court found that Maung Tha Kwe's case was the true one, giving reasons. The District Court did not discuss the evidence, but it evidently agreed with the Township Court as it described the land as being joint property. The evidence on the point was gone into on appeal, and it was allowed that the land was joint family property. It was further admitted that the Township Court was right in giving Maung Tha Kwe the right of pre-emption over half the land, but it was argued that the District Court was wrong in giving him the same right over the whole of it. The cases of *Ma On vs. Shwe O* (1), *Maung Hlaing vs. Tha Ka Do* (2), and *Tha Nu vs. Kya Zan* (3) were quoted in favour of the contention. The law relating to the right of pre-emption under Buddhist law was discussed and laid down in the case of *Nga Myaing vs. Mi Baw* (4), and it was there held that a co-heir of ancestral undivided estate, should he wish to sell his share, is bound to offer at first to his co-heirs, and that a sale to strangers, effected without such offer, is invalid if the co-heirs promptly assert their right. Further, in the case of *Ma Ngwe vs. Lu Bu* (5) it was held that, after division of ancestral estate, the holder thereof being a member of the family, wishing to sell the land falling to his share, must first offer it to his co-heirs, and a sale to a stranger without such offer being made, is invalid. It is contested here by the appellants that Tha Kwe agreed to the sale to them. The Township Court found that he did not so agree, and it is probable that the District Court came to the

same conclusion, though there seems to be no definite finding by it to that effect. On perusing the evidence it seems to me that Maung Tha Kwe did not consent to the sale, and objected promptly by asking the revenue surveyor not to effect the necessary mutation of names. In my opinion Maung Tha Kwe has a right of pre-emption with respect to the whole of the land and not only with regard to half of it. He appears not to have agreed to the sale to the appellants and to have asserted his rights promptly. The law on the subject is clearly quoted in the cases of *Nga Myaing vs. Mi Baw* (4) and *Ma Ngwe vs. Lu Bu* (5), and I agree with the decisions passed in those cases. The point in the case of *Ma On vs. Shwe O* had nothing to do with the exercise of the right of pre-emption. It was, what power a Buddhist widow had of disposal of the family property after the death of her husband, when children were also left. The case decided that she had an absolute right of disposal in respect of her own share and a life interest in the remainder. This decision does not seem to me to overrule the law relating to the right of pre-emption, as laid down in the earlier cases quoted above. Applying the rule laid down by it to the present case, it is not contended that Ma Yu cannot dispose of her own share. It is allowed, that she can; but it is asserted that she must first give the other heirs the right to purchase at any figure she is willing to sell the property for, before she sells to a stranger. Her power of disposal of her share is not affected by the exercise of this special right. If a co-heir will not purchase at her figure, she can sell it to another at that figure without hindrance. The same remarks can be made with regard to the second case quoted—that of *Maung Hlaing vs. Tha Ka Do*, and the third case—that of *Tha Nu vs. Kya Zan*. They had nothing to do with the right of pre-emption. I therefore hold, that Maung Tha Kwe had a right of pre-emption with respect to the whole of the land, and so I accordingly dismiss this appeal with costs.

(4) S. J. 39.

(5) S. J. 76.

(1) S. J. 378.

(2) P. J. 65.

(3) 2 L. B. R. 167.

(4) S. J. 39.

(5) S. J. 76.

IN THE CHIEF COURT OF LOWER  
BURMA.

SPECIAL SECOND APPEAL NO. 45 OF 1906.

Maung Po Shin vs. Maung Po We and one.

BEFORE MR. JUSTICE MOORE.

Dated 20th June 1907.

For Appellant.—Ginwala for Burjorjee and Dantra.

For Respondent.—Maung Kin.

Easement—cart-track—necessity.

When a granary is accessible by other ways than a cart-track, the owner of it is not entitled to the cart-track, as it is not then an easement of absolute necessity.

Wheeldon vs. Burrows, L. R., 12 Ch. D. 31, followed in accordance with Chunilal Mandiaram vs. Mancharam Atmaram, I. L. R. 18 Bom., 616 in preference to the principle of section 13 (d) of the Indian Easements Act (V of 1882).

Mitra's Law of Prescriptions, and Easements p. 481; Thomas vs. Owen, L. R. 20 Q. B. D. 230-231; Ram Narain Shah vs. Kamala Kanta Shaha, I. L. R. 26, Cal. 311; and Suffield vs. Brown, 4 De G. J. and S. 185, considered.

Plaintiffs (present respondents) sued defendant, present appellant, for an injunction to restrain him from obstructing an alleged right-of-way. In their plaint, plaintiffs based their claim upon prescription, alleging that they had enjoyed the use of this right-of-way for about thirty years. The Court of First Instance found that continuous user had been proved for nineteen years only, and dismissed the suit. The Judge of the District Court, in first appeal, concurred in holding that right by prescription had not been established, but held that the principle embodied in section 13, clause (c) of the Indian Easements Act, should be applied.

The facts of the case appear to be as follows: The land A. B. C. D. (Map, exhibit A) was originally held by one person, father of plaintiff Po We. On the father's death the land was divided into two halves, the western portion falling to the share of Ma Hmyin, sister of Po We, and the eastern half to Po We. The right-of-way claimed runs across the western half.

Ma Hmyin, after six years, sold the western half to Po We, and thus the two holdings again became one. Two years later, Po We sold the western half to one Nga Nwe, who sold to UAung, who sold to Maung Bya, who sold to appellant Po Shin. These transfers were apparently all verbal transfers. Apparently, also, the sale to Nga Nwe took place about nineteen years ago, so no right-of-way can have been acquired by prescription.

The plot of land A. B. C. D. is bounded on the south by a creek; on the east by private land; on the north by a village road, which does not admit of cart traffic; and on the west by a cart-road.

The eastern half, now in possession of plaintiff, has a dwelling-house on it and a granary—and the plaintiff claims that he is entitled to right-of-access for carts to this granary across the western half.

The general rule of law is, that if a grantor or transferor intends to reserve any right over the property granted he must show that intention by expressly reserving it.

In Mitra's Law of Prescriptions and Easements, page 481, 4th edition, it is stated that there are four important exceptions to this rule, requiring express reservation in the grant, of which it is only necessary to consider two in this case, namely,—(i) the case of ways of necessity, (ii) the case of formed roads which circumstances positively prove were intended to be reserved. As regards the second exception, in the case of Thomas vs. Owen (1), such a reservation was held to be implied in the case, of a made and fenced road subsisting visibly for the convenience of the plaintiffs farm and of no use, as a road, to the defendant. This case was quoted but distinguished, in the case of Ram Narain Shaha vs. Kamala Kanta Shaha (2). The way claimed in that case was a mere undefined track over a strip of land, and it was held that the case of Thomas vs. Owen was no authority for holding the reservation of a right-of-way to be implied in such a case.

As regard the cart track, claimed in the present case, the evidence is somewhat scanty. Plaintiff, Po We, speaks of it as a branch road existing since the time of his parents—but then a little wider. But in cross-examination he speaks of

(1) L. R. 20 Q. B. D., pp. 230-231.

(2) I. L. R., 26 Cal. 311.

a second track, width of the one now claimed. Pu Ki says he knows the track in question. It is a distinctly visible track, over forty feet wide, now twelve feet wide. It seems to be something more than the mere undefined track referred to in the case of Ram Narain Shaha, above quoted, but there is no evidence that it is a permanent, made or metalled road, such as the road referred to in *Thomas vs. Owen*. I hold, therefore, that the second of the two exceptions above referred to does not apply. As regards ways of necessity, section 13 of the Indian Easements Act divides easements of necessity into two classes, namely, —(i) easements necessary for the enjoyment of the property, and (ii) easements apparent and continuous and necessary for enjoying the property as it was enjoyed when the transfer took effect.

As regard implied reservation in favour of the transferor, these two classes of cases of necessity are dealt with in clauses (c) and (d) of the Act. In clause (2) the Indian Act departs from the English law as laid down in *Suffield vs. Brown* (1) and *Wheeldon vs. Burrows* (2).

These rulings are referred to in *Chunilal Mandiaram vs. Mancharam Atmaram* (3), a Bombay case in which the Indian Easements Act was not applicable. In this case a Divisional Bench of the Bombay High Court refused to apply the principle of clause (d) of the Indian Easements Act, preferring to be guided by what they describe as the settled law of England on the subject as set down in *Wheeldon vs. Burrows*. I cannot find that this judgment of the High Court of Bombay has been dissented from in any more recent ruling.

I agree in the conclusions arrived at in that case, and hold, therefore, that the principle of clause (d) of section 13 of Act V of 1882 should not be applied in this case.

There remains for consideration only the question whether the right-of-way claimed is an easement of strict or absolute necessity. I am unable, on considering the circumstances of the case, to hold that this is the case. There are other means by which plaintiff may enjoy his property. I cannot hold that it is an absolute necessity for him that carts should be able to go right up to

the door of his granary. He can convey pad to his granary by boat by the creek or he can convey it by cart to the point marked A on the map and thence by coolies. It would doubtless be more convenient for him if he could take cart right up to the granary, but I am unable to hold that a case of absolute or even of urgent necessity has been made out.

I therefore reverse the judgment and decree of the Lower Appellate Court and direct that plaintiff's suit stand dismissed with costs.

IN THE CHIEF COURT OF LOWER BURMA.

SPECIAL CIVIL SECOND APPEAL NO. 100 OF 1906.

Ibrahim,

vs.

(1) Abdulla, (2) Mahomed Shaban.

BEFORE MR. JUSTICE HARTNOLL.

Dated 22nd November 1906.

Stamp—ad valorem—possession.

When respondent is in possession of the land, an *ad valorem* stamp is chargeable on the appeal under article 17, schedule II of the Court Fees Act.

The appeal was filed on a ten-rupee instead of an *ad valorem* stamp paper, under article 17, schedule II, of the Court Fees Act. Objection being taken by Mr. Justice Irwin in chamber, it was put down for admission. The following order was passed, after hearing counsel, by Mr. Justice Hartnoll :

The subject matter in dispute in this case seems to be the land, and the point at issue, in deciding the Court fee payable, is as to who has been in possession of the land since the sale of whatever was sold under the deed of sale. From paragraph 5 of the plaint it appears that the respondents have been in possession. I hold that the plaint and memorandum of appeal must be stamped as a suit for possession of the land. This order is passed under section 12 (i) and (ii) of the Court Fees Act. The appeal will be stayed for one month from the date to enable the extra Court fees to be paid.

(1) 4 De G., J. & S. 185.

(2) L. R., 12 Ch. D. 31.

(3) I. L. R., 18 Bom. 616.

IN THE CHIEF COURT OF LOWER  
BURMA.

SPECIAL CIVIL SECOND APPEAL NO. 116 OF  
1906.

Kyin Gan vs. Debi Din.

BEFORE MR. JUSTICE MOORE.

Dated 4th July 1907.

For Appellant.—Agabeg.

For Respondent.—Israil Khan.

A court sale *ipso facto* confers no title on an auction-purchaser—Civil Procedure Code, section 313—Burden of proof, Indian Evidence Act, sections 101, 102.

A sale of immovable property by a Court in execution of a decree *ipso facto* confers no sort of title on the auction-purchaser who, in a suit to recover possession of the property purchased, must discharge the onus of proof, which lies on him, that the judgment-debtor had a saleable interest in the property sold.

Till that burden is discharged, a person in possession claiming to be its owner is entitled to retain possession as against the auction-purchaser.

The appellant sued the respondent, who was the third defendant, and Mutaya Chetty, Naran and Pandaw Hi in the Township Court of Maubin, for possession of a house of which the respondent, the third defendant, was then in possession and claimed to be the owner or, in the alternative, for its value. He stated that the first defendant, Mutaya Chetty had, in execution of a decree against Naran, the second defendant, had the property in question sold by the Court and that he had purchased the said property for Rs. 154. The sale was subsequently confirmed by the Court and the certificate of sale of the premises in question furnished to him. The third and fourth defendants were living in the house at the time of the suit and they had refused to quit the premises at the request of the appellant. The purchase-money, Rs. 154, had been drawn out of Court by the first defendant. The suit was withdrawn as against the fourth defendant. The Township Judge found that the judgment-debtor, Naran, had a saleable interest in the house and passed a decree for possession of the house

against the third defendant, Debi Din, the respondent in second appeal. The claim against the first and second defendants was dismissed.

The third defendant appealed to the District Court of Maubin who reversed the decree of the Township Court on the ground, that the burden of proof was on the plaintiff to show that Naran had a saleable interest in the land, and that he had failed to discharge it.

The plaintiff appealed to the Chief Court, and it was urged that, as the appellant had a certificate of sale granted to him by the Court, his title to the premises became complete, on payment by him of the purchase-money and confirmation of the sale by the Court.

The following was the judgment of Mr. Justice Moore :

Kyin Gan admittedly purchased the house, the subject of this suit, at a Court sale. The house was sold by the Court in execution of a decree obtained by one Mutaya Chetty against Naran, and Kyin Gan duly obtained and registered the certificate of sale. The house was and is in possession of Debi Din, present respondent, who claims to be the owner thereof.

Appellant failing to get possession after his purchase, filed the suit, now under appeal, against (i) Mutaya Chetty, the decree-holder; (ii) Naran, the judgment-debtor; (iii) Respondent, Debi Din and a fourth Pandaw Hi asking for possession of the house or, in the alternative, for refund of his purchase-money.

The Judge of First Instance framed the following issues :—

- (1) Had the judgment-debtor Naran a saleable interest in the house or not?
- (2) What relief, if any, is plaintiff entitled to?

Neither side called any evidence. Plaintiff relied upon his sale certificate, respondent, Debi Din, upon his possession.

The sale certificate proves that the right, title, and interest of Naran in the house sold passed to plaintiff. It is no sort of proof as between plaintiff and Debi Din that Naran had any interest in the house.

The cases quoted on appellant's behalf have no bearing on this appeal at all.

In my opinion the onus was upon plaintiff to prove Naran's title, and the suit as against respondent must fail.

It is urged in the memorandum of appeal that in any event plaintiff was entitled to recover his purchase-money. He can certainly not recover it from Debi Din, and Debi Din is the only respondent in this appeal.

I therefore dismiss this appeal with costs.

IN THE CHIEF COURT OF LOWER  
BURMA.

SPECIAL CIVIL SECOND APPEAL NO. 184 OF  
1906.

Maung Ba Aung vs. Ma Pa U.

BEFORE MR. JUSTICE HARTNOLL.

Dated 4th July 1907.

For Appellant.—R. M. Das.

For Respondent.—Palit.

*Death bed gift invalid—validity of gift without possession—right of second wife to family property brought by husband to second marriage—Buddhist law.*

A gift made in last illness is invalid according to Buddhist law; and even where such act has been concurred in by the surviving parent, it is necessary that possession should be given to the donee by the surviving parent.

If such possession is not given and the surviving parent marries again, a subsequent confirmation of the gift at the *shinbyuing* of the donee does not deprive the second wife of her right to hold the property jointly with her husband, and the confirmation under such circumstances does not create a valid gift.

Followed: *Mah Pwa Line vs. Ma Tin Nyo*, U. B. R. (1902), Gift, 1.

Maung Ba Aung, a minor son of Maung Shwe Ka and Ma Mein Kah, deceased, sued Ma Pa U, who became the wife of Maung Shwe Ka a

year after the death of Ma Mein Kah, the first wife, and who was in possession of a house which it was claimed had been given to him by his mother Ma Mein Kah in her last illness and which gift had been made with the concurrence of his father Maung Shwe Ka. It was admitted that, after the death of Ma Mein Ka, her husband, Maung Shwe Ka, lived in the house and, further, that he rented the premises to one Maung So Min.

The following judgment was delivered by Mr. Justice Hartnoll:

Maung Ba Aung, by his next friend Maung San Shun, sues to eject Ma Pa U from a house that he alleges is his property. The Township Court gave a decree holding it proved that the house had been given validly to Maung Ba Aung by his father, but the District Court dismissed the suit, holding no valid gift proved. Maung Ba Aung's case is, that, when his mother, Ma Mein Kah, was in her last illness she gave him the house, in which act his father concurred. This was in 1254 B. E. He further states that, when he was *shinbyued* his father confirmed the gift. As regards the first transaction, I am unable to hold that it was a valid gift. In the first place it was a death-bed gift, and, so, not valid, for the reasons given in the case of *Ma Pwa Line vs. Ma Tin Nyo* (1), with which I am in complete agreement; in the second place it is not shown that there was any delivery of possession, for Maung San Shun allows that Maung Shwe Ka lived in the house after the death of Ma Mein Kah, and, further, rented the house to Maung So Min. There could be no valid gift, unless Maung So Min is shown to have relinquished possession. It must therefore be taken that, when Maung Shwe Ka married the defendant, Ma Pa U, about a year after the death of Mein Kha, he brought the house as family property to that marriage. That being so, Ma Pa U acquired an interest in it, and her consent would be necessary to its alienation. The plaintiff is said to have been *shinbyued* in 1259 B. E., which would be some years after the marriage of Maung Shwe Ka and Ma Pa U. Maung Shwe Ka is said on that occasion to have given him the house again and so confirmed the first gift. In that the house must be held to have belonged to Maung Shwe Ka and Ma Pa U jointly at that time, he could not give it away without Ma Pa U's

(1) L. B. R. 1902, 1.

consent. There is nothing to show that she ever consented to such an act. I must therefore hold it proved that there has been no valid gift proved of the house to the plaintiff.

It is unnecessary to discuss whether a gift can be made without delivery of possession to a lad, when he is *shinbyued*.

The appeal is dismissed with costs.

IN THE CHIEF COURT OF LOWER  
BURMA.

CIVIL REVISION NO. 21 OF 1907.

Abdul Alli Mahomed Labbani and one,

Dada Essach.

BEFORE SIR CHARLES E. FOX, K.T., C. J.

Dated 27th June 1907.

For Applicant.—Fagan.

For respondent.—N. M. Cowasji.

*Evidence to alter terms of written document—object not admissible—section 92 Indian Evidence Act—ex. parte decree against partnership obtained by service of summons on one partner only not res judicata against other partners—section 13, Civil Procedure Code—admissions in evidence of witness how proved. Indian Evidence Act. Section 145.*

Evidence of object with which a document was executed is immaterial and, unless fraud or mistake be pleaded, the terms of the document cannot be contradicted by such evidence.

A decree passed *ex. parte* against partners on proof of the service of summons on one partner only is not *res judicata* on the question of partnership or no partnership.

An admission made by a witness is not evidence against him unless that admission be put to him specifically in cross-examination and he be given an opportunity to deny or explain it away.

The respondent, Dada Essach, filed a suit, being Civil Regular No. 3133 of 1902 of the Court of Small Causes, against P. C. Sen, Official

Assignee to the estate and effects of Noor Mahomed Abdul Shakoor, an insolvent; Abdul Alli Mahomed Labbani, the first applicant; Essa Abdulla and Tar Mahomed Sheriff, the second applicant. He alleged that the insolvent and the other three defendants were partners, and he claimed a sum of Rs. 1,061, alleged to be due to him on two hundis signed by Noor Mahomed Abdul Shakoor in the name of his firm, of which it was alleged the second, third and fourth defendants were partners at the time of execution. The Official Assignee did not defend the suit. Originally the suit was decreed *ex parte*, but, on application, the *ex parte* decree was set aside and the case tried on its merits.

The second defendant admitted the partnership but set up a document which purported to be a release by the plaintiff. Plaintiff, in his examination, stated that the defendants came to him and said that the trustees of their firm's stock wanted an assurance to the effect that he would not attach the goods of the firm, and that it was with that object that he signed the document which purported to be a release. The learned Judge of the lower Court found as a fact that plaintiff signed the document purporting to be a release with the object of giving the assurance referred to above. In a previous suit in the Chief Court (Civil Regular No. 88 of 1900), the second defendant was examined and there denied all knowledge of the document purporting to be a release. His statement in that case was admitted in evidence against him in the lower Court and it was also proved that when sued by the plaintiff in another case in the Court of Small Causes (Civil Regular No. 1448 of 1902), in which a decree was passed against him *ex parte*, he did not rely upon the release. The second defendant did not go into the box. The lower Court held that the decision in Civil Regular No. 1448 of 1902, of the Court of Small Causes, was *res judicata* in the present suit, on the ground that the circumstances of the two cases were the same, and if the release is a good defence in one case it is an equally good defence in the other. A decree was accordingly passed against the first, second and fourth defendants.

At an early stage of the case the plaintiff stated that the third defendant was dead and so no decree was passed against him.

The first and fourth defendants being dissatisfied with the judgment and decree of the Court of Small Causes, applied to the Chief Court to revise the same, on the grounds that the decision in Civil Regular No. 1448 of 1902 was not *res judicata* and that the admission of the second defendant in Civil Regular No. 88 of 1900 of the Chief Court was wrongly admitted in evidence against him.

The following was the judgment of the Chief Judge :

The second defendant's defence to the suit was, that the plaintiff had released him from the debts due on the promissory notes.

The plaintiff admitted execution of exhibit I. It is plainly a release and discharge of the second defendant from all debts due by the partnership carried on in the name of Noor Mahomed Abdul Shakoor.

The plaintiff did not allege that the document had been obtained from him by fraud, or that he was under any mistake as to its purport. He said he gave it with the object of giving [an assurance] that he would not attach the goods of the firm. His object in giving it is immaterial. He gave a discharge and is bound by it. The promissory notes were discharged, so far as the second defendant was concerned, under section 82 of the Negotiable Instruments Act.

The fact that the second defendant did not, in Civil Regular No. 1448 of 1902, raise the defence, founded on the document, was no bar to his raising it in this suit. The decree in that suit was passed *ex parte* upon proof of service of summons on one partner only. The second defendant never had an opportunity of raising the defence before the decree was passed.

The second defendant's evidence in Civil Regular No. 88 of 1900 in this Court was not properly admitted in evidence. If the second defendant had been called as a witness, and the statements relied on by the plaintiff had been put to him, he might have explained them. He was not in Rangoon when the suit was heard, and was not bound to give evidence. He was entitled to rely on Exhibit I as a complete answer to the suit, and on that he was entitled to succeed.

The decree will be set aside against the second defendant. The plaintiff will pay his costs of the suit and of this application.

The fourth defendant's defence to the suit was that he was not a partner in the firm of Noor Mahomed Abdul Shakoor. The plaintiff gave some evidence that he was a partner, and this defendant gave no evidence to the contrary.

The decree as against him will stand, and his application is dismissed, but without costs being allowed the plaintiff.

IN THE CHIEF COURT OF LOWER  
BURMA.

CIVIL REVISION\* NO. 115 OF 1906.

Tha Tun Aung vs. Abdul Karim.

BEFORE MR. JUSTICE MOORE.

For Applicant—Pennell.

Dated 13th June 1907.

Revision—section 578, Civil Procedure Code, wrongly applied—material irregularity.

A wrong application of section 578 of the Civil Procedure Code is a material irregularity within the meaning of section 622 of the Civil Procedure Code.

Tha Tun Aung, original plaintiff, brought a suit against respondent, Abdul Karim, to recover Rs. 403-4-9 secured by a mortgage of land and cattle. Defendant admitted the mortgage but contended that he had paid certain interest claimed by plaintiff, and disputed the price of paddy. The Judge of First Instance found the amount due to be Rs. 285 but, apparently, through pure carelessness, gave a simple money decree instead of a mortgaged decree, as prayed for. Tha Tun Aung appealed, and his first ground of appeal was, that the lower Court erred in giving the appellant a simple money decree instead of a mortgage decree as prayed for. The District Judge, as regards this grounds, remarked: "The error does not affect the merits of the case,

\*Against judgment and decree of E. Dawson, Esq. District Judge of Akyab, dated 17th August 1906, confirming the decree of the Township Court of Minbya, dated the 17th May 1906.

therefore, under section 578 of the Civil Procedure Code, it is no ground for interference." The District Judge quotes no authority for this extraordinary interpretation of section 578, Civil Procedure Code. The error, in my opinion, is one which most clearly vitally affects the merits of the case. I am of opinion the District Judge acted with material irregularity within the meaning of section 622, Civil Procedure Code, in wrongly applying section 578 to this case. I accordingly set aside the judgments and decrees of both lower Courts and direct that plaintiff be granted a mortgage decree for Rs. 285 against the property named and described in the plaint. The sum of Rs. 285, with plaintiff's costs throughout, to be paid within three months of date, failing which the mortgaged property will be sold and proceed applied to settlement of the decree and costs. Surplus, if any, to be paid to the mortgagor.

IN THE CHIEF COURT OF LOWER  
BURMA.

CIVIL MISCELLANEOUS APPEAL NO. 61 OF 1906.

In the matter of Sonnar Hussein.

BEFORE MR. JUSTICE HARTNOLL AND

MR. JUSTICE MOORE.

Dated 18th July 1907.

*Sufficient ground for refusing Insolvent's discharge—what is—Indian Insolvent Act.*

Concealment of promissory notes from the Official Assignee is a sufficient ground for refusing insolvent's discharge

The Judge on the Original Side had dismissed Insolvent's application upon the ground, among others, that he had committed an act of bad faith in concealing from the Official Assignee promissory notes to the value of Rs. 20,000 to Rs. 30,000.

In appeal.

*Held.*—The fact that it is proved that certain promissory notes have been concealed is sufficient ground for refusing the appellant's discharge.

IN THE CHIEF COURT OF LOWER  
BURMA.

CRIMINAL APPEALS NOS. 341 AND 342 OF 1907.

Nga Tha Chaw and one vs. King Emperor.

BEFORE MR. JUSTICE MOORE.

Dated 5th July 1907.

*Confession of accused—when admissible against co-accused—Indian Evidence Act, section 30, not affected by section 32, clause (3).*

*When approver's pardon withdrawn—Statement to Magistrate admissible in evidence—but not against co-accused.*

The rule in section 30, Indian Evidence Act, that the confession of an accused person can be taken into consideration against another accused only when they are being jointly tried for the same offence is not affected by the provisions of section 32, clause (3), of the same Act.

If an approver resiles in the Sessions Court from his statement to the Committing Magistrate, the latter statement is admissible in evidence, though its value as evidence is very small.

The approver's statement is not evidence against other accused, after the approver's pardon has been retracted and he has been committed for trial.

Followed I. v. Rudra.

I. L. R. 25, Bom, 457, Reg. vs. Mana Puna, I. L. R. 16, Bom, 661; Emp. vs. Durant, I. L. R. 23, Bom, 213.

Appellants Nga Tha Myat and Nga Tha Chaw have been convicted of dacoity, section 395, Indian Penal Code. The circumstances of the case are peculiar. Complainant, Ma Min Saw, an old Karen woman of about 70, relates that one night—she is unable to fix the date, but it appears to have been about the 9th of November 1906—after dark, a Burman or Karen man came into her hut. She was suspicious and called for help. The man squeezed her neck and struck her. Two more men came up. She groped for a *dah* and struck the men two blows with it. She is unable to say if she hit one or two of the men. Then the men went away and she found a basket of hers on the ground under the hut and its contents—clothing—in disorder, but nothing missing. She is unable

to identify any of the three men and only saw three in all.

Pawyam, complainant's daughter, tells the same story and is equally unable to identify any of the men. Tun Gyaw heard complainant's outcries and went to her house but did not see the men. Next morning he found a turban outside the house which is exhibit I.

Dido, headman, proves the report to him. Apparently to him, as in the Committing Magistrate's Court, the daughter, Pawyam, also said that she struck the robbers with a burning brand, but she resiled from that statement in the Sessions Court. Dido reported to the police, and also found a candle and matches near the spot. Dido goes on to relate that about a week later a Head Constable, Paw U, brought one Nga On to the village. Nga On is an absconding accused in this case. The learned Sessions Judge has admitted in evidence against present appellants certain statements made by Nga On to witness, Dido, and to another headman, San Hla, under section 32 (3), Indian Evidence Act. I know of no authority for placing such an interpretation upon this section. The general rule as regards confessions is, that the confession of an accused person can be taken into consideration against another accused only when they are being jointly tried for the same offence, and I do not think that the explicit restrictions imposed by section 30, Evidence Act, can be affected by the provisions of section 32, clause (3).

I hold that the evidence of Nga On's statements is inadmissible and must be left out of consideration.

I come now to the evidence of Ma Gun.

Ma Gun deposed that she was married to one Nga Pu and that some five or six months ago Nga Pu left the house with appellants and Nga On to go and reap paddy. On his return, Nga Pu went to Nya Thwe's house. He died four days later and was buried.

Ma Gun says that Nga Pu died because of wounds on his head. But apparently she was not present when he died and did not see the

wounds on his head. So it is not proved beyond doubt that Nga Pu did die because of these wounds.

Ma Gun has been allowed to give evidence as to certain statements made to her by Nga Pu. The learned Sessions Judge held these statements to be relevant under section 32 (1) of the Evidence Act. Even assuming that Nga Pu's death was caused in the dacoity, I do not think it clear that the cause of his death comes into question in this case within the meaning of clause (1) of section 32. It is quite immaterial to the present charge whether Nga Pu died of his wounds or of any other cause. But, in the absence of proof that Nga Pu did die on account of wounds inflicted in the dacoity, the statements are clearly inadmissible (*vs. Rudra*). I think that the statements ought also to have been excluded by reason of section 177 of the Evidence Act.

Ma Gun deposes that the turban, exhibit I, belongs to her husband, which is an admissible piece of evidence.

The next witness whose evidence is of importance is Maung Kan. Maung Kan was apparently first made a *witness* by the police who sent up appellants for robbery.

On the 10th January the Magistrate holding that there was evidence of dacoity tendered Nga Kan a pardon, which Nga Kan accepted, and on the 25th January Nga Kan was examined as an approver by the Committing Magistrate. Then, on the 7th February, Nga Kan retracted all that he had said. On the 14th February the Committing Magistrate held that Nga Kan had failed to fulfil the conditions of his pardon, retracted it and committed him for trial with the appellants.

The Sessions Judge, in my opinion, quite correctly held that Nga Kan should not be tried jointly with appellants, and postponed his trial, but examined him as a witness. Nga Kan again said that he knew nothing about the case, and the Sessions Judge then admitted the statement by Nga Kan before the Committing Magistrate under section 285, Code of Criminal Procedure. There is authority for the view that, if an approver resiles in the Sessions Court from his statement to the Committing Magistrate, the latter statement may be admitted in evidence,

Appeal from the jail from the order of the Sessions Judge of Tenasserim, dated 3rd May 1907.

although it is generally held that its value as evidence is very small. But I have not been able to find any case where the approver's statement is evidence against other accused, after the approver's pardon, had been retracted and he had been committed for trial.

The question really is, whether Nga Khan was a competent witness in the Sessions Court, he being at the time he was examined committed for trial for the same offence as to which he was called to give evidence. The exclusion of accused persons from giving evidence in criminal cases rests upon section 342, Code of Criminal Procedure (no oath to be administered to the accused). In *R. V. Mona Puna* (1) it was ruled that an accused person, for the purposes of that section, means a person over whom the Court is exercising jurisdiction. In a later case of the same Court, *Empress vs. Durant* (2), it was held that the words "the accused" in clause (4) of section 342, Criminal Procedure Code, mean the accused then under trial and examination. That case is practically, for the purposes of the point under consideration, on all fours with this case. I agree with the arguments of the learned Judge who decided that case and hold, therefore, that Nga Kan was a competent witness, and that his deposition before the Committing Magistrate was admissible in evidence.

It is, however, of less weight than the evidence of an accomplice who adheres to his statement. It cannot form the basis of a conviction. It would be most unsafe to convict either appellant upon Nga Kan's retracted statement in the absence of other independent evidence directly connecting them with the crime. Excluding the evidence which I have held to be inadmissible, I find no evidence upon the record directly connecting appellants with the offence charged.

I therefore reverse the convictions and sentences and acquitting both appellants. I direct that they be set at liberty.

(1) I.L.R., 25 Bom. 457.

(1) I.L.R., 16 Bom. 661.

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

IN THE CHIEF COURT OF LOWER  
BURMA.

CRIMINAL APPEAL NO. 274 OF 1907.

Thakersey Maganlal vs. Ko Maung Gyi.

BEFORE MR. JUSTICE HARTNOLL.

For Appellant.—Cawasji.

For Respondent.—McDonell.

Dated 21st June 1907.

Defamation—statement in affidavit—good faith necessary—  
Indian Penal Code, sections 499 and 500.

A deponent is liable to be convicted for defamatory statements made in an affidavit in the course of a judicial proceeding, even if such statement is relevant to the issues in the case, unless he proves that the statements were made in good faith, that is, with due care and attention.

Followed: *Mya Thi vs. Henry Po Saw*, 3 L. B. R. 265.

The appellant, Thakersey Maganlal, has been convicted of defamation under section 500 of the Indian Penal Code, in that he defamed one Ko Maung Gyi by solemnly affirming in an affidavit, in a civil case against him, that he verily believed he "has been and is in hiding with a view to avoid the service of the said summons." He has been fined Rs. 250, and it has been ordered that out of the fine Rs. 200 be paid to Ko Maung Gyi under section 545 of the Criminal Procedure Code. A legal objection was taken to the conviction, in that it was urged that the statement having been made in the course of a judicial proceeding, was privileged and, further, that, even without going to this length, it was privileged in that it was a statement relevant in the proceedings in the civil court. The law on the subject has lately been exhaustively reviewed in the case of *Mya Thi vs. Henry Po Saw* (1) and my views coincide with those expressed in that judgment. I am unable to allow the objection for the reasons given in their judgment and I cannot consider the statement privileged. There seems to be no doubt that the words are defamatory in themselves, but the benefits of exceptions 5 and 9 to section 499 of the Indian Penal Code are pleaded. Both these exceptions rest on the imputation complained of being made in good faith, and, that is, with due care and attention.

(1) 3 L. B. R. 265.

Has appellant shown that he did make the imputation with due care and attention? He has shown that he attempted to find Ko Maung Gyi and serve him personally, and that he was unsuccessful. He has also shown that the summons was twice posted on Ko Maung Gyi's house, and that one of the summonses did not reach his possession; but he has not shown that he was in hiding to avoid service of process, and from the evidence it appears that he was not. The appellant seems to me to have been rightly found guilty.

His error seems to have consisted in the broad and loose manner in which he swore his affidavit. If he had sworn that the summonses were stated by the process-servers to have been twice posted on Ko Maung Gyi's house and that, therefore, there was reason to believe that Ko Maung Gyi must have seen one or both of them and had neglected to obey one or both, his affidavit would seem to have been justified. There is ground for considering that Ko Maung Gyi did see one or both of the processes, that he did not obey the one or ones he saw, and so was putting the appellant to unnecessary trouble. I therefore think that the fine is too severe, and that, in the circumstances, compensation should not be given to Ko Maung Gyi, the more especially as it is doubtful whether Ko Maung Gyi's reputation has really been damaged in the eyes of his fellow-men by reason of the affidavit. I therefore reduce the fine to one of Rs. 50 with the result that Rs. 200 will be refunded to the appellant. The order awarding Ko Maung Gyi compensation under section 545 of the Code is also set aside.

IN THE CHIEF COURT OF LOWER  
BURMA.

CRIMINAL APPEAL\* NO. 358 OF 1907.

Nga Po Hla vs. King Emperor.

BEFORE MR. JUSTICE HARTNOLL.

For the King Emperor.—Assistant Government  
Advocate.

Dated 5th July 1907.

Stabbing in abdomen with clasp knife—inappropriate sentence—double sentence illegal—section 35, Criminal Procedure Code.

\* Appeal from the order of Mr. R. Casson, Senior Magistrate of Bassein, in Criminal Trial No. 45 of 1907.

A sentence of five years rigorous imprisonment for stabbing a man in the abdomen with a clasp knife is inadequate.

A double sentence for the same offence is illegal, *vide* explanation to section 35, Criminal Procedure Code.

Maung Po Hla has been convicted under sections 307 and 326 of the Indian Penal Code with attempting to murder and with causing grievous hurt with a knife to Maung Nyo. He has been sentenced to five years' rigorous imprisonment on each charge, the sentences to run concurrently, and has also been ordered to furnish security under the provisions of section 106 of the Criminal Procedure Code.

The double sentence is illegal, and the Magistrate is referred to the explanation to section 35 of the Criminal Procedure Code. Further, in this case, the sentence seems to me to be quite inadequate as punishment for stabbing a man in the abdomen with a clasp knife. The crime was a most serious one.

I set aside the conviction and sentence and direct that the Senior Magistrate, Bassein, do commit Maung Po Hla for trial to Sessions on a charge of attempting to murder Maung Nyo, an offence punishable under section 307 of the Indian Penal Code.

IN THE CHIEF COURT OF LOWER  
BURMA.

CRIMINAL APPEALS NOS. 391 AND 392 OF 1907.

Nga Shwe Dwe *alias*, Nga Dwe and one, *vs.*

King Emperor.

BEFORE MR. JUSTICE MOORE.

Dated 15th July 1907.

Misjoinder of charges—sections 233 and 239 Criminal Procedure Code—trial of two accused in one trial for three distinct offences.

Two accused cannot be tried together in the same case for three distinct offences.

The petitioners were convicted under sections 379 and 75 of the Indian Penal Code, by the Special Power Magistrate of Tharrawaddy in Criminal Trial No. 26 of 1907.

In this case two accused have been tried together in one trial for three distinct offences not committed in the course of the same transaction.

The trial is therefore bad for misjoinder. Either accused could have been tried alone for all three thefts, or both accused could have been tried together for any one of the thefts.

The convictions and sentences are set aside and new trials ordered.

IN THE CHIEF COURT OF LOWER  
BURMA.

CRIMINAL APPEAL \* NO. 383 OF 1908.

Maung Tha Ban vs. King Emperor.

BEFORE MR. JUSTICE MOORE.

*Dated 15th July 1907.*

*Confession of accused—Evidence Act, section 30—inadmissible—cruelty.*

The confession of a co-accused was put in after the case for the prosecution had been closed and the accused had named his witnesses who were not examined on the day fixed, and nothing appeared on the record to explain this. The accused alleged that he

\* Appeal from jail against the order of Mr. E. Dawson, Senior Magistrate, Bassein, in Criminal Trial No. 39 of 1907, sentencing appellant to five years' rigorous imprisonment under section 392 of the Indian Penal Code.

had confessed in consequence of ill-treatment. He was not questioned about the ill-treatment nor afforded any opportunity of proving it.

*Held:—Confession inadmissible.*

The conviction of appellant Tha Ban rests principally upon the confession of a co-accused, Zani Aung. Zani Aung was examined, after the case for the prosecution had concluded, on the 15th May and denied all knowledge of the crime. The case was then adjourned to the 25th May for the defence, appellant naming two witnesses. On that date appellant's witnesses were not examined, and there is nothing on the record to explain this. The case for the prosecution was, however, re-opened and Zani Aung's confession was put in. Asked if he made it he said that he did make it in consequence of ill-treatment by the police. He was not questioned as to the ill-treatment nor was he afforded any opportunity of proving it.

Under the circumstances I must entirely exclude this confession from consideration as against appellant Tha Ban.

The other evidence upon the record does not justify the conviction. I regard the evidence of

Thi Kyaw U as of very little value. The alleged admission by appellant to him was only deposed to after he was treated (without permission having first been obtained as required by the Evidence Act) as hostile by the prosecution and cross-examined as to statements made to, or recorded by, the police.

I reverse the conviction and sentence and acquitting appellant, Tha Ban. I direct that he be set at liberty.

IN THE CHIEF COURT OF LOWER  
BURMA.

CIVIL SECOND APPEAL NO. 104 OF 1906.

S. R. M. M. R. M. Chellappa Chetty—(Appellant, plaintiff),  
vs.

N. A. P. Chellappa Chetty—(Respondent, 3rd defendant).  
BEFORE MR. JUSTICE W. HARTNOLL.

Dated, 4th July 1907.

For Appellant.—Woodham.

For Respondent.—N. M. Cowasjee.

*Subrogation—rights of lender paying off mortgage money—title deeds handed over—presumption of parties, intention—Transfer of Property Act, section 59—mutilation of mortgage deed—Presumption from.*

Where a lender, not being himself interested in the land mortgaged, advances money to the mortgagor for the purpose of paying off the mortgage, and with money so advanced the mortgage is discharged, it cannot be presumed that the mortgage was kept alive for the benefit of the lender, unless there is clear evidence that such was the intention of the parties.

From the mere fact that the title deeds were handed over to the lender, it cannot be presumed that it was intended to keep the mortgage alive.

The mutilation of a mortgage deed goes to show that the intention was to extinguish it.

*Discussed: Apaji vs. Kanji, I. L. R., 6 Bom. 66; Kushal vs. Panamchand, I. L. R., 22 Bom. 169; Mohesh Lal vs. Mokant Bowan Das, I. L. R., 9. Cal. 961; Gokl Das vs. Puranmal, I. L. R., 10 Cal. 1085.*

*Referred to: Ghose's "Law of Mortgage," 3rd Edition, p. 402.*

This was an appeal from the judgment of the Divisional Court of Ma-ubin, in Civil Appeal No. 13 of 1906. The facts of the case are fully set forth in the following judgment by Mr. E. A. Moore, the then Divisional Judge and at present one of the judges of the Chief Court.

The following is the judgment of the Divisional Court.

This is an appeal against the judgment and decree of the Subdivisional Court of Ma-ubin, in Civil Regular No. 89 of 1905. In that case appellant, N. A. P. Chellappa Chetty, was third

defendant. Respondent (original plaintiff), S. R. M. M. R. M. Chellappa Chetty sued Tha Dun, Ma Po Ma, and appellant to recover the sum of Rs. 2010-9, said to be secured by a mortgage on three pieces of paddy land, known as holdings 40 and 37 of Yegyaw *kwun*, and holding 8 of Kanu *kwun*, originally mortgaged by defendants Tha Dun and Ma Po Ma by registered deed, exhibit A, to A. R. P. etc. Narayan Chetty, for Rs. 300, bearing interest at Rs. 2-8 per cent. per mensem, the date of mortgage being the 3rd September 1901. This mortgage is now disputed. Plaintiff (S. R. M. M. R. M.) goes on to allege that this mortgage was assigned by Narayan Chetty to Ramen Chetty. That defendant, Tha Dun, and another mortgagor, Po Lon, not a party, having failed to pay the amount due on this mortgage he, at the request of the mortgagors, advanced to them the sum due on the mortgage, namely, Rs. 1,850, taking from first and second defendants two pro-notes for this amount, and that the said Ramen Chetty, in consideration of the payment of Rs. 1,850, with the knowledge and approval of the mortgagors, assigned to plaintiff his rights as mortgagee, and made over to plaintiff the mortgage-deed above referred to with certain maps and tax receipts annexed thereto. Plaintiff states further that, in Civil Regular Suit No. 36 of 1905, of the Subdivisional Court, defendant-appellant, N. A. P. Chellappa Chetty, obtained against Tha Dun and Ma Po Ma a mortgage decree on the said three pieces of land (decree dated 10th day of May 1906). But he denies that the said three pieces of land were in fact mortgaged to N. A. P. Chellappa Chetty, and pleads that, even if they were mortgaged, he is entitled to priority as assignee of the prior mortgagee, Narayan Chetty. Appellant-defendant, N. A. P. Chellappa Chetty, denied that plaintiff had any mortgage over the land, or that any mortgage rights were assigned to him. He alleged that the mortgage to Narayan had been extinguished, and claimed priority for his own mortgage, dated 18th February 1904, as to which he furnished certain particulars.

Upon these pleadings five issues were framed, which I will not here repeat. The issues framed were sufficient and appropriate. Plaintiff bases his claim upon the assignment to him of the rights of the first mortgagee, Narayan Chetty, and the burden of proving this assignment is upon plaintiff. The first witness (who was

examined *de bene esse*) was the original mortgagee, Narayan Chetty. He proves the loan of Rs. 1,300 and the execution of the registered mortgage, exhibit A. To this mortgage there were attached two maps and three tax receipts, exhibits B, C, D E and F. He transferred this transaction and assigned the mortgage to the firm of R. A. M., represented by Ramen Chetty, on the 19th February 1904.

He does not mention what sum was then due on the mortgage.

Some time after this—date not given—Tha Dun came to him. He had informed Tha Dun of the assignment to Ramen, and he asked Tha Dun if he was going to pay as Ramen was going away.

He called Ramen who said that he would like to be paid.

Then he, Narayan, suggested to Tha Dun that he might borrow from them and repay Ramen.

Tha Dun went away and returned with the clerk of plaintiff chetty, who enquired of him if Tha Dun was a good man. He said "Yes," and the clerk asked what was due. Narayan referred him to Ramen. The clerk, Ramen and Tha Dun then calculated in a room. Then Tha Dun and the clerk went away. They came back soon, and Narayan swears that he saw the plaintiff's clerk pay money to Ramen Chetty, and he winds up by saying that the clerk and Tha Dun agreed to an assignment of the mortgage to plaintiff.

Plaintiff himself says that Tha Dun and wife came to him to borrow Rs. 1,850, saying that they owed that amount to Ramen and had mortgaged their land to him by registered deed. He sent his clerk to enquire. The clerk came back and reported favourably. He then gave his clerk Rs. 1,850 to pay to Ramen.

The clerk went with Tha Dun and came back with the registered deed, maps and receipts. Then he took two pro-notes for Rs. 350 and Rs. 1,500 from Tha Dun and Ma Po Ma. These are exhibits G and I. He says that he made an entry in his accounts to the effect that there was security, and, apparently, the account books were produced but no extracts are on the record though there is a reference to extracts marked

K and L. But as plaintiff says that the entry was only that there was security, the security not being specified, the entry is of little value.

It is clear that plaintiff himself never met Ramen Chetty, though in cross-examination he asserts that he paid the money to Ramen and took over the mortgage from him.

What I suppose he means is, that he did these things through his clerk.

He admits that when he received the mortgage-deed there were two notes on the stamp paper. This, he says, shows that Ramen Chetty's account is satisfied. He further admits that it was agreed that Tha Dun and his wife should execute a registered deed a few days later. Ramen Chetty says that he pressed Tha Dun for payment.

Tha Dun went off saying that he would get a loan from another Chetty. Then Tha Dun came back with plaintiff's clerk, Saddappa. Tha Dun brought money with him. He says he brought Rs. 1,500. Lower down he says "Tha Dun paid me over Rs. 2,000 in all" This apparently includes former payments. Later on, he refers to the principal amount then due on the mortgage as Rs. 1,000 and states, "Maung Tha Dun has paid Narayan Rs. 300 already." This evidently means Rs. 300 principal, as the original loan was for Rs. 1,300. He repeats, "at that time only Rs. 1,000 was due on the bond." He says that the holes in the stamp denote that the mortgage has been satisfied. There is not a word in his evidence about any assignment of the mortgage or about any agreement to keep the mortgage alive as security for the loan. He does not even agree with the plaintiff as to the amount of the loan, as he says: "He, Saddappa, came because Tha Dun took a loan of Rs. 1,500." His evidence does not at all agree with that of Narayan according to whom the money was paid by the clerk to Ramen. Saddappa himself says that Tha Dun and wife came and borrowed money saying that they had property mortgaged to Ramen which they would mortgage to them. This is not the same thing as assigning the existing mortgage.

Then he says that Tha Dun enquired of Ramen as to the amount and Tha Dun told him (Saddappa) that the amount was Rs. 1,850. He handed the money to Tha Dun who paid Ramen who

made over to Tha Dun the mortgage deed and annexures.

Tha Dun handed these documents to him. He admits that he did not himself settle accounts with Ramen, nor was he personally aware how much was due to Ramen. He has no memorandum or entry in his books of any kind to the effect that the mortgage was taken over from or assigned by Ramen.

This is somewhat significant as, when Narayan assigned the mortgage to Ramen, entries of the assignment were made in the books of both the parties.

It is also noteworthy that the mortgage-deed was handed by Narayan intact, whereas Ramen defaced the stamp before giving the deed to Tha Dun.

He states that Tha Dun promised to come and execute a registered deed ten or twelve days later. The next witness, Saw Pe, who wrote the pro-notes for Rs. 1,500 and Rs. 350, only knows that it was agreed that a registered deed was to be executed hereafter. He says not a word, and apparently heard nothing said about any assignment of the existing mortgage or of any intention to keep it alive. This concludes the evidence for the plaintiff. It is quite clear that there was no actual assignment, verbal or otherwise, by Ramen Chetty to plaintiff. It is, I think, proved that Tha Dun paid off Ramen's mortgage out of money borrowed by him from plaintiff for that purpose. There is a divergence of evidence as to the amount which was actually due at the time on the mortgage and was paid to Ramen by Tha Dun.

In the face of Ramen's statement that Rs. 300 had been paid, and that at the time (of settlement by Tha Dun) only Rs. 1,000 was due on the bond is, I think, impossible to hold that more than Rs. 1,000 of the money lent by plaintiff to Tha Dun went to the discharge of Ramen's mortgage.

As regards the terms of the agreement between Tha Dun and plaintiff, it is clearly proved that Tha Dun agreed to execute a registered mortgage in plaintiff's favour later on, but this deed was never executed. It is, also, I think, clear that Tha Dun deposited the old cancelled registered mortgage-deed and the maps and

tax receipts, exhibits B, C, D, E & F with plaintiff. As this took place on the 25th February 1905, the deposit of these documents was totally ineffective as creating any new mortgage.

I do not find it proved that there was any definite oral agreement between Tha Dun and plaintiff that the old mortgage should be kept alive.

Mr. Ghose, discussing the law of subrogation, remarks, after saying that in India the law is rather in an unsettled state, "Whatever may be the law, whether there is a distinct agreement with the debtor (Tha Dun in this case) that the lender (plaintiff) should be subrogated to the rights of the mortgagee, or *even when the money is expressly advanced for the purpose of paying off an incumbrance, without any such agreement*, there can be very little doubt that the mere fact that the money borrowed is used to pay off a prior mortgage does not entitle the lender to the benefit of the discharged security. (Law of Mortgage, 3rd edition, page 402.)

The words underlined seem to imply that the writer thinks that where the lender, as in the present case, advances money expressly for the purpose of paying off a mortgage, he may be subrogated to the rights of this mortgagee without any assignments, or any distinct agreement with the debtor to that effect.

The cases which I have examined do not support such a view. In the case of *Apaji vs. Kanji* (1), the mortgagors borrowed Rs. 325 from one Manikji to pay off their mortgagee, Nahar, and did pay him off with the money so borrowed. Nahar did not assign his mortgage to Manikji but endorsed a release upon the deed. Nahar attested the mortgage which was executed in favour of Manikji to secure the loan of Rs. 325. It was held that there was nothing to show that there was any intention to keep alive the mortgage to Nahar for the benefit of Manikji. Again, in the case of *Kushal vs. Panamchand* (2) under the circumstances similar to those in the present case, it was ruled that the plaintiff, who advanced money at the request of the mortgagors and paid off the mortgagee, could not compel the latter to assign

(1) I. L. R., 6 Bombay, 66,

(2) I. L. R., 22 Bombay, 169.

the mortgage to him, and that the effect of the payment of the mortgage and the delivery of the documents to the lender-plaintiff was merely to create a new equitable mortgage in his favour. The ruling of Their Lordships of the Privy Council in the case of *Mohesh Lal vs. Mohant Bowman Das* (1) appears to me to be very pertinent to the present case. In that case the lender advanced money upon a mortgage which was partly invalid, and relied upon a prior mortgage which had been discharged out of the money advanced by him. Their Lordships held that, in the absence of any expression of intention to the contrary, the borrower intended to extinguish the mortgage and that the plaintiff, the lender, did not become entitled to additional security, because that which he took turned out to be invalid. In this case the sum advanced was paid to the mortgagee by the lender's (plaintiff's) clerk or gomashtha and not, as in this case, by the borrower himself. The deed was endorsed to the effect that payment had been made and was returned by the mortgagee to the plaintiff's gomashtha. The facts in the present case are weaker, *i.e.*, less favourable to plaintiff, as he did not pay off the mortgagee himself or through his clerk, and the deed, after cancellation, was returned to the borrower. In the case quoted, as in the present case, the second loan was at a lower rate of interest than the first one, and Their Lordships were of opinion that the natural inference was that the borrower wished to extinguish the former loan, it being against his interest to keep it alive. They also held that the mere retention by plaintiff of the old mortgage bond in his custody did not evince any intention of keeping the mortgage alive.

I have also referred to the cases reported at 11 Madras 353, 16 Madras 95, and 20 Madras 487, but cannot find that they support plaintiff's case in any way. They are cases of successive mortgages, and are decided upon the same lines as the case of *Gokldas vs. Puranmal* (2).

My conclusion is that, where a lender, not being himself interested in the land mortgaged, advances money to the mortgagor for the purpose of paying off the mortgage, and with the money so advanced the mortgage is discharged, it cannot be presumed that the mortgage was kept alive for the benefit of the lender, unless there is

clear evidence that such was the intention of the parties. In the present case there appear to me to be several circumstances negating such an intention. There is the fact that the plaintiff did not himself ascertain or know what was due on the mortgage; the fact that the money was paid by the debtor and the deed returned to the debtor; and the fact that the deed was cancelled. There are, further, the facts that plaintiff made no entry in his accounts that this mortgage was transferred to him or was kept alive; the interest on the new loan was less than the interest on the former loan; and that it was agreed that defendant should execute a new mortgage and register it. There is also the significant fact that the chetty, Narayan, who supports to some extent plaintiff's case that there was an assignment to him by Ramen, is not borne out by Ramen himself, and the further fact that plaintiff's clerk and Ramen do not agree as to the amount which was actually paid on the old mortgage, which suggests that, all that the clerk wanted to ascertain was that the mortgage was extinguished. Having regard to the above facts, I find, under the second issue, that it is not proved that the rights of Ramen Chetty as mortgagee of the land in suit were assigned to a plaintiff, and that it not being proved that it was the intention of the parties to keep this mortgage alive, plaintiff is not entitled to any rights as mortgagee in respect of this mortgage. There is no other valid mortgage to plaintiff.

The deposit of title deeds did not create a mortgage, section 59, Transfer of Property Act. Plaintiff's suit as against defendant, Chellappa Chetty, must therefore fail.

I therefore set aside the judgment and decree of the Court of First Instance and direct that plaintiff's suit as against third defendant-appellant, Chellappa Chetty, do stand dismissed, and that plaintiff pay the costs of appellant in both courts.

The respondent in the Divisional Court of Maubin appealed and the judgment of the Chief Court was delivered by Mr. Justice Hartnoll, who said :

The plaintiff-appellant claims that Ramen Chetty assigned to him the mortgage deed executed by Maung Tha Dun and Maung Po Lon on the fifth Waning Wagaung 1263 B. E., in favour

1) I. L. R., 9 Calcutta 361.

2) I. L. R., 10 Calcutta 1085.

of Narayan Chetty. The Subdivisional Court found in his favour; but the Divisional Court found against him.

The question is, what was the intention of the parties? That intention must be gathered from the evidence which has been analyzed carefully by the Judge of the Divisional Court. I also have gone through it and I have come to the same conclusion as that judge. It is not shown that the mortgage was assigned.

Ramen Chetty does not say so, and the fact that Maung Tha Dun was to execute another mortgage deed goes to show that there was no intention to assign. Moreover, the mortgage deed itself is mutilated, which goes to show that the intention was to extinguish it. It is suggested that the mere fact that the title deeds were handed over to the plaintiff-appellant goes to show that it was intended to keep the mortgage alive. I cannot agree to this. They may be handed over as security pending the execution of the new deed.

There is no doubt that the plaintiff-appellant was to have the lands mortgaged to him as security, but it is not shown that any assignment was contemplated. The alternate claim in appeal was abandoned by the counsel for the plaintiff-appellant at the hearing of the appeal.

The appeal is therefore dismissed with costs.

IN THE CHIEF COURT OF LOWER  
BURMA.

CIVIL SECOND APPEAL\* NO. 112 OF 1906.

Ramen Chetty and two others,

vs.

Ko Sawe Wo and one.

BEFORE SIR CHARLES E. FOX, KT., C.J.

Dated 1st August 1907.

For Appellants.—Agabeg.

For Respondents—Maung Thin.

Extending time Contract Act, section 63—consideration not necessary.

\*Appeal from judgment of David Wilson, Esq., Divisional Judge, Hanthawaddy, in Civil Appeal No. 15 of 1906, confirming judgment and decree of Major Nethersole, District Judge, Hanthawaddy, in Civil Regular No. 44 of 1905.

An agreement to extend time covered by section 63 of the Contract Act does not require consideration to support it.

Referred to: Kankoni vs. Maung Po Yin (1902) 1 L. R. 190.

Followed: Davis vs. Cundasami Mudali (1895) I. L. R., 19 Mad. 398.

In 1902 the defendants-respondents borrowed Rs. 2,450 from the plaintiffs-appellants on an On Demand promissory note, bearing interest at 2 percent. per mensem

By the 9th March 1903 the amount due to the plaintiff was Rs. 4,000. On that date an agreement was entered into by the parties under which it was agreed between them that repayment of the Rs. 4,000 should be extended over eight years, Rs 500 of the principal to be paid in each year, and that the interest should be one per cent. per mensem instead of two per cent. as formerly, on the promissory note.

On the 25th February 1904 the plaintiffs received Rs. 500 for principal and Rs. 485 for interest. The receipt of these sums was acknowledged on the document. In July 1905 the plaintiffs sued upon the promissory note for the balance due on it. The defendants relied upon the document of the 9th March 1903 as a defence to the suit. The lower courts have held that a suit on the note was not maintainable.

It is contended on this appeal that the agreement of the 9th March 1903 was not binding on the plaintiffs because there was no consideration for it. The case of Kankoni vs. Maung Po Yin (1) is relied on in support of the argument.

The facts of that case were not in any way analogous to the facts of the present case, and the ruling has no application.

In this case the defendants owed money to the plaintiffs, which was payable on demand, the plaintiffs, by the document of the 9th March 1903, gave them time within which to pay the money, and also remitted in part the performance of the defendants' original promise as regards interest.

(1) (1902) 1. L. B.R. 190.

The case appears to me to fall within section 63 of the Contract Act. An agreement covered by that section does not require consideration to support it. See *Davis vs Cundasami Mudali* (1) and Mr. Pollock's notes on the section.

I do not think there was an error of law in the Divisional Court's judgment justifying the reversal of its decision. The appeal is dismissed with costs.

IN THE CHIEF COURT OF LOWER  
BURMA.

CIVIL SECOND APPEAL\* NO. 219 OF 1906.

Ma Tu and three others,

vs.

Maung Tun Zan and one.

BEFORE MR. JUSTICE MOORE.

*Dated 1st July 1907.*

*For Appellant.*—R. N. Burjorjee.

*For Respondent.*—May Oung.

*Appellate Court's duty in appeal on merits—Independent judgment on facts necessary.*

When the Legislature gives an appeal on the merits of a case, it is the duty of the Appellate Court to form its own judgment on the facts and to give its own reasons for its findings.

*Followed:* U Pa and two vs. Ma Myaing and others.

The principal ground of appeal in this case is that the judgment of the Lower Appellate Court is not a proper judgment.

The judge of the Divisional Court, after giving a list of the witnesses' names, remarks—"These witnesses corroborate respondents and their evidence has been believed by the lower Court and I see no good reason for differing from its decision.

The remarks of Mr. Hosking, Judicial Commissioner, in U Pa and two vs. Ma Myaing and others (2) appear to me apposite, namely, "The

(1) (1896) L. L. R., 19 Mad. 398.

(2) Printed Judgments, 343.

\*Appeal from judgment of H. S. Field, Esq., Divisional Judge, Bassein, in Appeal No. 47 of 1906, confirming the decree of Maung Po Hnit, Judge of the Subdivisional Court of Hensada, in Civil Regular No. 86 of 1905.

case is one which requires careful weighing of the evidence and the probabilities, but the Appellate Judge appears to have taken no pains to form an independent judgment on the case. When the Legislature gives an appeal on the merits of the case it is the duty of the Appellate Court to form its own judgment on the facts and to give its own reasons for its findings." The Appellate Court does not discharge this duty by saying "I see no reason to interfere with the Lower Court's decision as he (it?) has carefully and, seemingly, rightly weighed the evidence."

I hold that the judgment of the lower Appellate Court is bad in law as it has given no reasons for his decision on the facts.

I therefore set aside the judgment and decree of the lower Appellate Court and remand the case, with the order that the appeal be reheard and a fresh judgment given according to law. The costs in this Court to follow ultimate decision.

Appellant will receive a certificate under section 13, Court Fees Act, in respect of the stamp on this memorandum of appeal.

IN THE CHIEF COURT OF LOWER  
BURMA.

CIVIL SECOND APPEAL\* NO. 221 OF 1906.

Maung Pan Zin and three vs. Ma E Mya.

BEFORE SIR CHARLES E. FOX, KT., C. J., AND

MR. JUSTICE MOORE.

*Dated 27th June 1907.*

*Second Appeal—section 584, Civil Procedure Code—no finding in alternative on claim not put forward—not an error of law.*

An alternative claim to a right put forward for the first time on second appeal cannot be entertained.

\*Appeal from judgment and decree of G. Scott, Esq., Divisional Judge, Tennasserim, in Civil Appeal No. 42 of 1906, confirming the judgment and decree of the District Court of Amherst, in Civil Revision No. 4 of 1906.

Nor can it be said that the lower appellate court committed an error of law in not coming to a finding in the alternative in respect of a claim never put forward before it.

*Per Fox, C. J.*—The appeal is under section 584 of the Code of Civil Procedure.

The error of law in the Divisional Court's judgment is said to be in the omission to find that the defendants were at least the *Apatitha* children of Maung Saing and Ma Min Tha.

In their written statement, the defendants claimed to be the publicly adopted children of Maung Saing and Ma Min Tha, and, as such, to be entitled to the greater portion of the estate. This was obviously a claim to be the *Kittima* adopted children of the couple, and it was so treated throughout the case. Neither in the suit nor in the ground of appeal to the Divisional Court was there any suggestion that the defendants claimed, in the alternative, to be the *Apatitha* children of their benefactors.

The Divisional Judge cannot be said to have committed an error of law in respect of a claim which was never put before him. This new claim cannot, in my opinion, be entertained upon a second appeal.

I would dismiss the appeal and order the defendants to pay the plaintiff's cost of it.

*Moore, J.* concurred.

IN THE CHIEF COURT OF LOWER  
BURMA.

CIVIL SECOND APPEAL\* NO. 120 OF 1906.

Kyaw Zan vs. Tha Tun U.

BEFORE MR. JUSTICE HARTNOLL.

Dated 1st August 1907.

*For Appellant*—Pennell.

*For Respondent*—Anklesaria.

*Civil Procedure Code, section 265—partition by collector—undivided estate paying Revenue to Government.*

The partition of an undivided estate paying revenue to Government must be made by the Collector.

\*From the decree of E. Dawson, Esq., District Judge, Akyab, Civil Appeal No. 14 of 1906, against the decree of the Township Court of Akyab, in suit No. 314 of 1905.

Tha Htoon Oo sued Kyaw Zan to partition certain land and three shops thereon and for possession of two-thirds of the land and shops. The decree given by the judge of the Township Court was for partition as prayed for. An appeal was laid to the District Court by Kyaw Zan and dismissed.

A second appeal is now laid to this Court on the ground that, the subject matter of the suit being immoveable property paying revenue to Government, a suit for its partition is not cognizable by the civil courts. It has been found that the land pays revenue to Government. The advocate for the appellant allows that his ground of appeal is too wide. Further, this ground is now taken for the first time. As the land is an undivided estate, paying revenue to Government, under section 265 of the Code of Civil Procedure, the partition must be made by the Collector. If the point had been urged from the beginning it is probable that the right procedure would have been adopted.

It is urged that the plaint should be amended. I see no necessity for this at the present stage. This Court can pass a suitable order.

The decree of the Township Court is modified, and it is ordered and decreed that Tha Htoon Oo is entitled to a two-thirds share in the land and shops enumerated in the plaint, and that, under section 265 of the Civil Procedure Code, the Collector be requested to partition his share. After the partition has been made a final decree should be passed giving Tha Htoon Oo possession of the share allotted to him.

Under the circumstances each party will pay their own costs in this appeal.

IN THE CHIEF COURT OF LOWER  
BURMA.

SPECIAL CIVIL SECOND APPEAL NO. \* 218  
OF 1906.

Maung San Hla and one,

vs

Maung So Gyi and two.

BEFORE MR. JUSTICE MOORE.

Dated 1st August 1907.

For Appellants.—N. N. Burjorjee.

For Respondents.—Bagram.

*Secondary evidence of document which is inadmissible—section 92, Indian Evidence Act—admission of contents of inadmissible document—effect of.*

The admission by a party of the execution of a document, which is by law inadmissible in evidence, is immaterial, and such admission cannot be used for the purpose of giving evidence of the contents of a document which by law is inadmissible in evidence.

Appellants, original plaintiffs, sued for possession of certain garden lands which they claimed to have bought from defendants by a registered conveyance, exhibit A. Defendants admitted executing the deed of sale but contended that, at the same time, they executed another deed, exhibit 1, and that that deed contained the real agreement between the parties. Plaintiffs admitted execution of the deed, exhibit 1, but contended it was not admissible in evidence for want of registration. The judge of the Divisional Court appears to have held that though the document itself was not admissible in evidence, plaintiffs' admission of execution rendered the document unnecessary. The learned judge appears to have overlooked the provisions of section 92 of the Evidence Act. Defendants were not entitled to produce secondary evidence of the contents of this document and, therefore, could not prove its contents by the admissions of plaintiffs. Further, the document was under a double disability by reason of section 49 of the Registration Act. It was not only not

admissible in evidence but it could not affect any immovable property to which it referred, i.e., it could not affect the property in suit. The deed, exhibit A, is, on the face of it, a simple out and out sale deed. Defendants do not allege that they executed it under any mistake of fact, or that they were induced to execute it by any false representations. I am unable therefore to agree with the learned Divisional Judge that defendants could have successfully sued for the rectification of this document under section 31 of the Specific Relief Act. In my opinion defendants cannot prove the agreement exhibit 1 nor can they offer oral evidence varying the terms of the conveyance, exhibit A.

The security of the title afforded by registered deeds, in the case of immovable property, would be materially impaired if either oral evidence or evidence of unregistered agreements, contradicting or varying the terms of the registered deed, were admissible in evidence. If defendants suffer, it is their own fault for not having registered the agreement, exhibit 1. In my opinion the judgment of the Court of First Instance was perfectly correct. I set aside the judgment and decree of the lower Appellate Court and restore that of the Court of First Instance. I shall make no order as to costs in appeal.

IN THE CHIEF COURT OF LOWER  
BURMA.

CIVIL REVISION NO.\* 108 OF 1906.

San Baw Ri vs. Tun Pru.

BEFORE MR. JUSTICE MOORE.

Dated 1st August 1907.

For Appellant.—Lambert.

For Respondent.—Agabeg.

*Court auction sales—moveable property—no implied warranty of title—Civil Procedure Code, section 315 its scope.*

There is no implied warranty of title, either by the Sheriff or by the judgment-creditor at an auction sale of moveable property by the court, and the auction-purchaser buys at his own risk.

\* From the judgment and decree of Mr. David Wilson, Divisional Judge, Hantawaddy, in his Civil Appeal No. 52 of 1906, reversing the judgment and decree of the Subdivisional Court, Kyauktan, in suit No 6 of 1906.

Against the order of E. Dawson, Esq., District Judge, Akyab, in Appeal No. 37 of 1906, confirming the decree of the Township Court of Pantanaw, in Civil Regular Suit No. 54 of 1906.

Section 315 of the Civil Procedure Code (XIV of 1882) applies only to immovable property. It does not apply to moveable property.

*Considered:* Mohammed Holdar *vs.* Akial Mehaldar, 9. W. R. 118; Framji B. Duster *vs.* Hormasji Framji, I.L.R., 2. Bom. 258; Benodhe Behari Nundi *vs.* Mohesh Chunder Ghose; 12 C. L. R. 331.

*Followed:* Dorab Ally Khan *vs.* The Executors of Khajah Moheooddeen, I.L.R. 3. Cal. 806; Sundara Gopalan *vs.* Venkatavarada Ayyangar, I.L.R., 17. Mad. 228; Skanto Chander Mukerji *vs.* Nain Sukh and others, I.L.R., 23 All. 355.

Tun Pru got a decree against San Ri Me, and, in execution, brought to sale two buffaloes which were purchased at the auction by San Baw Ri. Afterwards U Gyaw sued both San Baw Ri and Tun Pru for possession of the buffaloes and got a decree. The auction-purchaser who has thus been deprived of the buffaloes now sues the decree-holder, Tun Pru, to recover the purchase-money, Rs. 112, paid by him.

The lower courts both held that the suit did not lie and that the only remedy was to set aside the sale. Various rulings have been quoted to me. The decision in 9 Weekly Reporter, page 118, merely decided, that a person whose moveable property has been sold could, under section 252 of Act VIII of 1859, sue to recover it. This power has been specifically given in section 298 of the present Act.

In Framji B. Duster *vs.* Hormasji P. Framji, I.L.R., 2 Bom. 258, it was ruled also under Act VIII of 1859, that an auction-purchaser who did not get the property purchased by reason of the judgment-debtor having no title could, whether the property purchased was moveable or immovable, sue to set aside the sale and to recover the purchase-money. The other cases cited have even less direct bearing upon the question in issue than the foregoing cases.

The District Judge appears to have held that plaintiff could not recover without first having the sale set aside. In this view of the law he seems to be wrong. There are now numerous decisions that an auction-purchaser of immovable property may recover his purchase-money without first getting the sale set aside (see Benodhe Behari Nundi *vs.* Mohosh Chunder Ghose, 12 C.L.R. 332).

The District Judge was also mistaken in thinking that section 313, Code of Civil Procedure, applies to moveable property. It does not.

I think, however, that plaintiff's suit was rightly dismissed for another reason. It has been repeatedly held that, in auction sales, there is no implied warranty of title either by the Sheriff or by the judgment-creditor (I.L.R., 3 Cal. 806; XVII Madras 228, and XXIII All. 355).

The right of the auction-purchaser to recover his purchase-money in the case of immovable property is a right which is expressly conferred by section 315, Code of Civil Procedure. He may recover his money if it is true, either by summary procedure under that section or by a regular suit, but in either case his right to recover depends upon section 315. In the case of moveable property there is no such provision, and there being no warranty of title, the auction-purchaser buys at his own risk. He cannot, except, perhaps, in the case of fraud, recover his money, although he afterwards has to give up what he purchased. I hold therefore that plaintiff's suit was rightly dismissed, and I dismiss this application with costs.

#### IN THE CHIEF COURT OF LOWER BURMA.

SPECIAL CIVIL SECOND APPEAL \* No. 188 OF 1906.

Pair-in-Bum and one ... *Appellants (plaintiffs),*  
vs.  
A. R. M. S. Chiniah Chetty ... *Respondent (defendant).*

BEFORE MR. JUSTICE HARTNOLL.

Dated 18th July 1907.

*For Appellants (plaintiffs).*—Lambert.

*For Respondent (defendant).*—Agabeg.

*License to build—indefinite period—irrevocability of.*

Where a substantial building has been erected on lands with the permission of the owner thereof obtained for consideration, and where the license has not been granted for any definite length of time, the owner of the land cannot revoke the license.

*Followed:* Ma Min Thi *v.* Sit Whet, L. B. P.J. 107.

*From judgment of B. H. Heald, Esq., I.C.S., District Judge of Hanthawaddy, in Civil Appeal No. 51 of 1906, reversing the decree of Maung Tha Din Esq., Township Judge, of Twante, in Civil Regular Revision No. 8 of 1906.*

Plaintiff-appellants sue the defendant-respondent to cause him to remove a certain barn that he has erected on their land. It appears from the evidence that appellants gave respondent permission to erect the barn and that they were paid Rs. 50 for such permission. Plaintiffs say that this was in December 1904, and allege that the permission was only given for one year. The respondent denies this. From the evidence, plaintiffs cannot prove that any definite length of time was fixed for the erection of the barn, and the burden of proof is on him to prove his allegation.

On the other hand, it would appear that no definite time was agreed on.

The respondent has erected a substantial barn. The law on the subject is laid down in the case of *Ma Min Thi vs. Sit Whet* (1), and I see no reason to differentiate this case from that.

The Plaintiffs-appellants cannot show that the license they gave was for any specified period. They gave a grant of occupation of their land for the erection of a barn and have allowed the erection of a substantial one. They also received money for their concession.

They cannot now, in my opinion, cause its removal.

I therefore dismiss the appeal with costs.

IN THE CHIEF COURT OF LOWER  
BURMA.

SPECIAL CIVIL SECOND APPEAL\* NO. 19 OF 1907.

Maung Pan Aung and one ... Appellants,  
vs.  
Maung Yauk ... Respondent.

BEFORE MR. JUSTICE MOORE.

Dated 22nd August 1907.

For Appellants.—Burn.

For Respondent.—Agabeg.

Refusal to register bond—suit not premature—contract against public policy—illegal consideration—Contract Act (IX of 1872), section 23.

(1) L B. P. J. 107.

From Judgment of G. F. Christie, Esq., Divisional Judge, Tenasserim, Civil Appeal No. 61 of 1906, against the decree of the Subdivisional Court of Amherst, in suit No. 51 of 1096.

A refusal by one party to register a document, entitles the other party to it to sue at once for the return of the consideration; and his suit is not premature if he do so sue.

*Semle* : An agreement, having as its object the prevention of a reconciliation between husband and wife, is illegal, because it is opposed to public policy ; and it will not be enforced by a court of law.

*Followed* : *Nga Ngwe vs. Mi Byaw*, S. J. 313.

Appellant sued to recover Rs. 1,710, principal and interest, due upon a mortgage bond, exhibit A. Respondent, Maung Yauk, refused to register the bond. Under the bond, the mortgage was repayable within twelve months. The learned Divisional Judge held that the suit was premature, having been filed before the twelve months had expired. I do not agree with him. The case in this respect is on all fours with the case of *Nga Ngwe vs. Mi Byaw*, page 313, Selected Judgments, and defendant's refusal to register gave plaintiffs the right to at once recover their money.

I hold, therefore, that the suit was not premature. Defendant's written statement sets out that he never received the Rs. 1,500, that he promised to pay plaintiff's Rs. 1,500 on condition of their giving him their daughter in marriage—as a second wife, that they gave him their daughter, and that, afterwards, they made him sign the bond. He pleads, therefore, that the agreement is immoral and opposed to public policy.

Plaintiff denied that this marriage had anything to do with the loan. He said that he advanced Rs. 1,500, cash, in presence of Nga Po, Shwe Kyu and Ma Gyaw, and the bond was executed next day. He called Nga Po and Shwe Kyu who depose that they saw the money paid. On the other hand, Tha Byu and Nga Paw, who witnessed the bond, say that it was executed as a security to prevent Maung Yauk, defendant, from going back to his elder wife.

The witnesses who signed as witnesses to the deed appear to me in every way more reliable than the witnesses of plaintiff. I am not satisfied that defendant ever received the money sued for, and, therefore, the suit must fail. I accordingly dismiss this appeal with costs.

IN THE CHIEF COURT OF LOWER  
BURMA.

CRIMINAL APPEALS\* NOS. 425 AND 426 OF 1907.

(1) Pru Thi Aung, (2) Nga Sein ... Appellants.

vs.

King Emperor ... Respondent.

BEFORE MR. JUSTICE E. A. MOORE.

Dated 9th August 1907.

*Confessions—retracted and unretracted—evidence against co-accused—value of.*

Retracted and unretracted confessions of accused may be taken into consideration against a co-accused but cannot form the basis of a conviction.

Their joint weight is less than that of the sworn evidence of an approver.

The evidence is lengthy, but very little of it in any way affects the present appellants.

Appellant Pru Thi Aung was arrested on the 14th March. He made a confession on the 16th March, which he has since retracted. Pru Thi Aung also dug up nine silver coins in front of his house, but the Sessions Judge was not satisfied that these were part of the dacoited property. Pru Thi Aung was also implicated in the confessions of five co-accused. Two of these men did not retract their confessions and some weight may therefore be attached to them.

The only other evidence implicating Pru Thi Aung is the obviously false evidence of witnesses 22 and 23 for the Crown. I do not see sufficient reason for disbelieving Pru Thi Aung's confessions corroborated as it is by confessions of co-accused. I confirm the conviction and sentence in his case and dismiss his appeal.

Appellant Nga Sein never confessed. He is implicated in the three retracted and the two unretracted confessions. These may be taken into consideration against him, but cannot form the basis of a conviction. Their joint weight is less than that of the sworn evidence of an approver.

The Sessions Judge refers to the evidence of Chi Do Pan as implicating Nga Sein. The men named by Chi Do Pan were Aung Kyaw U, Nga Pein and Maung Chan.

*Appeal from judgment of B. Houghton, Esq., Sessions Judge, Arakan, dated 15th June 1907, in Sessions Trial No. 18 of 1907.*

As there is no evidence on the record which would justify Nga Sein's conviction, I reverse the conviction and sentence in his case and, acquitting him, direct that he be set at liberty.

IN THE CHIEF COURT OF LOWER  
BURMA.

CRIMINAL REVISION NO.\* 479A. OF 1907.

King Emperor,

vs.

Nga Shwe Lok and two others.

BEFORE MR. JUSTICE MOORE.

Dated 21st August 1907.

*Conviction before completion of trial—illegality of—Misjoinder—section 239, Criminal Procedure Code.*

A conviction of an accused before the completion of the trial in which he and other accused are jointly tried and without any reasons is illegal.

Two or more persons cannot be jointly tried for two distinct offences unless they are committed in the course of the same transaction.

Nga Shwe Lok, Po Myaing and Po Thein were tried together, in one trial, on charges under sections 379 and 380 of the Indian Penal Code, for the theft of bullocks, the property of one Chit E, and of a cart, the property of Po Kyin.

On the 11th of May 1906 they were examined and pleaded not guilty. Shwe Lok stated he had no witnesses, the other two accused cited witnesses. The Special Power Magistrate made the following order, dated 11th May 1907: "I do not think it will be fair to accused, Shwe Lok, to have to wait for judgment till after the examination of the witnesses called by accused, Po Myaing and Po Thein. For reasons, which will hereafter be set out at length, I find that accused, Shwe Lok, son of Maung Waing, is guilty of committing theft of two bullocks, valued at Rs. 50, the property of Chit E, from the pen under his house, an offence punishable under section 380, Indian Penal Code. I further find the said accused, Shwe Lok, guilty of committing theft of a cart,

*\* From judgment of Po Sa, Esq., Subdivisional Judge of Insein, and Special Power Magistrate, Hanthawaddy.*

valued at Rs. 20, the property of Po Kyin, an offence punishable under section 379, Indian Penal Code. I direct that the said Shwe Lok do suffer (2) two years' rigorous imprisonment for the first count under section 380, Indian Penal Code, and (1) one year's rigorous imprisonment for the second count under section 379, Indian Penal Code. The second sentence to commence on expiry of the first sentence."

On the 25th May 1907, after the examination of the witnesses cited by the other two accused, the Special Power Magistrate having found them guilty of two distinct offences, passed sentence on Po Thein of two years' rigorous imprisonment for theft of the two bullocks and thirty lashes for that of the cart. The sentence on Po Myaing was deferred till the conclusion of the enquiry as to a previous conviction.

The accused, Po Myaing, was then charged with having been previously convicted of an offence under section 379 of the Indian Penal Code, namely, theft of cattle. He denied the previous conviction, but as he was being removed from the dock, after the adjournment of the case had been ordered to enable proof of the previous conviction to be given, he admitted his previous conviction. He was accordingly sentenced to four years' rigorous imprisonment on the first count and to thirty lashes on the second.

There was no certificate of the previous conviction on the record.

The case coming on before Mr. Justice Moore on revision, the following judgment was delivered:—

1. The Magistrate convicted Shwe Lok on the 11th May 1907, before the trial had concluded, and gave no reasons for his conviction but said that the reasons would be set out hereafter. His action was entirely unwarranted by law. He was bound to write a proper judgment.

2. The Magistrate found that two distinct offences of theft were committed and passed separate sentences. It follows, therefore, that the trials were bad for misjoinder, unless the two thefts were committed in the course of the same transaction, as to which there is no finding.

The Special Power Magistrate should have used Criminal form 80, not 79, for trying the previous conviction and a certificate of the previous conviction should have been on the record.

IN THE CHIEF COURT OF LOWER  
BURMA.

CIVIL FIRST APPEAL\* NO. 81 OF 1906.

Ma Nyein and one vs. Me Mya and nine.

BEFORE SIR CHARLES E. FOX, KT., C. J., AND  
MR. JUSTICE MOORE.

Dated 29th July 1907.

For Appellants.—Ormiston.

For Respondents.—Lambert.

Issues re-framed on retrial—power of original court to do so.

When the decree of an original court is set aside by a Court of Appeal and the case remanded for a new trial on its merits, the original court is seised of the case *de novo* and has power to frame new issues.

*Per Moore, J.*—In Civil Regular No. 122 of 1903 of the Subdivisional Judge, Pyapon, Ma Kon got a decree against Ma Nyein and Po Lu for the land described in paragraph 1 (a) of the plaint. By their written statement, defendants pleaded that the land was Tha Kun's, mortgaged by him for Rs. 2,686 and afterwards made over in usufructuary mortgage (1262 B.E). This decree was dated 24th October 1903 and was confirmed on appeal on 26th January 1904, on the admission of appellants' (Ma Nyein and Po Lu's) advocate, that the land in suit was not the land mortgaged by Tha Kun.

On 8th March 1904 Ma Nyein and Po Lu instituted the suit, now under appeal, against eleven defendants. The 1st defendant was Po Lu, alleged co-mortgagor with Maung Tha Kun. He never appeared and the case has been decided against him *ex parte*. Defendants 2 to 5 (now respondents 1, 2, 3, 4) were the children and legal representatives of Tha Kun, deceased. Defendants 6 to 11 (respondents 5 to 10) were: Ma Kon the widow, and the surviving children of U At Gyi, also deceased.

In that suit plaintiffs claimed to recover Rs. 9,000, being principal and interest due under the mortgage deed, exhibit A, by sale of two

pieces of land referred to as A and B, of which the piece A was said to have been mortgaged by Tha Kun and B by Po Lu.

In their plaint the plaintiffs alleged that, after the dismissal of the appeal in the suit brought by Ma Kon, they had learned that Tha Kun acted as general agent of his father, deceased At Gyi, and that Tha Kun mortgaged the land A which was the property of U At Gyi.

Ma Kon, by her written statement, pleaded—(i) that plaintiffs' claim was *res judicata* by reason of the decision in Civil Regular Case No. 122 of 1903 of the Subdivisional Judge, Pyapon; (ii) that plaintiffs were estopped from alleging that the land A was the land mortgaged by Tha Kun, by the admissions of their advocate in appeal. She denied the allegation that Tha Kun acted as general agent of At Gyi, or was authorised to mortgage this land, and generally denied all matters not expressly admitted.

Defendants 2, 3, 4, 5, namely, the legal representatives of Tha Kun, filed a separate written statement. They denied that Rs. 9,000 was due, as plaintiff had admitted in the former suit that only Rs. 3,000 odd was due. They alleged that they did not know whether the plaint land A was owned by Tha Kun or not, and in paragraph (2) alleged that plaintiffs were estopped from denying that the lands marked A and B was made over by Tha Kun in satisfaction of the mortgage debt or not.

They did not either admit or expressly deny the execution by Tha Kun of the bond sued upon. The District Judge framed, originally, six issues on the 9th June 1904 to which a seventh issue was added on the 6th October 1904.

On the 6th October 1904, before taking evidence, issues on the point of law raised were decided. The learned District Judge held that the case as regards the land A was *res judicata* and that the suit as against defendants 6 to 11 must fail entirely, and dismissed the suit as against them with costs.

He held that it was still open to defendants to enforce their claim against Po Lu personally and their lien over the land exhibit B, and that it was open to them to enforce the claim (? for a money decree only) against defendants 2, 3, 4, 5, as representing the estate of Tha Kun.

\* Appeal from the decree of Aung Zan, Esqr., District Judge, Pyapon, in suit No. 2 of 1904.

The learned Judge then proceeded to re-settle the issues. On the question of execution of the deed of mortgage, sued upon, the issue framed was—"Did Tha Kun execute the bond in suit on his own account or partly on his own account?" (This issue did not, in my opinion, arise, plaintiffs' case being that Tha Kun executed the deed neither entirely nor partly on his own account but as the authorised agent of At Gyi).

After recording evidence the learned Judge found that the deed, exhibit A, was executed by Tha Kun. He recorded no finding that it was executed by Po Lu. He found that the amount due on the bond was Rs. 3,000, and ordered that this sum be realised by sale of the land B, and held defendants 2, 3, 4, 5 jointly liable with Po Lu for the deficiency, if any, upon the sale. Against this judgment Ma Nyein and Po Lu appealed to this Court, and it was ruled by a Divisional Bench that the judgment in Civil Regular 122 of 1903 of the Subdivisional Judge, Pyapon, did not operate as *res judicata*, nor did the pleadings, evidence or admissions in that case operate as estoppels. The Bench held, therefore, that the decision of the District Judge dismissing the suit against defendants 6 to 11 was erroneous and that the case must be reheard on the merits against them. Holding, however, that there would be two trials on the facts against the two sets of defendants, the decree of the Lower Court was set aside, as against all defendants except Po Lu, and the case was remanded for trial upon the merits.

The effect of this order was, in my opinion, that the Judge of the District Court was seised of this case *de novo* and was at liberty to frame, as he did, new issues.

The first issue framed was—

1. Did Tha Kun mortgage the land, marked A, to plaintiffs.

This issue seems to me defective in form. There were two distinct questions for consideration.

(i) Did Tha Kun execute the deed sued upon?

(ii) Is the land described in the deed the same land as that described in paragraph 1 (a) of the plaint?

It is urged by appellants that neither of these questions properly arose.

As regards defendants 6 to 11, I think they unquestionably arose. It was their case throughout that the land A was not the land described in the mortgage deed and they never admitted execution of the deed by Maung Tha Kun, while by their written statement they put plaintiffs to proof of all matter not expressly admitted.

As regards defendants 2 to 5, Tha Kun's legal representatives, the case is different. I think that their written statement, in effect, amounts to an admission of execution by Tha Kun of the mortgage deed. There is no denial of execution, and paragraph (2) of their written statement amounts to a plea that the mortgage has been satisfied, while paragraph (3) disputes, not the factum of the mortgage, but the amount due.

Defendants 2 to 5 admittedly have no interest in the land described as A and therefore, as between them and plaintiffs, it is unnecessary to decide whether this land was the land mortgaged by Tha Kun. The only relief which plaintiff can get against them is a money decree.

As regards the identity of the land described in paragraph (1) (a) of the plaint with the land said to have been mortgaged by Tha Kun, the burden of proof was on plaintiffs. The land as described in the mortgage deed was one holding of land situated in Kyonwa *kwin* measuring 73 acres, bounded—

North.—by Po Thaung.

South.—Kyonwa.

East.—Thameintaw.

West.—Tha Maung.

The land (a) is situated in Kyaikkaba *kwin*. It is alleged that Kyaikkaba *kwin* was formerly known as Kyonwa *kwin*, but there is no proof of

this. The map, exhibit B, which plaintiff filed was not originally attached to the registered deed and appears to have been tampered with. The maps which Ma Kun filed in Civil Regular No. 122 of 1903 show that, even at settlement in 1889-90, the *kwin* in which the land she claimed was situated was known as Kyaikkaba *kwin*. The area of this holding at settlement appears to have been 62 acres and in 1902-03 to have been 70.33 acres.

And the area in the tax receipt which plaintiff filed (exhibit D) for the year 1892-93 was acres 62.15. The area can hardly have been changed from 62.15 acres to 73 acres between March 1893 and the date of the mortgage September 1893. We have also the admission of plaintiffs' advocate that the land mortgaged by Tha Kun is not the land A; this is an admission on a question of fact which is relevant against plaintiffs under section 21 of the Evidence Act.

I therefore agree with the Judge of the District Court in finding, that it is not proved that the land described in the mortgage deed is the land (A) over which a mortgage decree is claimed. Upon this finding I think it follows that plaintiffs are entitled to no relief against defendants 6 to 11, namely, Ma Kun and other legal representatives of U At Gyi. There is no proof that U At Gyi ever agreed to hold himself personally liable for the payment of the debt secured by the mortgage deed.

As regards defendants 2 to 5, I think the only point for determination is the amount due under the deed.

The mortgage bond, dated 20th September 1893, secures a principal sum of Rs. 2,686 with interest at 3 per cent. per mensem.

Maung Po Lu, in Civil Regular No. 122 of 1903, made the following statement.

"In 1262 he made over these pieces of land in satisfaction of principal and interest due upon the bond. I do not quite remember what was the actual amount due, but it was I think, Rs. 3,000 and odd \* \* Ko Kan Gale, Po Aung and Maung Paing were present when Tha Kun made over the land."

In that case he called Ko Kan Gale and Maung Paing, who both swore that the land was made over for Rs. 3,000 or 3,000 to Rs. 4,000.

In the present suit plaintiffs call neither of the three witnesses then said to have been present.

Po Lu himself tries to explain away his former statement by saying that he referred in the former case to principal only.

But the principal due was not Rs. 3,000 odd but Rs. 2,686, and from the context it is clear that he was referring to the whole amount then due on the bond, interest included. I hold therefore that the amount due on the bond at the time the lands were made over was Rs. 3,000, and for this amount the legal representatives of Tha Kun are liable jointly with Po Lu.

Plaintiffs have got an *ex parte* decree against Po Lu, ordering the sale of the land B for this amount and making Po Lu personally liable for the deficiency if any.

I think that plaintiffs are entitled, in addition, to a decree against respondents 1 to 4 (originally defendants 2 to 5) as legal representatives of deceased, Tha Kun, making them liable to the extent of the estate left by deceased Tha Kun for the deficiency, if any, after the sale of the land, described in paragraph (1) (b) of the plaint, for the sum of Rs. 3,000 due thereon under the mortgage deed, exhibit A.

I would therefore dismiss this appeal as against respondents 5 to 10 inclusive and order appellants to pay their costs throughout.

I would give appellants a decree against respondents 1 to 4 in the terms above indicated, and as this will in effect restore the decree of the Judge of the District Court, dated 12th November 1904, I would not allow appellants any costs against respondents 1 to 4.

*For, C. J.*—I concur.

IN THE CHIEF COURT OF LOWER  
BURMA.

CIVIL SECOND APPEAL\* NO. 139 OF 1906.

Ma Thai Hnit ... .. Appellant,

vs.

Yup Shaung Ngaw ... .. Respondent.

BEFORE MR. JUSTICE MOORE.

Dated 22nd August 1907.

For Appellant.—Dantra.

For Respondent.—Lentaigne.

*Oral Evidence to show vendee in deed only agent—admissibility of—Evidence Act, section 92—admissibility of agreement between party to suit and third party—Evidence Act, sections 21 (i), 32 (vi), 32 (ii) read with 13 (a).*

Section 92 of the Evidence Act does not preclude oral evidence to show that the vendee in a deed of sale is not the real vendee but only an agent of the person claiming to be the real vendee; and such evidence is admissible.

An agreement between a party to a suit and a third party, if it is relevant to a fact in issue, is admissible in evidence under sections 21 (i) and 32 (ii) or 32 (vii) read with section 13 (a) of the Evidence Act.

Respondent Yup Shaung Ngaw is the legal representative of original plaintiff Tan Kyu Wan. The latter sued appellant for a declaration of his title to a piece of garden land and a house built thereon.

Appellant Ma Thai Hnit is the mother of Tan Kyu Wan's wife, Ma Pu. The garden land in suit admittedly originally belonged to Saya Ko and Ma Hnya and was bought from them for Rs. 500. It is common ground that Ma Thai Hnit's name was entered in the conveyance as the vendee. Tan Kyu Wan's explanation is, that he was ill at the time and so authorised his mother-in-law

to buy this land for him. Ma Thai Hnit, on the contrary, alleged that she bought the land on her own account. It has been argued that, because Ma Thai Hnit is entered in the sale deed as the purchaser, oral evidence is not admissible to prove that the real purchaser was Tan Kyu Wan, and section 92 of the Evidence Act has been referred to in support of this contention. Section 92 of the Evidence Act in my opinion cannot exclude such evidence. The evidence is not to contradict or vary the terms of the document but to show that Ma Thai Hnit, in that transaction, acted merely as the agent and representative of Tan Kyu Wan.

The ground of appeal, that the suit was not maintainable, was not pressed. Both the lower courts have found that Tan Kyu Wan was in possession when he filed this suit.

The fourth ground, that the lower courts erred in law in admitting evidence to contradict the vendor of the land and erred in law in disbelieving him, does not merit discussion.

The only other question of law raised before me was as to the admissibility in evidence of exhibit D.

This is an agreement between Tan Kyu Wan and a carpenter for the construction of the house in suit and it contains an assertion that the land belongs to Tan Kyu Wan. I am of opinion that this recital was admissible in evidence under sections 21 (i) and 32 (ii) or 32 (vii) read with section 13 (a) of the Evidence Act. No other point of law has been raised.

I therefore confirm the judgment and decree of the lower court and dismiss the appeal with costs.

\* Appeal from judgment of David Wilson, Esq., Divisional Judge of Hanthawaddy, in Civil Appeal No. 19 of 1905, against the decree of the Subdivisional Court of Twante, in Suit No. 41 of 1905.

IN THE CHIEF COURT OF LOWER  
BURMA.

CIVIL REVISION\* NO. 96 OF 1906.

Mahomed Sultan ... .. Applicant,  
vs.  
Sithambaram Chetty and two ... Respondents.

BEFORE SIR CHARLES E. FOX, KT., C.J.

Dated 13th May 1907.

For Applicant.—N. M. Cowasjee.

Debtor and creditor—composition of debts—reservation of debt unknown to other creditors—suit to recover it not maintainable.

A creditor who is a party to a composition entered into by a debtor with his creditors cannot afterwards sue the debtor for a debt not included in the composition unless he proves that such debt was excluded from such composition with the knowledge of the other creditors.

Followed: Britten vs. Hughes. 5 Bing. 469.

The suit was for the amount due on hundis made in favour of the applicant and discounted with the plaintiff. The applicant set up that the plaintiff had been a party to a composition deed by which he agreed to accept 8 annas in the rupee in satisfaction of the amount due to him by the applicant. The plaintiff said he agreed to accept such composition in respect of Rs. 10,000 due upon a promissory note, but he did not so agree in respect of the hundis sued on. He did not say that he had made this reservation of debts known to the other creditors.

The principle laid down, in Britten vs. Hughes, (1) applied, and the plaintiff could not recover the hundis.

The decree of the Small Cause Court against the fourth defendant, Mahomed Sultan, is reversed, and the suit is dismissed as against him with costs.

The plaintiff must also pay the applicant's cost of the application two gold mohurs allowed as advocate's fee.

\* From judgment of A. H. Bagley Esq., Judge of the Court of Small Causes in Civil Regular No. 596 of 1906.

1 (1829) 5 Bingham, 460

IN THE CHIEF COURT OF LOWER  
BURMA.

CIVIL MISCELLANEOUS APPEAL\* NO. 24 OF 1907

Cecilia King and two ... .. Appellants,  
vs.  
Arthur Abrew and two ... .. Respondents.

BEFORE SIR CHARLES E. FOX, KT., C. J.

Dated 13th August 1907

For Appellants—Lentaigue.

Probate proceedings not a bar to an application to revoke probate—section 234, Succession Act—not fettered by section 13, Civil Procedure Code.

The right of applying for revocation of probate granted by section 234 of the succession Act is not in any way fettered by section 13 of the Civil Procedure Code, or by the application of a rule adopted in the English Courts:

*Distinguished*: Pitamber Girdhar's case. (1881) I L.R., 5 Bom. 638; Komullvehun Dutt vs. Nilruttun Mundle, (1878) I.L.R. 4 Cal. 360.

Dissented from: Brinda Chowdrain vs. Radheind Chowdrain (1885) I.L.R. 11 Cal. 492. Nistarina Dabya vs. Brahmomoyi Dabya (1890) I.L.R. 18 Cal. 40.

*Discussed*: Bhuggobuthy Dasi (1900) I.L.R. 27 Cal 927.

This is an appeal from an order dated the 7th December 1906, made in what was originally a suit, but was allowed to be amended to an application to revoke probate of a will under section 234 of the Indian Succession Act.

The District Judge dismissed the application on the ground that the matter involved in it was *res judicata* by reason of the decision in the proceedings in which the will was proved. The only question before us is, whether the decision appealed against was right. The respondent applied on the 28th March 1906 for probate of the will of James W. De Roche to the appellants who opposed the grant. The case was set down for hearing and was dealt with as a contentious matter under section 261 of the Act. The appellants objected to the grant of probate on the ground that the will had not been duly

\* Appeal from order of G. Scott Esq., District Judge, Amherst. Thaton in iv. Reg. No. 229 of 1906.

executed by Jamrs De Roche. They further alleged that, when he was said to have executed the will he was, by reason of sickness, unconscious of what he was doing and incapable of understanding, and of speech. The issues framed were—  
 (1) was the will executed by the deceased?  
 (2) If so, was the execution valid?

The respondent gave evidence himself and called witnesses who were cross-examined. The appellants also adduced evidence. The District Judge found that the will had been executed by James De Roche and that the execution was valid. He ordered that probate of the will be granted to the respondent. Probate was issued to him on the 20th July 1906. On the 24th of the same month the appellants presented an application for review of judgment on the ground that they had discovered fresh evidence which, if taken, would throw a different aspect on the merits of the case. This application was rejected on the 16th August 1906.

The suit which was allowed to be amended to an application under section 234 of the Succession Act was filed on the 22nd August 1906. It purported to be a suit to revoke the probate on the ground that the will had been obtained by undue influence exercised over the testator by the respondent. This ground was not set up at the hearing of the application for probate, but the facts on which it is based were the same as those on which the application for a review of judgment was made, and the just cause relied upon as ground for revoking the probate was, that it had been obtained by concealing these facts which were said to be material to the case. The learned Judge, in his order, says, that the grounds on which grant of probate was opposed were exactly the same as those on which the application for probate was based. This does not appear to me to be quite correct. The grounds on which the application for probate was opposed were, that the alleged testator had not executed the will, but if he had done so, it was not valid on grounds which would be covered by section 46 of the Act. I cannot find that grounds covered by section 48 of the Act were set up or considered in connection with the will or the grant of probate.

What the appellants sought in their latest proceeding was apparently revocation of the probate on the ground that the will was void

under this last mentioned section, and they relied on facts which they said they had discovered after the order granting probate. The question arises whether they are entitled to be heard upon an application for revocation based on such ground. If section 13 of the Civil Procedure Code applied, they might not be, for the question of the will being void under section 48 of the Act, was a matter which might have been made a ground of defence in the proceeding to obtain probate.

In none of the cases in which parties who have appeared as have had notice of such proceeding have been held not entitled to raise, on an application for revocation questions which might have been raised on the former proceeding, do I find that section 13 of the Civil Procedure Code has been applied. In Pitamber Girdhar's case (1) it was said that the rule in England was clear that, when once probate in solemn form has been granted, no one who has been cited or who has taken part in the proceedings or who was cognizant of them, can afterwards seek to have it cancelled. This rule was held applicable in a case which arose in Bombay because "by the rules of the Supreme Court which was succeeded by the High Court, the practice of the Ecclesiastical Court of the Diocese of London is adopted in this Court with respect to Probates and Letters of Administration, or as near there to as the circumstances of the country permit." In Komullvehun Dutt vs. Nilruttun Mundle (2) it was said that the duty of the judge, upon an application being made under section 234 of the Succession Act, somewhat depends upon what has passed on the previous grant of probate \* \* \* but a discretion is left to the judge. Where there had been already full enquiry as to the genuineness of the will, the judge would probably take, as he would have a right to take, the previous grant of probate as *prima facie* evidence of the will, and so shift the onus on to the objector. The report of the case does not show whether the objector to the will or his predecessor in title has been cited on the application for probate. The observations of the learned judges upon the procedure for obtaining a revocation of probate were, on the face of them, *obiter dicta*, and in this case also reference

(1) (1881) I. L. R., 5 Bom. 638.

(2) (1878) I. L. R., Cal. 4 360.

was made to the English practice and nomenclature of proof of a will in common form and proof in solemn form. In *Brinda Chowdhraïn vs. Radheïn Chowdhraïn* (3) the view of Markley, J., in the last cited case, as to the object of section 234 of the Succession Act was concurred in, and it was also said that if it appeared the applicant had had notice before the grant of probate issued, and had abstained then from coming forward, this would constitute a ground for refusing to allow her to interfere, unless, perhaps, it were made out that the circumstances leading her to believe that the will was not genuine had not come to her knowledge until after the grant of probate. The first part of this enunciation was based on the practice of the English court: the last part must have been the outcome of the learned judge's sense of justice in face of the injustice which the rule in England might entail if carried out under all circumstances. In *Nistarïnay Dabya vs. Brah-momoyi Dabya* (4) the last quoted observations were concurred in. The case was one for revocation of probate, but the grounds relied upon for revocation not having been made out, it was contended that the applicant was at least entitled to ask the executrix to prove the will in solemn form in her presence as she neither appeared nor had she been specially cited to appear in the proceedings for obtaining probate. This contention was held not to be well-founded.

In the case of *Bhuggobuthy Dasi*, (5) the English rule stated in *Pitamber Girdhar's* case was referred to, but was not strictly followed, the objector, who was cognizant of the previous proceedings, having been allowed to proceed with his objections if he satisfied certain conditions. In none of the above cases was the decision based on section 13 of the Civil Procedure Code applicable. They were influenced greatly by the practice of the English court.

The Indian Legislature had not laid down that the courts are to follow or be guided by such practice, and to my mind an application under section 234 of the Indian Succession Act stands on the same footing as any other permissible application. It must be received, heard and determined. It cannot be supposed that when the Legislature adopted section 234 it forgot

that, upon the proceeding for obtaining probate it had provided means for any one objecting to a will to come forward then and have his objection heard, yet it has not provided that any one who has once opposed probate of a will shall not be at liberty to apply for revocation of the probate if granted. There appears to me to be strong reasons for not adopting the rule stated in *Pitamber Girdhar's* case. Under section 258 of the Succession Act, probate may not be granted until after seven clear days from the day of the testator's death, but it may be granted at any time after the seven days. Assuming the case of an executor having fraudulently obtained a will to be executed, or setting up a false will which benefits him, it is open to him to apply for probate immediately after the death of the person whose will he asks probate of. Even if citations issue to the relatives of the deceased, it is conceivable that they may be deceived at the time as to the will being genuine, and that knowledge of the true facts in regard to the will may not come to them within the time allowed to them to appear and oppose the grant of probate. If they obtain knowledge of some facts, they may not acquire knowledge of all, and they may be led into opposing probate on insufficient grounds when, if they had sufficient time and opportunity for acquiring information and evidence, they might be able to make out a case for not granting probate. It seems to me that the Indian Legislature has provided a remedy for such a case in section 234 of the Succession Act, and as the Legislature has not fettered the right of applying for revocation of probate in any way, I do not think the courts are at liberty to put any fetters on such right by applying to it a rule adopted in the English courts, or section 13 of the Code of Civil Procedure.

As a safeguard against possible frauds not easily detected, it appears to me that it is of the highest importance that the relatives of an alleged testator should have the fullest opportunity which they can be given under the law for testing the genuineness and the validity of a will set up against them. I express no opinion on the merits of the present case. I think the appellants were entitled to have the evidence they wanted to produce taken and to an opportunity of making out a case for revocation of the will. I would set aside the order of the District Court appealed against, and would

(3) (1885) I. L. R., 11 Cal. 492.

(4) (1890) I. L. R., 18 Cal. 45.

(5) (1900) I. L. R., 27 Cal. 927.

remand the case with a direction to the court to take such evidence as may be produced by the parties and to decide the case on the merits. I would make no order as to the costs of the appeal.

Moore, J.—I concur.

IN THE CHIEF COURT OF LOWER  
BURMA.

CRIMINAL APPEAL\* NO. 331 OF 1907.

Nga Ba Thein vs. King Emperor.

BEFORE SIR CHARLES E. FOX, KT., C.J., AND  
MR. JUSTICE MOORE.

Dated 27th June 1907.

For Appellant.—Oung and Oung.

For Respondent.—Government Advocate.

Dying declaration—section 32. Indian Evidence Act—cautions to be observed in admitting.

In considering the weight to be attached to dying declarations it is necessary to bear in mind three things.

- (1) The danger of perjury in fabricating declarations, the truth or falsehood of which it is impossible to ascertain.
- (2) The danger of letting in incomplete statements.
- (3) The experienced fact that implicit reliance cannot in all cases be placed on the declaration of a dying person.

Against conviction under section 302, Indian Penal Code.

*Per Fox, C. J.*—The conviction is based upon the declarations of the deceased that it was the appellant who struck him. The question is whether those declarations were founded upon actual knowledge, or guess or deduction from other facts.

There is no question as to the deceased having met the accused in the Shanzu village not long

\* Appeal from the sentence passed by G. F. S. Christie, Esq., Sessions Judge of Tenasserim Division in Sessions Trial No. 26 of 1907.

before the assault. The deceased in his deposition said he had not spoken with the accused then. The accused says they had a conversation. The deceased said that he met the accused again in front of the cart toll collector's shed at Teik In village and there accused spoke to him telling him that he was going to Myenigon to give information about the death of his sister. They went along a short way together, and then the accused struck him with something. He thought the accused had been hired to beat him. The accused denies the second meeting. No doubt, if the deceased's statement as to the conversation with the accused, whilst going along the road, is correct, *prima facie* he could scarcely be mistaken as to the identity of the man who struck him. The statement however involves very strange conduct on the part of the accused. One would have thought that the very last thing he would have done would be to disclose his identity, and that if he had done so, he would have taken care to kill outright, as he had ample opportunity to do, no one being near at the time. Against the deceased's declarations is the evidence of a number of witnesses that the accused was taking a leading part in the funeral arrangements consequent on his sister's or cousin's death, and that he did not leave the funeral house or party and so could not have been the man who cut the deceased. The learned Sessions Judge disbelieved four of these witnesses for five reasons. The first was that their manner in the witness box led him to think they were lying. The learned Judge did not make any remarks as to their demeanour upon their depositions. A judge who hears evidence given has, of course, a great advantage over one who does not; impressions induced by the manner of a witness are sometimes mistaken.

His second reason was that it was not likely that, with such a crowd of persons as were at the funeral, they would have been able to keep their eyes glued on to the accused, for no reason at all, for four hours. This is no doubt correct, but the witnesses scarcely say that they kept their eyes glued on the accused. They say that he was taking a prominent part in the funeral arrangements and that he did not disappear.

The third reason is that, if they had the knowledge they claim, they would have come forward at once, as soon as the accused was arrested, and told the police or the magistrate that they knew the accused could not be the

guilty person. As far as my experience goes, it would not be somewhat unusual if they had done so, but it appears from the evidence of the Sub-Inspector before the Committing Magistrate, that on the day after the deceased was assaulted, he had examined five of the defence witnesses who told him that the accused had not gone anywhere from 5 p.m. until he was arrested. It is true that only one of those examined by the Sub-Inspector was examined in the Sessions Court, but all were among the defence witnesses summoned.

What the defence was to be must have been perfectly well-known to the police on the day after the offence was committed.

The fourth reason was, because they were not mentioned in the Magistrate's court, and have avoided as far as possible any cross-examination by only coming forward with their evidence at the last minute. This cannot be correct, because the list of defence witnesses was sent up by the Committing Magistrate, and they must have been summoned by him. Further, the Committing Magistrate recorded that the accused's advocate had asked that the defence witnesses should not be examined before committal and the Magistrate apparently acceded to the request. The learned Judge's fifth reason was, because evidence of the kind is so easy to concoct and so difficult to refute. This reason would apply to any evidence of an *alibi*, however strong it might be, and might be used as an argument for rejecting all evidence of the sort. This would not be justifiable.

The evidence of an *alibi* in this case seems to me to be fairly strong. It is in the first place natural that the accused should have taken a leading part in the funeral arrangements on his relation's death. His choosing of such an occasion for carrying out a plan to murder an obnoxious headman would be scarcely natural. He could not be certain that he would catch the headman alone on his homeward journey, and unless he had a probable chance of meeting him alone, there could have been no strong inducement to leave the gathering from which he might be missed by some one who would betray him.

The theory of the prosecution must be that he got ahead of the headman by going along some

route other than the high road, he must in all probability have been seen by the witness Po Han. Neither in his deposition or in what he said to the Sub-Inspector does the deceased appear to have said how it was that he knew that the man he met in front of Ko Kaw La's house was the accused. It is possible that the man gave the accused's name, but was not the accused. That the *accused* should have said that he was going to Po O's house in Myenigon to give the news about his sister's or cousin's death is strange, seeing that Po O of Myenigon was at the funeral, and if he was a relation or friend, he would probably have heard of the death long before the burial of the body was over. There evidently could not have been much moonlight at the time the two met, and there were no artificial lights about, by which the headman could recognize the man he met.

In the ordinary course there would be no reason for the headman taking particular notice of any one he met going along the road, and if such a man gave a name of another man, the headman would naturally take him to be that man. Mr. Taylor\* states that, the reason for restricting (in England) the admission of dying declarations to cases of homicide may be,—first, the danger of perjury in fabricating declarations, the truth or falsehood of which it is impossible to ascertain,—secondly, the danger of letting in incomplete statements, which, though true as far as they go, do not constitute "the whole truth,"—and, thirdly, the experienced fact that implicit reliance cannot in all cases be placed on the declarations of a dying person. Messrs Amir Ali and Woodroffe, in their notes on section 32 of the Evidence Act remark that this kind of evidence has been found to be on the whole useful and necessary, but the caution with which it should be received has often been commented on.

It appears to me that in the present case we have certainly *bonâ fide* declarations of a man who was killed, that it was the accused who struck him, but one of the dangers in accepting such declarations, adverted to above, is present, namely, the declarations are incomplete in so far as they contain no statement as to how the deceased recognized the accused, and consequently no absolutely convincing statement showing that the deceased could not have been mistaken.

In view of this, and of what I regard as fairly strong evidence to show that the accused could not have been the man who struck the deceased I would not uphold the conviction, and I think the accused should be acquitted.

Moore, J.—I concur.

IN THE CHIEF COURT OF LOWER  
BURMA.

CRIMINAL APPEAL NOS. \*370 & 373 OF 1907.

Nga Shan Byu, Nga Tun Hlaing and one *vs.* King  
Emperor.

Against convictions under Sections 394-397 and 411,  
Indian Penal Code.

BEFORE MR. JUSTICE W. HARTNOLL.

Dated, 12th July 1907.

For Appellant—Hla Baw.

*Confession partially retracted—rejected if circumstances point to probability of inducement by police officers.*

A partially retracted confession will be rejected where the circumstances seem to point to the fact that it is very probable the accused was told by a responsible police officer it would be good for him to confess and hand up the booty, and where the preliminary examination by the magistrate recording the confession was very bald and short.

Nga Tun Hlaing and Na Ka have been convicted under sections 394 and 397, Indian Penal Code, of voluntarily causing hurt in committing robbery and using a deadly weapon at the time and sentenced to seven years transportation. Maung Shan Byu has been convicted under section 411, Indian Penal Code, with the dishonest reception of stolen property stolen in the aforesaid robbery.

\* Appeal from the order of Maung Po Sa, Esq., Special Power Magistrate, Hanthawaddy, dated 13th May 1907, in his Criminal Regular Trial No. 14 of 1907.

Against the convictions the three men appeal. It is proved that on the night of the 23rd October last four robbers entered the house of one U Lu Gale at Tada village and forcibly stole from him silver and gold monies, currency notes and jewelry approximating in value to Rs.1,21,000 in value. The robbers are shown to have caused hurt, but not to any great extent, and to have been armed each with a dah. Report was made to the police and investigations commenced. One Tun Myat was called by the police on the 29th October and taken by them to one Maung Po Thaung, headman of Kadapanna, who was requested to examine him with a view to get information out of him. In consequence of a certain statement that he made, on the 30th October he was taken to Tagundaing where he had an interview with his uncle Maung Shan Byu and where on his information a tank was searched but with no result. Subsequently one Chit Twa was also called and subjected to examination by Maung Po Thaung, and on the night of the 1st November Maung Chit Twa made a statement and pointed out two jars out of which currency notes to the value of Rs. 22,540 were taken. Maung Tun Myat's confession was recorded by the Subdivisional Magistrate on the 31st October and Maung Chit Twa's confession was recorded by the same officer on the 2nd November. Both these men were convicted of the robbery on the same trial with appellants. Their confessions both implicate Tun Hlaing and Nga Ka, and that of Chit Twa's certainly implicates Shan Byu. The Convicting Magistrate took the confessions into consideration against the appellants at the trial. It is argued in the appeal that they should not have been so taken into consideration as the facts show that they were not voluntary and, further, that they were retracted at the trial. They were partially retracted, as Chit Twa and Tun Myat denied making them, though, at the same time, they said that they thieved at the house of U Lu Gale. I have given great consideration to the matter of these confessions, and whether they should be taken into consideration against the appellants or not, I have come to the conclusion that I should not do so. There is nothing directly put into evidence that Tun Myat or Chit Twa were ill-treated or induced to make them, and it may be true that they are perfectly true as regards the appellants; but, when I consider the circumstances under which that of Tun Myat especially was made, it seems to me that I should not be exercising a sound judicial discretion in admitting

them. It is said that Tun Myat was not arrested until the 1st November; but at the same time he was under police supervision from the 29th October. In a robbery of such magnitude the police must have had the greatest desire to recover some of the stolen property and, naturally so. Sub-Inspector Maung Tun Win in his evidence said that he took Maung Chit Twa to the Subdivisional Magistrate at once because he said he would point out the place where he had hidden the property but he did not take Tun Myat at once to the Sub-divisional Magistrate because he made no mention of his intention to point out any stolen property. Though Maung Po Thaug does not say that he induced and threatened Tun Myat, he states that he told him he must be concerned from information recorded against him. Why was Tun Myat allowed to be at large and not under proper arrest for two days after he made his statement? Similarly, with regard to Chit Twa, Po Thaug says that the examination commenced in the morning and it was in the afternoon that he gave his confession. The circumstances seem to me to point to the fact that it is very probable the two men were told that it would be good for them to confess and hand up the booty, and the question is whether this inducement was removed when the Subdivisional Magistrate recorded their statements. A perusal of their preliminary examinations by the Subdivisional Magistrate does not lead me to think, that, if they had any inducement operating on their minds, it was removed then. Their preliminary examination was very bald and short. I must reject the confessions, therefore, on the ground that it is not at all improbable that when they were made, the men making them may have expected to receive some advantage in these proceedings, which inducement emanated from responsible police officers. We are left with the other evidence. As regards Maung Tun Hlaing, it is clear that after an interview with him his wife went to her house and produced one of the robbed rings from it and that she then went to one Maung Pan's house and from there produced currency notes to the value of Rs. 9,000. She says, that she found them in a heap of rubbish at the foot of a tree were Tun Hlaing told her the things were; but this is evidently an untrue statement. Maung Tun Hlaing states that he found them in the pocket of his coat, does not know who put them there, and went and put them in a rubbish heap. This story does not

agree with the true facts. He therefore fails to satisfactorily account for these things. He tries to prove an *alibi*; but I am of opinion that he has not succeeded in doing so. The property produced by his wife was in his possession very shortly after the robbery and it seems to me clearly proved that he was one of the robbers. I accordingly dismiss his appeal.

As regard Maung Ka, the evidence against him is that his wife, undoubtedly after seeing Tun Hlaing, stated that the field behind his house should be searched and, in consequence thereof, it was searched and a considerable amount of the stolen jewelry was found in it. It is endeavoured to put in evidence a former statement of Maung Ka's wife; but she denies this statement now and says that it is not true. In the absence of Ma Yin, his wife now making it at the trial the only evidence against him is that a considerable amount of the stolen jewelry was found close to his house. This is hardly sufficient to convict him, though there is grave suspicion against him.

I accordingly set aside his conviction and sentence and direct that he be acquitted and, as far as this case is concerned, he be set at liberty.

As regards Maung Shan Byu, there is the fact that he handed up certain of the properties. By his counsel he tells me, that Maung Tun Myat told him where the things were and so that he handed them up. His petition of appeal is different. In it he says that he did not know anything about the stolen properties, that he did not point out the place where the properties were concealed, and that the police only stated that he pointed out the place. This diversity of statement must go against him. Moreover, there is the fact that, when he handed up the Rs. 1,401, he said that he had buried it. This statement is relevant under section 27 of the Evidence Act against him. His guilt seems to me to be proved and I accordingly dismiss his appeal.

IN THE CHIEF COURT OF LOWER  
BURMA.

CRIMINAL APPEAL\* NO. 442 OF 1907.

King Emperor vs. Nga Po Saing.

BEFORE SIR CHARLES E. FOX, KT., C. J.

Dated 26th August 1907.

For Appellant.—G. A. and Eddis.

For Respondent.—Pennell and Lambert.

*False trade mark—uses of—disused tins slightly altered and labelled—section 480, Indian Penal Code—presumption of intent to defraud.*

Where a private refiner of illuminant kerosine oil placed his refined illuminant oil in tins prominently bearing the trade mark of a company's illuminant kerosine oil but removed the handles and caps from the company's disused tins and substituted his own handles and caps, and placed paper labels on the tins to indicate that the illuminant oil sold was his own illuminant oil,—not the company's it was held that he was guilty of using a false trade mark and liable to be punished for an offence under section 480 of the Indian Penal Code unless he proved that he had no intention to defraud.

Where it is proved that an accused person has used a false trade mark it must be presumed, until the contrary be proved, that he had an intent to defraud.

Followed: Muri Chand vs. Wallace (1907) 1 L. R. 34 Cal. 495.

The respondent was prosecuted and charged with having used a false trade mark—not a false property—mark as stated by the District Magistrate.

He has a small refinery near Prome and refines an illuminant oil from crude petroleum. This refined oil he put into tins which had been issued by the Burma Oil Company filled with illuminant oil refined by it.

The tins issued by it bear one or other of its trade marks, and the name of the company prominently embossed on them. A buyer buys the tin as well as the oil in it.

\* Appeal from the order of acquittal passed by H. S. Pratt Esq., District Magistrate, Prome, reversing the sentence passed by Maung Gale Esq., Township Magistrate, Prome.

All that the respondent did, before issuing oil refined by him in such tins, was to take off the handles and replace them with handles not bearing the Company's name, to change the caps and to affix a paper label with words denoting that it was oil manufactured at a Prome refinery.

The respondent was convicted by the Magistrate by whom he was tried, but was acquitted on appeal by the District Magistrate. This is an appeal directed by the Local Government against such acquittal.

The District Magistrate held that it was quite clear that the respondent had no intention to pass off his oil as oil manufactured by the Burma Oil Company. He apparently formed this conclusion from the fact that his oil was sold in old tins which had been altered to some extent, and that he affixed paper labels to the tins to show that the tins contained his oil and not the Company's oil.

The part of section 480 of the Indian Penal Code applicable to the case is as follows:—

“Whoever uses any case, package or other receptacle with any mark thereon reasonably calculated to cause it to be believed that any goods contained in such receptacle are the manufacture or merchandise of a person whose manufacture or merchandise they are not is said to use a false trade mark” Section 482 of the Code provides that whoever uses a false trade mark shall be punished unless he proves that he acted without intent to defraud.

These provisions of the law were enacted for the protection of trade marks. A trade mark is adopted with a view to showing that the goods to which it is applied are the manufacture or merchandise of the person who has adopted it. It affords a ready means of distinguishing one person's manufacture or merchandise from another's; and it is well known that in Eastern countries especially a person's or firm's goods or manufacture may acquire and retain great reputation by reason of their bearing a particular trade mark, although buyers of the goods may not know the name of the manufacturer or of the person who owns the trade mark. It is not essential that this should be known. The first question in the case is—whether the issue by the respondent of his illuminant oil in tins bearing

the Burma Oil Company's trade mark was reasonable calculated to cause it to be believed that the oil contained in the tins was illuminant oil manufactured by the Company. In considering this question, the fact that traders in such oil, or even wary purchasers, would not be likely to believe that oil sold in old tins with clumsy handles and caps was the Company's oil, is immaterial. Adopting the rule stated in *Muri Chand vs. Wallace*, (1) what has to be considered is whether the sale of the respondent's oil in tins bearing the Company's trade marks is calculated to deceive the incautious, ignorant or unwary purchaser.

The question is not to be confined to buyers by the tin; the possible belief of buyers by the bottle, cup or other small measure, on seeing oil drawn from a tin bearing a trade mark, must be considered.

Nothing could be more calculated to lead an ignorant or unwary purchaser, who asks for oil by the name which a trade mark has acquired to believe that he is getting the oil which he wants than to have a tin bearing the trade mark offered to him or to see the oil offered him drawn from a tin bearing the trade mark. There can, in my opinion, be no doubt that in putting his illuminant oil in tins bearing the Company's trade mark used for their illuminant oil, and by letting his oil go out from his refinery in such tins with the knowledge that his oil would be sold in or from such tins, the respondent brought himself within the words of section 480 of the Indian Penal Code. Consequently he was liable to punishment under section 482 of the Code, unless he proved that he acted without intent to defraud. The effect of this section is that, when it is proved that a person has done an act covered by section 480, it is to be presumed that he did the act with intent to defraud unless he proves the contrary.

The words "with intent to defraud" are very comprehensive, and comprehensive wordings must have been purposely adopted, for it can rarely if ever happen that the buyer direct from a manufacturer or merchant is deceived as to a mark or goods being a genuine trade mark, or being legitimately applied to goods

The fraud committed by any one who knowingly applies to his goods the trade mark or a colourable imitation of the trade mark of another is of two kinds. He fraudulently attempts to obtain for himself some of the benefit which the owner of the trade mark is entitled to, and he commits a fraud on the public by enabling others to sell his goods to the public on the misrepresentation that they are the goods properly sold with the trade mark. In the present case the respondent must clearly have had in his mind the possibility of his oil in the tins in which he issued it being taken to be the Company's oil: otherwise there was no meaning in his changing the handles and caps and putting on a label. No one could reasonably suppose that the minor alterations of the handles and caps would effectually distinguish one manufacture of oil from another manufacture. It must have been apparent to the respondent that his paper labels gummed on the tins could be easily removed from them even if they did not come off in the course of transport. But even if he was such a simpleton as to believe that he was effectually distinguishing his oil from the Company's oil by the measures he adopted, the fact remains that he issued his oil in tins bearing the Company's trade marks very prominently shown on the tins, and he must have known that those trade marks were the property of the Company and that they were adopted by it to distinguish its oil from other manufactures of oil. He must have seen that the trade marks were the most prominent marks on the tins and the most likely marks to attract the eyes of purchasers and to lead them to believe that the oil in the tins was oil manufactured by the owner of the trademark.

Under the circumstances I find it impossible to hold that the respondent proved that, in using tins bearing the Company's trade marks, he acted without intent to defraud. I accordingly set aside the District Magistrate's order of acquittal and find the accused guilty of an offence punishable under section 482 of the Indian Penal Code.

The case being the first in which the Company has prosecuted any one for using tins bearing their trade marks unlawfully, I do not think that a severe punishment is called for. The sentence on the respondent is that he pay a fine of rupees fifty or, in default, that he suffer seven days' rigorous imprisonment. This sentence must not

(1) (1907) I. L. R., 34 Calo. 495.

be taken as a criterion of what sentence should be passed if the illegal use of the tins in question is repeated, or of how the infringement of any other trade mark should be punished.

Lest there should be any misapprehension as to the effect of this judgment in connection with the use of old oil tins bearing a trade mark, I will add that an oil tin may be used for any purpose and for selling anything in except the particular oil in this case illuminant kerosine oil for which the owner of the trade mark has adopted the mark on it.

IN THE CHIEF COURT OF LOWER  
BURMA.

CRIMINAL APPEALS\* NOS. 455 AND 456 OF 1907.

Nga Kyaw Gaung and three vs. King Emperor.

BEFORE MR. JUSTICE MOORE.

Dated 28th August 1907.

*Confessions retracted—no direct evidence but suspicions of ill usage—admissibility of—probative value—necessity of external evidence pointing to truth.*

Where confessions are retracted it being alleged that they were made in consequence of ill-usage and there is no direct evidence of such ill-usage, the confessions are legally admissible, but where there are circumstances which afford grounds for viewing the confessions with suspicion, they must be received with great caution.

Where an accused person confesses under suspicious circumstances his confession cannot be accepted against himself in the absence of external evidence pointing to its truth.

Where the Sessions Judge omits to record the finding of the assessors as to the guilt or innocence of the accused, a retrial will be ordered.

*Against conviction under section 395, Indian Penal Code.*

Nga Kyaw Gaung, Po Hnan, Po Si and Nga Pule, appellants, have been convicted of dacoity. The evidence against them consists of—(i) confessions by Po Hnan and Nga Pule, both retracted; (ii) evidence of identity.

As regards the confessions I have to consider, *firstly*, whether they are admissible, *secondly*, what is their probative value—

- (a) against the persons who made them.
- (b) against co-accused.

It is objected that the confessions are inadmissible, because they are both recorded in narrative form and not as required by section 364, Criminal Procedure Code, in the form of question and answer.

This irregularity, if it is one, could have been cured by examining the Magistrate who recorded the confessions.

I am not satisfied however that the alleged irregularity exists. It is not evident that any questions were put which have not been recorded.

The confessions are further objected to on the ground that they were obtained by improper means. Both Nga Po Hnan and Nga Pule complain that they were beaten and otherwise ill-treated in order to make their confessions.

There is no direct evidence of ill-usage. There are however some circumstances which afford grounds for viewing the confessions with suspicion. Nga Po Hnan was arrested on the 26th April, the day after the dacoity, and was taken to Kyaikpi police station. He was there detained in custody till 1st May. On that date he was taken, in the Custody of constable Po Sin, to Meikdalin where he was kept on the 1st and 2nd May. He was then sent to Moulmeingyun where his confession was recorded. He had thus been for eight days in police custody. There was apparently no necessity for his being taken to Medalin. The only conceivable object was to enable the police officers there to extract some information from him. The Code does not expressly forbid such a course. But it seems to me highly undesirable that an accused person having been arrested and taken to a police station should afterwards be taken away and kept in custody in the jungle. I think it is even doubtful if his detention at Medalin was lawful, as the remand order authorizing his detention is addressed to the officer in charge of the lock up at Kyaikpi.

Po Hnan was not examined on the 1st May but, according to the Inspector, on the 2nd May, when he at once confessed. He had apparently shown no desire to confess during his detention at Kyaikpi but changed his mind after spending a night in the jungle. His explanation is that in the course of that night he was taken across a river, beaten and held underwater. Nga Pule

\* Appeals from sentenced passed by E. Ford Esq., Sessions Judge of Delta Division in Sessions Trial No. 16 of 1907.

was sent for to Medalin on the 30th April. He was called by Constable Po Sin and arrived on the 30th April. The Inspector swears that he was willing to confess at his first interview with him. He admits that he told him to speak the truth. This was highly improper on his part. The law merely permits him to record any statement which an accused may be disposed to make of his free will. It does not allow him to examine an accused person much less to order or exhort an accused person to tell the truth. The Inspector further swears that Nga Pule was not arrested till the 2nd May. He is in this directly contradicted by Constable Kan Baw who swears that Nga Pule was kept on the night of the 1st May handcuffed to Po Hnan in Po Shein's house under the guard of villagers Po Sin, and Po Shein confirm the truth of Kan Baw's evidence in this respect. I think that in all probability Pule was arrested on the 30th April. He was certainly arrested not later than the 1st May, and the report that he was arrested on the 2nd May seems to be false. The District Magistrate's attention is invited to this matter as also to the taking of Po Hnan and afterwards of Kyaw Gaung and Po Si from Kyaikpi to Medalin. As I have said, there is no direct corroboration of Po Hnan and Pule's stories of ill-treatment at Medalin. It is somewhat significant, however, that Kyaw Gaung and Po Si who were both also fetched out to Medalin tree, who did not confess before a Magistrate, also complain of ill-treatment and allege that, in consequence, they gave up as dacoited property jewelry which was found to be their own property. The evidence however does not justify a finding that there was actual ill-treatment of Po Hnan and Nga Pule, and the confessions are therefore legally admissible.

In view of the circumstances under which they were given I think that they must be received with great caution. A retracted confession is under any circumstances the weakest possible kind of evidence against any person other than the person who made it. In the present case I regard their confessions as carrying no weight against any accuseds other than Po Hnan and Pule, and in their case it would not be safe to accept the confessions in the absence of external evidence directly pointing to their truth.

I will now consider the evidence as to identity. The only witness whom the Sessions Judge has

believed is Ma Baing, complainant. Other witnesses to identify are her son Maung Pu and five men—Shwe Ngon, Paw To, Po Yi, Tun U and Tha Han. I will deal with these five men first. All five of them swear that they saw at the dacoity and recognised Nga Kyaw Gaung, Nga Pule and Nga Aung Po. Not one of the five said a word as has been disclosed not before the 29th April.

All five say that they knew these three men by name. Shwe Ngon was the man who first gave information to the police. He went twice to the police station on the 25th and 26th yet said not a word.

Paw To and Tha Han went with their village headman that night to Palunza and were present when Ma Baing identified Kyaw Gaung. Yet they neither of them said a word to the headman about their having identified any dacoits. All of the five had abundant opportunities of communicating with the village officials or the police on the 25th and 26th. Po Yi and Tun U go so far as to say that they heard Aung Po and Nga Pule planning this dacoity a week before it occurred. They say indeed that they warned Ma Baing and her husband, Ma Baing and Shwe Dwe do not corroborate them. For the above reasons I have no hesitation in concluding that the Sessions Judge was quite right in discarding entirely the evidence of these five men.

The evidence of Nga Pu is on a rather different footing. He is a boy of 14 and was hit on the head by a dacoit. His mother Ma Baing went off with the headman directly after the dacoity letting him to go to bed which he did. Next morning Kyaw Gaung, Po Mya, Po Hnan were brought to the village and he identified all three. Later on, the same day, Po Si was brought in and he identified him also. I think that some weight is to be attached to his evidence.

Ma Baing appears to have identified Kyaw Gaung positively and without hesitation that same night. Then it was found that two men, Po Hnan and Po Mya, had not attended the parade of villagers. They were sent for and she looked at them. She complained that the lamp was burning dimly and said that she was not certain about them, and asked that they should not be allowed to disappear. They were shown to her again in day light and she then identified them positively.

In my opinion the identification of Kyaw Gaung by Ma Baing and her son is reliable and justifies his conviction. As regards Po Hnan his identification by Ma Baing is not very strong; but he was also identified by Manug Pu, and I think that this evidence of identity coupled with his retracted confession sufficiently established his guilt. The defence witnesses called by Kyaw Gaung and Po Hnan are of no value. As regards Nga Pule I find no evidence apart from his retracted confession directly connecting him with the dacoity. I have not dealt with the evidence as regards Nga Po Si, because the Sessions Judge has not recorded any finding of the Assessors as to his guilt or innocence, an omission which will render a new trial necessary in his case.

For the above reasons I confirm the convictions and sentences in the case of appellants Kyaw Gaung and Po Hnan. I reverse the conviction and sentence in the case of Nga Pule and acquitting him direct that he be set at liberty.

I set aside the conviction and sentence in the case of Po Si and direct that he be retried by the Sessions Judge, Delta Division.

IN THE CHIEF COURT OF LOWER  
BURMA.

CRIMINAL MISCELLANEOUS APPEAL NO 12  
OF 1907.

V. V. A. M. Muthia Chetty vs. King Emperor.  
BEFORE MR. JUSTICE HARTNOLL.

Dated 27th June 1907.

For Appellant.—Agabeg.

For Crown.—Assistant Government Advocate.

*Transfer—should be without delay—Criminal Procedure Code, section 526—grounds of transfer.*

An application for the transfer of a case should be made without delay.

It is not a good ground for a transfer where a magistrate proceeds with the trial of a case for the institution of which sanction is necessary without such sanction having been obtained.

This is an application for the transfer of Criminal Regular Case No. 20 of 1907, of the Court of the Subdivisional Magistrate, Ma-ubin, San Shwe vs. V. V. A. M. Muthia, from that Court to some other. The first ground is, that the Magistrate has proceeded with the trial though sanction should have been given under section

195, Criminal Procedure Code, and it has not been. As far as the record shows, objection on this ground was taken at a somewhat late stage, and the Magistrate gave reasons, rightly or wrongly, as the case may be, for considering sanction not necessary. I do not consider that bias is shown, and that, on their ground, a transfer should be ordered. The next ground is, that the petitioner has seen the complainant's wife in the house of the Magistrate and has reason to believe that the Magistrate is on very friendly terms with Maung San Shwe. The Magistrate denies the allegation. The petitioner did not apply for transfer till the case for the prosecution had been closed and he had been charged. He was charged on the 19th April. He says that he saw complainant's wife in the Magistrate's house in January and March. In any case, on his own showing, he has unduly delayed his application on this ground. The third ground is, that complainant's wife has several times said she would have him sent to jail. That is nothing to do with the Magistrate. The fourth ground is, that the Magistrate, in September or October, asked petitioner to lend him some money and that he procured a loan for him from another Chetty who has been pressing for payment so that he, in his turn, has been pressing the Magistrate. The Magistrate has not in so many words denied that he asked petitioner to lend him money; but it seems to me that his reply implies as much. He states that he took a loan from a Chetty but not from petitioner, that no demand for payment has ever been made up to date, and that if the money had been borrowed from the petitioner or there had been the alleged pressing for payment, he, the Magistrate, would not have taken up the case from the beginning. On this ground, therefore, I am of opinion that no good reason is shown for a transfer.

The last ground is, that the Magistrate told him that he was a bad fellow and that he ought not to have sent the complainant to jail. The Magistrate denies this. The application for a transfer has been made at a very late stage of the case and it is not apparent why it was not made before.

I see no good and sufficient reasons for granting the request and so, accordingly, dismiss the application.

IN THE CHIEF COURT OF LOWER  
BURMA.

CIVIL FIRST APPEAL\* NO. 97 OF 1906.

Ma Bu Lone vs. Ma Myat Sin and two

BEFORE SIR CHARLES E. FOX, KT., C.J., AND  
MR. JUSTICE HARTNOLL.

Dated 1st August 1907.

For Appellant.—Lentaigae.

For Respondent.—Giles.

Suit by next friend of minor—decree binding on minor—  
res judicata

Where in a suit a minor is represented by her father and natural guardian, she is bound by the decree passed therein and she will not be permitted to sue again by another next friend to have determined the same questions determined in the previous suit.

Ma Win Tha, a maiden lady, died on the 2nd March 1901 at the age of 61 years, or thereabouts. She had lived in the same house with Ma Yok who had predeceased her. Ma Yok had been married and had a daughter Ma Ne Bwin. She married Maung Kya Zaing, the first defendant in the case, and they had a daughter Ma Mya Sin, the first plaintiff in the case.

Ma Ne Bwin died about 1896. Maung Kya Zaing married again and lived apart from Ma Win Tha. He did not take his daughter Ma Mya Sin to live with him. She remained living with Ma Win Tha until the latter's death. There also lived with her a boy Maung Po and a girl Ma Bu Lone. Maung Po is the second plaintiff in the case, who was added as a plaintiff subsequent to the institution of the suit. Ma Bu Lone is the second defendant and is the appellant in this appeal.

Very shortly after Ma Win Tha's death litigation commenced over the property she left.

On the 26th March 1901, in Miscellaneous Case No. 3 of 1901, Maung Kya Zaing applied for letters of administration to the estate. He

\* Appeal from the decree of P. T. Metcalf, Esq., District Judge Mergui, dated the 31st July 1906, in Civil Regular Suit No. 1 of 1904.

stated in his petition that Ma Win Tha had left no blood relations, but that she had adopted, to inherit her property, Maung Po, Ma Mya Sin and Ma Bu Lone who had lived permanently with the deceased in her house. He claimed letters of administration by virtue of his being the father and guardian of Ma Mya Sin who was and is still a minor. In another proceeding, Case No. 5 of 1901, Maung Kya Zaing applied for the appointment of an administrator, *pendente lite* on the ground that Maung Po who was then only 17 years of age, had stolen the key of the iron safe boxes belonging to the deceased, and that he was squandering the property. In his petition in this case, Maung Kya Zaing reported that Ma Win Tha had adopted Maung Po and Ma Bu Lone as well as his daughter Ma Mya Sin.

On the 3rd April 1901 Ma Shew Lone, the natural mother of Ma Bu Lone, applied in Miscellaneous Case No. 6 of 1901 for letters of administration to be granted to her, basing her claim on her being the guardian of Ma Bu Lone then a minor who, she asserted, was the only child who had been adopted by Ma Win Tha.

On the 4th April 1901, in Miscellaneous Case No. 7 of 1901, one Maung Sein Han also applied, for letters of administration on the ground of his being guardian of a minor, Ma Hla U Me, who, he asserted, was an heir of Ma Win Tha.

The result of the applications was that the District Judge granted letters of administration to Maung Kya Zaing on the 3rd April 1901. The order was appealed against by Maung Po and Ma Shwe Lone, but it was upheld by this court and the appeal was dismissed on the 21st January 1902. The next step in the litigation was the institution, by Ma Bu Lone, on the 23rd May 1904, of a suit in *forma pauperis* against "the estate of Ma Win Tha, administered by Maung Kya Zaing." In an amended plaint she was made to claim possession of the whole estate by virtue of her being the *keittima* adopted daughter of Ma Win Tha, although, as a fact, she has all along admitted that Maung Po had also

been adopted by Ma Win Tha. Maung Kya Zaing resisted the suit on among other grounds, the ground that Ma Bu Lone had never been adopted as a *keittim*'s daughter by Ma Win Tha. In his written statement however he curiously did not set up that his own daughter Ma Mya Sin was the only adopted child of Ma Win Tha.

The issues tried in that case were: Was Ma Bu Lone formally adopted by Ma Win Tha as her *keittima* daughter? If not, did Ma Bu Lone live in Ma Win Tha's house as an adopted daughter, and, as such, is she entitled to inherit?

The District Judge decided in Ma Bu Lone's favour and gave her judgment "for the whole estate of Ma Win Tha, deceased, valued, for the purpose of the suit, at Rs. 11,554-1, with costs on that amount."

In the course of his judgment the District Judge remarked: "It appeared in the course of evidence that it is claimed that both defendant's daughter (*i.e.*, Ma Mya Sin) and Maung Po, a witness for plaintiff, are adopted children of Ma Win Tha. In a way it would have been more satisfactory had they been joined as parties. Neither of them however wished to be made parties, and both announced their intention of litigating separately, if they did so at all. As their interests are conflicting, I did not therefore insist on their being made parties." This was an unfortunate decision, for the litigation has been prolonged in consequence, and the parties have been put to expense and the estate wasted in needless litigation.

The ignorance of the pleaders concerned is, to a large extent, the cause of the utter confusion in which the estate matters have now got into. It is obvious that all along the parties knew which each claimed, but, instead of bringing such claims clearly before the court and making all the persons who had claims to the estate parties to the first suit, neither Ma Bu Lone's nor Maung Kya Zaing's pleader set out in their pleadings, drawn by them on behalf of the clients the full facts which should have been set out, and Ma Bu Lone's pleader did not ask for the relief which should have been asked for. If, instead of asking for possession of the estate to be given to the plaintiff, Ma Bu Lone's pleader had asked, as he should have asked, for a decree under section 213 of the Code of Civil Procedure for accounts of the estate, and for its due administration by the court, and if Maung Kya Zaing's pleader had set out in his written statement, as he should have done, that even if Ma Bu Lone had been adopted she was not the only adopted child of Ma Win Tha, and that Ma Mya Sin had also been adopted, and Maung Po claimed also to have been adopted the decree of the court might have ordered an enquiry as to

who were the persons entitled to shares in the estate and the matter would have been settled in one suit.

Maung Kya Zaing, who had been all along acting really on behalf of his daughter Ma Mya Sin, appealed to this court, but was unsuccessful. It was held that Ma Bu Lone had clearly proved that she was an adopted child of Ma Win Tha, entitled to inherit. The decision of this court was given on the 6th September 1905. On the 2nd November 1905 Ma Nyo Yin, sister of Maung Kya Zaing applied, admittedly at his instigation, to sue in *forma pauperis* as next friend of Ma Mya Sin. The application was rejected. On the 3rd January 1906 this aunt instituted the suit, out of which this appeal arises, as Ma Mya Sin's next friend.

The plaint was on this occasion drawn by a petition writer. It set out, that in spite of the decrees in the former case, Ma Mya Sin was the only surviving *keittima* adopted daughter of Ma Win Tha, but that her mother, Ma Ne Bwin, had also been adopted by Ma Win Tha.

The ground was taken that, as Ma Mya Sin was not a party to the former suit, the decrees in it were not binding on her, and it was claimed that she alone was entitled to the whole estate, Extraordinary and curious procedure, which had been a mark of the previous suit, continued in this suit. Maung Po, who wished to put forward his claim, was permitted to be put on the record as second plaintiff in a suit in which the original plaintiff claimed the whole estate.

Maung Kya Zaing naturally did not resist his daughter's claim. Ma Bu Lone's written statement put Ma Mya Sin to proof of her adoption, and set up that she had been adjudged to be the sole *keittima* daughter of Ma Win Tha. Again nothing was said about Maung Po's claim which Ma Bu Lone still admitted. On the 31st March the following issues were fixed:—

(1) Is Ma Mya Sin an adopted (*keittima*) daughter of Ma Win Tha?

(2) Is Ma Bu Lone an adopted (*keittima*) daughter of Ma Win Tha?

(3) Was Ma Ne Bwin, mother of Ma Mya Sein, adopted by Ma Win Tha.

(4) In the event of Ma Ne Bwin and Ma Bu Lone, but not Ma Mya Sin being proved to be the *keittima* daughters of Ma Win Tha, is Ma Mya Sin entitled to an equal share with Ma Bu Lone?

As to the last the District Judge noted that it was agreed that if both girls are shown to have been adopted they were entitled to equal shares.

No issue was then fixed regarding Maung Po's claim because he was not made a party until the 10th July. The then District Judge directed that a similar issue regarding Maung Po be framed as in the case of the other parties, namely, whether he is an adopted *keittima* son with right of inheritance.

A large mass of evidence was taken at the hearing. A great part of it consisted of hearsay and opinions of the witnesses. The District Judge decided that Ma Ne Bwin and Ma Mya Sin had been adopted by Ma Win Tha, and that Ma Bu Lone and Maung Po had not been. His judgment ends thus: "A decree therefore is passed in favour of the first plaintiff Myat Sin with costs. Maung Po will bear his own costs. The decree is It is ordered that second defendant Ma Bu Lone do pay to the first plaintiff Ma Mya Sin, the sum of Rs. 11,554 (eleven thousand and five hundred and fifty-four) and do also pay Rs. 968 (nine hundred and sixty-eight) the costs of this suit."

It is difficult to see how the helpless tangle into which the estate has got through this decision can be remedied.

It appears to me that the only way is to consolidate the two suits and to treat them as inquiries made in pursuance of a decree in an administration suit. The accounts have been taken in the previous suit 1 of 1904, and as the result of them, Maung Kya Zaing has been ordered to make over to Ma Bu Lone all the property, moveable and immoveable possessed by Ma Win Tha at the time of her death, together with all the property received in pawn on money lent from her estate, and the sum of Rs. 9,335-5-5, or, in the alternative that he pay to Ma Bu Lone the sum of Rs. 14,522-7-5. Treating all the claims to share in the estate as matters which might have been settled upon proper enquiries held in pursuance of a preliminary administration decree under section 213 of the Code of Civil Procedure, I would hold that the decree in Civil Regular Suit 1 of 1904 established

Ma Bu Lone's right to share in the estate as *keittima* adopted child. Although Ma Mya Sin was not actually a party to that suit, her father, who then claimed to be her natural guardian, and who had obtained his position as administrator on the ground that he was her natural guardian, was a party to it. He resisted Ma Bu Lone's claim as strongly as it could have been resisted and lost. Through him Ma Mya Sin's interest in opposition to Ma Bu Lone's claim was represented fully. This should have been recognized and the question of Ma Bu Lone's right to share in the estate should not have been gone into in this suit.

In the present suit I would hold that Ma Mya Sin's right to share in the estate as a *keittima* adopted daughter has been proved.

The evidence as to what took place after Ma Ne Bwin's death, and the fact that Ma Win Tha kept and brought up the child as her own leaves no doubt that she did adopt her.

As regards Maung Po, the evidence of his having been adopted is, perhaps, not so strong, but Ma Win Tha brought him up also, and Maung Kya Zaing, who is the person who should know best what position he occupied in the house, admitted, within a month of Ma Win Tha's death, that he was one of three children adopted by Ma Win Tha.

On these findings I would set aside the decree of the district court, and would decree that Ma Bu Lone do make or pay over a one-third share of the property which she has obtained or may hereafter obtain from Maung Kya Zaing under the decree in Civil Regular Suit No. 1 of 1904 to the properly constituted guardian of Ma Mya Sin, and that she do make or pay over to Maung Po also a one-third share of such property as she has received or shall hereafter receive under such decree.

If the parties cannot agree as to the values of property of the estate incapable of division, such property should be sold by the court in Civil Regular No. 1 of 1904, and the court should, in that suit, see that the estate is properly realized and converted into a form in which it will be readily divisible in terms of the decree on this appeal.

I would order each party to bear his and her own cost of the present suit and appeal.

Hartnoll, J.—I concur.

IN THE CHIEF COURT OF LOWER  
BURMA.

CIVIL REVISION\* NO. 38 OF 1907.

Maung Tha E vs. Maung Aung Myo.

BEFORE MR. JUSTICE MOORE.

Dated 28th August 1907.

For Applicant.—Hamlyn.

For Respondent.—A. C. Dhar.

Deceased decree-holder—right to execute devolves by survivorship.

The heir of a deceased decree-holder requires no certificate if the right to execute the decree has devolved upon him by survivorship.

Followed: Rajavendhra vs. Bhunia, I.L.R. 16 Bom. 349; T. N. Barati v. Ram Chander Barati, 20 Cal. 203.

In Civil Regular Smit No. 647 of 1903, of the Township Court of Okpo, Nga Tha E sued Ma Lon Ma Gale for possession of a piece of land forming a water channel. He got a decree for possession but the decree—which was confirmed by this court in second appeal—gave defendant the right of taking water from this channel and forbade plaintiff from permanently obstructing the channel.

Ma Lon Ma Gale died, and in Civil Execution No. 291 of 1906, Maung Aung Myo, present respondent, applied in execution of this decree. He alleged that the channel had been permanently obstructed and asked that it might be opened. He applied as legal representative of Ma Lon Ma Gale, deceased, who is his mother, he being the eldest son. The Township court, after hearing applicant, made an order directing applicant to open the channel. His order was confirmed in appeal by the District Court, Hensada.

The principal ground argued in revision before me is, that respondent Maung Aung Myo was not entitled to execute the decree, not having obtained letters of administration, and the decree not having been assigned to him. It appears to me that the respondent could properly execute

the decree as the representative of his mother, deceased. It was not a case to which section 4 of the Succession Certificate Act would apply. "The heir of a deceased decree-holder requires no certificate if the right to execute has devolved upon him by survivorship, Rajavendhra vs. Bhunia, 16 Bo. 349, vide also T. N. Barati vs. Ram Chander Barati, 20 Cal. 103. It was not contended in the court of first instance that respondent was not an heir of Ma Lon Ma Gale. It was objected that there were other children, but section 231 allows one of joint decree-holders to execute on behalf of them all.

I think therefore that there are no grounds for interference and I dismiss this application with costs; advocate fee two goldmohurs.

IN THE CHIEF COURT OF LOWER  
BURMA.

CRIMINAL APPEAL\* NO. 443 OF 1907.

Mi Pwa vs. King Emperor.

BEFORE SIR CHARLES E. FOX, KT., C. J., AND  
MR. JUSTICE MOORE.

Dated 19th August 1907.

Confession—made in the hope of becoming approver—inadmissible.

It is not sufficient to render a confession inadmissible that the accused had been told by a police officer that she would be made an approver if she confessed but it must also appear that the confession was made in the expectation or hope of becoming an approver.

Per Moore, J.—Appellant Mi Pwa has been convicted under section 302, Indian Penal Code, of the murder of Nga Kywet Po. The conviction is based mainly upon a confession by appellant which she subsequently retracted and it is argued that this confession was inadmissible on the ground that it was obtained by improper inducement. Appellant herself, in the sessions court, said that she made the confession because a woman, whom she does not know, came to her while in custody and told her that if she confessed she would get off. There is no evidence of this.

\* Application against the order of Maung Kyaw Nyein, District Judge, Hensada, in his Civil Appeal No. 169 of 1906, against the order of the Township Court of Okpo, in Civil Execution No. 291 of 1906.

\* Appeal from the order of the Sessions Judge of Prome, dated 10th day of July 1907, passed in Sessions Trial No 37 of 1907.

Po Chon, the police constable who arrested appellant, in the session court, said that he only told her to tell the truth. Po Chon is clearly not a truthful witness. In the committing magistrate's court he said: "I met Mi Pwa on the 19th April 1907, at noon. I advised her to say what she knows so that she may become an approver."

It does not, however, appear to me that Mi Pwa made the confession with any hope of being made an approver, and in the record of the confession it is shown that she was questioned on the point and denied that she had any expectation of being made an approver. The confession also itself negatives the idea that she expected to become an approver, as she incriminates no one but herself.

I, therefore, hold that the confession was admissible in evidence. The next point to be considered is whether the confession which was retracted both before the committing magistrate and in the sessions court, is true.

The substance of the confession is as follows: There had been thefts of Mi Pwa's property. On one occasion three jackets and four lungyis were stolen and on another occasion some ngapi. Mi Pwa believed that Nga Kywet Po had stolen these things and therefore she says she conceived a violent hatred for him and formed the intention of calling him away and of cutting him with a dah to appease her hatred. So, she says, she "deceitfully" called him to come with her to Okpo. She also called Nga Po Sein and Ma Thet Pyin. She took a clasp knife in her pocket and on the whole way her mind was full of the intention to cut him. On the way she again deceitfully went and borrowed a large and heavy dama—and told a lie to account for it. They arrived at dark at the junction of the Okpo-Temmyoh and Prome roads. Kywet Po then told them to go on saying he would go elsewhere. At this, she says, her anger was again aroused as she thought that he meant to go back and steal again from her house. She, therefore, persisted in going with him, and, presently, wishing to cut him with a dah, she suggested that they should rest. They sat down and there she planned to keep Po Sein and Ma Thet Pyin at a distance. So she went ten yards off calling Thet Pyin with her to shampoo her. Then she went back to

Po Sein and Po Kywet and sent Po Sein to Ma Thet Pyin for tobacco. Po Sein went and then, taking a deliberate aim, she cut Kywet Po on the neck with the dama. He fell, and being still very angry, she gave him five more cuts with the dama. Then, in order to gain the renown of having stabbed a man, she took the clasp knife from her pocket, opened it, and stabbed him twice in the side. She then rejoined Ma Thet Pyin and Po Sein, said nothing to them about it, and went on with them to Linlunbin. There they passed the night in the house of Po Sein's uncle, where she washed the dama. Next day she returned the dama to its owner, and the following day, still accompanied by Po Sein and Ma Thet Pyin, she came to Okpo, where she was arrested.

Asked if she confessed when she got to the police station she makes the following statement, which seems to me significant: "I did not make the statement (at first) as I thought Po Sein and Ma Thet Pyin might be implicated; next day I came to know that they cannot be implicated so I made a clean breast of it."

This confession, read by itself, appears to me singularly unconvincing. The motive alleged is wholly inadequate. It seems to me inconceivable that the mere theft of a few articles of clothing and some ngapi should have aroused in Mi Pwa such a virulent and implacable resentment. And the way in which she insists upon, and tries to bring into prominence, her hatred for Kywet Po, seems to me artificial. Again, she insists upon the point of the murder being preconceived and deliberate. The whole journey to Okpo was, she says, planned solely in order that she might get an opportunity of cutting this man. Yet she calls two other persons—one a young girl—to accompany her on the journey, and having called them, makes elaborate plans to get him to go ten yards away while she commits the murder. She and Nga Kywet Po were both living at Myaung, a jungle village on the eastern borders of the cultivated tract in Tharrawaddy. If she wanted to get Kywet Po alone there are lonely places and forests in the neighbourhood of Myaung where she could have met him, instead of which she calls him to come to Okpo, i.e., towards the more populated area, and calls two companions for no apparent reason. In the committing magistrate's court and in the sessions court Mi Pwa

retracted the greater part of this confession and told the following story: There was a theft in her house. She asked Kywet Po to enquire about it and also to escort her to Okpo as she wanted to go and see her father. He agreed to come and she, Kywet Po, Pe Sein and Ma Thet Pyin left at about 3 or 4 a.m. On the way Kywet Po made love to her and she discouraged his advances. It was Kywet Po who sent her to borrow the dah. On arrival at the cross roads at dark Kywet Po said he would go no further as he was afraid of being arrested if he went to Okpo. It is a fact that Kywet Po was at this time evading arrest for bad liveliwood. She said that she was afraid to go on in the dark without him, and Kywet Po then suggested that they should accompany him to Yeda where he meant to pass the night. She agreed, and all four went on together. Kywet Po then suggested a rest and they all sat down. It was Kywet Po who contrived to separate her from her companions. He then pulled her hands and kissed her and told her to lie down. He opened a clasp knife and used violence to her saying that he would not wait or delay his purpose beyond midnight. She then, in great agitation, resisted and struggled to get the knife from him. As they struggled he fell, and she having entirely lost her head, picked up the dama and cut and thrust with it at random. Then she ran away to Po Sein and Thet Pyin.

This second story of Mi Pwa's seems to me far more credible than the story she first told. I am of opinion however that neither of her two stories is wholly true.

The clue to her conflicting stories is, I think, contained in the following statements made by her on different occasions but which do not form part of her actual narrative:

Constable Po Chon relates (to the committing magistrate) that when he first met Mi Pwa she said: "I am ashamed to speak the truth and would rather die;" and again she said, "Will it not be better to say that I killed the deceased?" Ma Ok, the guard writer's wife, says that shortly after her arrest Mi Pwa was weeping and said she felt ashamed. Asked why she was ashamed she said that she had been troubled by thefts. But she declined to say why she was ashamed. She said "I am ashamed I don't want to tell any one."

It is clear I think that the thefts had nothing to do with her shame. The words seem to indicate that something had occurred which had outraged her modesty and that she was very unwilling to disclose this.

This presumption is strengthened by what occurred in the course of her examination by the committing magistrate. When she reached the point in her narrative immediately preceding her account of the assault upon her by Kywet Po she began to weep and said "kill me at once now I have never come across such a thing."

These different statements show I think that Mi Pwa, perhaps unreasonably, but not, I think, unnaturally, was extremely anxious to avoid disclosing the fact that there had been any assault upon her.

The remark which I alluded to above as significant, namely, that she did not confess at first because she was afraid of implicating Po Sein and Ma Thet Pyin but that she confessed when she knew they would not be implicated indicates, I think, a desire upon her part to shield Po Sein and Ma Thet Pyin.

Po Sein and Ma Thet Pyin have both been discredited by the Session Judge. It is clear I think that they are not telling the whole truth. Their evidence however is the only direct evidence apart from Mi Pwa's statements of what occurred and it corroborates Mi Pwa's statement in court and not the confession.

To return to the confession, the alleged motive is, I think, clearly inadequate. It is also proved Mi Pwa did not say that she suspected Kywet Po when she reported the theft of ngapi. There is no evidence that any other thefts were ever reported by her, or occurred. She appears to have called Nga Kywet Po openly. Two of his wives say that she called him first in their presence. She seems to have sent Thein Shin again to call him because he delayed in coming, and to have told Thein Shin to say that her mother wanted him to hasten his coming.

She left the village with him openly. Pyo Dun, Tha Han and others saw them.

She herself called Po Sein who is her father's tenant, and Thet Pyin, a girl of fifteen, sister to Po Sein, to come with them. Po Sein and Ma

Thet Pyin agree with Mi Pwa in saying that Kywet Po asked her to borrow a dah.

Po Sein appears to have been carrying a dashe and it was argued that it was unnecessary to borrow another dah. Kywet Po however was called as escort and it does not strike me as improbable that he should want a dah too.

Po Kye, who lent the dah, says that Ma Pwa rejected a *kaing* cutting dah and chose dama saying that men would only fear women if they had a big dah I think that this may have been a perfectly innocent joke.

The session judge and committing magistrate both drew an inference unfavourable to Mi Pwa from her insisting on going on with Kywet Po when he wanted to leave her at the cross-roads. Mi Pwa's explanation seems to me perfectly natural. It was dark and she was still two miles from Okpo. She had relied on Kywet Po to escort her and they had reached the part of the journey when there was most cause for apprehension. She did not consent to go on alone with Kywet Po.

As regards what actually happened at the time when Nga Kywet Po was killed, I think that the medical evidence tends strongly to show that the account given in the confession is untrue. She said then that the first blow was the one on the neck which almost decapitated deceased.

Then she struck five blows with the dah and finally stabbed him twice. Of the dah wounds, one is on the neck, one on the side of the head, and two on the back. Therefore deceased must have fallen on his face. If so, she must have turned over the body in order to inflict the stab wound in the belly. And there was only one stab wound, not two as described by her in the confession. I think it is very doubtful whether the wound on the neck, which must have been the immediate cause of death, was inflicted by Mi Pwa at all.

Her own story in court appears to be that he fell after receiving the stab in the stomach and that then she cut at random. I think it is doubtful if the wound on the neck could have been thus caused. Mi Thet Pyin says that she saw Mi Pwa cut Kywet Po, while they were struggling together. Po Sein said in the com-

mitting magistrate's court that they struggled and immediately after Mi Pwa was seen cutting Kywet Po with the dama held in both hands. In the sessions court he said that Kywet Po fell and Mi Pwa then cut as if cutting firewood, with something long. The wound on the neck could certainly not have been inflicted by Mi Pwa in the course of a struggle. It must have been inflicted from behind with a perfectly free hand. In my opinion the probabilities of the case point strongly to the wound on the neck having been inflicted by Po Sein.

Mi Pwa was undefended and the cross-examination of Po Sein and Mi Thet Pyin was principally by the Crown—they were treated as hostile witnesses to shake that part of their evidence which was in Mi Pwa's favour.

There appear to me, however, to be several points indicating Po Sein's complicity and which he should have been called upon to explain. In the first place I think there is proof that Po Sein and Mi Pwa were lovers.

Mi Thet Pyin admits that she told the sub-inspector that they were. I can see no reason for her having said so if it was not true.

Shwe Le, in whose house they slept on the night of the occurrence, says that Mi Thet Pyin went and slept inside with his daughter. Mi Pwa and Po Sein slept outside side by side. This I think is conclusive.

If Po Sein and Mi Pwa were lovers, it is exceedingly improbable that he would have remained a passive spectator during the struggle.

Secondly, Po Sein's conduct after the occurrence is difficult to explain, except on the view of his complicity. He was with Mi Pwa all that night and all the following day and was arrested in her company on the second day. She told no one anything of what had happened. He said in the sessions court that he told no one because Mi Pwa threatened to kill him if he did. His story to the magistrate was that she told him they would get into a scrape. Mi Thet Pyin makes similar contradictory statements.

Thirdly, Shwe Le deposed in the magistrate's court that when they came to his house Po Sein was carrying the dama. The point was not elicited in the sessions court. It is inconsistent with Po Sein's story.

Fourthly, Shwe Le states that Po Sein and Mi Pwa both bathed at his house. Po Sein denies it.

Fifthly Shwe Ton deposes that he found exhibit 5 in Mi Thet Pyin's bundle when he arrested her. It was stained with blood. Shwe Ton describes exhibit 5 as a "pawa" in the sessions court, but as a turban in the committing magistrate's court. A man's turban and a woman's scarf are different and distinct garments which the Burman magistrate would not confound. And exhibit 5 is described as a turban in the exhibit list. Now, to the committing magistrate, Ma Thet Pyin swore that the turban, exhibit 5 belonged to Po Sein. Po Sein says the turban is Mi Pwa's. Mi Thet Pyin was not questioned on the point in the sessions court, and the sessions judge says that the pawa, which is a turban, was found in Mi Pwa's bundle whereas Shwe Ton says that it was in Mi Thet Pyin's bundle.

I think the above circumstances, taken together and considered in the light of the medical evidence and of Mi Pwa's remarks evincing her desire to screen Po Sein, give rise to a strong presumption that Po Sein took part in the killing of Kywet Po.

In my opinion what in all probability occurred was that Nga Kywet Po assaulted Mi Pwa. She resisted and he produced a clasp knife. They struggled, and in the course of the struggle Kywet Po received a wound in the abdomen. Po Sein ran up and from behind struck Kywet Po on the neck nearly decapitating him, and then inflicted the other incised wounds.

Mi Pwa and Po Sein being lovers and Po Sien having acted in her defence, there would be nothing extraordinary in Mi Pwa taking the blame on herself to screen Po Sein. They had ample time on that night and the following day to concert a story with this view.

Upon this view of the facts I consider that Mi Pwa acted within her right of private defence and I would reverse the conviction and sentence and would acquit her and order her to be set at liberty.

IN THE CHIEF COURT OF LOWER  
BURMA.

CRIMINAL APPEAL\* NO. 472 OF 1907.

Nga Po Hmin and 4 others,

vs.

King Emperor.

BEFORE MR. JUSTICE MOORE.

Dated 2nd September 1907.

*Co-accused—evidence how weighed.*

Where two or more persons are co-accused, the evidence against each individual accused should be sifted and considered separately.

Appellants, Po Hmin, Po Tan, Aung Nyun, Kyaw Hmyin and Ngwe Daing have been convicted under section 366, Indian Penal Code, of abducting Ma Shwe Myaing a girl 17 or 18 years old. The case has not been well tried. There has been no attempt to sift the truth of complainant's story, and the judgment is particularly unsatisfactory. The facts of the case are imperfectly set out; there is no reference made to the numerous contradictions and improbabilities of the case and no mention of some of the most important pieces of evidence. It is not clear from the judgment whether the magistrate held that the girl was abducted by force or by deceitful means. He does not state at what stage he held that the abduction took place. He does not express any definite opinion as to the truth of the girl's story that she was raped four times by four different men in one night and, finally, there is not the least attempt to consider the evidence as against individual accused.

An officer entrusted with Special Powers is expected to show more intelligence and to exercise greater care in the trial of such serious cases. Complainant has told several stories varying in very important particulars. The story she told in court is, briefly, that she agreed to elope with her lover Po Nu on the night of the 29th April. She made the arrangement through Ngwe Daing in the first instance. In pursuance of the agreement she went out at 8 p.m. and met Po Nu, Ngwe Daing, and Po Hmin being also present. Po Nu himself told her it was too early and he would whistle for her again at 10 p.m. At 10 p.m. she went out again and met

Po Nu, Ngwe Daing, Po Hmin and Kyaw Hmyin. Po Nu then took her to Saingzu. When they got near Saingzu Po Nu pushed her towards Kyaw Hmyin and Po Hmin saying you had better follow them. She and Ngwe Daing then ran away and Kyaw Hmyin and Po Hmin dragged her by force through Saingzu village, gagging her mouth with their hands and squeezing her neck. Outside the village she met Aung Nyun and Po Tan (appellants) and witnesses Po Thit, Shwe Naing and Po Sein. The first two came along with her. She could not, she says, call out to the three witnesses as her mouth was gagged. I will pause here and go back to complainant's earlier stories.

She was examined both times at very great length on the 30th April and 2nd April by sub-inspectors of police. On both occasions she said that at she did not speak to Po Nu at all. It was Po Hmin who told her to come at 10 p.m. On both occasions she said that when she next went out at 10 p.m. she did not see Po Nu at all, he was not present; nor was Ngwe Daing. Yet Ngwe Daing has been convicted of abduction.

On both occasions she said that the men she did meet at 10 p.m., were Po Hmin, Shwe Naing and Po Sein, omitting entirely Kyaw Hmyin at this stage and including two witnesses. She went off with these three and then met Po Thit who spoke to her and asked if she had met Po Nu. Then Kyaw Hmyin came up and at his suggestion she went through Saingzu village. Not a word hereabout the forcible abduction, the squeezing of her neck or her being gagged. Po Sein, Po Naing and Po Thit walked with them through the village. Anything more hopelessly contradictory of her evidence in court it would be difficult to imagine.

After she got outside the village she relates how she was raped in succession by (i) Po Hmin, (ii) Po Tan, (iii) Aung Nyun, (iv) Kyaw Hmyin. Before each of these four rapes the other men go off and she stays with the man who commits it; and she describes each rape in identical words as occurring in exactly the same manner. As regards these four rapes it is, I consider, unnecessary to detail at length the numerous discrepancies which occur. The medical evidence is, that complainant is a strong healthy woman. She was examined at 8 a.m. on the 1st May, some

30 hours after the last rape. There was not a trace of violence or ill usage on any part of her body. The medical officer states—and it is impossible to avoid agreeing with him—that if four (five is apparently a mistake for four) men had had intercourse with her against her will there would be some signs of it apparent.

The clothing which she wore that night was sent to the Chemical Examiner. It bore no traces of anything in the least resembling seminal discharges. She does not on her own showing appear to have attempted to run away.

When Maung Gale, to whom she is supposed to have communicated the fact of the first two rapes—appears, she does not ask him to take her away or to summon assistance. She is content to let him go away and thus affords opportunity for the third and fourth rapes. There is no evidence that she was outwardly distressed or that her clothing was in any way torn or disordered. She spends the rest of the night alone under a haystack with Maung Gale, close to the house of Maung Gale's sister, which she seems unwilling to enter. I have no hesitation in concluding that the whole story of these rapes is false. I have already pointed out that the story of her forcible abduction by Po Hmin and Kyaw Hmyin is wholly contradictory to her earlier stories.

That she eloped with some one, probably Po Nu, that night is clear. The rest of her story seems to me pure invention. I reverse the convictions and sentences and acquitting all five appellants I direct that they be set at liberty.

IN THE CHIEF COURT OF LOWER  
BURMA.

CRIMINAL APPEAL\* NO. 565 OF 1906.

Nga Kyaw Yan vs. King Emperor.

Against conviction under section 403 Indian Penal Code.

BEFORE MR. JUSTICE BIGGE.

Dated 28th September 1906.

\* Appeal from the order of H. W. Godber, Esq., Western Sub-divisional Magistrate of Rangoon, dated the 6th day of August 1906 passed in Criminal Trial No. 806 of 1905.

*Partners—money drawn by one contrary to agreement—breach of trust—section 403 Indian Penal Code.*

Where one of two partners obtained a contract from a third party and it was agreed between them that, in consideration of the other partner supplying materials and expenses, the former should not demand and recover any money from the third party without the knowledge or order of the other partner; it is not a breach of trust on the part of the partner obtaining the contract from the third party if he draw the money and appropriate it to his own use.

Maung Kyaw Yan, the appellant, was sent to Rangoon by the complainant, who is the Secretary at Mandalay of the Burma Curio Department, Limited, to obtain a contract from U Po Tha for the regilding and decoration of his Pyathat in the Shwe Dagon Pagoda platform.

The appellant was successful, and returned to Mandalay with a contract dated 26th November 1903, under which Rs. 8,000 was to be paid for the work, but as it was taken in the name of the appellant only an agreement was, on the 11th December 1903, entered into between him and the complainant as such Secretary as aforesaid, whereby it was agreed that, in consideration of the complainant providing materials and expenses the appellant gave him a share in the profits arising out of the work and undertook to supervise such work and not to demand the Rs. 8,000 from U Po Tha without the knowledge or order of the complainant. The complainant and appellant thus became partners in the contract with U Po Tha in equal shares.

The work was sublet to Maung Po Thein, Maung Pon and Mah Mye for Rs. 6,000 and duly executed, and the sub-contractors were paid Rs. 6,000 by the complainant about February 1905.

In April 1904 on complainant's instructions, the appellant obtained Rs. 1,500 and remitted it to him in Mandalay and in March 1905 complainant called on U Po Tha to pay him the balance Rs. 6,500 and then found that it had already been paid to the appellant on 15th April 1905. The appellant wrote a letter to complainant in which he acknowledged having drawn the money contrary to the provisions of the 11th of December 1903, and asking him to abstain from prosecuting him and promising to pay Rs. 4,321, the sum admittedly due to him, by the instalments mentioned.

This letter is greatly relied on by the magistrate as being practically an admission of misappropriation of the money. The question on these facts is whether the appellant has been guilty of criminal breach of trust, that is to say, whether he has dishonestly misappropriated or converted to his own use property entrusted to him or property, the dominion over which has been entrusted to him, in violation of any direction of law prescribing the mode in which such trust is to be discharged or of any legal contract, express or implied, which has been made touching the discharge of such trust.

As Mr. Mayne has said, "the two ingredients in the offence are, first, an original trust and, secondly, a dishonest appropriation of the trust property." Mr. Mayne has defined a trust for the purposes of section 403 as "any arrangement by which one person is authorized to deal with property for the benefit of another," and I utterly fail to find even a glimpse of a trust, express or implied, subsisting as between complainant and the appellant.

They were partners and though, as between themselves, the appellant had bound himself not to draw money from U Po Tha as between himself and U Po Tha, if he made demand the latter perforce was obliged to comply with his request.

Despite the abject terms of his letter of the 11th December 1903, I cannot see that the appellant has committed criminal breach of trust, or that any criminality can be of necessity imputed to him. It seems to me that the case is one of those in which the remedy of the complainant being purely a civil one he has wrongfully had recourse to the criminal court which should not have convicted the appellant.

I set aside the conviction and sentence and order the appellant to be released.

IN THE CHIEF COURT OF LOWER  
BURMA.

CRIMINAL REVISION \*NO. 211 OF 1907.

Vadivailloo Chetty ... Applicant.

v.s.

Abdool Razak ... Respondent.

BEFORE MR. JUSTICE MOORE.

Dated 2nd August 1907.

For Applicant.—Dawson.

For Respondent.—Bagram.

*Disposal of thing bailed—contrary to terms of bailment—breach of trust.*

A borrower dishonestly disposing of the thing lent to him in manner not justified by the terms of the bailment is guilty of criminal breach of trust.

Approved of : 3 Madras H. C. Rulings 6.

The complainant, Vadivailloo Chetty filed a complaint in the Court of the Eastern Subdivisional Magistrate, Rangoon, against one Abdul Razak, alleging that at the request of the accused he had lent him a gold chain which the accused obtained from him for the purpose of wearing it at a wedding. The accused did not return the chain, and it was alleged that he at first promised to give it back and subsequently denied all knowledge of it.

The original court discharged the accused on ground that the facts disclosed neither the offence of cheating nor criminal breach of trust.

The complainant applied to the District Magistrate to revise the order of discharge. The learned District Magistrate was unable to find that the original court had erred and, after referring to a passage in Mayne's Criminal Law of India, dismissed the application.

The complainant filed a revisional application in the Chief Court. The facts of the case are fully set out in the following judgment of Mr. Justice Moore.

\* Revision of the order of H. G. I. Leveson Esq., District Magistrate, Rangoon; in Criminal Revision No. 119 of 1907, confirming the order of discharge of the Eastern Subdivisional Magistrate of Rangoon, in Regular Trial No. 208 of 1907.

Complainant Vadivailloo Chetty alleges that on the 22nd May 1907, Abdul Razak, respondent, borrowed from him a gold chain and a pendant to wear at a wedding. Complainant lent respondent the chain, respondent promising to return it on the following day. Respondent failed to return the chain on the 23rd May as promised. Complainant met him some days later and respondent apologised for the delay and promised to return the chain immediately. The chain was not returned. Complainant met respondent three days later when respondent denied that he had ever borrowed the chain. There is evidence to corroborate complainant's story. The magistrate who was trying the case discharged respondent remarking that "there is nothing to show that the alleged representation of the accused that he wanted to wear the chain at a wedding was fraudulent."

The magistrate has evidently confused section 420, Indian Penal Code, with section 406. Obtaining possession of property by fraud is not an ingredient of the offence of criminal breach of trust.

The District Magistrate, before whom the case came in revision, held that the chain was not "entrusted" to respondent within the meaning of the word as used in section 405, Indian Penal Code. The District Magistrate quotes Mr. Mayne's commentary (Criminal Law of India, paragraph 534) where the term "trust" is defined as "any arrangement by which one person is authorized to deal with property for the benefit of another."

This definition is not authoritative and is in my opinion somewhat misleading.

The wording of section 405 is in my opinion wide enough to cover any case in which possession of property is given by one person to another subject to an express or implied contract as to the manner in which that other may use or dispose of the property.

There is authority (1) for holding that a pawnee who dishonestly disposes of the thing pledged to him in a manner not justified by the terms of the pledge is guilty of criminal breach trust,

(1) 3. Mad. H. C. Rulings 6.

and I do not see any grounds for differentiating in this respect between a pledge and other bailments of goods.

In the present case there is *prima facie* evidence that the Chetty entrusted to respondent a gold chain upon the express condition that the chain should be returned to him. There is evidence that respondent, after admitting the entrustment, and promising to return the chain, subsequently denied that he had even received it. This denial, on the assumption that the bailment is proved, would justify the presumption that respondent had dishonestly misappropriated the chain, or converted it to his own use.

I therefore, under section 437, Code of Criminal Procedure, remand the case to the District Magistrate with directions to make further enquiry into the complaint, or to direct further enquiry to be made by such subordinate magistrate as he may appoint.

IN THE CHIEF COURT OF LOWER  
BURMA.

CRIMINAL REVISION \* NO. 221B OF 1907.

Maung Pan Aung *vs.* Ma Hmwe Bon.

Against the conviction under section 488, Criminal Procedure Code.

BEFORE SIR CHARLES E. FOX, Kt., C. J.

Dated 26th September 1907.

The order of a civil court for restitution of conjugal rights supersedes any previous order of a magistrate for maintenance, if the wife should persist in refusing to live with her husband.

The authorities show that an order of a civil court for restitution of conjugal rights supersedes any previous order of a magistrate for maintenance, if the wife should persist in refusing to live with her husband, and that a magistrate ought to cancel his order or to treat it as

\* Revision of the order of the Subdivisional Magistrate of Kyaukpadaung, dated the 27th day of February 1907, passed in Criminal Miscellaneous No. 2 of 1907.

determined if the wife, failing to comply with the decree for restitution, refuses to live with her husband.

The magistrate's order for maintenance to be paid to the respondent, dated the 1st May 1906, is cancelled.

IN THE CHIEF COURT OF LOWER  
BURMA.

CRIMINAL REVISION \* NO. 263B OF 1907.

P. Klier ... .. Applicant,

*vs.*

D. A. Ahuja ... .. Respondent.

BEFORE SIR CHARLES E. FOX, Kt., C. J.

Dated 19th September 1907.

For Applicant.—Agabeg, Eddis and Broadbent.

For Respondent.—Barjorje and Ormiston.

Trade mark—acquired by adoption and user—scope of section 478, Indian Penal Code.

In India where there is no provision for registration of trade marks, a trade mark may be acquired by adoption and user upon a vendible article, and a trade mark so acquired falls within section 478 of the Indian Penal Code.

Section 478 of the Indian Penal Code covers any and every mark used for denoting that goods are the manufacture or merchandise of a particular person.

The applicant in this case is a photographer and he complained that the accused, who is a rival photographer, reproduced photographs printed and sold by the complainant. The complainant's photographs all bore his name "P. Klier" on them and it was proved that photographs reproduced by the accused also bore the complainant's name "P. Klier." The accused was prosecuted for counterfeiting applicant's trade mark with intent to deceive. The lower court was of opinion that the mark "P. Klier" was not a trade mark within the meaning of section 478 of the Indian Penal Code and that

\* Revision of the order under section 203 Criminal Procedure Code, of H. G. A. Leveson Esq., District Magistrate, Rangoon in Criminal Trial No. 15 of 1907.

the marks "P. Klier" on the prints produced before it were not counterfeited, because there was nothing to show that the accused intended to practise deception. The lower court was also of opinion that the name "P. Klier" did not imply that P. Klier made the print any more than the photograph of a portrait with "Herkomer" painted on it would have implied that Herkomer made the photograph. The complaint was accordingly dismissed under section 203 of the Criminal Procedure Code.

The complainant applied to revise the order of the lower court, and it was urged (*inter alia*) on his behalf that the name "P. Klier" on the prints was a trade mark within the meaning of section 478 of the Indian Penal Code.

The following judgment was delivered by the Chief Judge:

The grounds on which the District Magistrate dismissed the complaint are not sustainable. In India, where there is no provision for registration of trade marks, a trade mark may be acquired by adoption and user upon a vendible article, and a trademark so acquired falls within section 478 of the Indian Penal Code.

Photographs, such as those produced before the Magistrate, are vendible articles, and if a photographer applies a trade mark to photographs which he sells, the provisions of the Penal Code are as applicable to such trade mark as they are to trade marks on other goods and vendible articles.

The trade mark claimed is the name "P. Klier." It has been contended that, because the name is printed in ordinary type it cannot be a trade mark. This would be so in England, because under the Patent Designs and Trade Marks Act, 1883, a name of an individual cannot be registered as a trade mark unless it is printed impressed or woven in some particular and distinctive manner. In India, however, there is no similar provision of law. Section 478 of the Indian Penal Code covers any and every mark used for denoting that goods are the manufacture or merchandise of a particular person.

The complainant was, in my opinion, entitled to have process issued against the respondent.

The Magistrate's order dismissing the complaint is set aside. He will issue process and deal with the case according to law.

IN THE CHIEF COURT OF LOWER  
BURMA.

CRIMINAL REFERENCE\* NO. 41 OF 1907.

King Emperor vs. Ngã Paw.

BEFORE SIR CHARLES E. FOX, KT. C. J., AND  
MR. JUSTICE MOORE.

Dated 19th August 1907.

For Applicant—Government Advocate.

*Insanity of prisoner—reference, Criminal Procedure Code, section 374—procedure.*

Where, pending the disposal of a reference under section 374 for confirmation of a death sentence, it appears from the report of the Jail Superintendent that the prisoner has shown symptoms of unsoundness of mind since his conviction, though no express provision is found in the Criminal Procedure Code, in Chapter XXXIV, procedure similar to that laid down in sections 464, 465, Criminal Procedure Code, should be followed, as no order to the detriment of the prisoner can be passed assuming that the report of the Superintendent is correct.

*Also*, where there is any doubt as to the sanity of the prisoner, enquiry as to his antecedents, with reference to his condition of mind, should be made, in the village in which he has lived previous to the commission of the offence.

*Also*, even if the High Court refuses to accept an explanation given by a medical man that the act proved against the prisoner might have been committed by him in a trance arising from epilepsy, which prevented the prisoner from knowing the nature of the act, there is reason for altering the sentence of death to one of transportation for life.

PRELIMINARY ORDER.

The case comes before this court on a reference under section 374 of the Criminal Procedure Code. The accused was convicted of murder and sentenced to death on the 29th July last. The Superintendent of Jail, in which he is detained, reports that, upon receipt of a copy of

\* Reference made by E. Ford, Esq., Sessions Judge, Delta Division, for confirmation of the death sentence, dated 29th July 1907, passed in Sessions Trial No. 17 of 1907.

the judgment, the accused at first refused to appeal, but that on the 3rd August, that is, within the seven days allowed for an appeal, he stated he wished to appeal. When asked for the grounds on which an appeal should be prepared he gave none, and it was with difficulty that any answers could be obtained to questions put to him. The Superintendent, who is a medical officer, reports that the accused was very silent, that he had a gloomy appearance and that he evidently is of unsound mind.

Assuming that the Superintendent's opinion is correct, and that the accused is now of unsound mind, and, in consequence, incapable of understanding the nature of the proceeding upon a reference for confirmation of a death sentence, and that such unsoundness of mind has come on or developed since his conviction, the circumstances are not provided for explicitly in Chapter XXXIV of the Code of Criminal Procedure, but it appears to me that as it would not be right to pass any order to his detriment without his having an opportunity of being heard, we should adopt a procedure similar to that laid down in sections 464 and 465 of the Code when an accused at an inquiry or trial appears to be of unsound mind and, in consequence, incapable of making his defence, and that we should examine the Civil Surgeon of the district as to the accused's state of mind.

It appears to me also that further inquiry should be made as to the antecedents of the accused with reference to his condition of mind before he left his village. The witnesses believed he came from Kadan village in the Salin township. I would request the District Magistrate of the Minbu district to enquire if anything is known of the accused in that village and, if so, whether he ever showed any signs of insanity before he left the village.

If there are any persons who can give material evidence as to the accused's state of mind, I would examine them under section 375 of the Code.

The hearing of the reference should, I think, be postponed.

*Judgment per Fox, C. J.*—The case comes before this court on reference for confirmation of the sentence of death on the accused. The Civil

Surgeon and Superintendent of the Jail reported that the accused had stated that he wished to appeal, but when asked to state grounds on which the appeal was to be prepared he gave no reasons, and it was with difficulty that any answer to questions could be obtained from him. The Civil Surgeon considered that the accused was evidently of unsound mind. We thought that inquiry as to the accused's antecedents should be made. This has been done, but the statements taken do not throw any certain light on the question of the accused's sanity, and it appears useless to have the persons examined called as witnesses. We have had the Civil Surgeon called and examined before us. His theory is that accused suffers from a form of epilepsy which does not manifest itself in fits, but on which the sufferer loses consciousness temporarily and commits act of violence without knowing what he is doing. He believes that the accused committed the violent act proved against him whilst in a trance arising from epilepsy, and that at the time he did not know the nature of his act or that he was doing wrong.

Although not fully convinced that the Civil Surgeon's view affords the real explanation of the cause of the accused's act, we think it affords sufficient reason for altering the sentence.

We accordingly do not confirm the sentence of death on the accused, but, confirming the conviction of murder, alter the sentence on the accused to one of transportation for life.

*Per Moore, J.*—I concur.

IN THE CHIEF COURT OF LOWER  
BURMA.

CRIMINAL REVISION\* NO. 395B OF 1907.

King Emperor vs Ba Pe and six others.

BEFORE MR. JUSTICE IRWIN.

Dated 3rd December 1907.

\*Reference made by the District Magistrate, Thaton, vide his order in Criminal Revision No. 171-07, dated the 26th November 1907, for review of the order of S. G. Grantham, Esq., 2nd class Subdivisional Magistrate, Kyaikto, dated 14th November 1907, passed in Criminal Regular No. 199-07.





*Examination of accused—Criminal Procedure Code, section 342—reference, when appeal allowed—Criminal Procedure Code, section 439 (5)—sentence in default of payment of fine—Penal Code, section 55.*

A conviction will not be set aside merely because the accused are not examined under section 342 when they are not prejudiced, especially on reference.

The High Court will not interfere on reference when there is a right of appeal and the appellant has not exercised it, under section 439, Criminal Procedure Code.

When sentence in default of fine is in excess of the proportion provided by section 65 of the Indian Penal Code, so much of it as is in excess, must be set aside.

*Followed* : Crown vs. Po Maung, 1 L. B. R. 362.

*Cited* : King Emperor vs. Kyan Baw, 2 L. B. R. 239.

*Referred to* : King Emperor vs. Yena, 4 L. B. R. 49.

Shwe Pan and six others were tried and convicted of offence under the Gambling Act, sections 11 and 12. The Magistrate omitted to examine the accused as required by section 342, Code of Criminal Procedure. For this reason the District Magistrate recommends that the convictions be set aside, citing King Emperor vs. Kyan Baw (1).

Doubtless the trial was bad by reason of the omission, but it is not imperative on the High Court to set aside every void order which comes to its notice, when the person aggrieved does not move the court to do so. In King Emperor vs. Yena (2) we refrained from interfering with an order of acquittal made by a court which had no jurisdiction to make it. In the present case the accused did not petition either the District Magistrate or this court. Indeed, if they had done so this court could not have entertained the petition, because they had a right of appeal and did not exercise it. Section 439 (5), code of Criminal Procedure.

From the record it appears that the accused, though they were not examined, stated the substance of their defence when the charge was stated to them under section 242, and they called witnesses in defence. It does not appear that they were prejudiced by the omission to examine them; and as they might have appealed but did not, I see no reason to set aside the convictions.

The sentences in default of payment of fine were contrary to section 65 of the Penal Code. One of these sentences has not yet expired, it has been suspended by the District Magistrate. This particular illegality cannot be passed over. Crown vs. Po Maung (3). I reduce the sentence on Ba Pe in default of payment of fine under section 12 of the Gambling Act to 21 days, and as he has suffered more than that period I direct that his recognizance bond be cancelled.

IN THE CHIEF COURT OF LOWER  
BURMA.

CRIMINAL APPEAL NO.\* 530 AND 531 OF 1907.

Nga Twet Pe alias Shan Gale, Nga San U,

vs.

King Emperor.

BEFORE SIR CHARLES E. FOX, KT., C. J., MR. JUSTICE  
HARTNOLL AND MR. JUSTICE IRWIN.

Dated 13th December 1907.

*Theft, and inference of—section 114, Evidence Act, where thief receives gratification—conviction under sections 380 and 215—joinder of charges, sections 235, 236, Criminal Procedure Code.—transaction—doubt as to the meaning of words.*

*Per Fox, C. J.*—Conduct of the accused, and their knowledge where the stolen property was, are facts from which it may be presumed that the accused were the actual thieves. Section 114, Evidence Act.

Where, upon the facts proved, the conclusion is justified that an accused who has taken or agreed to take a gratification for helping to restore stolen property to the owner was himself the thief or engaged in the commission of theft, he is liable to be convicted for theft, but is not liable to be convicted under section 215 of the Indian Penal Code.

Where the theft of the property is followed within a short time by negotiations for its return in exchange for a gratification, and its actual return, the facts are so connected as to form a single transaction within the meaning of section 235 of the Criminal Procedure Code and there is no objection to the accused being tried together under section 379 and section 215 of the Indian Penal Code.

*Obiter*—In cases in which the question is likely to arise the charges should be in the alternative under section 236 of the Criminal Procedure Code.

(3) 1 L. B. R., 362.

\* Appeal from the order of Maung Pe, Eqr., Special Power Judge, Thaton, dated 20th July 1907, passed in his Criminal Trial No. 33 of 1907.

(1) 2 L. B. R., 239.

(2) 4 L. B. R., 49.

*Per Irwin, J. (dissenting).*—Though a double conviction under sections 380 and 215 of the Indian Penal Code is contrary to the principles of natural justice, and though the sentences may be set aside as being improper and unjust, the conviction is not contrary to law.

*Per Hartnoll, J.*—When there is a reasonable doubt as to the meaning of words in a section the benefit of it should be given to the accused and not to the Crown.

*Fox, C. J.*—Followed: King Emperor vs. Nga To (1903) 2 L.B.R., 23.

Considered: Queen Empress vs. Mahomed Ali, I.L.R., 23 All 81; Nga Oh Gyi, vs. Queen Empress (1889) L.B.S.J., 449; Nga Shwe Kya vs. Queen Empress (1889) L.B.S.J., 461; Queen Empress vs. Nga Tun Bya (1896) L.B.P.J., 226.

*Irwin, J.*—Referred to: King Emperor vs. Nga Po Shein, 2 L.B.R., 14.

*Hartnoll, J.*—Dissented from Crown vs. Nga Shein (1902) 1 L.B.R., 203.

*Per Fox, C. J.*—The following are the facts as found by the magistrate. On the night of the 9th decrease Nayon 1267, B.E. (3rd June 1907), a bullock belonging to the complainant was lost from underneath his house where it was tied up to a post. He made a search for the animal but failed to find it. He then asked Nga Maung (second witness for prosecution) to make an enquiry about it. On the same day (4th June) Nga Maung went to Kyaikyedwin, and he met the two accused there. He informed them that the complainant had lost a bullock and asked them if they knew who had stolen it. Both accused said “ငွေရှိရင်နွားရှိလှာ်. If there is money there is bullock,” and demanded Rs. 20. Nga Maung came back to complainant and told him what accused had said. On the following day (5th June) he got Rs. 20 and then went to accused who were in Kyaikyedwin village. He offered the money, when first accused, Twet Pe, said that he would not accept it from any other person than complainant himself, and took Re. 1 only. Nga Maung came back and informed complainant what first accused had said. On the same day, at 1 p.m., complainant went with Nga Maung and Nga Pan Tha Gyi (third witness for prosecution) to the jungle where they met the two accused. They demanded Rs. 20, when complainant said that he would pay the money on their producing the bullock. They however insisted on immediate payment of the money. On this complainant paid Rs. 19 to first accused, Twet Pe, in the presence of Nga

Maung and Pan Tha Gyi. Both accused then took complainant into the jungle. The first accused, Twet Pe, pointed out the bullock which was tied up to a bush, untied the animal and made it over to complainant. The second accused, Nga San U, was present. Nga Maung and Pan Tha were not present, they returned home immediately after the payment of the money to the first accused, Twet Pe. Both the accused went away together after the bullock had been made over to the complainant.

The above facts are fully supported by the evidence. Upon them the magistrate convicted both accused of offences punishable under sections 380 and 215 of the Indian Penal Code, and passed separate sentences on them for each offence.

The chief grounds of appeal are to the effect, that the accused having been held guilty of theft not by direct evidence but by inference drawn from facts which proved the commission of an offence under section 215 of the Indian Penal Code, there should not have been convictions and sentences under both sections 380 and 215 of the Code, and that if the accused committed both theft in a building and an offence punishable under section 215, the offences were distinct and did not form part of the same transaction, and therefore the trial of the accused for such offences in one trial was illegal.

This last contention may be dealt with first. The magistrate found that the accused stole the complainant's bullock for the express purpose of obtaining money for its restoration. This finding was, in my opinion, justified, and the negotiations and return of the bullock followed within such a short time of the theft of it that the theft and what followed, until the return of the bullock, may reasonably be considered as a series of acts so connected together as to form the same transaction. Consequently section 235 of the Code authorized the trial of the accused in one trial for both the theft and the taking of the gratification, and, subject to what I have to say upon the applicability of section 215 of the Penal Code to the case of the actual thief, they were liable to be convicted, and to have separate sentences passed on them for each of the offences. None of the clauses of section 71 of the Penal Code apply to the

case of a man committing a theft and subsequently taking a gratification to restore the stolen property, consequently there is nothing to forbid separate sentences for each offence held proved if actual thieves can be also convicted of an offence under section 215 of the Indian Penal Code. This view accords with my ruling in *King Emperor vs. Nga To* (1).

The first ground of appeal assumes that the accused were convicted of theft solely on the inference drawn from the proved fact that one of them received money to restore the stolen bullock in conjunction with proof of facts justifying the conclusion that the two accused were acting in concert. This is not a justifiable assumption. The connection of the accused with the bullock is shown in the combination of facts proved, and on those facts it is reasonable to conclude that the two accused were in possession of the bullock soon after the theft. But assuming that this was not established, the combination of facts and the conduct of the accused and their knowledge of where the bullock was, afforded reasonable ground for presuming that they had actually committed the theft of the bullock themselves. Amongst the illustrations given in section 114 of the Evidence Act, of what a court may presume, is one that a man who is in possession of stolen goods soon after the theft is either the thief or that he has received the goods knowing them to be stolen, unless he can account for his possession. The illustrations to the section are not exhaustive in respect of the presumptions mentioned therein, and other facts, besides possession of stolen goods soon after a theft, may justify the presumption that a person has stolen the goods. The facts proved in this case against the accused appear to me to fully justify the conclusion that they actually stole the bullock.

Another question has been raised which was not considered in the case of *Nga To*. It is contended that section 215 of the Penal Code does not apply to the case of an actual thief who takes or agrees to take a gratification for restoring or helping to restore the property he has stolen. In *Queen Empress vs. Mahammad Ali* (2), Aikman, J., says that a careful perusal of the section will show that it was never intended to apply to the actual thief, but it was intended to apply to some one who, being in league with

the thief, receives some gratification on account of helping the owner to recover the stolen property without at the same time using all the means in his power to cause the thief to be apprehended and convicted of the offence. In *Nga Oh Gyi vs. Queen Empress* (3), Ward, J. C., held that if the accused, who had offered to find the stolen property for the owners in consideration of payment of a certain sum of money, and had received the money, had himself stolen the property, the section did not apply, for the curious reason that the accused could not well have adopted more effectual measures than he did for causing the offender (that is to say, himself) to be apprehended and convicted. In *Nga Shwe Kya vs. Queen Empress* (4), Ward, J. C., again set aside a conviction under the section when the accused had also been convicted of the theft. In this case he gave his views as to what the offence made punishable by the section consisted of. In *Queen Empress vs. Nga Tun Bya* (5), Aston, J. C., held that a thief might be convicted of an offence punishable under section 215 as well as of theft. In *the Crown vs. Nga Shein* (6), Copleston, J. C., held that a thief who took a gratification for restoring what he had stolen might be convicted of theft and also under section 215, but where the theft was proved not by direct evidence but by inference drawn from the facts which proved commission of the offence under section 215, there should not be separate convictions and sentences. The wording of the section is peculiar. It was probably adopted from a provision of the English Law which is now contained in section 101 of 24 and 25 Vict., c. 96.

I cannot adopt Ward, J. C.'s view, that the offence under the section lies in the fact that the offender did not use every means in his power to bring the actual thief to justice. The language is that whoever takes or agrees or consents to take any gratification under pretence or on account of helping any person to recover moveable property of which he shall have been deprived by any offence punishable under the Code shall be punished unless he uses all means in his power to cause the offender to be apprehended and convicted of the offence.

(1) (1903) 2 L. B. R. 23.  
(2) (1900) I.L.R., 23 All. 81.

(3) (1889) L.B.S.J., 449.  
(4) (1889) L.B.S.J., 461.  
(5) (1896) L.B.P.J., 226.  
(6) (1902) I.L.B.R., 203.

This, to my mind, means that any one who takes or agrees to take a gratification under pretence or on account of helping the owner to recover, say, stolen property, commits an offence at the time he takes or agrees to take the gratification, but he may, so to speak, condone the offence and avoid punishment by using all means in his power to cause the offender who took the property to be apprehended and convicted of the offence which he committed. This is the view which appears to have been taken by the English courts of the similar provision of the English Law. See Russell on Crimes, Cap. 29.

In regard to whether the section applies to the actual thief who takes or agrees to take a gratification for restoring the property he has stolen, I think there is much force in Aikman, J.'s remarks that section 215 was not intended to apply to the actual thief. It appears to me that the inherent intention to be gathered from the language was to provide punishment for an act done by some one or other than the person who has deprived the owner of his property. The person who commits the offence of taking a gratification can only be absolved from it and its consequences by showing that he used all means in his power to cause the person who deprived the owner of his property to be apprehended and convicted. No offender is under any legal obligation to cause himself to be apprehended and convicted; or to confess to having committed an offence. The inquisition makes it obligatory on any one who takes or even agrees to take a gratification on pretence of or on account of helping an owner to recover his stolen property to use all means in his power to bring the actual thief to justice.

It could scarcely have been intended by the section to make a thief, who possibly and probably benefits the owner by restoring his property to him, liable to greater punishment because he takes money for restoring the property and does not hand himself up to justice and confess his crime.

The English decisions on the similar provision of law are all in cases in which a person other than the actual thief was prosecuted for taking a gratification.

Upon consideration I am of opinion that, where, upon the facts proved, the conclusion is

justified that an accused, who has taken or agreed to take a gratification for helping to restore stolen property to the owner, was himself the thief or engaged in the commission of theft, he is liable to be convicted of and sentenced for the theft, but he is not liable to be convicted under section 215 of the Indian Penal Code also.

In cases in which the question is likely to arise the charges should be in the alternative under section 236 of the Criminal Procedure Code.

I would, in the present case, uphold the convictions and sentences for theft in a building, but would set aside the convictions and sentences under section 215 of the Penal Code.

*Per Irwin, J.*—The facts found are fully set out in the judgment of the learned Chief Judge; I need not repeat them. I agree that there is no doubt about the correctness of the findings on the evidence.

The first ground of appeal is based on the ruling of the late Chief Judge, Mr. Justice Copleston, in the *Crown vs. Nga Shein*(1). With great respect, I am unable to assent to the proposition that the question of the liability of any person to conviction of an offence can depend on the manner in which the commission of an offence is proved. Apart from that point, in the present case the appellants are proved to have been in possession of the stolen bullock soon after the theft, and the theft is therefore proved by circumstantial evidence distinct from the proof of the offence under section 215.

The second ground of appeal is based on the same ruling. On this point also I am unable to follow Mr. Justice Copleston. I agree with the learned Chief Judge that the theft and the negotiations which ended in the ransom of the bullock are a series of acts so connected together as to form the same transaction within the meaning of section 235, Code of Criminal Procedure.

On the question, whether the actual thief is liable to conviction under section 215, I should be glad if I could answer the question in the negative, because I think such a double conviction is contrary to the principles of natural

justice. But I cannot say that I think it contrary to law. This is not an isolated instance of such an anomaly, another instance is to be found in *King Emperor vs. Nga Po Shein* (7).

Section 215 seems to me to be designed for the punishment of a person who makes, or assists the thief or receiver to make, profit out of a theft in one particular way; and it was enacted because thieves and receivers had devised means by which the profit could be attained without affording evidence of such facts as would support a conviction of either theft or receiving. The section seems to be aimed mainly at thieves and receivers who are too cautious and too clever to let themselves be caught under other sections of the Code.

If, then, a person who is probably the thief is liable to conviction under section 215, is there anything to indicate that a person who is proved to be the thief is not so liable? In my opinion if the Legislature intended to make any such restriction it would be found in Chapter XIX of the Code of Criminal Procedure, and if it were intended to limit the punishment on a double conviction of theft and of the offence under section 215 it would be found in Chapter III of the Penal Code. There are no such restrictions.

I am thus constrained to hold that the double convictions and sentences in the present case are not illegal. But I consider the double sentences improper and unjust. A thief who returns the stolen property in consideration of a payment does not thereby inflict any additional injury on the owner. On the contrary, the owner effects the transaction because he thereby recovers part of the loss that was caused to him by the theft.

I would therefore uphold the convictions under both sections and the sentences for theft, but would set aside the sentences under section 215.

*Per Hartnoll, J.*—As the proved facts have been set out by the learned Chief Judge it is unnecessary to set them out again.

On them it seems to me beyond doubt, that the convictions under section 380 of the Indian Penal Code are correct. I am unable, with all

due respect, to follow the reasoning of Copleston, J. C., in the case of *Crown vs. Nga Shein* (6). If inferences drawn from proved facts support the conclusion that a person has committed more offences than one of which he may be properly convicted, I can see no reason why he should not be convicted of such offences. In the present case the connection of the appellants with the stolen animal so soon after the theft warrants, to my mind, the conclusion that they were the thieves in the absence of reasonable explanation by them which explanation they have not offered.

The proved facts certainly also seem to me to be so connected together as to form the same transaction within the meaning of section 235 of the Code of Criminal Procedure. The most difficult point in the appeal remains for consideration, and that is, whether a person, who is proved to be the thief, can also be convicted under section 215 of the Indian Penal Code, if it is shown that he has taken a gratification to restore the property and has not then handed himself up to justice. In other words, was section 215 of the Code intended to apply to the thief himself? The learned Chief Judge has reviewed the available decisions on the point and it is unnecessary for me to further discuss them. The section may be so read that it would apply to the thief himself, as it may be argued that the thief, after taking the gratification, has the power of causing himself to be apprehended and convicted and that, if he does not do so, he does not use all means in his power to cause the offender to be apprehended and convicted; but I think that to so read them would be to strain and give them an unnatural meaning. The natural meaning of the section seems to me to be that an offender under it must be some one other than the actual thief. To say the most in favour of the Crown on the point it seems to me that there is a reasonable doubt as to the meaning of the words, and since there is such doubt in my opinion the benefit of it by all well known principles of interpretation should be given to the subject. As regards the justice and propriety of punishing criminals both under section 379 and section 215 with respect to the same property, it seems to me that in the majority of cases it would be most unfair to give heavier combined sentence

(7) 2 L. B. R. 14.

(6) 1 L. B. R. 14.

under sections 379 and 215 than the sentence that would have been passed under section 379 only. In cases that merely come under section 379 the property is often totally lost or destroyed, but where a gratification is taken to restore stolen property, it often, and in the majority of cases, finds its way back to the owner intact and unhurt for very much less than its value.

After due consideration I would hold that section 215 of the Indian Penal Code does not apply to one proved to be the actual thief. I would therefore set aside the convictions and sentences passed on Maung Twet Pe and Maung San U under section 215 of the Indian Penal Code, but I would confirm the convictions and sentences passed under section 380 of the Indian Penal Code.

IN THE CHIEF COURT OF LOWER  
BURMA.

CIVIL SECOND APPEAL NO.\* 92 OF 1907.

Ma Hnin Get and four others.

vs.

S. N. A. Satappa Chetty.

BEFORE SIR CHARLES E. FOX, KT., C.J., AND  
MR. JUSTICE HARTNOLL.

Dated 9th December 1907.

For Appellant—McDonnell.

It is not open to a court, and especially a court of appeal, to arrive at a determination inconsistent with the case set up.

The determination in a cause should be founded upon a case either to be found in the pleadings or involved in or consistent with the case thereby made.

Approved: Mahomed Buksh Khan vs. Hosseini Bibi (1888) I.L.R., 15 Cal. 684.

Followed: Eshen Chunder vs. Shama Charan Bhutto (1866) 11 Moore L. A. 7.

Mylapore Iyasawmy Vyapoory Moodliar vs. Yeo Kay (1887) I.L.R., 14 Cal. 801.

The only appeal open is under section 584 of the Code of Civil Procedure. The decision of the appellate court on the facts is final, consequently most of the grounds of appeal are not open to the appellants.

\* Appeal against the judgment and decree of E. Ford, Esq., Divisional Judge, Delta division, dated 18th March 1907, passed in Civil Appeal No. 16 of 1907.

It has been urged that the Divisional Judge erred in law in dealing as he did with the question of whether the defendants had signed the promissory note, sued on, under coercion. He practically refused to enter into the question. The only defence to the claim on the note set up by the defendants was denial of execution of it and of consideration for it. Consequently, the issues in connection with the note were framed upon the allegations on one side and the denial on the other of execution and consideration.

The plaintiff, in giving evidence, stated the circumstances under which he alleged the defendants had executed the note. Upon part of what he said, the question whether the consent of the defendants to sign the note had not been obtained by coercion of them by the plaintiff might well have been raised. Such a plea, however, had not been raised by the defendants in their written statements, and, if it had been, it would have been inconsistent with their plea of non-execution of the note. It would have involved their admission of execution of the note and setting up that it was a contract voidable at their option under section 19 of the Contract Act, and that they exercised their option and refused to be bound by it.

The question whether it would have been permissible to raise an issue on the question of coercion would have arisen, and still more does it arise when the defendants did not in fact raise any question about coercion in their written statements.

In Mahomed Buksh Khan vs. Hosseini Bibi (1) the plaintiff sought to have a deed of gift, which purported to have been made by her, set aside on the grounds—*firstly* that she had not executed it and, *secondly*, that undue influence had been exercised upon her. The latter ground involved the admission that she had executed the deed. An issue was framed which covered both grounds namely, whether she had executed it and whether it had been executed under undue influence. Their Lordships of the Privy Council said that the latter part of the issue ought not to have been admitted, because it was absolutely inconsistent with the case made by the plaintiff,

(1) (1888) I. L. R., 15 Cal. 684.

and it only became possible on the assumption that the alleged cause of action was unfounded. The principle of not allowing a party to set up inconsistent pleas would logically apply to a defendant as well as to a plaintiff, and in the present case the defendants, if they had set up coercion as a ground of defence in their written statements, should not have been heard as to it.

Another principle laid down by Their Lordships of the Privy Council is, that the determination in a cause should be founded upon a case either to be found in the pleadings or involved in or consistent with the case thereby made—see *Eshen Chunder vs. Shama Charan Bhutto* (2) and *Mylapore Iyasawmy Vyapoory Moodlier vs. Yeo Kay* (3).

This principle affords another justification for the Divisional Judge's refusal in the present case to enter into the question of whether the defendants' consent to sign the note was caused by coercion.

The argument that on the plaintiffs own evidence he was not entitled to a decree might prevail, if such evidence showed that the contract was an illegal or void contract; because no court should give effect to such a contract, but where, as in this case, the contract was at most a voidable one, it was the duty of the defendants to raise in their pleadings the ground on which the contract was voidable, instead of denying execution of the note.

In my judgment there was no error of law in the Divisional Judge's decision and I would dismiss the appeal.

*Hartnoll, J.*—I concur.

(2) (1866) 11 More, L. A. 7.

(3) (1887) I. L. R. 14 Cal. 501.

IN THE CHIEF COURT OF LOWER  
BURMA.

CIVIL MISCELLANEOUS APPLICATION NO. 74 OF  
1907.

In the matter of professional misconduct of Maung  
—, 3rd grade pleader.

BEFORE SIR CHARLES E. FOX, KT., C. J. AND  
MR. JUSTICE IRWIN.

Dated 5th December 1907.

For the pleader—May Oung.

*Legal practitioners—power of courts to suspend or dismiss, —applicability of section 40 of the Legal Practitioners' Act (Act No. XVII of 1879.)*

A pleader cannot be suspended or dismissed under the Legal Practitioners' Act unless he has been allowed an opportunity of defending himself before the authority suspending or dismissing him.

This principle is applicable to cases of suspension by subordinate courts as well as to suspension and dismissal by a High Court.

After perusal of certain records before him, the District Magistrate instituted a proceeding under section 14 of the Legal Practitioners Act, and charged the pleader with having conspired with others to put a public insult on a Township Officer by having the latter assaulted by two strange women. He at the same time suspended the pleader from practice without affording him any opportunity of showing cause against being suspended. After a lengthy investigation the District Magistrate found that the pleader, angered at a slight he imagined had been put upon him, hired two women and brought them to Padaung to assault the Township Officer, intending to put him publicly to shame. The Magistrate submitted his proceedings to this court with the recommendation that the pleader should be struck off the rolls. The Sessions Judge agreed with the District Magistrate's finding, that the pleader abetted the assault on the Township Officer, and considered the pleader's conduct afforded reasonable cause for suspending or dismissing him. In our opinion the proceedings under the Legal Practitioners Act was misconceived. If the pleader did what was alleged against him he committed a criminal offence punishable under the Indian Penal Code, and the proper tribunal to decide

whether he had been guilty of what was alleged against him was a court exercising criminal jurisdiction. If he had been found guilty by such court of an offence, the proper course would have been to report the case to this court in order that the court might consider it with reference to section 12 of the Legal Practitioners Act. Under the circumstances we decline to consider the evidence on which the lower courts were of opinion that the pleader should be dealt with under that Act.

The District Magistrate suspended the pleader hastily and without due consideration of what he was bound to do before he could pass an order of suspension. Section 40 of the Act enacts that no pleader, mukhtar, or revenue agent shall be suspended or dismissed under the Act unless he has been allowed an opportunity of defending himself before the authority suspending or dismissing him. This, by its terms, applies to suspension by subordinate courts as well as to suspension and dismissal by a High Court.

The Magistrate's order of suspension will end upon the making of this present order.

We neither suspend nor dismiss the pleader, and we do not acquit him because we consider that the question whether he was guilty of the conduct alleged against him and whether, if guilty, such conduct calls for his suspension or dismissal, do not properly arise in this proceeding.

IN THE CHIEF COURT OF LOWER  
BURMA.

CIVIL REFERENCE NO.\* 2 OF 1907.

Maung Shwe Tha

vs.

(1) Ma Saw Hla, (2) William Andrews, (3) Maung Ba Choe.  
BEFORE SIR CHARLES E. FOX, KT., C. J., MR. JUSTICE  
IRWIN AND MR. JUSTICE MOORE.

Dated 2nd December 1907.

The general rule under both the Civil Procedure Code and the rules of the Divorce Courts is that personal service upon the party to be effected should only be dispensed with when every reasonable effort has been made to trace him or her without success.

\* Reference made by G. F. E. Christie, Esq., Divisional Judge Tenasserim, for confirmation of the decree for the dissolution of marriage, dated 8th March 1907, passed in Civil Suit No. 1 of 1906.

ORDER.

The case comes before this court for confirmation of a decree for dissolution of marriage made by the Divisional Court.

The petitioner and respondent are Christian Karens and were lawfully married on the 29th January 1895. The ground on which the petitioner sought for dissolution of his marriage with the respondent was, that she, on the 17th April 1906, left the place, where they were living, for Rangoon in company with the co-respondents and that he had subsequently learnt that she had gone with them to Calcutta and that she had committed adultery with both of them in Rangoon and Calcutta.

In his evidence he said that on the above date she had said she would go to Rangoon to buy carriages which were to be used to let out for hire in Toungoo. He gave her Rs. 1,000 and five hundred rupees worth of jewellery for the purpose of buying the carriages. She never returned and had never sent any letter to him. In May of the same year, a friend of his in Calcutta had sent him a telegram which was to the effect that he had seen the respondent there with two boys. On the 19th May this same friend wrote a letter giving some information he had received about her having committed adultery, but not with either of the co-respondents. The addresses of the respondent and co-respondents were not given in the petition. At the time of presenting his petition the petitioner applied that, instead of the summons being sent in the ordinary way, the summons to the respondent should be advertised in local papers in Rangoon and Calcutta. On this the judge ordered that notices be published in the "Statesman" newspaper, Calcutta, and in the "Rangoon Times," in eight issues of each paper. The petitioner asked that this might be done on the ground that he could not ascertain his wife's proper address.

The only method adopted to bring the proceedings to the notice of the respondent and co-respondents was by publication of the summonses in the above papers. The procedure was irregular. Section 82 of the Code of Civil Procedure does not contemplate substituted service being granted except after reasonable endeavour has been made to serve a summons personally.

Maung Po Min, the petitioner's friend in Calcutta, stated that in May 1906, he saw the respondent in the house of a Burmese broker who lived in Kolutollah street, Calcutta. He said he did not know the broker's address, but it is obvious that he could have easily found it out if he had taken the trouble to do so. He said he saw her living there with two boys, one of them looked like a native and the other like an Eurasian.

He had seen the native many times in Toun-goo, but he does not identify him either with William Andrews (the first co-respondent) or Maung Ba Choe (the second co-respondent). He said he saw the boys in the house twice but he did not know if they lived there. The broker had told him that the Eurasian had gone away and that the respondent had slept with the native boy for three days and nights. He afterwards saw her with the Eurasian boy and she said she would return to Burma in three or four days.

The information he received from the broker living in the house is hearsay, and there is no admissible evidence to prove the truth of the information: the broker was not called as a witness, nor was his evidence taken on commission.

Under section 7 of the Indian Divorce Act (1869), the courts of this country have to act and give relief on principles and rules as nearly as may be conformable to the principles and rules on which the court for divorce and matrimonial causes in England for the time being acts and gives relief. The general rule under both the Civil Procedure Code and the rules of the Divorce Courts is, that personal service upon the party to be affected should only be dispensed with when every reasonable effort has been made to trace him or her without success. In the present case reasonable efforts do not appear to have been made to trace either the respondent or the co-respondents. The mode in which the summons was held to have been served was ineffective, and no attempt seems to have been made to serve a copy of the petition as required by section 50 of the Act.

Again, the Divorce Court of England requires convincing evidence in proof of adultery. In the present case the admissible evidence is only to the effect that the respondent was seen on

two occasions in a house in Calcutta, which is not alleged to have been a brothel, in company with two boys. This does not, in my opinion constitute sufficient proof that the respondent committed adultery with the co-respondents or with either of them.

Under the circumstances I think the decree for dissolution of petitioner's marriage with respondent should not be confirmed.

*Irwin, J.*—I concur.

*Moore, J.*—I concur.

IN THE CHIEF COURT OF LOWER  
BURMA.

CRIMINAL APPEAL\* NO. 551 OF 1903.

M. A. Mamsa vs. Crown.

BEFORE MR. JUSTICE FOX.

Dated 16th December 1903.

*For Appellant.*—Mr. Vakbaria.

*For Respondent.*—Mr. Giles (Assistant-Government Advocate).

*Possession of opium—evidence—Opium Act—information received by excise officers—inadmissible.*

When there is no reliable evidence that accused has exercised any right of ownership over trunks in which opium is found, he cannot be punished under section 4 of the Opium Act.

Information received by the excise authorities that accused would bring opium with him by the steamer on which he was arrested, cannot be taken into consideration in convicting, and should not even be admitted in evidence.

The appellant was convicted of having imported into Rangoon 4,980 totals of opium in contravention of section 4 of the Opium Act. He was tried conjointly with a Mrs. Walters. Two others described as her servants had also at first been co-accused, but they were discharged.

\*Appeal from the order of U Po Bye, Esq., Additional Magistrate of Rangoon, dated the 30th October 1903, passed in Criminal Case No. 353 of 1903.

The opium was brought to Rangoon in two steel trunks. All the accused had been passengers from Calcutta by the same steamer. Mrs. Walters and her child had occupied one of the second class cabins, and Mamsa and some other native gentlemen, amongst whom was a chief constable of police from Surat, occupied another of them. During the voyage the other steel trunks were in the cabin occupied by Mrs. Walters.

Her servants in their examination said that they had been brought to the vessel by Mrs. Walters. On the other hand, a little boy who was brought by Mamsa said that Mamsa had brought them. The magistrate rejected this boy's evidence, and, in my opinion, he was right in not placing any reliance on it. The boy was evidently a precocious and wicked boy, and he had been thrashed on the voyage by Mamsa for stealing from a fellow passenger. He showed signs of considerable inventive power in explaining how money came to be found on him. He must have been quite capable of appreciating what line he should take in connection with the steel trunks in order to have his revenge on his master. There was no corroboration of anything that he said.

There is then no reliable evidence that the appellant exercised any acts of ownership over the trunks before or on the voyage. There was some evidence to show that he was on friendly terms with Mrs. Walters during the voyage, and I take it to have been proved that he paid for the messing of her two servants. He admitted himself that he had paid for the messing of three persons and, whilst denying that he had paid for Mrs. Walters' servants, he did not indicate who the two were for whom he paid in addition to his own servant, or why he should pay for them.

Beyond the probability of a woman carrying out a scheme for importing opium unaided by others, the appellant's action in paying for her two servants raises a strong suspicion that there was some connection between him and Mrs. Walters, and that he did it because she was doing something for him. But such suspicion is not sufficient to justify his conviction for taking part in the importation of the opium in question. The only other evidence to connect him with the boxes is that of two police officers who said that they saw him giving directions to

coolies who brought down the baggage from the steamer to the wharf. The directions were given by gestures only and these were to indicate where the articles were to be taken. Among the articles taken to the spot were the two steel trunks, but other articles were taken to the same spot, and amongst them were articles belonging to Mrs. Walters. The appellant left the wharf with all the baggage he claimed as his, leaving the steel trunks. Mrs. Walters, according to the Assistant Port Health Officer, claimed the steel trunks as hers, and displayed anxiety to have them passed without being opened. The impressions derived from seeing a man make gestures to coolies bringing a lot of baggage down from a steamer scarcely form any firm foundation for coming to a conclusion that any particular articles belong to the person making the gestures.

What appears to have chiefly led the Magistrate to convict the appellant was the fact that information had been received by the Excise authorities that he would bring opium with him by that steamer.

This should not have been taken into consideration at all; it should not even have been admitted in evidence. Although there may be grounds for strong suspicion that the appellant was concerned in the importation of the opium there was not sufficient reliable evidence to justify his conviction. I set it aside and find him not guilty. His bail bond will be cancelled.

### IN THE CHIEF COURT OF LOWER BURMA.

CRIMINAL APPEAL\* NO. 607 OF 1907.

John Davies vs. King Emperor.

BEFORE MR. JUSTICE ORMWOOD.

Dated 1st October 1907.

For Appellant.—Mr. Woodham for Mr. Giles.

*Jurisdiction—military authorities—section 549, Criminal Procedure Code—examination of accused—Criminal Procedure Code, section 342.*

\* Appeal from the order of Major E. R. Vaughan, Cantonment Magistrate of Rangoon, dated the 26th day of July 1907, passed in Criminal Trial No. 931 of 1907.

The sending of the accused up before the magistrate by the military authorities, though done no doubt at the suggestion of the police, and the presence of a superior military officer on behalf of the military authorities, who raised no objection, is tantamount to a request by the military authorities that the magistrate should try the accused, and therefore the magistrate has jurisdiction under section 549 of the Criminal Procedure Code.

When the accused pleads "not guilty", but when questioned under section 342 of the Criminal Procedure Code, gives an answer, which, if taken into consideration would convict him from his own mouth, and there is no other evidence, the conviction must be set aside, because that section does not authorize a court to examine an accused in order to fill up a gap in the evidence for the prosecution.

The accused, a private in G company of the Devonshire regiment, was brought before the Cantonment Magistrate on the 26th July; and on that day was tried and convicted under section 411, Indian Penal Code, of having dishonestly received a stolen bicycle, and was sentenced to three months rigorous imprisonment.

It is contended for the appellant, *first*, that under Notification No. 1222 of the Government of India, Home Department, dated the 27th July 1887, the Magistrate had no jurisdiction; and *secondly*, that there was no evidence to show that accused was ever in possession of the bicycle.

Under the above notification, which is made in pursuance of section 549 of the Criminal Procedure Code, the magistrate had no jurisdiction to try the accused unless he was "empowered to do so by the military authorities."

The Diary of the Proceedings is as follows: "26-7-07.—Case received to-day. Accused brought in military custody charge under section 379-411, Indian Penal Code. Three prosecution witnesses present. Major Travers, Devonshire Regiment, present on behalf of accused and regimental authorities.

"Accused states he does not claim to be tried by a jury or object to be tried by me. Examined two prosecution, accused and his witness (Major Travers). The property is returned to owner."

The sending of the accused up before the magistrate by the military authorities, though

done no doubt at the suggestion of the police, and the presence of Major Travers at the trial on behalf of the military authorities, who raised no objection, is tantamount, I think, to a request by the military authorities that the magistrate should try the accused. And, if so, the magistrate had jurisdiction.

As to the evidence; it comes to this: The bicycle was taken away from outside the Jubilee Hall on the night of the 16th July. On the 22nd July two soldiers (who said they belonged to G company Devonshire Regiment) took the bicycle to a shop to be repaired, and on the morning of the 23rd the owner identified his bicycle in G company verandah. No one has identified the accused in connection with the bicycle. The accused pleaded "Not guilty" to both charges; but after the evidence for the prosecution had been taken the magistrate put the following question to the accused:—

"Was the bicycle in court found in your possession?" to which the accused answered "yes," and stated that he had bought it; and he called no witnesses except Major Travers who spoke as to his character.

Now, if the accused's admission can be taken into consideration, he has been rightly convicted; otherwise not. The accused has been convicted out of his own mouth, upon an answer to a question put by the court, under section 342 of the Criminal Procedure Code. But that section does not empower the court to examine an accused in order to fill up a gap in the evidence for the prosecution; but only for the purpose of enabling the accused to explain any circumstances appearing in the evidence against him. There was no evidence incriminating accused, more than any other member of G company; the question therefore should not have been put. It has materially prejudiced the accused in his trial. The conviction and sentence must be set aside, and the accused be discharged. The accused presented his appeal on the 6th September when he was released on bail, having then suffered one month and eleven days imprisonment. The military authorities are at liberty to retry the accused if they think fit.

THE BURMA LAW TIMES.

IN THE CHIEF COURT OF LOWER  
BURMA.

CIVIL REVISION NO.\* 5 OF 1907.

Maung On Gaing vs. S. Dhar and one.

BEFORE MR. JUSTICE MOORE.

Dated 28th August 1907.

For Applicant.—Hamlyn.

For Respondent.—Burjorjee and Dantra.

Order of dismissal—Civil Procedure Code, section 102, 157—158—power of original court to restore.

Where the plaintiff fails to appear on any day to which the hearing is adjourned, section 157 of the Civil Procedure Code expressly authorizes the court to dispose of the suit under section 102, and if the suit is so dismissed the court does not act without jurisdiction in setting it aside and re-admitting the suit; and section 158 of the Civil Procedure Code has no application.

Followed: Shrimant Sagajirao vs. Smith, I.L.R., (1895) I. L. R., 20 Bom. 736.

Referred to: Badam vs. Nathu Singh (1902), I.L.R., 25 All. 194.

ORDER.

This is an application to revise the order of the Subdivisional Court, Kyaiklat, setting aside the dismissal of plaintiff respondent's suit, Civil Regular 21 of 1906 of that court. It is contended by applicant that this order was made without jurisdiction as the suit was dismissed under section 158, Code of Civil Procedure.

In reply, it is argued that the suit was dismissed not under section 158, but for default under section 157, read with section 102.

The suit in question was instituted on 15th January 1906. Issues were fixed on 13th July and the case was fixed for hearing on the 25th September 1906. On that date plaintiffs made no appearance and the case was, on the following day, dismissed for default with costs.

\* Appeal from the order of Maung Nyo, Esqr., Subdivisional Judge of Kyaiklat, dated the 20th December 1906, passed in Civil Miscellaneous Case No. 61 of 1906.

It is argued that section 102, Code of Civil Procedure, only applies to cases where the plaintiff fails to appear on the date first fixed for hearing. But section 157 expressly empowers the court to dispose of the suit under section 102 in the event of the plaintiff failing to appear on any day to which the hearing is adjourned.

Section 158 appears to be intended to apply to cases in which, after the hearing has commenced, time is given to a party for some specified object, such as the production of accounts or to obtain the attendance of an absent witness.

This view is in accordance with the case cited on behalf of applicant reported in xxv All. 194.

The present case is on all fours with the case of Shrimant Sagajirao vs. Smith, I. L. R. 20 Bom., p. 736.

I am clearly of opinion that the lower court was empowered to dismiss the suit for default under sections 157—102. And though these sections are not specifically quoted in the order, the order, on the face of it, is an order of dismissal for default, not a decision of the suit as provided by section 158. I therefore hold that the order was passed under sections 157—102, and that, therefore, the judge did not act without jurisdiction in setting it aside and re-admitting the suit, and I therefore dismiss this application with costs. Advocate's fee two gold mohurs.

IN THE CHIEF COURT OF LOWER  
BURMA.

CRIMINAL REVISION NO.\* 347 B OF 1907.

Maung Tun Myat vs. Ma Shwe Yoke.

BEFORE MR. JUSTICE IRWIN.

Dated 22nd November 1907.

For Applicant.—Jordan.

For Respondent.—In person.

Maintenance—arrear—warrant—Criminal Procedure Code, section 488 (3)—change in circumstances.

\* Appeal against the order of Maung Tau, Esqr., Eastern Subdivisional Magistrate, Rangoon, dated 28th September 1907, passed in Criminal Miscellaneous Trial No. 119 of 1907.

If the wife neglects to apply for warrants promptly, she must not except to get the arrears in full but must submit to a reduction.

The magistrate has no jurisdiction to issue an order to pay arrears instead of a warrant under section 488 (3) Criminal Procedure Code.

Where the circumstances of the husband have changed for the worse, and the children are admittedly 21, 19, 17 years of age, the magistrate is bound to enquire into the facts.

The respondent applied for a warrant to levy the arrears of maintenance. The magistrate gave her, not a warrant but an order for petitioner to pay Rs. 200 within seven days. This was an order he had no jurisdiction to make.

The petitioner's circumstances are very different now from what they were in 1894. In his written statement in reply he made an application under section 489 for alteration of the order for Rs. 44 per month. The magistrate has not dealt with this.

The magistrate ordered payment of Rs. 200 arrears. This was too much to order, considering that the petitioner is in debt. The wife ought to apply for warrants promptly, and when she does not do so she must not except to get much arrears.

I reduce the amount to Rs. 30 in respect of arrears due to the end of August, and I direct that the magistrate proceed to enforce payment of that amount and that he do further proceed to dispose of petitioner's application for reduction of the monthly amount, considering both petitioner's circumstances and the facts that the children are admittedly 21, 19, and 17 years, of age.

IN THE CHIEF COURT OF LOWER  
BURMA.

CIVIL REVISION No. \* 25 of 1906.

Kruger & Co., Ltd. vs. Birjee Cumaree.

BEFORE SIR CHARLES E. FOX, K.T., Offg., C.J.

Dated 14th June 1906.

For applicant.—J. R. Das.

*Jurisdiction how determined—value of suit—section 43, Civil Procedure Code.*

When a plaintiff gives credit in his plaint for a certain sum alleged by him to be due to the defendant, he does not relinquish any portion of his claim within the meaning of the first paragraph of section 43 of the Civil Procedure Code.

This was an application to revise an order passed by the learned judge of the Court of Small Causes, Rangoon, returning the plaint for presentation to the proper court.

The judgment of the Chief Court contains all the necessary facts.

The plaintiffs sued in the Rangoon Small Causes court upon a guarantee contract, alleging that the defendant was liable to pay them Rs. 3,000 in respect of the debt to them of a trader for whom the defendant had stood surety for such amount. They, however, gave the defendant credit for Rs. 1,112-1 for brokerage due in respect of the transactions of other traders whose debts were guaranteed by the same contract, and the suit was for Rs. 1,887-5. The defendant questioned the jurisdiction of the court to entertain the suit.

I agree with him. The suit was, in substance, one to recover Rs. 3,000 as being due, because a particular trader whom the defendant had guaranteed to that extent had failed to pay. In giving credit for what they said was due for brokerage or transactions with other guaranteed traders, the plaintiffs did not relinquish any portion of their claim within the meaning of the first paragraph of sections 43 of the Code. It is only when a plaintiff relinquishes a portion of his claim that he can bring a suit in a court which would have no jurisdiction if he sued for his claim in full.

The application is dismissed with costs. Two gold mohurs allowed as advocate's fee.

\* Application to revise of order A. H. Bagley, Esq., Judge of the Court of Small Causes, Rangoon, in Civil Regular No. 121 of 1906.

IN THE CHIEF COURT OF LOWER  
BURMA.

CRIMINAL REVISION No.\* 29B of 1907.

J. F. Bretto vs. Rangoon Municipal Committee.

BEFORE MR. JUSTICE IRWIN.

Dated 6th December 1907.

Giles for petitioner.

Eddis and Jordan for respondents.

*Burma Municipal Act—Burma Act III of 1898—sections 130, 147 and 180—admissibility of evidence to prove house fit for human habitation—whether house is fit for human habitation is always a question of fact.*

Where the owner or occupier of a house receives a notice under section 130 of the Burma Municipal Act, prohibiting him from using or suffering the said premises to be used for human habitation after three months from the receipt of the notice, or until such time as the municipal committee is satisfied that the said premises have been rendered fit for such use and he is afterwards prosecuted under section 180 of the said Act for suffering his house to be so used without the permission of the said committee, evidence to prove that his house has been rendered fit for human habitation is admissible.

When the owner or occupier has done what he thinks, or alleges he thinks, to be sufficient to make the house sanitary and habitable, if the committee differ from him, the law does not allow either party to appeal to the Commissioner.

Section 130 of the Burma Municipal Act, goes not make the committee the judge of the question whether the house has been made fit for habitation. It is a question of fact to be decided by the magistrate if the committee see fit to prosecute.

A Notice dated 31st July 1906, and signed by the Municipal Health Officer was served on Mr. Bretto on 4th September 1906. The notice is in these terms,

"To Mr. J. F. Bretto.

"Owner.

"Occupier of No. 27, 42nd street.

"Whereas the premises above named appear to the Municipal Committee of Rangoon to be unfit for human habitation, in consequence of its insanitary condition, this is to give you notice that the said committee, in exercise of the powers conferred upon it by section 130 of the Burma Municipal Act, 1898, hereby prohibits you from using the said premises, or suffering them to be used, for human habitation after three months from the receipt of this notice or

"until such time as the said committee is satisfied that the said premises have been rendered fit for such use.

"*Note.*—you are hereby warned that no repairs of any kind may be commenced until written permission has first been obtained from the Municipal Engineer."

On the 21st October 1906 Mr. Bretto acknowledged the receipt of the notice, and reported that the house had been thoroughly cleaned and painted, and was open to inspection.

On 30th November 1906 the Health Officer replied that something further was required to make the building sanitary. Further correspondence ensued. Mr. Bretto let the house to a tenant about the end of December.

On 21st May 1907 the committee instituted a prosecution for disobedience of the notice, under section 180 of the Municipal Act. The complaint, after setting out the principal directions contained in the notice, alleged, "That the accused has failed to comply with the said notice".

Lengthy evidence was adduced by the committee to prove that the accused did not put the house into a sanitary condition, and by the accused to prove that he did. After hearing the arguments of counsel, however, the magistrate came to the conclusion that it was not necessary to consider the evidence at all, because it was contended on behalf of the committee that, whether in fact the house was in a sanitary state or not, Mr. Bretto committed an offence by permitting his tenant to use the house before the committee were satisfied that it was fit for habitation.

A ruling under the Calcutta Municipal Act was cited on the part of the committee, but the magistrate does not seem to have regarded it as of much consequence, and, in fact, it is not in point at all, as both the substantive law and the procedure laid down in the Calcutta Act are widely different from those contained in the Rangoon Act.

The magistrate convicted the accused, and fined him one rupee, and the ground of his decision is, that section 147 enacts that no order made under section 130 shall be liable to be called in question otherwise than by appeal to the commissioner under section 147. Mr. Bretto applies to have the conviction reversed.

\* Review of the order of Maung Ne Dun, Esq., 1st Class Additional Magistrate of Rangoon, dated 2nd August 1907, passed in Criminal Trial No. 375 of 1907.

IN THE CHIEF COURT OF LOWER  
BURMA.

CIVIL REVISION No.\* 111 OF 1907.

Sewnath vs. Maung Bwin.

BEFORE MR. JUSTICE IRWIN.

Dated 5th December 1907.

For applicant—Israil Khan.

*Revision—section 25, Provincial Small Cause Courts Act—facts left out of consideration altogether—good ground.*

When a judge of a Court of Small Causes leaves some important facts out of consideration altogether in his judgment, it is a good ground for the interference of the High Court under section 25 of the Provincial Small Cause Courts Act.

The plaintiff-petitioner sued in the Court of Small Causes, Rangoon, for Rs. 143-4, being principal and interest due on a promissory note. The defendant pleaded payment; and also that the note was barred by limitation under the following circumstances: The promissory note was dated 18th March 1904. The suit was instituted on 25th April 1907. Three endorsements on the note in the plaintiff's hand show payment of interest on three occasions, i.e., on 25th April 1904, 15th May 1904 and 17th June 1904, and plaintiff claimed exemption from the operation of the statute of limitation on the ground of these alleged payments, which were not admitted by the defendant. At the hearing of the suit the defendant, in his deposition, did not expressly deny these three payments of interest, whereas the plaintiff affirmed them.

The learned Additional Judge was unable to accept plaintiff's statement as to the payments of interest and dismissed the suit on the ground that the claim was barred by limitation.

The following judgment was delivered by Mr. Justice Irwin:

*Irwin, J.*—Plaintiff sued on a promissory note for Rs. 50, bearing interest at one anna per rupee per month. The note is dated 18th March 1904. The suit was instituted on 25th April 1907, and

\*Against the decree of Maung Hpay, Esq., Additional Judge, Court of Small Causes, Rangoon, dated 17th July 1907, passed in Civil Regular No. 2547 of 1907.

plaintiff alleged three monthly payments interest, the last made on 17th June 1904. These payments were not made the suit would be barred by limitation.

Defendant said nothing about these payment but alleged that he paid Rs. 75, principal and interest in full, in September 1904.

The judge did not say whether he believed the evidence of payment in September 1904. He said that defendant did not admit the three monthly payments of interest and there was no evidence to corroborate plaintiff about them.

He therefore dismissed the suit as barred by limitation.

It is true that defendant did not admit the three payments, but neither did he deny them. The learned judge omitted to notice that interest for six months would amount to only Rs. 18-12 whereas defendant alleged that he paid Rs. 2 interest, and did not offer any explanation why he paid Rs. 6-4 in excess. Also, the note was in the possession of plaintiff. These two facts tend to show that the defence is false. When coupled with that, we have the fact that defendant did not deny the payments of monthly interest, the plaintiff's evidence about these payments ought to be believed. As the judge left some important facts out of consideration altogether, I think there is sufficient ground for the interference of this court.

I set aside the decree of the Court of Small Causes. Plaintiff will have a decree for the amount claimed, with costs in both courts.

IN THE CHIEF COURT OF LOWER  
BURMA.

(ORIGINAL CIVIL JURISDICTION.)

CIVIL MISCELLANEOUS NO. 156 OF 1907.

In the Matter of the estate of David Nicolson and Charlotte Shaw Nicolson, both deceased. The petition of Annie Elizabeth Black.

BEFORE MR. JUSTICE MOORE.

Dated 2nd December 1907.

For Petitioner.—Okeden.

*Court fees—Act No. VII of 1870, section 19C.—Letters of administration de bonis non—no further Court fee leviable.*

When court-fees have once been paid on the value of the estate of a deceased person and letters of administration have issued for the administration of that estate, no further court-fees are leviable in respect of the unadministered portion of that estate on a subsequent application for letters of administration *de bonis non*, if the value of the property has increased in the meanwhile.

*Section 19C of the Court-fees Act exempts the payment of such extra court fees.*

This was an application by Mrs. Anne Elizabeth Black for letters of administration *de bonis non*. In her application, the petitioner stated that in Civil Miscellaneous No. 115 of 1883, of the Court of the Recorder, of Rangoon probate of the will of one David Nicolson was, on the 19th August 1883, granted to Charlotte Shaw Nicolson, and that the said Charlotte Shaw Nicolson died on the 25th March 1902 without having fully administered the estate of the deceased David Nicolson. Subsequently, in Civil Miscellaneous No. 55 of 1902 of the Chief Court, letters of administration of the property and credits of the above deceased, David Nicolson, left unadministered by the said Charlotte Shaw Nicolson were, on the 28th April 1902, granted to Charlotte Shaw Adam, daughter of the deceased. Charlotte Shaw Adam died on the 2nd August 1907 without having fully administered the estate of the deceased David Nicolson.

The property so left unadministered was part of the same property in respect of which court fees had already been paid and petitioner asked for a grant of letters of administration of the property and credits of the above deceased left unadministered by the said Charlotte Shaw Adam, deceased. Petitioner also prayed that, under section 19C of the Court-fees Act, no further court-fee should be chargeable in respect of the present grant of letters of administration.

The Assistant Registrar, in the following note drew the attention of the court to various decisions :

*Until about two years ago it was the practice of this court, in cases of applications for letters of administration de bonis non, to levy court-fees on the grant of such letters on the difference in the values of the estate and the property remaining unadministered. Such court-fee used to be paid as a matter of course, vide C. M. Nos. 27 and 55 of 1902 and C. M. 23 of 1904.*

*In C. M. 13 of 1905—estate of J. A. Danker— which was, however, a case in which the executor applied for probate of the will which, had already been previously proved by the executor.*

*Although the values of the estate properties under administration by the executor had greatly increased since the time of the first application for probate, court-fees were not levied on the second grant of probate, as Bigge, J., upheld the contention of the petitioner's advocate that the grant was exempt from payment of court-fees under section 19C of the Court-fees Act. Acting on that decision, I have, in some subsequent cases, not required court-fees to be paid on grants of letters de bonis non although the value of the unadministered portion only of the property exceeded the value of the estate on which court fees had been paid on the original grant.*

*According to the recent ruling of the Financial Commissioner of Burma, in Stamp application No. 27 of 1907 (copy filed in the record, of C. R. 22-06. C. M. 77-05. which is put up for reference), court-fees are to be paid by an executor or administrator, not on the value of the estate property on the date of applying for probate or letters but on its value as determined in the course of administration. This is the view now acted upon by the Financial Commissioner: vide in the matter of E. T. B. White's estate—C. M. 11 of 1905.*

*This ruling appears to me to affect the question as to whether the applicant for letters de bonis non, in a case like the present, should not pay court-fees on the difference between the value on which court-fee has already been paid and the value of the unadministered portion of the property. In the matter of this very estate court-fees had previously been paid on such difference in C. M. 55-02 which is also put up. The applicant prays in her application for exemption from payment of court-fees on the grant.*

*I submit the matter for orders, as it appears to me that the question is a very important one for, if the Financial Commissioner's ruling is applicable to cases of applications for letters de bonis non, and if that ruling is to be followed in levying court-fees on grant of such letters, the applicant in these cases ought not to be exempted from payment of court-fees on the difference in the values of the property on which court-fee has been paid and*

If the magistrate's construction of the law is correct it follows that no matter how illegal, *ultra vires* or even absurd the committee's order may be, the magistrate is bound to convict of disobedience of it, unless it has been set aside by the commissioner on appeal. That this is the logical consequence of the magistrate's finding is admitted by the learned advocate for the committee. It would require very cogent reasons to uphold such a decision as this.

The words of section 130, as far as they relate to the present case, are as follows: "Whoever disobeys any notice in writing lawfully issued by the committee under the powers conferred upon it by the last foregoing chapter shall be punishable," and so forth. The construction of section 147, contended for by the committee, makes the word "lawfully" in section 130 mere surplusage and requires that the latter section should be construed as if it ran thus: "Whoever disobeys any notice in writing issued by the committee and purporting to be issued under the powers conferred upon it by the last foregoing chapter." At first sight there seems to be a conflict between the two sections. The duty of the court is to endeavour to reconcile them in such a way as shall do least violence to the language of both.

The expression "called in question" might no doubt be construed, in its widest sense, as including not only a direct challenge in a proceeding instituted for that purpose by the person aggrieved, but also a challenge made by way of defence to a civil action or a criminal charge:

But such a construction is not the only possible one, and it cannot be adopted if it is plainly contrary to the context or to other sections of the same Act. To hold that it includes the defence to a criminal prosecution is to make an absolute nullity of the word "lawfully" in section 130, and to reduce that section to an absurdity. I cannot accept this construction.

The notice issued by the committee is open to criticism in more points than one, but, for the purpose of this case, the only part which need be discussed is the prohibition for using the house "until such time as the said committee is satisfied that the said premises have been rendered fit for use."

This prohibition is *ultra vires*. The section makes the committee the judge of the question whether the house is, in the first instance unfit for human habitation, but another section (147) allows an appeal to the commissioner on that point. When the owner or occupier has done what he thinks, or alleges he thinks, to be sufficient to make the house sanitary and habitable if the committee differ from him, the law does not allow either party to appeal to the commissioner, and the reason apparently is that section 130 does not make the committee the judge of the question whether the house has been made fit for habitation. It is a question of fact, to be decided by the magistrate if the committee see fit to prosecute.

The conviction therefore cannot be upheld without examining the evidence to ascertain whether it is proved that Mr. Bretto did not make the house fit for human habitation. I do not consider it necessary to do this. The committee never pressed for more than a nominal penalty. The prosecution was instituted several months after the house had been let. The committee have not complained of the magistrate's action ignoring the evidence and dealing only with the point of law.

I therefore set aside the conviction and sentence and acquit the applicant and direct that the fine be refunded.

IN THE CHIEF COURT OF LOWER  
BURMA.

CIVIL REVISION NO.\* 93 OF 1907.

Rutten Singh vs. Sardar Singh.

BEFORE MR. JUSTICE IRWIN.

Dated the 5th December 1907

For Petitioner—Dantra.

For Respondent—Israil Khan.

Revision—section 25, Provincial Small Cause Courts Act—  
judge stopping party in middle of case—good ground for—

\*Application to revise the judgment of H. Broadbent, Esq.,  
Officiating Judge, Small Cause Court, dated 13th June 1907,  
passed in Civil Suit No. 7391 of 1906.

When a judge stops a party in the middle of his case without giving him any option of calling further witnesses, it is tantamount to refusing to examine witnesses, and it is an illegal act. The High Court will, under such circumstances, interfere in revision.

The following judgment of the Court of Small Causes contains all the necessary facts:

"The plaintiff and his witness, Teja Singh, the original holder of the pro-notes sued on, have contradicted themselves so hopelessly as to the execution of these notes that it is useless proceeding further with the case. The suit is dismissed with costs as against first defendant. Defendant 2 has confessed judgment, there will be a decree against him for Rs. 522 and costs."

*Irwin, J.*—From the terms of the judgment, and in the absence of any other indication on the record, I must take it that the judge stopped the plaintiff in the middle of his case without giving him any option of calling further witnesses. This is tantamount to refusing to examine witnesses, and it was an illegal act.

I set aside the decree of the Small Cause Court and direct the court to proceed with the hearing of the suit and to determine it in accordance with law.

Costs will abide the result.

IN THE CHIEF COURT OF LOWER  
BURMA.

CIVIL REVISION NO.\* 99 OF 1907.

Kala Ram vs. Saya Baw.

BEFORE MR. JUSTICE IRWIN.

Dated 5th December 1907.

For Applicant.—A. C. Dhar.

Revision—material irregularity—overlooking deposition of witness—Civil Procedure Code, section 622.

When a judge overlooks the deposition of a witness, that is a material irregularity within the meaning of section 622, Civil Procedure Code.

\*Against the decree of J. L. McCallum Esq., District Judge, Toungoo, dated 6th May 1907, passed in Civil Appeal No. 13 of 1907, reversing the decree of Maung Nyo, Esq., Township Judge of Pgu, dated the 21st December 1906, in Civil Regular No. 776 of 1906.

The defendant-respondent was sued by the plaintiff-petitioner in the township court of Pyu for wages. The defence put forward was, that he was one of several persons who had engaged the plaintiff and that he had paid his share. The only issue fixed by the township court was: Did defendant alone engage the plaintiff? The township judge believed the plaintiff and passed a decree for the amount claimed.

The defendant appealed to the district court of Toungoo, and the finding of the township court was reversed and the suit dismissed with costs. In coming to this conclusion the district court overlooked the deposition of one of plaintiff's witnesses.

The plaintiff applied to the Chief Court to revise the judgment of the district court on two principal grounds which are stated in the following judgment:

*Irwin, J.*—There are two principal grounds on which revision is asked for. The first is, that the district court overlooked the third witness for plaintiff, whose deposition was, by mistake, filed after the evidence for defendant. The second is that, even if defendant and several other persons jointly engaged the plaintiff, he is entitled to recover from any one of them the full amount that he earned.

The learned judge did overlook the third witness, and I think that was a material irregularity, because the ground on which he reversed the decree of the township court is, that plaintiff produced only one witness.

I set aside the decree in appeal and remand the appeal of the district court for a fresh decision. It is not necessary for me to consider the second ground for revision. It will be considered by the District Court at the re-hearing.

Costs will abide the result.

of that remaining unadministered which forms the subject of this application. For this court only the question involves the payment of large amount of revenue every year.

## ORDER.

In 1883 when probate was granted to Charlotte Shaw Nicolson the property in respect of which letters are now asked for was included in the schedule.

In Civil Miscellaneous 55 of 1902 the executrix Charlotte Shaw Nicolson having died one daughter Charlotte Shaw Adam took out letters of administration *de bonis non*. The two lots in Strand road were both included. They were valued at Rs. 25,000 and court-fees were paid on Rs. 53,000, including this property. The present application is for letters *de bonis non* in respect of a portion of the sale proceeds of the same two lots of land in Strand road—the portion of the sale proceeds being Rs. 1,34,500.

Mr. Okeden claims that, under the provisions of section 19C, Court-fees Act no further court-fee is chargeable.

Letters of administration have previously been issued in respect of the whole of the property in respect of which letters are now asked for. The full fee chargeable on the property at the value then placed upon it was levied. The property has since apparently risen in value. I am of opinion that this cannot affect the question. The full fee chargeable was paid when letters were previously issued.

Consequently no fee is leviable now in spite of the rise in property.

I therefore decide that no further court-fee is leviable in respect of the present grant of letters. Letters will issue on security being furnished.

## IN THE PRIVY COUNCIL.

Ma Wun Di and another ... Appellants.

vs.

Ma Kin and others ... Respondents

BEFORE LORD MACNAGHTEN, LORD ROBERTSON, LORD ATKINSON, LORD COLLINS, AND SIR ARTHUR WILSON.

Dated 4th December 1907

*Evidence Act,-- section 114—presumption from habit and repute—what conditions necessary—presumption in case of woman cohabiting with Burman whom she knows to be married—construction placed by parties on issue cannot be altered on second appeal.*

Before the presumption arising from habit and repute can be applied, certain conditions are necessary for its existence.

(1) There must be some body of neighbours, many or few, or some sort of public, large or small, before repute can arise.

(2) The habit and repute which alone is effective is habit and repute of that particular status which, in the country in question, is lawful marriage.

If a woman cohabits with a Burman, whom she knows to be the lawful husband of another woman, the presumption is that she is a mistress and not a wife, and the presumption is strengthened if the cohabitation is behind the back and without the knowledge of the first wife.

In second appeal a party will not be allowed to place on an issue a wider construction where the parties have by their conduct in the case in both the lower courts construed it in its narrower sense.

This was an appeal from a decree of the Chief Court of Lower Burma, dated 19th March 1906, passed in Civil first Appeal No. 77 of 1905, affirming the decree of Mr. N S. Field, District Judge, Amherst, dated the 27th June 1905, passed in Civil Regular No. 12 of 1903.

In the Chief Court, at the hearing, the case was argued for the appellants by Mr. Chit Hlaing and for the respondents by Mr. Law.

On appeal to the Privy Council, before a Board consisting of Lord Robertson, Lord Collins and Sir Arthur Wilson, there appeared for the appellants Mr. Roskill, K.C. and Mr. J. W. McCarthy and for the respondents Mr. Herbert Cowell.

The following is the judgment of the Chief Court:

*Adamson, C. J.*—The question in this appeal is whether the first appellant, Ma Wun Di, was the legally married wife of the deceased Maung Gale, or whether she was merely his mistress.

Maung Gale's domicile was Burma, but his business required him to live for long periods in Siam. He went to Siam in 1887, and, except for a few visits to Burma, he resided in Siam until his death in 1894. From 1887 to 1894, while in Siam, he cohabited with first appellant and she lived in his house.

Maung Gale had a wife in Burma, the first respondent, long before he went to Siam. It is not alleged that he was ever divorced from her, nor is it alleged that the first appellant was not fully aware that Maung Gale had a wife in Burma.

The learned advocate for appellants has referred to the well-known principle that the presumption of marriage arising from cohabitation with habit and repute can be rebutted only by the clearest and most satisfactory evidence. It would, in my opinion, be quite unreasonable to allow this presumption to arise or have any weight in the case of a woman who enters into a union with a man, her eyes open to the fact that the man has already a legally married wife.

It is not forbidden to a Burman Buddhist to have two wives at the same time, but it is universally conceded that the leading principle of Buddhism is rather monogamy than polygamy, that polygamy is rare, and that it is considered disrespectful. On the contrary, I should be inclined to say that, if a woman cohabits with a Burman, whom she knows to be the lawful husband of another woman, the presumption is that she is a mistress and not a wife, and I would add that the presumption is strengthened if, as in the present case, the cohabitation is behind the back and without the knowledge of the first wife.

The alleged marriage between the first appellant and Maung Gale occurred in Siam, and it is necessary to consider the marriage law of that country. The appellants, throughout the case, have assumed that the marriage law of Siam is

exactly the same as the Burman Buddhist law of marriage. The respondents have produced a decree of His Majesty the King of Siam, dated 1898, defining the principles of the marriage contract in Siam, and the manner in which foreigners residing in Siam may obtain proof of marriage. The latter part of the decree need not be considered, because it was passed long after the union of the first appellant and Maung Gale. But the first part of the decree is important, as it shows that marriage is governed by exactly the same principles in Siam and in Burma. Marriage is a contract in both countries.

The witnesses produced by the appellants are four from Moulmein, and seven, who were examined by commission, in Siam.

The most important of the Moulmein witnesses is Maung Nyein. He accompanied Maung Gale to Siam, lived with him there, and was present when Ma Wun Di and Maung Gale came together. He states that they were married, on the ground that they lived together, ate together, and slept together. It is quite clear from his evidence that there was no marriage ceremony. He states that the girl was asked for by Maung Gale's Burman friends who had accompanied him from Moulmein. No Shan officials were present, and there was no real ceremony. Had there been any marriage ceremony, he must have known it, and as he was a witness hostile to the respondents, he would not have failed to mention it. Now, Maung Gale was a wealthy man. He was a man of considerable importance in Siam, and it is stated that he lived like a prince. A man of such importance, if he had been entering into a real marriage, would have done it with show and ceremony.

Besides Ma Wun Di, three concubines lived in Maung Gale's house. Each of the four had separate rooms. This condition of affairs is also somewhat inconsistent with the theory of marriage.

The next Moulmein witness Shwe La, lived for some time with Maung Gale in Siam. He states that Maung Gale had Ma Wun Di and three lesser wives in the house. He sometimes ate with all of them, but he did not eat with

all of them when he had visitors. Ma Wun Di was not dressed so well as the wives of Siamese with the same wealth as Maung Gale.

The next witness, Maung Bin, does not help the appellant much. He was a servant in Maung Gale's house, but he appears to have held all these women in considerable contempt. The last Moulmein witness, Shwe On, is important. He was in the house with Maung Gale and Ma Wun Di when Maung Gale died. He wrote to Maung Gale's relatives in Moulmein but apparently did not think it worth while to mention that Maung Gale had a wife in Siam. He informed the British Consulate of the death. The Consul took charge of the property, without any objection being raised by Ma Wun Di. A relative from Moulmein subsequently took out letters of administration at the British Consulate without any objection being raised.

The Moulmein witnesses state that Ma Wun Di superintended Maung Gale's house, and kept his keys. But this is not inconsistent with the supposition that she was his head concubine.

I attach little weight to the evidence of the witnesses examined on commission in Siam. There was no means of cross-examining them or of testing their evidence in any way. They say that Maung Gale and Ma Wun Di lived together and borrowed money together and were regarded as being man and wife. Some of them talk of a ceremony of marriage, at which there was a reception of Shan elders. But in the face of Maung Nyein's statements it is impossible to believe this evidence.

The appellants place much reliance on two documents. One is a certificate of nationality as a British subject of Maung Gale in which, under the heading "Names of female relations living with Maung Gale" is entered "Ma Wun Di, wife." The other is a decree of a Siamese court for money against Maung Gale, husband, and Ma Wun Di, wife. I do not think that these documents afford a very strong inference that the relation of husband and wife actually existed.

On the whole I think that the evidence is quite as consistent and, in fact, more consistent with concubinage than with marriage.

The conduct of Ma Wun Di, subsequent to the death of Maung Gale, raises the strongest inference that she did not regard herself as having the status of wife. She allowed the whole of Maung Gale's property to be taken possession of, first by the British Consul, and then by Maung Gale's relations from Moulmein, without raising a protest. Though Maung Gale died in 1894, and though a lawsuit was going on about his estate for many years, she never intervened, and it was not till 1902, eight years after Maung Gale's death, and after she had herself married again, that she took any steps to assert her rights as a married woman, or to obtain a share of his estate.

As regards Maung Gale, it is very clear from his letter to his wife in Moulmein, *exh. 1*, which was written in 1890, three years after he had united with Ma Wun Di, that he did not regard Ma Wun Di as having the status of a wife.

There is much evidence on the record that shows that it is customary for Burman foresters from Moulmein, who have to spend long periods in Siam on business to take concubines in that country. One witness states that these girls can be got for Rs. 10 or Rs. 5 each. Maung Gale was a special sinner in this respect. At the same time he would have five or six concubines, all under the age of 16. Several of these lived in the same house as Ma Wun Di, and the evidence does not convince me that she differed in any way from them, except that she may have been the head of the harem.

If anything more is wanting to discredit the appellant's case, it is to be found in the circumstances under which the suit was brought. The respondents had a protracted litigation with Tha Hnyin, the brother of Maung Gale, which ended in Tha Hnyin compromising the case by paying Rs. 53,000. Within a few days after the compromise a claim was made on behalf of the appellants for a share in Maung Gale's estate. It is exhibit II. Ma Wun Di states that it was made without her authority or knowledge. Ma Wun Di has had to admit, after much prevarication, that she is financed for the purposes of this suit by Tha Hnyin and his son A Baw. The stamp for Rs. 900, which is on the plaint, is endorsed by the treasury officer as

having been sold to A Baw. It is therefore pretty clear that, in this suit, Ma Wun Di is only the tool of Tha Hnyin who is grieved because he lost Rs. 53,000 in the previous suit.

For the reasons stated above I agree with the lower court that Ma Wun Di was not the legally married wife of the deceased, Maung Gale.

The learned advocate for respondents raised a question of Buddhist law, as to whether a Burman Buddhist can legally marry a second wife, during the lifetime of his first wife, without her consent. I regret that, taking the view that I have taken of the facts, the question does not require a decision in this case. I may say, however, that the arguments of the learned advocate, which he has embodied in a very interesting printed pamphlet, appear to me rather to throw doubt on the ruling of the special court in *Ma In Than vs. Maung Saw Hla* (1), that a second marriage by the husband without the first wife's consent does not constitute a ground for a divorce at the instance of the first wife, than to prove the broader proposition, that a second marriage under these circumstances is null and void. That there is a custom of polygamy among Burman Buddhists is beyond dispute. That it is sanctioned by texts in the *Dhammathats* is also beyond dispute. In view of the existing custom, I think that it is now too late to dissect the *Dhammathats* and to say that the law, as contained in certain portions of them, is not to be applied to Buddhists because it appears to have a Hindu origin and to have special reference to Hindu usages.

I would dismiss the appeal with costs.

*Fox, J.*—I agree in thinking that, on the evidence in the case, it was not proved that Ma Wun Di was a wife of Maung Gale entitled to share in his estate.

The judgment of their Lordships of the Privy Council was delivered by Lord Robertson.

The question in this appeal is one of fact, and it has been decided against the appellants by two courts. The case, however, deserves attention, for there has been a strong appeal made to the general

presumption of marriage arising from cohabitation with habit and repute. It is necessary, before applying this presumption, to make sure that we have got the conditions necessary for its existence. It is not superfluous to suggest that, first of all, there must be some body of neighbours, many or few, or some sort of public, large or small, before repute can arise. Again, the habit and repute which alone is effective is habit and repute of that particular status which, in the country in question, is lawful marriage. The differences between English and Oriental customs about the relations of the sexes make such caution especially necessary. Among most English people open cohabitation without marriage is so uncommon that the fact of cohabitation in many classes of society of itself sets up, as a matter of fact, a repute of marriage. But, in countries where customs are different, it is necessary to be more discriminating, more especially owing to the laxity with which the word "wife" is used by witnesses in regard to connexions not reprobated by opinion, but not constituting marriage. In the present case the broad facts are these. A domiciled Burman, Maung Gale, has his house and wife at Moulmein, in Burma. His business took him to Siam, and there he lived for years with various other women, and with the principal appellant Ma Wun Di who, for shortness, will be called the appellant. The appellant has maintained that, while the other women were concubines, she was a wife, taken as a second wife, the first wife being all the time in Burma. The opposite contention is that while the appellant was older than the other women (who all lived in the same house) and had, for that reason, and also for reason of choice, a strong hold on the man, yet she has not made out the status of a wife. It is a noticeable feature of the case that the appellant, in her own evidence and in the evidence of other witnesses examined for her, endeavoured to set up a marriage ceremony as having inaugurated the connexion, but her counsel in the appeal declined to maintain this part of her case, which was represented as resting on habit and repute. Now, the first difficulty is that, apparently, this is a part of the world where there are not many people at all to act the part of neighbours or the public, and at all events there is no tangible evidence of recognition of this woman in her quality of wife by people external to the house and independent of it. What evidence she has is that of the people who

(1) S. J. L. B. 130.





either speak to the abandoned marriage ceremony or distinguish her position in the house as one of more consequence and a stay in it as of longer duration, than those of the other women. In truth, when all is said, there is little more pointing to marriage than the use of the word "wife" by some of the witnesses, and the most cursory, as well as the most careful, examination of the evidence shows that it is applied to persons whose status is not matrimonial. Nor has the appellant in evidence or in argument, faced the grave difficulty which arises from the existence of the lawful wife in Burma. The following observation of the Chief Judge are apposite and weighty: "It is not forbidden to a Burma Buddhist to have two wives at the same time; but it is universally conceded that the leading principle of Buddhism is rather monogamy than polygamy, that polygamy is rare and that it is considered disrespectful. On the contrary, I should be inclined to say that if a woman cohabits with a Burman, whom she knows to be the lawful husband of another woman, the presumption is that she is a mistress and not a wife, and I would add that the presumption is strengthened if, as in the present case, the cohabitation is behind the back and without the knowledge of the first wife." There remains to be noticed one point which the appellants' counsel treated as part of his case of habit and repute, and which seemed to be regarded as the most substantial item of it. Maung Gale, in 1887, obtained a certificate of nationality as "A British subject proposing to travel in Siam." In 1891 he renewed it; and as part of the docket of renewal, which is signed by the Acting Vice-Counsel, are the words, (1) Ma Wun Di, wife; (2) I Mun, sister-in-law. The argument upon this document is, that the appellant could only be entitled to be named in this certificate of nationality if, by marriage, she had acquired her husband's certified nationality. On this, however, it is to be observed, first, that this is not evidence of repute at all; the Vice-Counsel is not proved to have had any personal knowledge of these people at all, and the most it comes to is, that, on this occasion, Maung Gale said that Ma Wun Di was his wife. But, further, any value or relevance which this writing has in the present case is entirely taken away by the addition of the sister-in-law, who, on no theory, was a naturalized British subject. The truth probably is, that the entry is put in merely as an item of

information identifying Maung Gale in addition to those given in body of the certificate. The appellant's counsel endeavoured to raise the question whether the second appellant, who is the son of the first appellant by Maung Gale, was not entitled to a share of Maung Gale's estate even assuming no marriage to be proved. Whether the third issue in the suit was, in its terms, susceptible of the wider construction thus suggested for it or not, the parties, by their conduct in the case, have construed it in the narrower sense, assuming the existence of a marriage; and the point urged by Mr. Roskill having been submitted in the conduct of the case to neither court, Their Lordships are unable to entertain this question. Their Lordship, will humbly advise his Majesty that the appeal ought to be dismissed. The appellants will pay the costs of the appeal.

IN THE CHIEF COURT OF LOWER  
BURMA.

CRIMINAL APPEAL\* NO. 625 OF 1907.

King Emperor vs. Ba Nun alias Ba Na.

BEFORE MR. JUSTICE IRWIN.

Dated 22nd November 1907.

For Applicant.—Government Advocate.

Acquittal—appellate court will not interfere if question one of credibility of witnesses.

A court of appeal will hesitate to interfere with an order of acquittal where it is a question of the credibility of witnesses, but where the question is one of inferences to be drawn from proved and admitted facts, the appellate court will interfere with an order of acquittal.

Ba Na was clerk to Tan Hok Laing, who entrusted to him Rs. 7,000 on 11th July 1906 to give to his brother Ba Gyaw at Kyan village on the Pegu and Sittang canal. Ba Tun and Maung Pya were sent with him. They went to Pegu and got on board the launch. Ba Na then went ashore saying, he would go and see Maung Maung of Ywathit, and, in case he should miss the launch, he gave Maung Pya one

\*Against the order of acquittal passed by H. G. A. Leveson, Esq., District Magistrate of Rangoon, dated the 22nd May 1907, in his Criminal Trial No. 47 of 1907.

rupees for his own and Ba Tun's fares. He disappeared then and was not found until the following April. All this is disputed. His excuse for not paying the money to Ba Gyaw is, that he does not know whether he dropped it or whether it was stolen out of his pocket on his way to U Maung's. It does not appear that he ever went to U Maung's at all, but he has called one witness as an afterthought, who tells a cock and bull story about Ba Na getting drunk in Pegu. The magistrate rightly discredited this evidence, but he considered that there was a reasonable doubt of Ba Na's guilt, because he adduced evidence that a few days after the money had been entrusted to him he said to Aung Tha that he had lost it. In my opinion this statement, though it might have been proved on behalf of the Crown, was not admissible at all on behalf of the accused, being barred by section 21 of the Evidence Act. But even if admissible, it is of no value in face of the fact that Ba Na never made any report to his employer. The evidence of Ba Na's brother is clearly false, for the complainant flatly denied in examination-in-chief that he ever received any communication from Ba Na about the money, and he was not cross-examined on this point.

I do not think Aung Tha is worthy of any credence either, for I think that, if Ba Na had come and made in good faith such a communication as Aung Tha describes, Aung Tha would have mentioned the fact to the policeman who came inquiring for Ba Na's property a few days later. I think the natural and proper inference from the known facts is that when Ba Na left the launch he had no intention of either going to see U Maung or going to Kayan to deliver the money to Ba Gyaw.

I should hesitate to interfere with the acquittal if it were a question of the credibility of witnesses; but in the present case there is hardly any such question. Whether Aung Tha is believed, or not makes no perceptible difference. The question is one of inferences to be drawn from proved and admitted facts. The inference I draw is that Ba Na conceived the intention of misappropriating the money before he left the launch at Pegu.

I therefore set aside the acquittal, and I find Ba Na guilty of criminal breach of trust as a

clerk, an offence under section 408 of the Indian Penal Code; and I sentence him to suffer two years' rigorous imprisonment.

IN THE CHIEF COURT OF LOWER  
BURMA.

CRIMINAL APPEAL NO.\* 653 OF 1907.

Ramalingam vs. King Emperor.

BEFORE MR. JUSTICE IRWIN.

Dated 29th November 1907.

For Appellant.—Mr. Vakharia.

Presumption—illegitimate child—same caste as mother.

Where a child is illegitimate she will be presumed to be of the same caste as her mother.

Ramalingam was convicted of adultery with Durgama who was alleged to be the wife of the complainant. The principal ground of appeal is, that Durgama could not be legally married to the complainant, because she is a Kulla and he is a Nadar. Complainant of course alleges that Durgama is a Nadar.

It is admitted that Rangama is Durgama's mother. Pampia Nadar, who gave Durgama in marriage to the complainant, claims to be her father, but he admits that he was not lawfully married to her mother because he is a Nadar and she a Kulla. Durgama therefore is illegitimate. The defence argued that an illegitimate child is of the same caste as her mother. The magistrate thrust this aside as no authority was adduced for it. It seems to me that authority is required for the contrary proposition. Again, the girl herself says she is a Kulla, and she was nine years old when her mother began to live with Pampia Nadar. The magistrate held her evidence to be worthless, and no doubt it is not worth much, but, on the other hand, the one person who knows best who her father is, was not called to prove it, namely, her mother Rangama. Rangama is alleged to have been the lawful wife of Rangasawmi Thinkondar, a

\* Appeal from the order of Maung Kyaw Zan Hla, Esq., Second Additional Magistrate of Rangoon, dated 1st October 1907, passed in Criminal Miscellaneous Trial No. 275 of 1907.

Kulla. If this be true, it matters little whether Durgama is his daughter or the illegitimate daughter of Pampa Nadar for, under section 112 of the Evidence Act, the only way in which the latter assumption could be established would be by proof that Rangama's husband could not have had access to her at any time when Durgama could have been begotten.

It is not satisfactorily proved that Rangaswami is Rangama's husband, but this being a criminal case it lies on the prosecution to prove the contrary, or, at least to establish by the best evidence available that Pampa Nadar is the real father. It cannot be said that this was done when Rangama was not examined. The girl must be held to belong to the Kulla caste, and the marriage was therefore not valid.

I set aside the convictions and sentences and direct that Ramalingam be acquitted and released.

IN THE CHIEF COURT OF LOWER  
BURMA.

CRIMINAL APPEAL\* NO. 804 OF 1907.

*Dated 10th January 1908.*

J. B. Lefevre vs. King Emperor.

BEFORE SIR CHARLES E. FOX, KT, C. J.

*For Appellant—Giles.*

*For Crown—Dawson, Assistant Government Advocate*

*Sentence of fine in addition to imprisonment—when not appropriate.*

A sentence of a fine in addition to imprisonment is not called for where there is nothing on the record to show that the accused had any means and the offence points to his being a dishonest spendthrift.

The accused, who was the late secretary to the Wakema municipality, was convicted by the District Magistrate, Rangoon, of criminal breach of trust as a public servant and sentenced to two years rigorous imprisonment and ordered to pay a fine of Rs. 250 or suffer six months rigorous imprisonment in addition in default.

\* Appeal from the order of H. G. A. Leveson, Esq., District Magistrate of Rangoon, dated the 31st day of October 1907, passed in Criminal Case No. 88 of 1907.

The accused appealed to the Chief Court. The sentence of imprisonment was upheld but the sentence of fine and imprisonment in default was set aside by the Chief Judge who delivered the following judgment:

It is clear that the bazaar gaung, Maung Po Kin, collected Rs. 541-12 for bazaar stall rents for October 1905. He charged himself in his register with such amount as having been collected by him. It is highly improbable that he would have done this if he had not collected the amount. His register is in order, and does not bear any sign of having been tampered with. The accused signed it in token of having checked it. Po Kin said that he took the Rs. 541-12 to the accused, who was secretary of the municipality, in order that it should be sent into the treasury. He should have paid it in direct, but at that time he did not know he should have done so, and it was the practice to take the collections to the secretary.

He says the accused told him he might go and, later, he received through a peon the original chellan on which the money had been paid into the treasury. This bears the accused's signature. The words and figures denoting the amount paid in have obviously been altered from Rs. 311-12 to Rs. 541-12. The duplicate chellan and the treasury pass-book show that only the latter amount was paid in. This is not disputed. It is clear, then, that Rs. 230, collected by Maung Po Kin, was purloined either by Po Kin or by the accused. All that can be said against Po Kin is that he produced an obviously falsified chellan from his possession. He says that he noticed when he got it that it had been altered, but he says he can only read figures and cannot read letters. The alteration of the figures is not quite so obvious as in the alteration of the words.

The figures, as altered agree with the amount, he says, he handed over to the accused, and it is not altogether improbable that he should have thought that he had received a valid voucher for the amount he had collected and had handed over to the accused to pay into the treasury.

The accused's story was that only Rs. 311-12 had been handed to him by Po Kin, and he had paid that amount into the treasury. He repudiated having altered the original chellan.

The accused had to keep the cash book and the demand register, and had also to cheque the register of stall rents kept by Po Kin. The amount shown in the cash book as paid in on the 9th October 1905 was originally Rs. 311-12 written in black ink. This was altered by an entry in red ink to Rs. 541-12 and these figures were again altered to Rs. 311-12. In the demand register the original entries of collections for October were Rs. 1,550 and Rs. 541-12, giving a total of Rs. 2,091-12, and Rs. 18 was entered as not collected. The figures Rs. 541 were struck out by a red ink line and Rs. 311 written above them, and the total collected was also struck out and Rs. 1,861 was entered in red ink below.

Then another entry of "uncollected Rs. 230" in black ink was made. In determining which of the two men kept the Rs. 230, we have, on the part of one, the fact that he charged himself in the account which he had to keep with having received Rs. 541-12, and the fact that he produced as his voucher for having paid into the treasury a chellan which to any one who knew English would at once disclose that Rs. 541-12 had not been paid in. On the part of the accused we have the fact that he originally entered in the demand register, as having been collected the sum of Rs. 541-12, then he made alterations to show that only Rs. 311 had been collected; the fact that the cash-book shows an attempt to alter the original entry of Rs. 311-12 to Rs. 541-12, which presumably was considered useless, and, further, the fact that the accused checked the gaung's register showing Rs. 541-12, as collected and signed it as correct. This latter he could not have done if he had made any check at all, for, if his memory did not tell him that only Rs. 311-12 had been paid over to him, the duplicate chellan, his cash-book and his own register, if altered by that time, would have done so. His attempt to explain why he originally entered Rs. 541-12 as collected in the demand register is puerile. Under the circumstances I have no hesitation in believing that it was the accused and it was not Po Kin who kept the Rs. 230, and I think the conviction was right. In regard to the sentence, I do not think that the sentence of fine in addition to imprisonment was called for. I do not find anything on the proceedings to show that the accused had any means. The offence points to his being a dishonest spendthrift, and a fine

is not likely to be realised from any property belonging to him. I set aside the sentence of fine and of imprisonment in default of payment, but the conviction and the substantive sentence of imprisonment will stand.

IN THE CHIEF COURT OF LOWER  
BURMA.

CRIMINAL MISCELLANEOUS APPEAL\* NO. 23  
OF 1907.

Messrs. Kruger & Co., Ltd.

vs.  
Maung Po Mya.

BEFORE MR. JUSTICE IRWIN.

Dated 29th November 1907

*Criminal Procedure Code—section 517—money deposited with third party not money in court—inapplicability of Section 517, Criminal Procedure Code.*

Where money was in the hands of a third party and not in court, and there was no finding that an offence had been committed in respect thereto, it cannot be said to be property of the kind described in section 517 of the Criminal Procedure Code.

An order to pay money into court, to be detained there pending the orders of a civil court, is not an order for disposal, and is therefore an order which cannot be made under section 517, Criminal Procedure Code.

The cheating case ended abruptly on the 20th April 1906 by the death of the accused Po Ko.

On 6th May 1907 the complainant, Po Mya, applied for an order that the money in respect of which the offence was alleged to have been committed be handed over to him. The money had never been brought into court and was in the hands of Messrs. Kruger & Co.

The magistrate directed Messrs. Kruger & Co. to pay the money into court. Messrs. Kruger & Co. then objected, but the magistrate made another order to the same effect. Ordinarily, the magistrate should pass orders about the property at the time of passing judgment, and I have considerable doubts whether the magistrate had jurisdiction to entertain the application of 6th

\* Against the order of H. W. Godber, Esq., Watan Subdivisional Magistrate of Rangoon, directing the appellants to pay into court the sum of Rs. 6,556 deposited by the deceased Maung Po Eho, dated 2nd September 1907, passed in Criminal Regular Bail Trial No. 739 of 1905.

May 1907 at all. It is not necessary, however, to decide that point, because the order is otherwise bad.

An order to pay the money into court, to be detained there pending the orders of a civil court, is not an order for disposal, and is therefore an order which cannot be made under section 517.

Moreover, there is no finding, and in the circumstances there could not properly be any finding, that an offence had been committed in respect of the money. It had not been produced before the court. The money therefore was not property of the kind described in section 517. I set aside the magistrate's order.

IN THE CHIEF COURT OF LOWER  
BURMA.

CRIMINAL MISCELLANEOUS APPLICATION \*  
NO. 25 OF 1907.

Maung Po vs. Ma Hpaw and one.

BEFORE MR. JUSTICE IRWIN.

Dated 6th December 1907.

*Court trying without jurisdiction—interference by High Court not always necessary—section 531, Criminal Procedure Code.*

Where a court acts without jurisdiction in taking cognizance of a complaint and it is not suggested that the accused has been in any way prejudiced by this error, a High Court will not necessarily interfere if no good purpose will be served by such interference.

It seems that the offence was committed in Rangoon Town, and that the magistrate acted without jurisdiction in taking cognizance of the complaint; but it is not suggested that the accused were in any way prejudiced by this error.

Having regard to the fact that the case for the prosecution was completed before the magistrate discovered his error, and to the provisions of section 531, Code of Criminal Procedure, it does not appear that any good purpose

\* Reference made by District Magistrate, Tharrawaddy, for transfer of Case No. 82-07, now pending before the second Additional Magistrate of Minhla, to the District Magistrate of Rangoon.

would be served by stopping the trial at Minhla. It would be necessary to examine all the witnesses again in Rangoon, whereas, at Minhla, the trial can be resumed at the point where it was interrupted.

I, therefore, do not think it necessary to make any order in the matter. Let the record be returned through the District Magistrate, Tharrawaddy.

IN THE CHIEF COURT OF LOWER  
BURMA.

CIVIL FIRST APPEAL No\* 86 OF 1907.

Babu Goridut Bagla vs. Ebrahim Esoof Dooply.

BEFORE SIR CHARLES E. FOX, Kt., C.J., AND  
MR. JUSTICE IRWIN.

Dated 13th January 1908.

*Negotiable Instruments Act (XXVI of 1881)—chapter IV, Section 50—title to note how acquired—assignment how effected—indorsement to order—indorsement in blank.*

Title to a negotiable instrument can be acquired either by indorsement or by assignment.

A promissory note payable to order and indorsed to order can only be negotiated by indorsement and delivery by the last indorsee to order. Chapter IV of the Negotiable Instruments Act must be taken to deal fully with the subject of negotiation and transfer by such method.

The property in a promissory note cannot be assigned by merely handing over the note to another to sue.

*Quære*: An indorser to order of a promissory note, on the note being returned to him by the indorsee to order can, by striking out his indorsement to order and indorsing the note in blank, make the note payable to a subsequent holder to whom he transferred it by delivery only.

*Approved of*: Muthar Sahib Maraikar, vs. Kadir Sahib Maraikar (1905) I. L. R., 28, Mad. 544.

*Referred to*: Harrop vs. Fisher (1861) 10 C.B., N.S., 196.

*For appellant.*—Lentaigne.

\* Appeal from the decree of G. Scott, Esq., District Judge Amherst, dated 8th July 1907, passed in Civil Suit No. 277 of 1906.

The plaintiff, Solaiman Esoof Dooply, sued the defendant, Goridut Bagla, to recover Rs. 5,000 upon a promissory note in the following terms and bearing the following indorsements :

(On face of note.)

Moulmein, 30th June 1903.

Rs. 5,000.

"Five months after date I the undersigned promise to pay to the order of Peroshaw Sorabshaw the sum of Rupees Five thousand only for value received.

"GORDUT BAGLA.

"(Back of note.)

"Pay Bank of Bengal or order.

PEROSHAW SORABSHAW."

The defendant resisted payment of the note on the grounds—(1) that the plaintiff was not the holder of the note in due course; (2) that it was not presented to him for payment at maturity and notice of dishonour had not been noted by a notary public, (3) that the note had been made and delivered by him in consequence of fraudulent misrepresentations by Peroshaw Sorabshaw who at the time owed him money on another account to a far larger amount, which he promised to pay but did not pay. The history of the note disclosed in the evidence is, that it is one which was given by the defendant to Peroshaw Sorabshaw in connection with some partnership transactions between them on those transactions being brought to an end. Peroshaw Sorabshaw said that he discounted the note with the Bank of Bengal. When it was not paid the Bank returned the note to him. He subsequently handed the note to one Cassim Jewa to whom he owed Rs. 2,000 and wrote his second signature on the back. Cassim Jewa handed it to his clerk the plaintiff, in order that the latter should file a suit on it. There is no doubt that the plaintiff is not a holder in due course of the note. He admittedly did not become the possessor of it for consideration.

The question arises whether he could sue upon it at all.

Upon the indorsements on the back of the note, the legal title to it was in the Bank of Bengal, since the indorsement to it was an indorsement in full, and there is no indorsement by it to any one else or in blank. The learned judge has held that it was indorsed to the Bank for collection only. This is contrary to what Peroshaw Sorabshaw said.

He said he discounted the note with the Bank. The indorsement to it is not for collection, and contains no express words restricting or excluding the right of further negotiation. In order that such right may be restricted or excluded, section 50 of the Negotiable Instruments Act requires that an indorsement must contain express words to that effect. On the view that the note was indorsed to the Bank for collection only the learned judge held that on the return of it to Peroshaw Sorabshaw the latter was re-instated in his original rights, and by his subsequent indorsement in blank the note became payable to any one who held it. He relied upon the decision in *Muthar Saib Maraikar vs. Kadir Sahib Maraikar* (1) in support of his finding. That ruling goes to the extent of holding that an assignee of a negotiable instrument payable to or indorsed to order may sue upon it without it being indorsed to himself or in blank.

The following propositions were laid down or adopted :—

(1) That a promissory note is a chose in action and is subject to the incidents attaching to it in that aspect, so long as the rules of the law merchant are not departed from, and that choses in action are in this country assignable.

(2) That the rules in regard to choses in action prior to the Negotiable Instruments Act coming into force do not cease to be any the less (*sic*) applicable to them by the passing of the Act unless its provisions expressly or impliedly affect those rules.

(3) That the Negotiable Instruments Act leaves untouched the rules of general law which regulate the transmission of bills of exchange

and promissory notes by act of law and their transfer as choses in action or chattels according to the general law.

(4) That a transfer of a promissory note payable to order may be effected otherwise than by an indorsement by the payee or subsequent indorsee.

(5) That the possession of a note by the maker or by the payee or by any subsequent indorsee is *prima facie* evidence that he is the true and lawful owner thereof and that he has acquired the full title thereto.

(6) That an indorser of a note who comes into possession of it again after he has delivered it may strike out any indorsement on it in full subsequent to his own and may sue upon it in his own name.

For the purposes of the present case these propositions may be conceded as correct, it being unnecessary to question them.

The plaintiff had to prove title to the note: this he could do either by proving a title by negotiation or a title by assignment.

As regards a title by negotiation the plaintiff fails, for the note was payable to order and was indorsed to order, and that indorsement has not been struck out. A note in such condition could only be negotiated by indorsement and delivery by the last indorsee to order. Chapter IV of the Negotiable Instruments Act must be taken to deal fully with the subject of negotiation and transfer by such method. The only method of negotiation of a promissory note payable to order provided for is indorsement and delivery. The Bank of Bengal did not endorse either in full or in blank; consequently the title by negotiation stopped with it.

The English Bills of Exchange Act, 1852, contains an explicit provision as to the right of the transferee of such a document who takes it without indorsement. Sub-section (4) of section 31 is as follows: "Where the holder of a bill payable to his order transfers it for value without indorsing it, the transfer gives the transferee such title as the transferor had in the bill, and the transferee in addition acquires the right to have the indorsement of the transferor. One of Mr. Chalmers' illustrations to this sub-

section, founded on *Harrop v. Fisher*, (2) is as follows:—

'The holder of a bill payable to order transfers it to *D* for value without indorsing it. *D* cannot sue the acceptor in his own name or negotiate the bill by indorsing it to *E*.'

If Peroshaw Sorabshaw, on the note being returned to him, had struck out his indorsement to the Bank of Bengal, possibly his subsequent indorsement in blank would have made the note payable to a subsequent holder to whom he transferred it by delivery only. He did not however strike out his first indorsement, and the title by negotiation must be taken to be that shown by what is on the back of the note. According to this the plaintiff is not the transferee of the note by negotiation. Upon the question whether he has property in the note by assignment, according to Peroshaw Sorabshaw's evidence he not only transferred the legal title to the note to the Bank by indorsement, but he actually transferred the property in the note for value. He may have used the word "discounted" in a loose sense, and it may be that he handed the note to the Bank merely as a security, and that when it was not paid it was returned to him as being of no value as a security. If Peroshaw Sorabshaw had himself sued on the note, the American decisions which the learned judges adopted as correct in *Muthar Sahib Maraikar vs. Kadir Sahib Maraikar* (2) would have availed him in proof of his title to sue. Although there is no evidence as to what the transaction between him and the Bank was when the note was returned to him, it may be presumed that the Bank assigned back to him whatever right it had to the note. A verbal assignment by him to Cassim Ahmed Jewa may be taken to be proved by the evidence.

The question remains whether there was any assignment of the note to the plaintiff. By assignment I mean a real assignment of property in the note. Jewa said that he handed it to the plaintiff to enable him to file a suit on it. The plaintiff said that he simply filed the case under the instructions of Jewa. This cannot be regarded as a real assignment of the property in the note. Presumably Jewa believed that the

(2) 10 C. B. N. S. 196.

plaintiff would have a right to sue on the note in his own name, because Peroshaw Sorabshaw had ultimately indorsed the note in blank.

In my judgment the plaintiff had no property in the note, either through negotiation of it, or through assignment of it to him, consequently he had no right to recover the amount due on it.

I would allow the appeal, reverse the decree of the district court, dismiss the suit with costs, and order the plaintiff to pay the defendant's costs of this appeal.

*Irwin, J.*—I concur.

IN THE CHIEF COURT OF LOWER  
BURMA

CIVIL FIRST APPEAL \*NO. 107 OF 1907.

Ma Naing vs. Maung Nyun.

BEFORE SIR CHARLES E. FOX, K.T., C. J., AND MR.  
JUSTICE IRWIN.

Dated 6th January 1908.

For Appellant.—D. M. Karaka.

*Buddhist law—divorce—grounds of ill-treatment to what extent necessary.*

Ill-treatment of a wife by the husband is a good ground for a divorce, but it must be continued ill-treatment and it must be proved that her life was made unbearable.

Chan Toon's "Principles of Buddhist Law," page 64.

*Irwin J.*—The parties are Burmese Buddhists, husband and wife. Appellant sued for a divorce, on the grounds that since the beginning of October 1906 the defendant was continually ill-treating the plaintiff by beating and assaulting and abusing her, and has been associating with other women, and that on or about 19th October 1906 he left her and has taken a dislike to her and is not maintaining her.

The defendant appeared, and said he did not want to defend the suit, but neither did he wish plaintiff to obtain a divorce. Eventually he put in a written statement denying the allegations of cruelty and desertion, and alleging that she went away of her own accord on 10th January 1907 and was co-habiting with one Po Thaw.

The defendant did not appear at the hearing and has not appeared to oppose this appeal.

The learned judge held that such cruelty as would justify a divorce was not proved, and dismissed the suit.

We were asked to hold that, taking a lesser wife is a ground for divorce. That point was not raised at the trial on the Original Side, nor even in the memorandum of appeal; it cannot be considered. On the question of desertion we were referred to page 64 of Chan Toon's Principles of Buddhist Law, "Ill-treatment may be a good cause for a divorce of it is continued and her life made unbearable." Plaintiff's own evidence makes out a formidable case of ill-treatment, but she is not corroborated, except in respect of once pulling her hair, which the plaintiff herself does not specifically mention. The witness says they abused each other but defendant abused plaintiff more I agree with Mr. Justice Ormond that cruelty which would be ground for a divorce is not proved.

The remaining question is desertion. It is alleged in the appeal that respondent separated himself some ten months ago, giving the appellant a letter which amounts to a divorce certificate or separation. This letter is appended to the appeal. It was referred to in the plaintiff's evidence, but not produced in the trial on the Original Side. Possibly, if it had been produced, and the plaint differently framed, the plaintiff might have succeeded. On this point I do not think we should express any opinion. As neither of those things was done, the effect of the document cannot be considered in this appeal.

For these reasons I would dismiss the appeal.

*For C. J.*—I concur.

\* Against the order of Mr. Justice Ormond, sitting on the Original Side of this Court, dated 2nd September 1907, passed in Suit No. 113 of 1907.

IN THE CHIEF COURT OF LOWER  
BURMA.

CIVIL REVISION No. 109 OF 1907.

Joman vs. Ah Yu and one.

BEFORE SIR CHARLES E. FOX, KT., C. J.

Dated the 15th August 1907.

For Applicant—Lambert.

For Respondent—Dawson.

*Civil Procedure Code (XIV of 1882), section 622—  
illegality—section 93, Evidence Act.*

Admission of oral evidence to show the intention of the parties, contrary to the provisions of section 93 of the Indian Evidence Act, is an illegality within the meaning of section 622 of the Civil Procedure Code.

JUDGMENT.

This case was presented as an application for revision, but by an error it was admitted and registered as an appeal. No appeal lay in the case. It will be treated as a revision. The District Judge held that the contract compensation for breach of which was sued for was ambiguous on the face of it in two respects, but he held that evidence was admissible to show the intention of the parties, and he acted on such evidence. This was in direct contravention of section 93 of the Evidence Act. It was illegal within the meaning of section 622 of the Code of Civil Procedure. As the claim in the suit included a claim for Rs. 100 paid as earnest money, which the plaintiffs were entitled to receive back, the suit will not be entirely dismissed. The decree of the district court will be altered to a decree for Rs. 100 with costs in favour of the plaintiffs.

Each party will bear his own costs of this application.

IN THE CHIEF COURT OF LOWER  
BURMA.

CIVIL MISCELLANEOUS No. 54 OF 1907.

The Botatoung Bazar Co., Ltd. vs. The Collector.

BEFORE MR. JUSTICE HARTNOLL AND  
MR. JUSTICE ROBINSON.

Dated 5th February 1908.

*Land Acquisition Acts (Act I of 1894 and Act XVIII of 1885.*

*Section 50 (2).*

The provisions of section 50 (2) of the Land Acquisition Act are merely enabling, and permit the corporation for whom Government is acquiring the land to appear, but they in no way over-ride the other provisions of the Act or prevent Government from appearing and defending the suit before the court. Therefore both Government and the corporation are entitled to the right of cross-examining witnesses of the claimant.

ORDER.

On Mr. Cowasji's rising to cross-examine Ebrahim Ally Mulla after his cross-examination by the Government advocate on behalf of the Collector, objection was raised to two counsel appearing and cross-examining in what were, it is urged, identical interests. Counsel admitted that Mr. Cowasji had the right to appear as representing the Port Commissioners under section 50 (2) of the Act, and the question therefore is confined to whether the Collector can appear as well as the Port Commissioners. We are of the opinion that the provisions of section 50 (2) are merely enabling, as without them possibly the Port Commissioners might not be able to appear though they would have to pay the compensation, but they in no way over-ride the other provisions of the Act or prevent Government from appearing and defending the suit before the court. In this case the objection is with regard to the amount of the compensation and under section 20 (c) the court is bound to cause notice to be served on the Collector directing his appearance before the court. Moreover, it is the local Government which is acquiring the land under section 32 of the Rangoon Port Act (Burma Act IV of 1905) and not the Port Commissioners, though the land is being acquired on behalf of the latter. We accordingly over-rule the objection.

IN THE CHIEF COURT OF LOWER  
BURMA.

CIVIL MISCELLANEOUS NO. 54 OF 1907.

The Botataung Bazaar Co., Ltd. vs The Collector.

BEFORE MR. JUSTICE HARTNOLL AND  
MR. JUSTICE ROBINSON.

Dated 17th February 1908.

*Land Acquisition Act (Act I of 1894) section 23 (1)—market price—meaning of—inadmissibility of sale after declaration to prove price at time of declaration.*

Events subsequent to the date of the declaration cannot be proved and evidence as to such fact is inadmissible, not being relevant to the fact in issue which is the market price of the land to be acquired, on the date of the publication of the declaration relating thereto under section 6.

ORDER.

On the claimants desiring to put in a deed proving the sale of property in block J, which was dated October 1906, Mr. Young raised the objection that events subsequent to the date of the declaration could not be proved, and that evidence as to such facts would be inadmissible, not being relevant to the fact in issue which was the market price of the land to be acquired on the date of the publication of the declaration relating thereto under section 6. Mr. Giles urged that the evidence was admissible, *firstly*, because it was an equally good method of arriving at the market value of a certain property on a certain date to prove what was its value on a certain subsequent date and to work backwards from that starting point as it was to work forwards from a sale prior to the date of the declaration and, *secondly*, because the evidence was intended to prove that there had been a continuance in the rise of land values in Rangoon to a period beyond the date of the declaration, and that this rise had not stopped before that date which could only be done by proving that it existed subsequent to the date of the declaration. He also urged that the court was not confined by anything that appeared in the Act to a consideration of only those circumstances which could have been in a mind of a willing purchaser and influence him on the date of the declaration. Mr. Young based his objection principally on his latter argument, and supported his objection by reference to two authorities—

Secretary of State for Foreign Affairs vs. Charlesworth Pilling & Co. (1), and Raghunath Das vs. Secretary of State (2).

We are of opinion that the objection must prevail. In the first place the expression used in section 23 (1) *first*, is "market-value" and not "value". The market value must be the price that could be obtained in the open market on a given date, namely, the date of the publication of the declaration. The price that would be given in the open market would be the price that a willing purchaser would pay and a willing vendor would accept. All the facts which could affect either the one or the other must have been facts that were actually in existence and might have been known to them on the date mentioned above. Over and above the facts, the purchaser might, and no doubt, would consider possible and probable rise or fall in value as the case may be, in the future. He might also take into consideration the possibility of increasing the income to be derived from the property by laying it out in a more lucrative and advantageous way. Speculation such as these as to the future might be and can be taken into consideration. But facts which only occurred subsequently could not have been present to the mind of the purchaser. It might be possible to prove that, as a matter of fact, future events have justified his speculations; but that proof could not have influenced his mind at the date of the purchase. It may possibly be that a sale of a similar property on the day after the date of the publication of the declaration would be just as valuable evidence from which to deduce the market value as a similar sale on the day before; but the latter could have been and the former could not have been present in the mind of a purchaser in open market on the date of the publication of the declaration, and it seems to us impossible, on the wording of section 23 (1) *first* to hold that the court is not limited to the same date for arriving at the purchase price as a willing purchaser would be. Neither of the rulings quoted appear to us to deal with the exact point that we have to decide. Their Lordships of the Privy Council appear to us to have been confining their remarks to clauses *fifthly* and *sixthly* of section 24. So far as it is argued that proof of such sales is

(1) I L. R., 26 Bom. 1.  
(2) I L. R., 29 Bom. 504, 520.

relevant as establishing that the rise in land values, which it is said have been proved to have commenced, continued not only up to but also beyond the date of the publication of the declaration it appears to us, that proof of the continuance of any such rise up to the date or nearly up to the date of the publication of the declaration is all that could have been considered by a purchaser, though in the absence of anything to show that prices had reached their zenith and had begun falling again, it may be a matter for argument that the purchaser might have premised on a continuance of the rise.

IN THE CHIEF COURT OF LOWER  
BURMA.

CIVIL MISCELLANEOUS APPEAL NO. 63 OF 1907.

Maung Tha Hnyin vs. Abdul Rahman and one

BEFORE SIR CHARLES E. FOX, Kt, C. J., AND  
MR. JUSTICE HARTNOLL.

*Dated 19th December 1907.*

*For Appellant—Agabeg.*

*Code of Civil Procedure, section 596—appeal to Privy Council—Creditor of insolvent claiming Rs. 10,000—insolvency proceeding under Chapter XX of Code not a suit.*

A proceeding under chapter XX of the Civil Procedure Code is not a suit within the meaning of section 596 of the Code. The mere fact that the applicant is a creditor for Rs. 10,000, about which there is no dispute, does not give him a right of appeal to the Privy Council.

*Fox, C. J.*—The petitioner desiring to appeal to His Majesty in Council against an order of this court setting aside an order of a district court, and declaring the respondents insolvent and ordering their discharge, applies for a certificate that the case fulfils the requirements of section 596 of the Code of Civil Procedure, or that it otherwise is a fit one for appeal to His Majesty.

Unless the case fulfils the requirements of section 596, the certificate should not, in my opinion, be granted. There does not appear to be anything special in the case which would bring it within the ruling of their Lordships of the Privy Council in *Banarsi Prasad vs. Kashi Krishna Narain* (1900, I. L. R., 23 All. 227).

In regard to the question whether the case fulfils the requirements of section 596, there is, in the first place, no suit. The proceeding was one under chapter XX of the Code, and the only

question involved was whether the respondents should be declared insolvent and the procedure of the chapter adopted. The present petitioner is a creditor for over Rs. 10,000, but there was no dispute about this, and it is not clear how the order of this court involved a claim or question to or respecting any property or amount of Rs. 10,000 or over. If the amount which the insolvents set out in their schedule as due to them were recoverable in full, the petitioner would, on recovery of them, be paid in full. If they were only partially recoverable he would receive a proportionate share of what might be recovered, which might or might not amount to Rs. 10,000. In any case, there is no question or dispute as to the petitioner's claim, nor is it affected except that, by the order of discharge, he was not able to keep the respondent in prison.

I would refuse the certificate asked for.

*Hartnoll J.*—*I concur.*

IN THE CHIEF COURT OF LOWER  
BURMA

CRIMINAL APPEAL \*NO. 411 OF 1907.

King Emperor vs. Kwe Haw and sixteen.

BEFORE SIR CHARLES E. FOX, Kt, C. J., MR. JUSTICE  
IRWIN AND MR. JUSTICE HARTNOLL.

*Dated 6th January 1908.*

*For Appellant.*—Mr. McDonnell, Asstt. Govt. Advocate.

*Burma Gambling Act. (Burma Act I of 1899), sections 6, 7, 11 and 12—Criminal Procedure Code (V of 1898); section 103 (1)—search how to be made—witnesses must accompany officer—headmen of wards not eligible as such witnesses.*

*Per Fox, C. J.*—It is obligatory on an officer or person about to execute a search warrant to call upon and get two or more respectable inhabitants of the locality to attend to witness the search before he does his first act under the authority of the warrant in entering the place to be searched. In other words, a place is not entered under the provisions of section 6 of the Gambling Act unless the officer entering is accompanied by two or more respectable inhabitants of the locality.

*Appeal against the order of acquittal passed by Maung Ne Dun, Esq., Additional Magistrate of Rangoon, dated 3rd June 1907, passed in Criminal Case No. 156 of 1907.*

The persons called to witness a search by a police officer or person holding a search warrant must be respectable inhabitants of the locality in which the place to be searched is situate, who do not hold offices to which they may have been appointed by a Government officer, the duty of which include taking part in the prevention or discovery of offences or in bringing offenders to justice.

Headmen of wards appointed under the Lower Burma Towns Act, 1892, are not eligible as witnesses to a search under section 103, sub-section (1) of the Criminal Procedure Code.

*Per Irwin J.*—Following *King Emperor vs. Maung Cho* (1903) 2 L.B.R. 43, entry and search are one indivisible transaction for the purpose of section 103 of the Criminal Procedure Code, and the operation of sub-section (3) of section 6 of the Burma Gambling Act is not limited to searches made under clause (d) of sub-section (1) of the same Act.

A person who is a respectable inhabitant of the locality is none the less a respectable inhabitant of the locality within the meaning of the section if he has been appointed a headman of a ward; such person is eligible as a witness of a search.

*Per Hartnoll, J.*—A house cannot be deemed to be entered under the provisions of section 6 of the Burma Gambling Act, 1899, unless the police officer authorized by the warrant be accompanied by two respectable inhabitants of the locality within the meaning of section 103 of the Criminal Procedure Code.

The word "inhabitants" in section 103 of the Criminal Procedure Code bears a restricted meaning and cannot be construed so as to include all respectable inhabitants.

A headman of a ward is not such an inhabitant and is therefore, not eligible as a witness at a search.

*Followed: Maung Cho vs. King-Emperor* (1903) 2 L.B.R. 43.

*Fox, C. J.*—This is an appeal directed by the Local Government against an order acquitting the respondents who have appeared, and others against whom the appeal has been withdrawn, of offences under sections 11 and 12 of the Burma Gambling Act, 1899. It is admitted that the case is on all fours with the case of *Ah Shee vs. King Emperor* (1), in so far that there was no evidence that the house in which the accused and instruments of gaming were found was used as a common gaming-house, and that the two persons who were called as witnesses by the police officer entrusted with the search warrant were headmen of wards appointed under the Lower Burma Towns Act 1892.

(1) (1906) 3 L. B. R., 229.

The object of the appeal is to obtain a re-consideration of the above decision. In support of the appeal it has been contended that, apart from the question of whether the headmen were persons contemplated by section 103 of the Code of Criminal Procedure as witnesses of a search, the presumption under section 7 of the Gambling Act should be drawn because the house was entered under section 6 of the Act, and the instruments of gaming were found without it being necessary to make any search of the house in the ordinary sense of the word. It was argued that in sub-section (1) of the section a search is distinguished from an entry, and in the present case the house was entered under a search warrant, and that is sufficient to enable the presumption under section 7 to be drawn. This raises the question of what is the meaning of the words "entered under the provisions of the last preceding section" in section 7 of the Gambling Act.

Sub-section 3 of section 6 enacts that all searches under sub-section (1) shall be made in accordance with the provisions of sub-section (3) of section 102, and of section 103 of the Code of Criminal Procedure 1898. Before entering private property with the object of looking for property in or on it which the person in occupation of the property is not likely to produce voluntarily, a police officer has to obtain a search warrant from an authorized magistrate. Section 98 of the Code gives certain magistrates power to issue warrants authorizing police officers above the rank of a constable, first of all, to enter the place to be searched, and then to search it, and to deal with property found in the place. Although these warrants are termed search warrants for shortness, they convey to the police officer the authority to enter which he would not have without the warrant.

Sub-section (1) of section 103 of the Code enacts that, before making a search, the officer about to make it shall call upon two or more respectable inhabitants of the locality in which the place to be searched is situate to attend and witness the search. No doubt it is not stated in express words that he must call the inhabitants before he enters the place, and that he must

(2) (1903) 2. L. B. R., 43.

take them into the place with him, but the only object for which he is authorised to enter being to search the place; and witnesses to the search being necessary, it is, I think, clear that he is bound to do so. As stated in *King Emperor vs. Maung Cho* (2) the object of the law could be entirely defeated if it were open to the police to raid a house first, and defer calling elders until after they had made the entry and arrests.

We were referred to several authorities upon the construction of statutes with the view of showing that it is not for judges to make law, their functions being to declare the law. This is an accepted proposition.

The rules for the construction of statutes are well settled. When the object and intention of the Legislature is plain, the courts have to give any provision which may be in question its reasonable construction according to the real sense of the language used.

The real sense of the language used in sub-section (1) of section 103 of the Code of Criminal Procedure involves it being obligatory on an officer or person about to execute a search warrant to call upon and get two or more respectable inhabitants of the locality to attend to witness the search before he does his first act under the authority of the warrant in entering the place to be searched. I consequently hold that a place is not entered under the provisions of section 6 of the Gambling Act unless the officer entering is accompanied by two or more respectable inhabitants of the locality.

It is unnecessary to deal with the argument that the instruments of gaming were found without a search. The presumption under section 7 of the Act does not arise, unless the place in which instruments of gaming are found has been entered under section 6. The question remains whether the provisions of that section and of sub-section (1) of section 103 of Criminal Procedure Code were satisfied by the police officer having taken with him two headmen of wards in the locality to witness the search.

It has been argued that the words "respectable inhabitants of the locality" are not in any way limited by the Legislature, and that it

is not for the courts to limit them. In the abstract, the words used include every respectable human being dwelling in the locality, and Mr. McDonnell has argued that the provision would be satisfied by a police officer holding a search warrant, taking with him as witnesses two other police officers residing in the locality. This is the logical and necessary conclusion, if the words "respectable inhabitants of the locality" must be construed in their widest sense and without any limitation.

But in view of the subject-matter of the provision, the objects which the Legislature must have had in view, and of the language used when considered in connection with the subject-matter and the objects of the provision, it is clear to me that some limit must be put on the very comprehensive words. If not, the Legislature has made a futile provision in the guise of a provision, manifestly disguised, to ensure fair dealing and a feeling of confidence and security amongst the public in regard to a sometimes necessary invasion of a private right regarded as almost sacred under the British system. One rule for the construction of statutes is that they must be construed *ut res magis valeat quam pereat*, so that, to use the words of Bowen, L. J., in *Curtis vs. Stovin*, (1) the intention of the Legislature may not be treated vain or left to operate in the air.

As stated in *R. vs. Hall* (2), the meaning of ordinary words when used in Acts of Parliament is to be found, not so much in a strictly grammatical or etymological propriety of language, nor even in popular use, as in the subject or occasion on which they are used, and the object which is intended to be attained. In its legislation with regard to search warrants the Indian Legislature made provision for the private right of a subject to prevent any and every one from entering on his property being abrogated when necessary in the interests of the public welfare, and it gave power to certain officers of the Government to authorize other Government officers engaged in the prevention, discovery and suppression of crime, and other persons also, when necessary, to invade the private right of the individual subject. At the same time, however, it made the provision now in question that whoever was about to act under must call two or

(1) (1889) 22 S. B. D. 512.

(2) (1822) 1 B. and C. 123.

more respectable inhabitants of the locality to witness the search to be made. To my mind, reading the language used in connection with the subject-matter and the objects which the Legislature must have had in view, the meaning of it is quite clear, and it indicates plainly that the persons who must be called to witness that the Government officer's appointee acts properly and fairly must be chosen from respectable members of the general public, not in any way connected with the Government officer's appointee, or with the carrying out of his duties, so that the invasion of the private right may be attended with as much fairness and may convey such sense of fairness as it is possible to secure. The language appears to me to point to the intention being that the selection of witnesses should not be confined to any particular persons or class of persons amongst the respectable inhabitants, but that it should be made from amongst the general body of respectable inhabitants available for the particular occasion on which witnesses may be required, the underlying idea being the same as that which underlies the system of selection of jurors for a trial on an accused, namely, that the persons selected should be absolutely unprejudiced and uninterested in the results of what they have to take part in. If I am right in my view of the meaning of the language used by the legislature and of its' intentions, the giving of the widest construction to the words used, which would admit of two police officers being admissible witnesses, to a search, would certainly defeat the objects and intentions of the provision of law in question. In an equal degree would the practice which has grown up in the town of Rangoon, of almost invariably selecting ward headmen as witnesses, defeat such objects and intentions. They are nominees of a Government officer. How can a person whose property is searched, and how can the public, have implicit confidence that a search has been fairly and properly done by a police officer, and that articles said to have been found in a house have really been found there if the persons called in as witnesses are nominees of another officer appointed to assist the police? Headmen appointed under the Lower Burma Towns Act, 1892, have far more extended duties as regards giving information about crime, and assisting the police than any ordinary member of the public has. They are part of the establishment provided by Government for the prevention, discovery and suppres-

sion of crime. Although their duties in regard to reporting and investigation may not have been extended beyond the offences specified in section 4 of the Act, their position even as regards such offences must bring them into very close connection with the police. A practice of selecting certain members of the respectable public only for witnesses to searches has been reprobated in another province. The practice of confining selections to certain people who are connected with the police, and have to assist them is far worse. There is, to my mind, no way out of the fact that, if the words "two or more respectable inhabitants of the locality" are taken in their widest sense, they must include two or more fellow police officers of the police officer entrusted with a search warrant. If they do include police officers, then it appears to me that the plain objects of the Legislature are not secured, and a most important provision of the Legislature may be entirely frustrated. A limit, therefore, must be put on the words. In putting a limit on them, I think that the intention of the Legislature should be carried out to their fullest extent without a shadow of an attempt to depart from them, however convenient it may be to the authorities to adopt some particular system.

The language in which I expressed my views in *Ah Shee vs. King Emperor*, may have been somewhat too wide. Confining myself to the particular question involved in this case, I hold that the persons called to witness a search by a police officer or person holding a search warrant must be respectable inhabitants of the locality in which the place to be searched is situate, who do not hold offices to which they may have been appointed by a Government officer, the duties of which include taking part in the prevention or discovery of offences, or in bringing offenders to justice. As the duties of ward headmen include such duties, they are not, in my opinion, such persons as the Legislature contemplated should be called as witnesses to a search under a search warrant.

Upon this view the house entered in the present case was not entered under the provisions of section 6 of the Burma Gambling Act, and the presumption under section 7 of the Act cannot be drawn. I would dismiss the appeal.

*Irwin. J.*—By section 6 (1) of the Burma Gambling Act, 1899, the Commissioner of Police is empowered to authorize an officer of police to.

- (a) enter a specified house with such assistance as may be necessary, and by force if necessary;
- (b) take into custody all persons he may find therein;
- (c) seize all instruments of gaming, and so forth, found therein;
- (d) search all parts of the house, and seize all instruments of gaming and so forth, found on such search.

I said in *King Emperor vs. Maung Cho* (1) that I did not think it possible to separate the sub-clauses of this clause (I should have said the clauses of this sub-section) and consider the search as distinct from the entry and arrest for the purpose of section 103 (1) Code of Criminal Procedure. The learned Counsel for the crown asks us to say that this dictum is not correct.

Search warrants may be issued under section 96 or section 98 of the Code. If the former stood alone there would be some force in the argument that sub-section (3) of section 6 of the Gambling Act refers only to clause (d) of subsection (1), and that instruments of gaming may be seized without any search within the meaning of the section, for a warrant under the Gambling Act authorizes the police officer to do many things which he is not authorized to do by a search-warrant under section 96. Moreover clause (3) is a new provision, which did not exist in Act III of 1867. But section 98 is much wider, and its language is very similar to that of section 6 of the Gambling Act. It does not authorize arrest and it does not mention seizure of any articles before search, but it expressly authorizes entry, and its provisions about seizure are exactly analogous to those of clause (c) of the sub-section in the Gambling Act. I think it has never been doubted that the entry and the search are one indivisible transaction for the purpose of section 103. If the Burma Legislature had intended to limit the operation of sub-section (3) to searches made under clause (d) of sub-section (1) I think it would have said so expressly. I therefore adhere to the opinion I expressed in 1903.

On the question of the true construction of the words "two or more respectable inhabitants of the locality in which the house to be searched is situated," I do not think it necessary in this case to consider whether two police officers other than the officer conducting the search would be within the terms of the section. My opinion is that a person who is a respectable inhabitant of the locality is none the less a respectable inhabitant of the locality within the meaning of the section if he has been appointed a headman of a ward. If he is not so because he holds an appointment the duties of which include taking part in the prevention of crime, then the headman of a village is equally outside the terms of the question, for he has exactly the same duties to perform; in respect of detection of crime his duties are rather more onerous than those of his brother in a town. To say that a village headman may not lawfully be called to witness a search under section 103 would be, to my mind, not only absurd but very detrimental to village administration. If my view of the law is correct it may be that the law does not work so well in towns as in villages. It may be that if the police in any case wish to circumvent the law they can do so more easily in towns than in villages. It may be that the police act injudiciously in selecting ward headmen, so often as they do, to witness searches. It is possible that the people might have more confidence in the impartiality of the headmen in Rangoon if they were appointed by the Deputy Commissioner instead of the Commissioner of Police. If any of these matters are so it is no concern of ours in the decision of this case. I do not think we are warranted in imperting into section 103 of the Code of Civil Procedure a proviso that a person who, though not a police officer, holds an appointment by virtue of which he is obliged to assist the police in certain of their duties is not a respectable inhabitant of the locality within the meaning of the section.

The house searched was No. 250, Dalhousie street, between 23rd and 24th street. The two headmen who were called to witness the search lived, one in 23rd street and the other in 24th street. They were inhabitants of the locality. No allegation has been made that they are not respectable. They entered with the police Officers. The entry and search were therefore, in my opinion duly made under, section 6. It is not disputed that instruments of gaming were

found scattered about the upper room where eleven Chinamen were found. The appellants merely said they knew nothing about it as they were not in the room. Under section 7 I think it must be presumed that the room was a common gaming house and the persons found in it were here for the purpose of gaming.

As a majority of this Bench are of a contrary opinion, it is not necessary for me to discuss the evidence against each respondent in detail.

*Hartnoll, J.* It is unnecessary for me to set out the facts and points for decision as they have already been set out by the learned Chief Judge, whose judgment I have had the advantage of reading. On the first point I agree with him in considering that a house cannot be deemed to be entered under the provisions of section 6 of the Burma Gambling Act, 1899, unless the police officers authorized by the warrant be accompanied by two respectable inhabitants of the locality within the meaning of section 103 of the Criminal Procedure Code.

There remains the second point for consideration, and that is whether, headmen of wards appointed under the Lower Burma Towns Act, 1892, by the Commissioner of Police Rangoon are inhabitants within the meaning of section 103 of the Code. In interpreting the laws of judges, must no doubt remember that their object is *jus dicere* not *jus dare*; but it is a fundamental principle that the intention of the Legislature is to be carried into effect in interpretation and to arrive at the meaning of words as was laid down in *R. vs. Hall* (1), the subject the occasion on which they are used and the object to be attained must of necessity be taken into consideration. It therefore certainly seems to me that the intention of the Legislature in framing section 103 of the Code of Criminal Procedure should be considered in deciding whether the word "inhabitants" should be taken in its widest and ordinary senses, or whether it should be restricted so as to exclude certain class of "inhabitants." The intention of the enactment, beyond doubt, to me seems to have been to ensure that searches are conducted with decency and in order and that no wrong-doing, such as the planting of articles by the police in the house searched, should take place. The regularity and proper conduct of the search was to be secured by two or more witnesses, and, this being so, it seems to

me to be obvious that the intention was that only those should be chosen as witnesses who can be reasonably relied on to secure the desired result and in whose trustworthiness and ability towards the carrying out of this particular duty required of them confidence can be felt. It follows, in my opinion, that the intention was to exclude from the category of inhabitants those, in whom confidence could not be felt and those against whom a reasonable suspicion arises that they may not carry out the duty required of them. For instance, I consider that it was never the intention of the Legislature that two policemen should be chosen as witnesses. Since I am of opinion that it was the intention of the Legislature to restrict the meaning of the word "inhabitants," as used in section 103 of the Code, it remains for consideration whether headmen of wards in the city of Rangoon should be excluded. They are appointed by the Commissioner of Police, and it has become the practice to constantly use them as witnesses of searches. To give an instance, in Criminal Appeal No. 276 of 1907 of this Court, *Mi Hauk vs. King Emperor*, one headman during the last year witnessed searches, some eight, nine or ten times with one excise officer. They further have certain police duties to do. They may be good and respectable men, and I would lay stress on the fact that I lay no imputations against their respectability and good faith, but, under the circumstances, I am of opinion that it would be dangerous to hold that they are of the class of those whom the law intended to be called as witnesses of searches. Where they have police duties, are constantly being called on to attend searches, and are appointed by the police, it seems to me, that there cannot be that confidence in their doing the duty required of them that there should be and that they become of that class that the law never intended witnesses to be chosen from.

I would therefore hold that the house entered in the present case was not entered under the provisions of section 6 of the Burma Gambling Act, and the presumption under section 7 of the Act cannot be drawn. I would dismiss the appeal.

IN THE CHIEF COURT OF LOWER  
BURMA.

CRIMINAL APPEAL No.\* 510 OF 1907.

Sayed Aung Zel vs. King Emperor.

BEFORE MR. JUSTICE MOORE.

Dated the 23rd August 1907.

*Indian Penal Code—section 304—culpable homicide not amounting to murder—watchman cutting down thief who dies of loss of blood.*

A watchman in charge of property is not justified in cutting down a thief in order to prevent his escape and to mark him for future apprehension. If the thief so cut down dies in consequence of the injury so inflicted he is guilty of culpable homicide not amounting to murder if he knew that he was likely to cause death by his act.

A severe sentence under such circumstances is not called for.

I agree with the view of the facts accepted by the learned Sessions Judge, namely, that appellant cut deceased on the leg as deceased was making off with paddy which he had stolen. Appellant was a durwan, in charge of the paddy. The weapon which he used was a formidable one—a sort of battle axe with a crescent-shaped blade. Appellant himself said that he cut deceased in order to be able to identify him. He cut him on the calf of the leg and I think he probably had no intention of killing but merely intended to disable the man and prevent his escape. The learned Sessions Judge had found him guilty of culpable homicide not amounting to murder punishable under the latter part of section 304. His finding is, that appellant intended neither to cause death, nor to cause injury such as was likely to cause death, but that appellant knew that he was likely to cause death by his cut. I think that the finding is justified and that appellant did, therefore exceed his right of defence. But I think that his offence was not one deserving severe punishment. He probably believed that he was quite justified in cutting a thief down to prevent his escape, and his aiming at the leg shows that he exercised some restraint. I confirm the conviction but reduce the sentence to three months rigorous imprisonment.

*Appeal from the order of the Sessions Judge of Hanthawaddy, dated the 9th July 1907, passed in Sessions Trial No. 44 of 1907.*

IN THE CHIEF COURT OF LOWER  
BURMA.

CIVIL FIRST APPEAL No. \*50 OF 1907.

Malladi Sathalingum

vs.

Ramjan Laljee Sajan and one.

BEFORE SIE CHARLES E. FOX, KT., C. J., AND  
MR. JUSTICE IRWIN.

Dated 20th December 1907.

*For Appellant—Higinbotham.*

*For Respondent—N. M. Cowasjee.*

*Indian Contract Act (Act IX of 1872), sections 151-152—liability of common carriers—liability of carriers by water who are not common carriers—Contract Act did not abolish common law—not a complete code.*

The Indian Contract Act is not a complete code dealing with the law relating to contracts, and section 151 of the Act did not abolish the common law liability of a common carrier.

The common law liability of decarrier by water who is not a common carrier rests on the same foundation as the liability of a common carrier.

A common carrier impliedly undertakes to carry goods at his own absolute risk, the act of God or the King's enemies alone excepted, unless by agreement between himself and a particular freighter he limits his liability by further exceptions.

This was an appeal by the plaintiff from the judgment of the Judge of the Original Side of the Chief Court who dismissed the suit with costs. The facts as they appeared in evidence and as found by the learned Judge are contained in the following judgment:—

“On the 21st July 1905, 2,500 bags of rice of the plaintiffs were loaded on the defendant's cargo boat to be carried by the defendant from Kemmendine to the S.S. *Emile*, in the port of Rangoon, at Rs. 3-8 per 100 bags. The rice was loaded by 6 p.m. and the boat left about 9 p.m. Water came in through a rat hole; the tidal not being able to keep the water down by baling, grounded her near the bank about 3 a.m., after which the tide came up and covered the boat and cargo, 9 bags, had been transferred to another cargo boat. The plaintiff sues for the value of the remaining 2,409 bags which by consent is taken to be Rs. 14,583-6-3. The plaintiffs' case is that the boat was not, at the time of starting on the voyage, in a fit state to carry the rice, and he also alleges that the rice was lost through the defendant's negligence.

*Appeal against the decree of the Original Side of this court, dated 1st May 1907, passed in Civil Regular Suit No. 20 of 1906.*

The hole was one inch or one-and-a-half inches in diameter on the outside and larger inside; it was in the outer shell of the boat which was two-and-a-half or three inches thick—about four-and-a-half feet above the water line—when the boat was empty and about two feet or two-and-a-half feet below water when the boat was fully loaded. The outside edges of the hole showed that the rat had gnawed the hole right through. There was an inside shell to the boat so that the hole could not be seen from inside. The defendant contends that he is only liable of negligence under section 151 of the Contract Act; that the boat was examined inside and out before starting and nothing wrong was found. The *tindal* states he saw water coming in, i.e., he saw a larger quantity of water in the well than usual at 9 or 10 p.m., and that he took the boat ashore because he could not keep down the water by bailing; that as soon as he saw the water, coming in at 9 p.m. he intended to take the boat ashore. It is impossible to suppose that the rat completed the hole when it was under water and the *tindal's* evidence goes to show that he knew that the boat was leaking when starting on the journey. The rat-hole, therefore, was made and completed before the boat was fully loaded.

“In every view of the case I think the defendant is liable under the common law. A carrier by water impliedly engages that his vessel shall be water-tight, an obligation applicable to all carriers, whether common carriers or otherwise, see *Nugent vs. Smith*, I. C.P.D. at page 432, and see page 17 of *Carver on Carriage by Sea*. And the case of *Irrawaddy Flotilla Co. versus Bugwandas*, 18 Cal. 620, shows that section 151 of the Contract Act has not the effect of limiting a common law liability. The defendant is also liable under section 151 of the Contract Act for negligence—for loading the boat after the water had begun to come in. It clearly is negligence for a *tindal* not to notice that his boat is badly leaking. And assuming that the water first began to come in after the boat was on its way (which is not shown), the *tindal* could have seen that he could not keep down the water by bailing and he should then, without delay, have brought the boat to a jetty or on shore, for the tide was still running out at 3 a.m., and thus have saved the bulk of the cargo. The suit is decreed for Rs. 14,584-6-3 with costs.”

The judgment of the appellate court was delivered by the Chief Judge and concurred in by Mr. Justice Irwin.

*Foz, C. J.*—The plaintiffs delivered to the defendant a number of bags of rice for carriage in a cargo boat or lighter to a steamer lying in the Rangoon harbour. On its way to the steamer the boat was found to be filling with water, which came in through a hole in the side made by a rat. Some of the bags of rice were transferred to another cargo boat. Eventually, the boat was beached, and, on the tide rising, the rice still in it was soaked with the water that had entered the boat and was rendered unfit for use.

The plaintiffs sued the defendant for the value of the rice spoiled. The learned judge held the defendant liable for the agreed value of such rice, on the ground of his being liable by law as a carrier, and also on the ground of the loss having been occasioned by the negligence of his servants. The defendant appeals on the ground that his liability as a carrier is governed by the provisions of section 151 of the Indian Contract Act, and that he and his servants had fulfilled the requirements of that section as to the care which a bailee must take of goods bailed to him, and that consequently, in the absence of a special contract, he was exempted by section 152 of the Act from responsibility for the deterioration and practical destruction and loss of the rice.

It was admitted by the advocate for the plaintiff that the defendant was not a common carrier, but it was contended that he impliedly contracted that his cargo boat was fit for carrying rice, and that the law imposed on him a duty to provide a fit boat. In the case of the *Irrawaddy Flotilla Company vs. Bugwandas*,\* their Lordships of the Privy Council dealt with the case of a common carrier. The principles of the English common law were applied to the case of such a carrier even when the cause of action arose in Upper Burma. The decision has no direct bearing on the present case in which the liability of a carrier by water who is not a common carrier has to be determined. The present case arose in the Rangoon Town District within the original jurisdiction of this court. The law applicable to the case is that indicated in subsection (2) of section 13 of the

\* (1891) I. L. E., 18, Cal. 620.

Burma Laws Act, 1898, which enacts that, subject to certain provisions, which have no application to the present case, all questions arising in civil cases instituted in the courts of Rangoon, shall be dealt with and determined according to the law for the time being administered by the High Court of Judicature at Fort William in Bengal in the exercise of its ordinary original civil jurisdiction. The common law of England is part of the law administered by such court in cases which arise in Calcutta. If such common law would or should be applied in the case of the same description as the present arising in Calcutta, it should be applied by this court to the present case.

Although the decision in the *Irrawaddy Flotilla Company vs. Bugwandas* is not a direct authority upon the liability of a carrier who is not a common carrier, the reasoning of their Lordships, upon which they came to the conclusion that the Indian Contract Act did not apply to the case of a common carrier anywhere in India, applies when considering the case of a carrier who is not a common carrier in a place in which the English common law is applicable. Their Lordships pointed out that the Indian Contract Act did not profess to be a complete code dealing with the law relating to contracts. They said it was scarcely conceivable that it could have been intended to sweep away the common law as regards common carriers by a side wind, and, finally, they said that the obligation imposed by law on common carriers had nothing to do with contract in its origin, but it is a duty cast upon common carriers by reason of their exercising a public employment for reward, and a breach of such duty is a breach of the law, and for this breach an action lies founded on the common law, which action wants not the aid of a contract to support it.

The common law liability for a carrier in the position of the defendant rests on the same foundation as the liability of a common carrier. In *Lyon vs. Mells*,† cited with approval in *Nugent vs. Smith*,‡ Lord Ellenborough said that a carrier by water impliedly engages that his vessel shall be water-tight. In the *Liver Alkali Company vs. Johnson*,§ before the Ex-

chequer Chamber, one of the learned judges expressly held that a barge-owner or lighterman who carried goods—as the defendant in the present case—did was not a common carrier. All the judges held that a lighterman incurred liability to the same extent as a common carrier. Brett, J., said that it was a recognized custom of England that every shipowner who carries goods for hire in his ship, whether by inland navigation, or coastways, or abroad, undertakes to carry them at his own absolute risk, the act of God or of the Queen's enemies alone excepted, unless by agreement between himself and a particular freighter, he limits his liability by further exceptions. This law prevailed in Calcutta when the Indian Contract Act was enacted, it prevails there still unless that Act has repealed it. In the *Irrawaddy Flotilla Company vs. Bugwandas*, their Lordships held that the Act had not repealed what was a custom of the realm as regards common carriers. If it did not repeal that custom, it did not repeal the custom of the realm as regards carriers by water who are not common carriers, and in a place in which the common law prevails as it does in Rangoon that custom must be given effect to.

In this view of the present case, the defendant was liable for the rice lost apart from any question of negligence on the part of his servants.

The evidence is not sufficiently full to show what the crew of the boat might have done to save the rice, but, *prima facie*, the delay of about six hours before the boat was beached points to negligence on the part of those in charge of and working the boat.

I would dismiss the appeal with costs.

*Irwin, J.*—I concur.

#### IN THE CHIEF COURT OF LOWER BURMA.

CIVIL REGULAR No.\* 34 of 1905.

Mary Magdalen Merritt vs. James Meritt.

BEFORE MR. JUSTICE MOORE.

Dated 25th February 1905

For Petitioner—Messrs. Higinbotham and Grant.

For Respondent—Mr. Villa.

*Indian Divorce Act, section 16—discretionary power of court not affected by application to exercise that discretion.*

The existence of a decree nisi which has not been made absolute is not a bar to a claim for judicial

† (1804) 5 East 428.

‡ (1876) L. R., 1 C. P. D. in 423.

§ (1874) L. R., 9 Ex. 838.

separation by the petitioner in the former proceedings when such application for judicial separation is made more than six months after the decree *nisi* and it is alleged that conjugal intercourse has taken place since the decree *nisi*.

The court has a discretionary power vested in it under section 16 of the Indian Divorce Act and it will make no difference in the exercise of that discretion if the petitioner applies to the court to dismiss the application for dissolution of marriage.

On the 14th March, 1905 the petitioner, Mary Magdalen Merritt, obtained a decree for dissolution of marriage against respondent, James Merritt, on the grounds of cruelty and adultery. She took no steps to have the decree made absolute.

She subsequently filed a suit for judicial separation and alleged a renewal of conjugal intercourse after the decree *nisi*.

The respondent objected to the maintenance of the suit for judicial separation on the ground that the decree *nisi* was a bar thereto. The petitioner then filed the present application asking the court to exercise its discretion under section 16 of the Indian Divorce Act and to dismiss the previous suit. The respondent opposed the application.

The matter was argued before Mr. Justice Moore, who passed the following order—

“Petitioner asks the court to exercise the power vested in it under the last paragraph of section 16 of the Indian Divorce Act and to dismiss the suit, Civil Regular No. 34 of 1905. In that suit petitioner obtained a decree *nisi* for dissolution of marriage against respondent on the grounds of adultery and cruelty. The decree *nisi* is dated 14th March 1905.

“Respondent opposes the application, but in my opinion he has no *locus standi*. If petitioner had not made any such application it would have been within the discretion of this court to dismiss the suit. And I do not see why the fact of petitioner making the application should preclude the court from exercising that discretion it thinks fit.

“Petitioner, who is a Roman Catholic, has filed a fresh suit for judicial separation, alleging renewal of conjugal intercourse after the decree *nisi*. The renewal is in that suit denied by

respondent. But, apart from the question of renewal, I think that there is clearly a case in which the suit should be dismissed. I therefore order that the suit be dismissed, respondent to pay costs of applicant; advocate's fee three gold mohurs.

IN THE CHIEF COURT OF LOWER  
BURMA.

CIVIL REGULAR No 176 OF 1907.

Annmalai Chetty vs. Sigappi Ammal and another.

BEFORE MR. JUSTICE MOORE.

Dated 25th February 1908.

For Plaintiff—Oung and Oung.

For Defendant—Mt. Spitteler.

*Mortgage—new house built by mortgagor or his assignee on site of old house that was mortgaged—liability of mortgagor and assignee of equity of redemption*

If a mortgaged house is pulled down and a new one erected in its place by the assignee of the equity of redemption, with notice of the mortgage by his assignor, the mortgagee can enforce his security on the new building.

*Followed: Morais vs. Hafeezun, S.D.N.W.P. 432; Ghose: Law of Mortgage, third edition, p. 350 approved.*

Plaintiff sues to recover Rs. 296 principal and interest due under a mortgage deed of a certain house built on Government land. The first defendant does not defend the suit. The second defendant, by his written statement, pleads that he purchased the house in question for valuable consideration without notice of plaintiff's mortgage; that he has pulled down the old house and has erected a new house upon the site thereof and that plaintiff, though aware of such erection, stood by and said nothing.

The mortgage upon which plaintiff sues is a registered mortgage and second defendant cannot plead that he bought the old house without notice of the mortgage. Defendant has also failed to prove that plaintiff was aware of his erection of the new house at the time of erection.

The only question for determination is whether the house originally mortgaged having been pulled down plaintiff can enforce his security upon the new building erected in its place? I have not been referred to any authority on the point involved. The only authority which I have been able to find which, however, is directly apposite to this case, is an old case—*Morais vs. Hafeezun*, S.D.N.W.P. 432. This ruling, which is quoted with approval at *Ghose Law of mortgage*, third edition, page 350, is to the effect that, if a mortgaged house is pulled down and a new one erected in its place by the assignee of the equity of redemption, the mortgagee can enforce his security on the new building. This decision seems to be in accordance with equity. The assignee of the equity of redemption is in the shoes of the mortgagor and it can. I think, hardly be contended that if the mortgagor himself pulled down the house and built a new one in its place the mortgagee would not be entitled to enforce his mortgage over the new building.

I hold, therefore, that plaintiff is entitled to enforce his security over the new building and award him a decree, as prayed with costs.

Interest at contract rate to expiry of the time allowed for redemption (six months) thereafter at 6 per cent. per annum.

First defendant to be personally liable for deficiency upon sale, if any, surplus, if any, to be paid to second defendant.

IN THE CHIEF COURT OF LOWER  
BURMA.

CIVIL MISCELLANEOUS. No.\* 110 OF 1906.

Ma Pe and one vs. Ma Thein Yin

BEFORE SIR CHARLES E. FOX, KT., C. J., AND  
MR. JUSTICE IRWIN.

Dated 3rd February 1908.

For Appellants—Lambert.

For Respondent—Agabeg.

*Probate and Administration Act, (Act V of 1881) Chapters VI and VII.—discretionary power of court under section 85—when exercisable.*

\* Appeal against the order of T. J. Metcalfe Esq., District Judge, Mergui, dated 1st November 1906, passed in Civil Miscellaneous No. 15 of 1906.

(1) (1886) L.B.S.J., 378.

An application for letters of administration with the manifest object of getting possession of property from the person entitled to it on the ground that it was being wasted should not be granted. The proper method of enforcing such right is by a regular suit and procedure under the Probate and Administration Act cannot be used for such purpose.

Letters of administration should not be granted where it would be useless to grant it.

*Fox, C. J.*—Eighteen years after the death of her father, Sit Tit, the respondent, his younger daughter, applied for letters of administration of this estate. During the argument of his appeal it was stated that Sit Tit was a Chinamen, but this nowhere appears on the proceedings. There is a note by the judge that the parties agreed that the Buddhist law should apply to the distribution of the estate. If Sit Tit was not in fact a person to whom the Burmese Buddhist law of inheritance was applicable, the applicant being a younger daughter, had no present right to a share of his estate, her mother being still alive. The positions of a surviving parent and of children of a deceased parent in relation to his or her estate was laid down in *Ma On and others vs. Ko Shwe O and others* (1). Under that ruling, assuming that the Burmese Buddhist law was applicable, the property of Sit Tit devolved, upon his death, on the applicant's mother, and she was entitled absolutely to half of what Sit Tit and she had owned jointly, and to a life interest in the remaining half, subject to the eldest child's right to a quarter share.

The applicant has no right to claim or recover anything whilst her mother lives. At present there is only a mere possibility of her living longer than her mother and of becoming on her mother's death entitled to share in property which at one time belonged to her father and mother jointly. This does not, in any opinion, bring her within the terms of section 23 of the Probate and Administration Act as a person who, according to the rules for the distribution of the estate of an estate of an intestate, applicable in the case of the deceased would be entitled to the whole or any part of the deceased's estate.

Whether or not the Burmese Buddhist law of inheritance applied to Sit Tit, the applicant does not show that she was a person entitled to letters of administration to his estate, and, consequently letters should not have been issued to her.

The fact that the application was made about eighteen years after Sit Tit's death shows that the objects of granting letters of administration to an estate are not correctly understood. The objects 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 administration is bound to collect with reasonable diligence the property of the deceased and the debts which were due to him: has he 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 has then 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 amongst the persons entitled to it under the law of inheritance applicable to the deceased.

In the case of persons entitled to make wills an estate may remain not wholly administered for years, because the ultimate devolution of the property may be prolonged by the terms of a will, but in the case of one of a Burmese Buddhist married couple dying, it can rarely, if ever, be necessary that letters of administration to the deceased's estate should be granted after the period of limitation for the recovery of debts owing to or by the deceased has expired.

All property other than debts and securities may be recovered without letters of administration by the person entitled thereto. The survivor of a Burmese Buddhist married couple would be entitled to recover for himself or herself all such outstanding property. If debts which were due to the deceased are not recovered within the period of limitation for a suit for recovery of them they become irrecoverable, and are lost to the estate, consequently, the issue of letters of administration with a view to collecting such debts would be useless, and should not be granted.

Section 85 of the Act empowers the court to refuse to grant an application for letters of administration for reasons to be recorded by it

in writing. The present is a case in which an order under this section should have been made. The funeral expenses, death bed charges, wages due by the deceased must have been paid years before. All debts due to the deceased must have been either collected or have become long since time barred. The property of the deceased and of the respondent's mother had come into and was in the mother's possession, and she was entitled to keep it. The application was made by a daughter who might never become entitled to a share in the property. The manifest object of the application was to get the property out of the possession of the person entitled to it on the ground that it was being wasted. If a child of Burmese Buddhist parent has a right to prevent his or her surviving parent from wasting the one half of the property in which the parent has only a life interest, the proper method of enforcing such right is by a regular suit. Procedure under the Probate and Administration Act cannot be used for such purpose, and the courts should not grant letters under the Act when such is the obvious object and design of the application.

I would allow this appeal, reverse the order of the district court and dismiss the respondent's application. I would also order her to pay the appellant's costs in both courts.

*Irwin J.*—I concur.

IN THE CHIEF COURT OF LOWER  
BURMA.

CIVIL MISCELLANEOUS APPEAL No.\* 102 OF 1907.

IN the matter of Yar Ali.

BEFORE CHARLES E. FOX, KT., C. J., AND  
MR. JUSTICE IRWIN.

*Dated 5th December 1907.*

*For Applicant*—R. N. Banerji.

*Indian Insolvent Act—Procedure.*

In an application under the Indian Insolvents Act, the procedure is not that under the Civil Procedure Code but it is to be, as far as practicable, in accordance with the procedure prescribed by the statute itself.

\* Appeal from the order of Mr. Justice Ormond, dated 6th August 1907, passed in Insolvency No. 82 of 1907.

*Fox, C. J.*—The proceeding was one under the Insolvent Act. The procedure in such a case is not that of the Civil Procedure Code but as to be as far as practicable in accordance with the procedure prescribed by the Statute—See the Lower Burma Courts Act 1900, section 8, sub-section (2). The first ground of appeal fails because section 203 of the Code did not apply to the case.

The petitioner was a peon on a salary of Rs. 23 a month. He became liable on promissory notes for Rs. 1,840, when, according to his Schedules, he had only Rs. 7-12 worth of property besides his income. He said he stood surety for others, but even if he received no part of the monies borrowed, he contracted debts on the notes, and on his statement of his means he could not have had any reasonable or probable expectation at the time he signed the notes that he would be able to pay the amounts of them.

I think the learned judge rightly dismissed the petition, and I would dismiss the appeal.

*Irwin, J.*—I concur.

IN THE CHIEF COURT OF LOWER  
BURMA

CIVIL SECOND APPEAL \*NO. 45 OF 1907.

Chinaswamy Visaya Thaver

vs.

R. M. V. A. Pallineappa Chetty.

BEFORE MR. JUSTICE IRWIN.

*Dated 16th January 1908.*

*For Appellant*—N. N. Burjorjee.

*For Respondent*—Lambert.

*Transfer of Property Act (Act IV of 1882), sections 54 and 55—Code of Civil Procedure, sections 280, 281 and 283—conveyance of immoveable property during attachment pursuant to prior bona-fide agreement to purchase and possession.*

Where immoveable property is attached after an agreement for the sale thereof accompanied by possession has been entered into, a conveyance by deed

*\*Against the decree of D. Ross Esq., Divisional Judge, Hanthawaddy, dated 3rd January 1907, passed in Civil Appeal No. 75 of 1906.*

subsequent to the attachment made in pursuance of the previous agreement is not void merely because of the attachment prior thereto. Such a conveyance will be upheld if made in pursuance of a previous *bona-fide* agreement of purchase.

The appellant was the plaintiff and he sued under section 283, Civil Procedure Code for a declaratory decree after failing in an application under section 278 for removal of attachment.

The attachment was before judgment, and was made on 10th June 1905. Paragraph 3 of the plaint gives no dates, and is vaguely worded, but it contains allegations that plaintiff bought and obtained possession of the land before attachment, and that he got it with a registered conveyance. Defendant pleaded that the registered conveyance was executed after the attachment, and that it was fraudulent.

The plaintiff's case is that he entered into a contract for sale and purchased the property on 29th May 1905, and the same day he paid part of the price, and was given possession.

That was before the attachment.

The registered conveyance was executed and presented for registration on 5th July 1905 after the attachment. The decree in the suit in which the property was attached was passed on 7th July 1905.

The issue that was tried was: "what right and title did the plaintiff have in or to the property in question at the time the same was attached in suit No 39 of 1905?"

The suit was dismissed on the ground that, section 54 of the Transfer of Property Act, sale of the land could only be made by a registered instrument and that under section 276 of the Civil Procedure Code the sale made while the attachment continued was void. The court of first appeal agreed with this, adding: "But if I am wrong in this view, I should like to say that the evidence of the earlier sale seems to me to be of very doubtful value, and that the only really trustworthy evidence we have on the point is the deed of sale Ex. A."

The decision of the lower courts on the point of law is not supported by respondent's advocate, and is clearly wrong. Section 55 of the

Transfer of Property Act was overlooked, and the issue framed was not the real issue. The case is governed by sections 280 and 281, Civil Procedure Code. Plaintiff's possession at the time of attachment is not specifically denied in the pleadings, but it was denied by defendant in his evidence. Therefore the first issue should be on this point. The second issue should be "If it was in possession of the plaintiff, was it so in trust for the judgment debtor?" In other words, was the contract for sale a *bona fide* one or a *benami* one? *San Tun Pru vs. Mi Ani Me* (1).

A contract for sale, though it does not, of itself, create any interest in or charge on the property, is nevertheless a real contract and has important consequences, as set out in section 55 of the Transfer of Property Act. Under subsection (c), clause (d), the seller is bound, on payment or tender of the amount due in respect of the price, to execute a proper conveyance of property when the buyer tenders it him for execution at a proper time and place. That is the position in which the judgment-debtor was at the time of attachment if the contract for sale was a *bona fide* one. The decree-holder could not bring to sale anything more than the indigent-debtor possessed.

There is another matter in the pleadings which was entirely disregarded by the court of first instance, namely, the allegation in the plaint that the land belonged to four persons, who sold it to the plaintiff, whereas only two of those persons were defendants in suit No. 39. The point was not pressed in the first appeal.

The appeal having been decided on a wrong view of the law, the facts have to be considered. The Divisional Judge has not reviewed the evidence and has not even recorded a distinct finding on it. He only says that the evidence of the earlier sale, by which he means the contract for sale, is of very doubtful value. This is not a sufficient disposal of the main point in the case.

I therefore set aside the decree of the divisional court and remand the appeal to that court for a re-hearing and disposal.

IN THE CHIEF COURT OF LOWER  
BURMA.

CRIMINAL APPEAL \*NO. 576 OF 1907.

Nga Me vs. King Emperor.

BEFORE SIR CHARLES E. FOX, K.T, C. J., AND  
MR. JUSTICE ORMOND.

Dated the 26th September 1907.

For Respondent—Assistant Government Advocate.

*Indian Evidence Act sections 26 and 27—inadmissibility of confessions to police—admissibility of statements to police to prove guilt of accused when such statements false.*

If the prosecution rely on the statements of the accused to the Police as being true they are inadmissible, if they amount to a confession, but they are admissible if the prosecution rely on their falsity and bring them forward for the purpose of proving that the defence of the accused is false and that he is guilty having put forward a false defence.

Approved: R. vs. Rangal Mali, Criminal Reference 30 of 1905, Cal., H. C. 18th, September 1905, not reported.

*Per Ormond, J.*—Three children were murdered whilst their parents were away from home for a few hours; and Rs. 50 and a jacket, in which the money was wrapped up, were stolen from the house.

Suspicion pointed to the accused, and three days later he gave the following information to the police:—

That he knew where the jacket was hidden (and he pointed it out).

That Maung Gyi was the murderer and the thief; that he saw him committing the crime; that he took Maung Gyi to the place with a view to committing theft of the Rs. 50, and he pointed out correctly the places where the murderers were committed. He first stated that he saw the crimes committed from certain positions, which he altered to other positions when it was pointed out to him that it was impossible for him to have seen the occurrences from the former positions. Then the accused was arrested. As the learned

\* Appeal from the order of C. R. Wilkinson, Esq, Sessions Judge, Bassein, dated the 23rd day of August, 1907, passed in Sessions Trial No. 41 of 1907.

sessions judge points out, the case against the accused rests almost entirely upon his statement to the police.

The statement that he took Maung Gyi to the place in order to commit theft is clearly a confession by accused of an offence and is inadmissible in evidence under section 25 of the Evidence Act. The rest of his statement is used by the prosecution to show that accused was acquainted with all the details of the crimes and that he was not merely an on-looker leading to the inference that he took part in the commission of the offence.

Now, if we apply the principle which I think is correct and which was adopted in the Calcutta unreported case *R. vs. Kangal Mali* (Criminal Reference 30 of 1905), mentioned at page 163 of Mr. Amir Ali's Law of Evidence (fourth edition) *viz*:—that such statements of the accused as are relied on by the prosecution as being false, are admissible in evidence against the accused; the statements of accused that Maung Gyi committed the crimes and that accused saw him committing them would be admissible,—because the prosecution rely on them as being false, but the statements showing that accused knew the details of the criminal acts, would be inadmissible, because the prosecution rely on these as being true, and they would amount to incriminating statements, and to be confessions.

If the prosecution wished to rely upon the statement of accused that he saw the crimes committed, as involving something true, namely that accused was present on the scene; the statement would be inadmissible,—it could only be proved in order to show that it was false, *i.e.*, that accused did not see Maung Gyi committing the acts.

The fact that the jacket was discovered in consequence of information received from accused is admissible in evidence, although section 27 of the Evidence Act does not apply (inasmuch as the accused was not then accused of an offence).

The following facts, therefore, might be proved namely, that the accused knew where the jacket was; that he was attempted to fix the guilt upon an innocent person, and that he did not see Maung Gyi committing the criminal acts. This

would not be sufficient, I think to convict the accused. In this case, however, the statement was reduced into writing, which writing was wrongly admitted in evidence (section 162, Criminal Procedure Code); and, apart from the writing, there is no direct evidence on the record to show that accused stated either that Maung Gyi or any one else had committed the crimes, or that he saw Maung Gyi committing the acts.

I think the appeal must be allowed, the conviction reversed and the accused acquitted.

*Fox C. J.*—I concur.

### IN THE CHIEF COURT OF LOWER BURMA.

CRIMINAL APPEALS Nos.\* 601 AND 602 OF 1907.

(1) Khwas, (2) Fazir Ali *vs.* King Emperor.

BEFORE SIR CHARLES E. FOX, KT., C.J., AND MR. JUSTICE IRWIN.

*Dated 6th January 1908.*

*For Respondent*—Assistant Government Advocate.

#### *Confession—inferences.*

From the fact that one of the accused confessed to beating the deceased, whose head was cut off by some person or persons unknown, it cannot be inferred that he was present when the head was cut off.

In the absence of any definite evidence of the nature of the injuries which actually caused death, it is not proper to infer that the accused intended to inflict such injury as would in the ordinary course of nature be sufficient to cause death.

*Fox, C. J.*—The materials on which to come to a conclusion in this case are meagre. Kajab Ali's evidence, in so far as he says that he was not present at the beating of Kodanaw, and that he only came to know of his death by hearing of it from another person, appears to me to be very doubtful.

His story about the plan to get the accused Khwas' money back appears a probable one. On that it is unlikely that any of those who joined in the *punchayet* could at first have intended to kill Kodanaw or the other suspected man.

\* Appeal from the order of E. Ford, Esq., Sessions Judge, Delta Division, dated 26th July 1907, passed in Sessions Trial No. 15 of 1907.

If Khwas' confession is removed from consideration, as I think it should be as being irrelevant under section 24 of the Evidence Act, the only account of what happened when Kodanaw was beaten is that contained in the confession of Fazir Ali. This is very meagre in detail, and, obviously, cannot be a full and true account of the assault. The civil surgeon said that the jaw of the man whose head he examined was broken into four bits. It is not likely that this result followed on his being merely slapped and kicked, but possibly it may have been caused by his falling after a violent push or blow. Kodanaw was an elderly man of apparently poor physique, the civil surgeon describes his internal organs as healthy but shrunken. It was impossible for him to say whether the head was cut off before or after death. It appears to me improbable that any of the people in *punchayet* used a knife on Kodanaw whilst he was alive. The object of the beating must have been to get him to restore the money they thought that he had taken. It is not impossible that Kodanaw succumbed to a beating which most men of ordinary physique would not have succumbed to, and that the council, seeing a result which they never detended, intermined to make identification of his body as impossible as they could by cutting off the head and burying it in a different place from the rest of the body. That Khwas and Fazir Ali were two of those concerned in the beating of Kodanaw is sufficiently proved by Rajab Ali's evinence. Khas pointing out where the head was, and Fazir Ali's confession. The injury caused by the beating was intentional, and, therefore, I think that, in order to find the accused, or either of them, guilty of even culpable homicide not amounting to murder, it must be found that they joined in a common object and intention to inflict on Kodanaw bodily injury likely to cause death. I find it difficult to believe that any of the members of the *punchayet* intended to go so far or not, they knew that Kodanaw's death would be the likely result of the beating they determined to give him. It appears to me to be more probable that Kodanaw unexpectedly died from the result of a beating that would not have ordinarily led to a man's death. I think that section 330 of the Penal Code was the section most applicable to the case of both accused, and I would alter the

convictions of both accordingly, and would reduce the sentence on Khwas to one of seven years rigorous imprisonment, and that on Fazir Ali to one of five years rigorous imprisonment.

*Irwin, J.*—The appellants were committed for trial on a charge of having committed culpable homicide not amounting to murder by causing the death of Kodanaw on 14th April. The sessions judge altered the charge to one of murder, but, ultimately, convicted the appellants of voluntarily causing hurt for the purpose of extorting property, section 327. The 4th of April appears to have been entered in the charge because that date was in the first information report, but in the information itself the offence is stated to have been committed on a Friday; about seven days before 11th April. This fixes the date as 5th April, and Rajab Ali's evidence in the court of sessions agrees with this. To the magistrate he said Saturday. The magistrate ought to have examined him on his information to clear up this point. At any rate, the 4th was not Saturday.

It was Rajab Ali who gave information on 11th April, and the next-day he pointed out where the headless body was buried. On 14th April appellant Khwas pointed out where the head was concealed, about two miles from the body. Khwas says the head was pointed out by Rajab Ali, but I think the evidence leaves no doubt at all that it was pointed out by Khwas himself. It is most probable that Rajab Ali knows more than he admits, but his disclosure of the crime was quite voluntary. It is very improbable that it would ever have come to light if he had not given information. Kodanaw and one Yacub Ali and Munshi were suspected of having stolen a considerable sum of money from Khwas. Rajab Ali's account is that several natives of India, including both the appellants, assembled in council to devise means of inducing these two persons to give up the money. He (Rajab Ali) was driven away from the council by his employer Akbar Ali, and shortly after this he heard cries from the place. A few days later he found the headless body buried in the jungle.

The civil surgeon said the head fitted the body; the jaw was broken in four pieces and there were six small cuts on the neck besides the

cut which severed the head. The broken jaw would not account for the death, and the body was apparently too far decomposed to ascertain whether there were other serious injuries.

Khwas made a confession four days after his arrest. In view of Alaik's statement that he told Khwas he would be pardoned if he pointed out the head, I think it is not safe to hold that the confession was voluntary. But, putting the confession, aside I think Rajab's evidence, and the fact that Khwas pointed out the head, are quite sufficient to prove that Khwas was one of the persons who beat Kodanaw, cut off his head and buried the head and the body.

Fazir Ali made a confession the day after his arrest. There is no reason to suppose that it was not voluntary. He confesses to nothing more than slapping Kodanaw on the foot and thigh, but his confession proves that he was one of those who beat Kodanaw. I do not think it can be inferred that he was present when the head was cut off, but he admitted that the person who was beaten died after the beating.

The other suspected thief, Yacub Ali Munshi, as totally disappeared. Khwas said that he was the person who cut off Kodanaw's head. It does not appear from the record whether search was made for Munshi, and it is possible that he may have been killed when Khwas was killed.

The convictions for causing hurt are, in my opinion, quite justified by the evidence. Section 330 would be more appropriate to the facts than section 327. But the local Government has appealed against the acquittal on the charge of murder. It is necessary to consider what offence is proved.

From the confessions of both the appellants there can be no doubt that Kodanaw either died or was to all appearance dead a very short time after the beating. As there is no definite evidence of the nature of the injuries which actually caused death, it is not proper to infer that the offenders intended to inflict such injury as would in the ordinary course of nature be sufficient to cause death. In my opinion the

proper inference is that some of them intended to inflict such bodily injury as is likely to cause death, but there is not sufficient ground for presuming that such was the common intention of all of them, and there is nothing to show who was the person who actually caused the mortal injury. On this finding neither of the accused can be convicted of homicide in any degree.

There is a further reason for not convicting Fazar Ali of homicide. I do not think it is safe to assume that Kodanaw was dead before his head was cut off. It is possible that he was apparently dead but would have recovered if no further violence had been used. I have already said that it cannot be inferred that Fazar Ali was present when the head was cut off.

I would therefore alter the convictions of both the appellants to voluntarily causing hurt for the purpose of constraining the suffered to restore valuable property, an offence under section 330 of the Penal Code, and I would reduce the sentence passed on Khwas to seven years rigorous imprisonment, and that on Fazar Ali to five years rigorous imprisonment.

IN THE CHIEF COURT OF LOWER BURMA,

CRIMINAL No.\* 310B OF 1907.

King Emperor vs. San Pe.

BEFORE SIR CHARLES E. FOX, Kt. C.J.

Dated 17th September 1907.

*Acquittal - application for revision will not lie from order of - appeal by local Government not permissible.*

The High Court does not exercise revisional powers where an appeal may be preferred by the local Government from an order of acquittal.

This was a reference made by the District Magistrate, Rangoon, in Criminal Revision No. 185 of 1907. The order of reference, containing the principal facts, says:

One Ba Wa complained at the Police station that accused, Nga San Pe, had stolen his clothes and Rs. 15. Accused was subsequently arrested and sent up for trial under section 380, Indian Penal Code. Mr. G. W. Godber the Western Sub-divisional Magistrate, empowered to try summarily, tried the case summarily and acquitted the accused on the 28th August 1907. The acquittal is based on the ground that accused had brought all the clothes back and had only borrowed, not stolen, them. No mention is made in the magistrate's record of the fifteen rupees. It appears from the police papers that accused admitted having gambled and lost the money. It was therefore clearly the duty of the magistrate to enquire as to this point which, from the wording of the record, he apparently failed to do. The theft of the 15 is clearly alleged in the complaint laid. It is entered in the police final

report as "not recovered." It is nevertheless entered in the magistrate list of exhibits. This latter entry is apparently a mistake. The acquittal under these circumstances appears to be incorrect. The case is therefore reported for the orders of the Chief Court under section 438, Criminal Procedure Code, with the recommendation that the accused be called on to shew cause why the acquittal should not be reversed and further enquiry made.

On coming before the Chief Judge the following order was made :

The accused having been acquitted, an appeal may be directed by the local Government. Under the circumstances this court does not exercise revisional powers.

The records may be returned.

## IN THE PRIVY COUNCIL.

T. P. Petherpermal Chetty,

vs.

R. Muniandy Servai and others.

Dated 18th March 1908.

For Appellant :— Mr. Upjohn

For Respondents :—

*Benami conveyance—defined—legal consequences—ineffective where fraud has not been completed—Limitation Act (XV of 1877), sections 144 and 91—unnecessary to set aside benami document.*

A benami conveyance is not intended to be an operative instrument. "Where a transaction is once made out to be a mere benami, it is evident that the benamidar absolutely disappears from the title. His name is simply an alias for that of the person beneficially interested. The fact that A has assumed the name of B in order to cheat X can be no reason whatever why a court should assist or permit B to cheat A." Where the fraudulent intent has not been effected and no creditor has been cheated, A can recover the property back. But when the fraudulent intent has been carried out, the court will help neither party, and then this maxim applies, "*In pari delicto potior est conditio possidentis.*"

Where a conveyance has once been found to be benami, it is unnecessary to set it aside as preliminary to obtaining relief.

There were present at the hearing: LORD MACNAGHTEN, LORD ATKINSON, SIR ANDREW SCOBLE, SIR ARTHUR WILSON. The judgement was delivered by LORD ATKINSON.

Approved and followed:

Taylors vs. Bowers, I.Q.B.D., 271.

Symes vs. Hughes, L.R. Eq. 9 Eq. 475 and at p. 479.

In re Great Berlin Steam Boat Coy., 26 Ch. D. 616.

In this case an action was originally brought by R. Muniandy Servai, claiming through his deceased brother Chellum Servai, who was himself heir and administrator of one Muniandy Maistry, against T. P. Petherpermal Chetty, the uncle and predecessor of the Appellant (hereinafter called "Petherpermal the elder") and two formal defendants, R. M. A. R. L. Muthia Chetty and P. R. M. P. Chinnia Chetty, to recover possession of a certain tract of paddy land about 2,500 acres in extent, known as Government Waste Land No. 1, situate in Tamanaing circle,

Kungyangon township, Hanthawaddy district, Lower Burma. One Arunachellam Chetty claimed to be an incumbrancer on these lands as equitable mortgagee by deposit of the title deeds for a sum of Rs. 14,568.120.

On the 11th June 1895, Chellum Servai executed a deed purporting to be a conveyance on sale of the abovementioned lands to Petherpermal Chetty the elder, a money-lender residing in Rangoon, in consideration of the sum of Rs. 30,000, the receipt whereof was thereby acknowledged.

On the 15th September 1895, Arunachellam Chetty, the equitable mortgagee, instituted a suit in the District Court of Hanthawaddy against Chellum Servai, as administrator of the estate of Muniandy Maistry deceased, and Petherpermal the elder, in which he alleged that at the time of the execution of the abovementioned conveyance, Petherpermal the elder was aware of the existence of his (Arunachellam's) claim as equitable mortgagee, and that the sum of Rs. 30,000, the consideration mentioned in the deed, had never been paid, and claimed that he might be declared entitled to hold his equitable mortgage over these lands in priority to the last-mentioned conveyance, and that the defendant Chellum Servai might be ordered to pay to him the sum of Rs. 14,568-12, with interest, and other relief.

Petherpermal the elder filed his defence, and, the case having come on for hearing, the district judge decided, amongst other things, that Petherpermal the elder was, at the date of the deed of conveyance to him, well aware of the existence of this equitable mortgage, and declared that the latter was entitled to priority over the former, and ordered the defendant Chellum Servai to pay to the plaintiff the amount of the latter's claim. Thereupon Petherpermal the elder procured a loan from the two formal defendants to the present suit sufficient to enable him to discharge the amount due to Arunachellam Chetty for debt and costs, and as security for this loan he executed a mortgage of the lands now sought to be recovered. No question has been raised as to the validity of this latter incumbrance.

It is therefore clear that, whatever may have been the design to effect which the deed of the 11th June 1895 was executed, Arunachellam

Chetty, the creditor, was not by it in fact defrauded of his debt. He was paid his debt together with the costs of the litigation which he successfully prosecuted, and if his interests were prejudiced at all, it was only to the extent that he was obliged to take proceedings which, had the deed never been executed, he might possibly never have been obliged to take.

On the 30th July 1897 R. Muniandy Servai and Petherpermal the elder executed a deed of release by which the former released all his interest in the lands sued for in consideration of Rs. 1,000 paid to him by the latter. The district judge found that the execution of the deed was procured by a misrepresentation, and declared that its only effect at law was as a receipt for the sum of Rs. 1,000. No objection was taken in the argument on the appeal in reference to the finding on this point.

It was proved by the affirmation of Muniandy Servai given in evidence in this case, that the deed of the 11th June 1895 was executed in order to enable the rent to be collected and paid to the grantors, and "to quash Sobramanian's case," *i. e.*, the case of the equitable mortgagee. The district judge held that it was "a *benami* conveyance" made by the parties to it "in collusion to defeat" the claim of the equitable mortgagee on the lands. The Chief Court of Burma on appeal upheld that decision.

It was not pressed in argument by counsel on behalf of the appellant that, on an issue of fact such as this, the finding of the judge who tried the case and saw the witness, approved, as it was, upon appeal, should under the circumstances of the case be disturbed. The only questions, therefore, for their Lordships' decision are—

- (1) Is the plaintiff, despite his participation in this fraudulent attempt to defeat his creditor, entitled to recover the possession of the lands purported to be conveyed?
- (2) Is his right of action barred by the 91st article of schedule II to the Indian Limitation Act?

Their Lordships are of opinion that their answer to the first question must be in the affirmative.

A *benami* conveyance is not intended to be an operative instrument.

In Mayne's Hindu Law (7th ed., p. 595, para. 446) the result of the authorities on the subject of *benami* transactions is correctly stated thus:—"446. . . . Where a transaction is once made out to be a mere *benami* it is evident that the *benamidar* absolutely disappears from the title. His name is simply an *alias* for that of the person beneficially interested. The fact that *A* has assumed the name of *B* in order to cheat *X* can be no reason whatever why a court should assist or permit *B* to cheat *A*. But if *A* requires the help of the court to get the estate back into his own possession, or to get the title into his own name, it may be very material to consider whether *A* has actually cheated *X* or not. If he has done so by means of his *alias*, then it has ceased to be a mere mask, and become a reality. It may be very proper for a court to say that it will not allow him to resume the individuality which he has once cast off in order to defraud others. If, however, he has not defrauded any one, there can be no reason why the court should punish his intention by giving his estate away to *B*, whose roguery is even more complicated than his own. This appears to be the principle of the English decisions. For instance, persons have been allowed to recover property which they had assigned away. . . . where they had intended to defraud creditors, who, in fact, were never injured. . . . But where the fraudulent or illegal purpose has actually been effected by means of the colourable grant, then the maxim applies, *In pari delicto potior est conditio possidentis*. The court will help neither party. 'Let the estate lie where it falls.'"

Notwithstanding this, it is contended on behalf of the appellant that so much confusion would be imported into the law, if the maxim *in pari delicto potior est conditio possidentis* were not rigorously applied to this case, and, apparently, that the cause of commercial morality would be so much prejudiced if debtors who desired to defraud their creditors were not deterred from trusting knaves like the defendant, that in the interest of the public good, as it were, he ought to be permitted to keep for himself the property into the possession of which he was so unrighteously and unwisely put.





The answer to that is, that the plaintiff, in seeking to recover possession of his property, is not carrying out the illegal transaction, but is seeking to put everyone, as far as possible, in the same position as they were in before that transaction was determined upon. It is the defendant who is relying upon the fraud and is seeking to make title to the lands through and by means of it. And despite his anxiety to effect great moral ends, he cannot be permitted to do this. And, further, the purpose of the fraud having not only not been effected, but absolutely defeated, there is nothing to prevent the plaintiff from repudiating the entire transaction, revoking all authority of his confederate to carry out the fraudulent scheme, and recovering possession of his property. The decision of the Court of Appeal in *Taylor vs. Bowers* (1 Q. B. D. 291) and the authorities upon which that decision is based clearly establish this. *Symes vs. Hughers* (L. R. 9 Eq. 475, at p. 479) and *In re Great Berlin Steamboat Co.* (26 Ch. D. 616) are to the same effect. And the authority of these decisions, as applied to a case like the present, is not, in their Lordships' opinion, shaken by the observations of Fry. L. J., in *Kearley vs. Thomson* (24 Q. B. D. 742.)

Mr. Upjohn contended that, where there is a fraudulent arrangement to defeat creditors, such as was entered into in this case, if anything be done or any step be taken to carry out the arrangement, such as, on the trial of an indictment for conspiracy, would amount to a good overt act of the conspiracy, any property transferred by the debtor to his co-conspirator cannot be recovered back. This, however, is obviously not the law. In conspiracy the concert or agreement of the two minds is the offence, the overt act is but the outward and visible evidence of it. Very often the overt act is but one of the many steps necessary to the accomplishment of the illegal purpose, and may, in itself, be comparatively insignificant and harmless; but to enable a fraudulent confederate to retain property transferred to him in order to effect a fraud, the contemplated fraud must, according to the authorities, be effected. Then, and then alone, does the fraudulent grantor, or giver, lose the right to claim the aid of the law to recover the property he has parted with.

As to the point raised on the Indian Limitation Act, 1877 their Lordships are of opinion that

the conveyance of the 11th June 1895, being an inoperative instrument, as, in effect, it has been found to be, does not bar the plaintiff's right to recover possession of his land, and that it is unnecessary for him to have it set aside as a preliminary to his obtaining the relief he claims. The 144th, and not the 91st, article in the second Schedule to the Act is, therefore, that which applies to the case, and the suit has consequently been instituted in time. Their Lordships are, for those reasons, of opinion that the decision appealed from is right and should be affirmed, and that this appeal should be dismissed. They will humbly advise His Majesty accordingly.

The appellant will pay the costs of the appeal.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL FIRST APPEAL \*NO. 82 OF 1906.

*Khatoon Bee vs. Abdul Rahman and seven others.*

BEFORE THE HON'BLE JUSTICE IRWIN, OFFG. CHIEF JUDGE, AND MR. JUSTICE ORMOND.

*Dated 23rd March 1908.*

*For Appellant—Vertannes.*

*For 1st 2nd 7th and 8th Respondents—J. R. Das.*

*For 3rd, 5th, 6th, and 7th Respondents.—Israel Khan.*

*Indian Arbitration Act (Act of 1899)—sections 6, 11 (2), 13 14,—no appeal order of court to file award unnecessary—order refusing to set aside award not a "decree" within section 2 of Civil Procedure Code—suit.*

An award made under the Indian Arbitration Act, 1899, is final and no appeal is allowed. It is not necessary for the court to pass a formal order to file the award. The words in section 11 (2) seem to imply that the award, when received in court is to be filed at once, without any order.

An award under the Act so filed is not a decree within the meaning of section 2 of the Civil Procedure Code.

An application under the same Act is not a suit.

*Per Irwin, Offg. C. J.—This is an appeal against an order made on the Original Side of this Court, directing that an award be filed under the Indian Arbitration Act, 1899.*

The respondents have taken a preliminary objection that no appeal lies.

The Act contains no provision for an appeal. There can be no appeal unless it is allowed by some other law. Under section 14 of the Lower Burma Courts Act an appeal from a decree made by a single judge on the Original Side lies to a bench of two judges, and an appeal from an order made by a single judge on the Original Side lies only when an appeal from such order is permitted by any law for the time being in force. We have not been referred to any law permitting an appeal from an order, as distinguished from a decree, under the Arbitration Act. The decision of the point raised therefore depends on whether the order appealed against is a decree.

No ruling bearing directly on this point was cited, and I have not been able to find any. There are many rulings on the question whether an appeal lies against decrees passed under Chapter 37 of the Code of Civil Procedure, but they afford little or no help in the present case.

The course of the present case was as follows: On 26th August 1905 the arbitrators sent their award and connected papers to the Assistant Registrar with a letter which did not contain any request to file the award in court. On 30th August 1905 one of the parties to the submission presented a petition praying that the award be filed and made a decree of the court after notice to the other parties and the arbitrators. Notice was issued to the other parties, and on 29th November 1905, two of the parties, one of whom is the present appellant, presented a petition praying that the award be not made a decree of court, but be set aside. Evidence was taken and eventually the learned judge decided that the respondent before him had not proved any misconduct of the arbitrators in consequence of which the award should be set aside under section 14 of the Act, and he ordered the award to be filed. The formal order following on the judgment does not purport to be a decree.

This procedure appears to be in accordance with the rules under the Act framed by the High Court of Calcutta, except that the arbitrators ought to have requested that the award be filed. It is laid down in rule VIII that the registrar shall not file the award without an order of court, to be obtained on the application of a party interested; in rule IX that a petition

by a party interested to file the award shall be registered as a suit; and in rule X that if no ground be shown against the award the court shall order it to be filed. In the full bench case of Janokey Nath Guha vs. Brojo Lal Guha (1), in which the question was whether an appeal lies from an order under section 526, Civil Procedure Code, directing the filing of an award, Mr. Justice Sale, who was one of the majority who held that an appeal lies, made some observations from which it would seem that on the Original Side of the High Court of Calcutta the practice is the same as that which existed before the Arbitration Act came into force, and that an order to file an award under that Act was regarded by him as on exactly the same footing as a similar order under the Code of Civil Procedure. At the same time it should be noted that in one sentence the learned judge implies that the order to file the award is the decree, while in two other sentences I think he implies that the award itself is the decree.

But provisions similar to Calcutta rules VIII, IX and X are not found in the rules of the High Courts of Madras and Bombay, nor in the rules of this Court. It seems to me very doubtful whether the Act contemplates an order to file the award being made by the court in any case. Such an order is not specifically mentioned in the Act. Under section 11 (2) the duty of the arbitrators is not to apply to the court to file the award, but to "cause the award to be filed in the court," and the notice they are required to give to the parties is not a notice that they have applied, nor a notice that they have sent the award to the court, but a "notice of the filing." This seems to imply that the award when received in the court is to be filed at once—without any order. The Act contains no provision for any of the parties applying to have the award filed. Section 15 states the consequence of an award on submission being "filed in accordance with the foregoing provisions." There are no foregoing provisions relating to filing except the provisions in section 11 (2), that the arbitrators shall, on certain conditions being fulfilled, cause the award to be filed. The construction of the Act which I have just indicated would cause great difficulties in connection with limitation of applications under

(1) I. L. R., 33 Cal. 757.

sections 13 and 14, and that casts a good deal of doubt on the point. I do not think it is necessary to decide whether this construction is correct or not. Section 15 declares that an award on being filed shall be enforceable as if it were a decree of the court. Even if the correct procedure be for the court to pass an order to file the award, it is plain that it is not that order, but the award itself, which is to be enforced as if it were a decree.

I need not speculate on the difficult questions, as to limitation and otherwise, which would arise if it were held that an appeal lies against the award itself. The words "as if it were a decree" are to my mind perfectly clear. Not only do they not indicate that the award is a decree, they indicate clearly that it is not a decree. If this view required any support it is to be found in section 6, "a submission unless a different intention is expressed therein, shall be deemed to include the provisions set forth in the first schedule, so far as they are applicable to the reference under submission." Clause VIII of the first schedule is this: "The award to be made by the arbitrators or umpire shall be final and binding on the parties and the persons claiming under them respectively."

Lastly, under section 2 of the Civil Procedure Code, a decree is an adjudication in a suit or appeal only, not in any other proceeding. There is nothing in the Arbitration Act indicating that any proceeding under it is a suit or should be treated as such. Even if any such proceeding were a suit the award would not be an adjudication in such suit: it was made before the suit commenced, and was made out of court. Under the Code of Civil Procedure no award has ever been held to be itself a decree: the Code provides for an order of the court in every case, and it is that order which constitutes the decree. The Arbitration Act makes no express provision for any order to file the award, and it enacts expressly that the award itself shall be enforced as if it were a decree. I would dismiss the appeal with costs.

*Per Ormond, J.*—I concur in thinking that no appeal lies under the Arbitration Act. No order of the court, I think, is necessary for the filing of an award; and the order appealed against is, in effect, an order dismissing an application to set aside the award. Such an

application is neither a suit nor an appeal; and there is nothing in the Arbitration Act to show that it is to be treated as a suit: the order therefore is not a "decree" within the meaning of the Code and appealable as such. Moreover, I think that the provisions of the Arbitration Act clearly indicate that an award, upon a submission which contains no provision to the contrary, is final; unless the court in which it has been filed, remits it or sets it aside. I think the appeal should be dismissed with costs.

IN THE CHIEF COURT OF LOWER  
BURMA.

CIVIL SECOND APPEAL No.\* 144 of 1907.

Marimuthu Thaver vs. Omar Ally.

BEFORE THE HONBLE' A. M. B. IRWIN, OFFG.  
CHIEF JUDGE.

Dated 28th February 1908

For Appellant—Dautra.

For Respondent—Vertannes.

*Limitation Act (Act XV of 1877)—section 28—adverse possession for more than twelve years—plaintiff claiming possession of land must prove possession within twelve years of suit.*

A person claiming possession of land must commence his case by proving that he has been in possession thereof at some time within twelve years prior to the suit, unless it is admitted by the defendant.

The appellant, Marimuthu Thaver, claimed from the respondent, who was first defendant in Civil Regular No. 83 of 1905 of the Sub-divisional Court of Insein, a piece of land of which he was then in possession. The claim was based on a conveyance from one Anamalay Chetty, admittedly the original owner of the land, dated the 4th day of November 1904. Anamalay Chetty was made a *pro forma* defendant in the suit.

The defendant pleaded that he had purchased the land from the Chetty more than twelve years ago for a consideration of Rs. 200, and

\* Against the decree of D. Ross, Esq., Divisional Judge, Hanthawaddy, dated 1st May 1807, passed in Civil Appeal No. 111 of 1906, reversing the decree of Po Sa, Esq., Sub-divisional Judge of Insein, passed in Civil Regular No. 83 of 1905.

though the Chetty had not conveyed the land to him by deed, had been uninterruptedly in possession thereof in his own right ever since; he had paid the Government taxes for the said land for over thirteen years. It was admitted that the Chetty had been away from Burma for a long time. The defendant asserted that he had been absent from Burma more than thirteen years whereas the plaintiff's case was that the period was not more than eight to ten years. The Subdivisional Court placed the burden of proof on the defendant who gave evidence to show (*inter alia*) that he had been in possession of the said land for more than twelve years.

The plaintiff endeavoured to show that the Chetty had been in possession of the land at a time less than twelve years prior to the institution of the suit, but the Chetty defendant who was examined on commission stated, in answer to interrogatories, that he did not know how and when Omar Ally the first defendant came into possession of the land. He also said nothing as to when he had last been in possession thereof. The subdivisional court granted the plaintiff a decree holding that the burden of proof was on the defendant to show that he had bought the land from Anamally Chetty, and that he had not discharged that burden. The said court also held that at the time of the sale to the plaintiff by Anamally Chetty, the latter was in possession of the land. This fact was not spoken to by a single witness in the case and, in fact, even Anamally Chetty was not interrogated on the subject and, therefore, said nothing about the matter.

The first defendant appealed to the divisional court (*inter alia*) on the ground that the burden of proof was on the plaintiff to show that he had been in possession of the land some time within twelve years prior to the institution of the suit and that the plaintiff had failed to do this and that, in consequence, his suit must fail. It was also urged that his claim was barred by limitation. The divisional court allowed the appeal on the ground that the claim was barred by limitation.

The plaintiff then appealed to the Chief Court and urged that the question of limitation not having been put in issue in the court of first instance, the court of first appeal ought to have remanded the suit for trial of that issue.

The following is the judgment of the Officiating Chief Judge before whom the case was argued:

*Irwin, Offg. C. J.*—The divisional court reversed the decree of the court of first instance, and dismissed the suit on the ground that it was barred by limitation. The five grounds of second appeal all resolve themselves into one, namely, that the question of limitation not having been put in issue in the court of first instance, the court of first appeal ought to have remanded the suit for trial of that issue.

One of the grounds of first appeal was, that the suit was barred by defendant's adverse possession for more than twelve years. This was argued at the hearing of the appeal, and the judge has recorded that he was not asked to take or cause to be taken any further evidence on the point. This alone is sufficient to put the appellant out of court. But, in addition, I think there is a pretty obvious reason why plaintiff did not ask to have the suit remanded. The first issue framed was "Did first defendant buy the land from Anamally Chetty? If so, when?" This covers the whole facts on which the question of limitation depends, and even taking the onus to have been wrongly put on defendant, defendant adduced quite enough evidence to make it apparent to plaintiff that he could not safely risk his case on the weakness of that evidence and he should adduce the best evidence he could to disprove the sale. The obvious way to do that was to show, if he could, that Anamally was still in possession at a date later than that of the alleged sale to Omar Ally.

The upshot of this is that plaintiff had abundant opportunity of proving that Anamally was in possession within twelve years, and he did not do so.

The finding of the court of first instance that Anamally was in possession at the time of the sale to plaintiff is not based on any evidence set out in the judgment, and I cannot imagine how it was arrived at.

The appeal is dismissed with costs.

IN THE CHIEF COURT OF LOWER  
BURMA.

CIVIL REFERENCE No. 5 OF 1907.

Maung Nge vs. Ranganatham Chetty

BEFORE SIR CHARLES E. FOX, KT., C. J., AND  
MR. JUSTICE MOORE.

Dated 8th July 1907.

For applicant—Mr. McDonnell.

For Respondent—Mr. Chari.

Civil Procedure Code (Act XIV of 1882) section 526—  
award—appeal lies.

An appeal lies from an order refusing to file an  
award under section 526 of the Civil Procedure Code.

*Fox C. J.*—The question referred is "Does an  
appeal lie from an order refusing to file an award  
under section 526 of the Code of Civil Procedure?"  
The answer depends upon whether their  
Lordships of the Privy Council have in the judg-  
ment in Ghulam Khan vs. Mahomed Hassan  
ruled definitely that an order under section 526  
amounts to a decree. In view of the many con-  
flicting decisions of the Indian High Courts on  
the provisions of Chapter XXXVII of the Code  
their Lordships were led to give their views upon  
the provisions of the chapter generally. Refer-  
ring to cases in which the agreement of reference  
is made, and the arbitration itself takes place  
without the intervention of the Court, and the  
assistance of the Court is only sought in order to  
give effect to the award, the judgment says—  
'In cases falling under heads II and III, proceed-  
ings described as a suit and registered as such  
must be taken in order to bring the matter—the  
agreement to refer or the award as the case  
may be—under the cognisance of the court.  
That is, or may be a litigious proceeding—cause  
may be shown against the application—and it  
would seem that the order made thereon is a  
decree within the meaning of that expression as  
defined in the Civil Procedure Code.'

These words have been the subject of much  
discussion. In Ponnusami Mudali vs. Mandi  
Sundra Mudali, † a full bench of the Madras

\* (1901) I.L.R. 29 Cal 167.  
† (1903) I.L.R. 27 Mad. 255.

High Court held that they conclusively showed  
that an order under section 526 refusing to file  
an award was a decree and was appealable. In  
Basant Lal vs. Kunji Lal, † a bench of the  
Allahabad High Court held that the words were  
intended to apply to cases where an order had  
been made directing an award to be filed, and  
not to cases where such applications have been  
rejected. The view was based upon an earlier  
decision of their Lordships in Mohammad  
Newany Khan vs. Alam Khan. § The matter  
has been more recently considered by a full  
bench of the Calcutta High Court in Janokey  
Nath Guha vs. Brojo Lal Guha. || The question  
in that case was, whether an appeal lay from an  
order under section 526 directing the filing of  
an award. The judgments in the case show  
much diversity of opinion, but the decision of  
the majority was that an appeal did lie.

The dissentient judges conceded that an  
appeal lies from an order under the section re-  
fusing to file an award, but, in their opinion, no  
appeal lies from an order directing an award  
to be filed except in the cases specified in  
section 522.

In my opinion the Lordships of the Privy  
Council held in Ghulam Khan vs. Mohammad  
Khan that an order under section 526 of the  
Code amounts to a decree and this court is  
bound to follow that ruling.

I would answer the question referred in the  
affirmative.

IN THE CHIEF COURT OF LOWER  
BURMA.

CIVIL REFERENCE No.\* 7 OF 1907.

The Rangoon Electric Tramway and Supply Co., Ltd.  
vs.

The Rangoon Municipal Committee.

BEFORE SIR CHARLES E. FOX, KT., C.J.,

MR. JUSTICE IRWIN AND MR. JUSTICE HARTNOLL.

Dated 6th January 1908.

† (1905) I.L.R. 28 All. 21.  
§ (1891) I.L.R. 18 Cal. 414.  
|| (1906) I.L.R. 33 Cal. 757.

[Reference made by A. H. Bagley, Esq., Judge, Court of Small  
Causes, Rangoon, under section 617, Civil Procedure Code.]

for Plaintiff—Giles.

for Respondent—Eddis.

*Burma Municipal Act Section 56 (1) A (a) Land on which Tram lines are placed is land within section 46 (1) A (a) of the act.*

The Montgomery street, tram lines are "buildings and lands" within the meaning of section 46 (1) A (a) of the Burma Municipal Act.

The Montgomery street, tram lines are in the occupation of the owners of the lines within the meaning of sections 68 and 69 of the Burma Municipal Act.

*The following judgment in which Mr. Justice Irvine and Mr. Justice Hartnoll concurred was delivered by the Chief Judge.*

The following questions have been referred to this court by the Judge of the Court of Small Causes, Rangoon, under sub-section (5) of section 4 of the Burma Municipal Act, 1898:

(1) Are the Montgomery street tram lines "buildings and lands" within the meaning of section 46 (1) A (a) of the Burma Municipal Act?

(2) Are the Montgomery street tram lines in the occupation of the owners of the lines within the meaning of sections 47 and 48 of the same Act?

A difficulty in answering the questions presented itself at the outset in the fact that it was not stated what was meant by the words "tram lines."

The advocate for the municipal committee is, however, stated at the hearing of the reference that what has been assessed is the land in or in which the appellant company's property has been laid. This may be accepted to be the case and, being so, there can be no doubt that such land is land within the meaning of section 46 (1) A (a) of the Act. The first question however appears to assume, and it has been argued on behalf of the appellant company at the words "buildings and lands" in the clause must be read conjunctively and that they actually mean lands covered with buildings. The natural meaning of the language used in the section is that a committee may impose a tax on buildings, and they may impose a tax on lands not exceeding ten per centum of the annual value of such building and lands. There is no sufficient reason for thinking that the words should be read in any other sense. The

language used with respect to other alternative taxes does not support the construction contended for by the appellants. The answer I would give to the first question is, that the tram lines, meaning thereby land of the street in or on which the appellant company's, sleepers and rails are laid, is land within the meaning of clause (a) of division A of sub-section (1) of section 46 of the Burma Municipal Act.

The second question, as put, is meaningless, but it may be taken that the learned judge had in mind section 68 and section 69 of the Act, and by mistake wrote sections 47 and 48. It has been argued for the appellant company that it is not an occupier of the land in which the rails and sleepers have been laid by it, and that it does not even own such rails and sleepers. The question put by the judge assumes that the company still own what it laid in the street, and, for the purpose of answering the question, we must assume that it does, because the judge's decision on this point is final under sub-section (7) of section 64:

It is contended that the company has a mere user of the road, and, not having exclusive occupation, it cannot be said to occupy the land. The same argument was used in the case of the Pimlico Tramway Company *vs.* The Greenwich Union\*, but did not prevail. In the case of that company and in the case of the appellant company, a tramway was laid in the roadway under authority in such a way that a carriage with wheels having a flange going into a groove or space might be run on it with facility. Three eminent judges held no doubt the Tramway Company were occupiers of the portion of land upon which they laid the tram rails.

The decision was accepted as correct by their Lordships of the Privy Council in the Melbourne Tramway and Omnibus Company *vs.* Mayor of the City of Fitzroy.† In the face of such weighty pronouncements as to what constitutes occupation of land by a tramway Company it is impossible to accede to the argument put forward on behalf of the appellant company. I would answer the second question referred in the affirmative.

\* (1873) L. R. Q. 9 B., 9

† (1900) L. R. A. C. 153.

IN THE CHIEF COURT OF LOWER  
BURMA.

CIVIL REVISION \* No. 98 OF 1907.

TOON CHAN vs. P. C. SEN (Official Receiver).

BEFORE SIR CHARLES E. FOX, KT., C. J.

Dated the 29th January 1908.

For Applicant—R. M. Das.

For Respondent—J. B. Das.

*Transfer of Property Act, section 50 (Act IV of 1882)—  
payment of rent in advance good payment.*

An agreement to pay rent in advance is a perfectly valid and binding agreement. Where rent is paid in advance to a mortgagor in an English mortgage, neither the mortgagee nor his assignee, who merely steps into his shoes, can claim from the tenant rent for the months for which payment in advance has already been made to the mortgagor.

The plaintiff was the Official Receiver who, by an order of the Chief Court in Civil Regular No. 97 of 1906, was appointed Receiver of the properties forming the subject matter of that suit among which was comprised the house in respect of which rent was claimed from the defendant. The defendant had been tenant of the house from the 1st November 1906, at a rent of Rs. 200 per mensem, under a verbal agreement made between himself and Ma Gyi, one of the mortgagors of the house, on the 27th October 1906. He paid Rs. 1,000, the rent for five months, in advance.

The Official Receiver took possession on the 17th December 1906 and on the same day informed the defendant of the fact and that all rents were payable to him.

The plaintiff subsequently demanded payment of rent for the months of December 1906 and January and February 1907. The defendant relied on his payment to Ma Gyi as disentitling the plaintiff to claim again for the same months. The learned Officiating Judge of the Small Cause Court held plaintiff was entitled to recover and accordingly gave him a decree.

The defendant applied to the Chief Court to revise the said judgment and decree.

[Against the decree of H. Broadbent, Esq., Officiating Judge, Court of Small Causes, Rangoon, dated 16th May 1907, passed in Suit No. 20 of 1907.]

The case was argued before the Chief Judge, who gave the following judgment:

*Fox, C. J.*—This was a suit brought by the Receiver appointed in a mortgage suit for rent of one of the mortgaged houses for the months of December 1906 and January and February 1907. The defendant resisted the suit on the ground that he had, on the 27th October 1906, paid five months rent in advance to the mortgagor who was in possession and who let him into possession. The circumstances under which he paid the rent in advance were not in dispute. As previous tenants had left the house without paying the rents due by them, the mortgagor made the defendant pay in the five months rent in advance.

The plaintiff-Receiver was appointed on the 10th December 1906. He claimed the rent for December apparently on the ground that the rent for that month fell due upon its expiry.

The Receiver stood in the shoes of the mortgagors of the house. Whether it was open to him or them to claim for rent is doubtful, *vide* the notes to *Moss vs. Gallenore* in Smiths' Leading cases. Assuming that he could, the question remains whether he could make the defendant pay to him rents for months for which the defendant had already paid in advance. In support of the contention that he could do so, *De Nicholls vs. Saunders\** and *Cook vs. Guerra†* were relied on, but those cases are distinguishable from the present inasmuch as according to the contracts in those cases the rents were not due until the expiry of certain periods. In the present case the lessor made it a condition of her letting the premises that rents for five months should be paid in advance. There is no provision of law forbidding such a contract, and when such is the contract, the basis of the reasoning on which the above mentioned cases were decided is absent.

If a lessee pays his rent before it is due it may well be said that he does not pay in fulfilment of an obligation upon him, and that such payment must be regarded as an advance to the lessor with an agreement that on the day when the rent becomes due such advance shall be treated as a fulfilment of the obligation to pay

\* (1870) L. B. 50 P. 589.

† (1872) L. B. 70 P. 132.

rent. But when it is part of the contract, as it was in the present case, that the lessee should pay rent in advance, and the lessee pays in advance, he does so in fulfilment of an obligation under the contract. In such a case section 50 of the Transfer of Property Act, in my opinion, protects him from having to pay over again to a person who may subsequently become entitled to the rents or profits of the property leased.

On these grounds I think the decision of the Small Cause Court was erroneous in law.

The decree is set aside and the suit is dismissed with costs. The plaintiff must pay the defendant's costs of this application.

IN THE CHIEF COURT OF LOWER  
BURMA.

ORIGINAL REVISION No. \*253B OF 1907.

Meshidi Khan vs. Rangoon Municipal Committee.

BEFORE MR. JUSTICE IRWIN.

Dated the 24th January 1908.

For Applicant—Giles and Higinbotham.

For Respondent—Eddis, Connel and Lentaigne.

Criminal Procedure—section 190, sub-section (1), clauses (a) and (c)—summons issued without examination of complainant—Criminal Procedure Code, section 537—defect not fatal.

The principle that it is necessary to examine the complainant before issuing process against the accused is also applicable in cases instituted by municipalities under the Burma Municipal Act. (Burma Act III of 1898).

When no injustice has resulted, it is not a fatal defect, vitiating the whole proceedings that the court failed to examine the complainant before issuing process. Such a defect is cured by section 537, Criminal Procedure Code.

The petitioner was prosecuted by the Municipal Committee of Rangoon for an offence under the Burma Municipal Act. The complaint was presented to the District Magistrate who en faced it with a rubber stamp in these terms: "I take cognizance of this case under section 190(c) of the Criminal Procedure Code, and transfer the case for enquiry to the Honorary Magistrates' Bench." This was signed by the District Magistrate, and the complaint was made over to the

honorary magistrates, who disposed of it. The accused was convicted and fined Rs. 50. He appealed to the district magistrate, who dismissed the appeal.

The present application is for revision of the proceedings on several grounds. I shall at this stage refer to only two of those grounds, namely, those marked (i) and (iii).

The first is that the district magistrate exceeded his jurisdiction in taking cognizance of the case under section 190(c), and the other is that the honorary magistrate exceeded their jurisdiction in issuing process without first examining the complainant on oath. These objections were not raised either at the trial or in the appeal. They seem to be mutually inconsistent, for if the district magistrate took cognizance of the offence under clause (c), the honorary magistrates were not required by any provision of law to examine the complainant before issuing process. At the hearing it was the first ground that was pressed. It is not alleged that the district magistrate is not empowered to take cognizance under clause (c), but it is enacted by section 1, sub-section (2) of the Code of Criminal Procedure, that nothing contained in that Code shall affect any special form of procedure prescribed by any other law for the time being in force, and by section 195 of the Burma Municipal Act, that no court shall take cognizance of any offence punishable under that Act or any rule or bye-law thereunder except on the complaint of the committee or of some person authorized by the committee in this behalf.

If the district magistrate really took cognizance of the offence under clause (c), it is clear that he was not empowered by law to do so, and his proceedings are void under section 530 (k) of the Code of Criminal Procedure. But did he so take cognizance?

If the matter were *res integra* I should have no hesitation in saying that cognizance was not taken under clause (c), because the magistrate took cognizance "upon receiving a complaint of facts which constitute such offence." These are the exact words of clause (a) of section 190 (1).

If the district magistrate had recorded that he took cognizance of this offence under clause

[Review of the order of the Honorary Magistrates of Rangoon, dated 8th August 1907, passed in Summary Trial No. 3566 of 1907.]

(b), I do not think any one would venture to contend that he had really done so. The contention seems to me to be equally untenable when the district magistrate records that he took cognizance under clause (e). I cannot see how the subsequent omission to examine the complainant can affect the fact that cognizance was taken on receiving a complaint of facts which constitute the offence.

But in the case of *King Emperor vs. Po Chon (1)*, the late Chief Judge of this court said, "In taking cognizance of an offence on the report of a revenue surveyor, the magistrate must proceed either under clause (a) or under Criminal Procedure. If he proceeds under clause (a), he must examine the complainant," and so forth. If that be correct, I think it disposes of this case. As I do not see my way to agree with it, I must refer the point to a bench.

Meantime, I think it will be convenient to consider the other points in the case, on the assumption that the district magistrate took cognizance of the offence on complaint.

The omission to examine the complainant is covered by clause (a) of section 537 of the Code of Criminal Procedure. It did not occasion any failure of justice, and would have been no obstacle to the case proceeding even if the objection had been raised at the commencement of the trial. *A fortiori* it is no ground for interference now. See the explanation to section 539.

Another of the objections urged by Mr. Giles is that, as the accused could, under section 191 of the Code of Criminal Procedure, have objected to being tried by the district magistrate, the district magistrate was incompetent to try the appeal. If the district magistrate took cognizance under clause (a), the objection fails. If he took cognizance under clause (c), it equally fails, because the accused did not object to the district magistrate trying the appeal.

Mr. Giles, next objection is a most sweeping one, namely, that the Burma Municipal Act has no operation in the town of Rangoon, but only in a few outlying strips of land. His argument is this: section 5 of the Burma Municipal Act, 1898, continued in existence the municipalities which had been established under the Burma Municipal Act, 1884. Under the Act of 1884,

the Municipality of Rangoon was defined as the area which had been previously defined as the municipality of Rangoon under the Act of 1874 in General Department Notification No. 192, dated 27th December 1876. The notification by which the municipality was in point of fact defined was Revenue Department Notification No. 192, dated 27th December 1876. Because the word "General" was by mistake substituted for "Revenue" in notification No. 1, dated 2nd January 1885, the learned advocate asks me to hold that the last named notification is wholly void and inoperative, and the Rangoon municipality has been for the last twenty-two years a mere figment of the imagination. It is difficult to suppose that this argument was intended to be taken seriously. It cannot be entertained for a moment.

The remaining objections relate to the nature of the offence complained of, and the terms of the judgment. The complaint is in these terms: "That the accused above named was, on the 28th March 1907, served with a notice under section 93 (2) of the Burma Municipal Act, 1898, and with a subsequent reminder of 20th May 1907, which required him to, within thirty days from the date of his receipt thereof, remove the covering that he had placed over the five feet passage between his buildings Nos. 48 and 44 in Fraser, junction of Maung Taulai street, as the said passage is required to be left entirely open to the sky under direction No. 19 and bye-law No. 23 of the Act. That he has failed to comply with the said notice and reminder. The prayer is for a summons under section 93 (2) and 180 of the Act."

The prosecution put in a copy of directions which were given to the accused on 8th December 1905, under the sub-clause (2) of section 92 of the Act. Most of the directions are printed, but the only one which is now in question is part of No. 19 which is in manuscript, namely, "19. The passage behind the building in Fraser street must not be covered but be open to sky." The prosecution also put in a copy of the notice served on the accused on 28th March 1907, the material parts of which are as follows: "Whereas you have erected two three-storied pucca buildings in <sup>contravention of</sup> <sup>disobedience to</sup> directions and bye-laws Nos. 19 and 23 respectively of the directions and bye-laws framed under section 93 of the Burma

